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Ethics

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AVOIDING ETHICAL THINGS THAT GO BUMP IN THE NIGHT

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The phrase "things that go bump in the night" is familiar. It seems to have appeared in print in 1918 for the first time, but likely was around before that, indicating unknown or unrecognizable noises that one hears from the bed in the dark of the night, creating unsettling thoughts or insomnia.

Every lawyer has had those "things that go bump in the night" thoughts. Today, they might cause the lawyer to go to his home computer or laptop to check a file, a deadline, or whatever kind of noise the lawyer heard. In pre-computer days, the lawyer may have slipped on some jeans and driven to the office to check a file or even do some legal research.

Ethics issues can create things that go bump in the night. This presentation will explore some of the ethical issues that might cause insomnia if a lawyer does not pay close attention to them.

In a simpler society the ethical obligations of lawyers to clients were easier to remember. Treat your client right, keep your client's confidences, and avoid conflicts of interest. The Rules of Professional Conduct embrace these principles, but the complexity of society and communications, as well perhaps as changing client and societal expectations, have expanded the specifics of the principles, resulting in some complicated rules. The history of the form of ethical principles or rules for lawyers substantiates the growing complexity of the relationship of lawyers with their clients.

Even before the American Bar Association (ABA) adopted canons of ethics for lawyers, the Louisiana State Bar Association formally addressed attorney ethical issues. Using the Swiss

Canon of Geneva, a 17th century text, as a base, the Association promulgated the Canon in 1899.[1] The ABA weighed in with the *Canons of Professional Ethics* on August 27, 1908.[2] The ABA stated 32 Canons, mostly consisting of broad statements of principle. The Canons are brief, one set[3] is 14 pages long, in large font.

The ABA adopted a new means of expressing ethical rules in 1969. The ABA *Model Code of Professional Responsibility* contained three layers of content. The Canons were broad statements of principle. For example, Canon 7 said, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."[4] The Code then expressed "Ethical Considerations," which were more specific, but still statements of principle. For example, EC 7-9 provided:

> In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.[5]

The meat of the Code was the expression of actual rules, called the "Disciplinary Rules." The Disciplinary Rules, or "DRs," contained specific standards of conduct. DR 7-106 (A) stated:

> A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.[6]

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[1] Ciolino, Dane, *Louisiana Legal Ethics,* Historical Background of Louisiana Rules of Professional Conduct at n. 6-8, www.https://lalegalethics.org/louisiana-rules-of-professional-conduct/introductory-materials/.
[2] *Id.,* ABA Canons of Ethics, at n. 11.
[3] www.http://minnesotalegalhistoryproject.org/assets/ABA%20Canons%20(1908).pdf
[4] www. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr.pdf, at 48.
[5] *Id.* at 49.
[6] *Id.* at 54.

The DRs resemble what lawyers today would recognize as the Rules of Professional Conduct. Lawyers could receive discipline for violation of the DRs, not for allegedly failing to live up to Canons or Ethical Considerations.

The Louisiana State Bar Association (LSBA) adopted the Code of Professional Responsibility in 1970.[7] Older lawyers may recall the blue loose-leaf binder they received in law school, and the replacement pages that the LSBA distributed when changes occurred or the Committee on Professional Responsibility issued opinions.

The Code of Professional Responsibility had a short life. Professor Dane Ciolino of Loyola School of Law in New Orleans describes it:

> After re-evaluating the Model Code, the Kutak Commission [of the ABA] eventually jettisoned its hortatory Canons and Ethical Considerations and replaced them with a single set of black-letter "Rules" setting forth minimally-acceptable standards of conduct. In adopting these proposals in 1983 as the "Model Rules of Professional Conduct," the ABA "completed the transformation from the vague and largely inspirational Canons to an expressly legalistic rule-based ethics regime."[8]

After the ABA promulgated the Model Rules of Professional Conduct (Model Rules), the LSBA formed a "Task Force to Evaluate the American Bar Association's Model Rules of Professional Conduct."[9] Based on the recommendations of the Task Force, the Louisiana Supreme Court enacted the Louisiana Rules of Professional Conduct (LRPC), making them effective on January 1, 1987.[10] The LRPC contain some significant departures from the Model Rules[11] that are beyond the scope of this article. While the Supreme Court has amended the

[7] Ciolino, *supra*, ABA Model Code of Professional Responsibility, at n. 28.
[8] *Id.* at n. 30.
[9] *Id.* at n. 31.
[10] *Id.* at n. 35.
[11] *Id.* at n. 34.

LRPC many times since 1987, they are still the ethics regulatory rules that govern lawyer conduct in Louisiana.

Definitions

Rule 1.0 of the LRPC contains some important definitions that affect the impact and interpretation of other rules. For purposes of this article, there are four particularly pertinent definitions: "confirmed in writing," "informed consent," "screened," and "writing" or "written."

Rule 1.0(e) defines "informed consent:"

> (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Throughout the rules, particular decisions by the client require not just consent, but "informed consent." The best practice with respect to advising clients regarding these decisions is communicate most of the "adequate information and explanation" in writing, so that should the client complain later, the lawyer has a note, letter, or email in the file to back up the lawyer's assertion that he or she gave the client adequate information and explanation of the situation.

Rule 1.0(b) defines "confirmed in writing":

> (b) "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. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Note that the writing does not have to be by the client, but can include a written confirmation by the lawyer to the client of the client's informed consent. That device could be helpful with unresponsive clients.

"Writing" is an expansive term as defined in Rule 1.0(n):

> (n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and electronic communication. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Clearly, the LRPC intend for lawyers to be able to rely on the broadest possible means of communication that are capable of documentation, so that a "signed writing" includes sounds that can be attached or associated with a writing, such as an electronic file.

Finally, in some instances of possible conflicts of interest, the conflicts can be resolved by "screening" a lawyer. Rule 1.0(k) defines that term:

> (k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Competence

It should go without saying that a lawyer should provide competent representation to a client. The requirements of Rule 1.1(a) reflect the complexities of modern society that affect the practice of law:

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

Notice that four elements comprise what competence is: knowledge, skill, thoroughness, and preparation.

The first two elements have to do with education and experience. A law degree and license do not confer knowledge in all technical areas of the law, and more and more areas are technical. Gone are the days of completing Bath forms and filling in the blanks. In addition, some level of technological skill is involved in all aspects of law practice, and some areas require

knowledge of and proficiency in specialized computer software and access to databases to have even minimum competence to undertake representation.

Use of search software and the Internet can be tempting when a client presents a matter in a new area, particularly if the lawyer's desk is empty. Don't succumb to the temptation. Refer the matter to a lawyer more experienced in the area or associate that lawyer in the representation.

The second two elements of Rule 1.1(a) deal with time and effort. The lawyer must devote sufficient time and energy to the client's matter to give the client the representation the client needs and deserves. Lawyers seem to believe that their physical capacity has no bounds, but it does. If a lawyer does not have enough time and energy to devote to the client's matter, he or she should refer the matter to another lawyer or associate another lawyer to make up the shortfall.

Finally, a lawyer should not overlook the administrative requirements of maintaining a law license. Rule 1.1(c) deals with those:

> (c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.

From time to time, I look up lawyers on the LSBA website to find out directory information, or length of practice. It is not unusual to notice outdated addresses, phone numbers, or email addresses. When a lawyer moves or changes, he or she should put notification to the Louisiana Supreme Court and the LSBA on the checklist of tasks related to the move or change.

Client Communication

Communications with clients can be some of the most important and yet challenging aspects of law practice. Some institutional clients stay on top of their matters and even require

periodic status reports, making communications easier, although possibly more burdensome. Practices that involve individuals, particular consumers and other persons who have limited experience with courts and the legal system, can require more specific communication. Many of those clients have difficulty understanding basic concepts, and the lawyer is counselor, teacher, and advocate all in one.

LRPC 1.4 (a) deals with keeping the client informed about the case and certain aspects of the representation:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Rule 1.4 (a) deals with when a lawyer must communicate with a client, as well perhaps how often.

> Rule 1.4(b) deals with the substance of required communication:
>
> (b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

A lawyer must know the client well enough, and be patient enough with the client, to keep the client "in the loop" as a practical matter. This could have important ramifications, particularly if the outcome is not positive, or if some tactical decisions do not work as well as planned or at all.

Confidentiality

Because of the attorney-client privilege, it is easy to think of client confidentiality in terms of the privilege. However, the obligation of confidentiality is broader than the evidentiary privilege. The essential rules of client confidentiality are contained Rule 1.6(a)(b):

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest between lawyers in different firms, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Note that the prohibition against revealing information without the informed consent of the client is not limited to confidential information but applies to any "information relating to the

representation of a client." If it is possible that the matter is or might become newsworthy or the subject of social media or other communications, a lawyer should have a clear understanding what the client expects and to which the client gives informed consent. Otherwise, mum's the word.

In the world of electronic skullduggery, Rule 1.6(c) is important:

> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Many corporate and institutional clients now have specific cyber security requirements for firms to represent them. In the financial institution world, many financial institutions consider that they are responsible for their lawyers as agents. Thus, title companies and persons representing lenders must protect personally identifiable information from inadvertent disclosure. This could involve firewalls and other protection, and it also could involve limiting access to certain files, so that only the lawyers working on those files have access to the information. Another area of importance is remote access, and the possibility of a third party obtaining information while a lawyer is working, for example, in a coffee shop or hotel wi-fi system. How to deal with these issues is beyond the scope of this article, but every lawyer needs to be aware of the requirement and the need to protect client information from inadvertent disclosure or theft by the bad guys.

Conflicts of Interest

Closely related to the duty of confidentiality are the rules respecting conflicts of interest. These rules can have particular importance given the increased mobility of lawyers between firms and in and out of either government service or private representation through being an institutional employee of a client.

Rule 1.7(a) contains the traditional rule regarding conflicts of interest:

> (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.

Rule 1.7(b) explains when a lawyer may undertake or continue representation even if a concurrent conflict of interest exists:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Note that the informed consent of each affected client must be confirmed in writing.

One of the ways that conflicts of interest arise is when a lawyer joins a firm from another firm, a private client, or a government organization. Because of the general imputation standard of Rule 1.10, meaning that when a rule applies to one lawyer in the firm, it applies to all lawyers in the firm, lawyers joining a firm from another firm, or from other representation, can present significant conflict of interest inquiries and attempts to obtain client waivers. The general imputation rule is in Rule 1.10(a):

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited

> from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Rule 1.9 deals with conflicts created by former representation. Rule 1.9(a) involves representation of a new client when that client may be adverse to a former client:

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

The imputation provisions of Rule 1.10 mean that if a lawyer comes to a firm and the lawyer (not the lawyer's prior firm) previously represented a client, the new firm cannot continue representing the adverse client unless the firm complies with the remainder of Rules 1.9 and 1.10. This has important consequences.

If a lawyer, or firm, has a concurrent conflict of interest, the lawyer and the firm cannot continue to represent either client unless Rule 1.9(b) applies:

> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
>
> unless the former client gives informed consent, confirmed in writing.

Louisiana's Rule 1.10 differs substantially from ABA Model Rule 1.10, and the differences can create practical difficulties. If a lawyer new to a firm came from a firm that represented a client adverse to a client at the new firm, there is a concurrent conflict of interest. If the transferring lawyer was not involved in the case for the client adverse to client of the new

firm, the ABA Model Rule gives the new firm a process for "screening" the new lawyer at the new firm from the new firm's client matter in Model Rule 1.10(a)(2):

> (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
>
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
>
> (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
>
> (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

Louisiana's Rule 1.10 does not contain the above procedure. Thus, any continued representation by the new firm must occur with the informed consent, confirmed in writing, by both clients. A practice tip that arises in these circumstances is that in seeking client informed consent, the new firm should offer to screen the new lawyer from any activity or information about the matter, outlining the screening process perhaps using the ABA Model Rule as a template.

What about the firm with which the lateral lawyer formerly was associated? That firm has fewer conflict issues. Rule 1.10(b) covers that firm:

> (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

In other words, lateral moves create fewer conflict issues for the departure firm than for the arrival firm.

Closely related to the conflict-of-interest rules is a separate provision in Rule 1.9(c) involving confidentiality:

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

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

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Sometimes lines get blurred about who is the client. This is particularly true when an organization, like a corporation, a limited liability company, or government entity or agency is the client. While the client contacts are individuals, it is the organization that is the client, not the contacts. This can be difficult for the client contacts to understand, and it can strain the relationship between the lawyer and the client contacts.

Rule 1.13 establishes the provisions that govern the relationship between a lawyer and a client organization:

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer

the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

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

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

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

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

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

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

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

Potential conflicts also can arise when one person is the client, but another person or entity is paying the fees and expenses of representation. The most obvious situation when this is the case is when a person has liability insurance that provides for liability defense. It may also

occur in family or criminal cases in which one family member is the client and another is paying for the services. Rule 1.8(f) of the LRPC gives clear direction for such a situation:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent, or the compensation is provided by contract with a third person such as an insurance contract or a prepaid legal service plan;
>
> (2) there is no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Another situation when conflicts of interest can arise is when a lawyer represents multiple clients in the same matter. It makes economic sense for the clients, but the lawyer can do it only when all the clients are on the same page. Once their interests diverge, concurrent conflicts of interest exist, and the lawyer must meet the standards and client consents of Rule 1.7 to continue to represent any of the clients.

In the particular circumstances of aggregate settlements for plaintiffs or defendants, or co-defendants in criminal matters, Rule 1.8(g) establishes concrete rules:

> (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client, or a court approves a settlement in a certified class action. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Note that this rule requires documentation beyond the standard of "informed consent confirmed in writing." It requires consent in a writing signed by the client unless it is a class action settlement approved by a court.

Former Rule 2.2 permitted a lawyer to serve as an "intermediary" under limited circumstances described in the rule.[12] The Louisiana Supreme Court removed the rule in 2004.

One occasion when a lawyer might serve as "scrivener" or intermediary is when several parties are forming a business entity. The representation might involve writing an operating agreement for a limited liability company, for example. In most instances, the parties do not need or want to pay for multiple lawyers to accomplish such a task. One way ethically to handle this circumstance is an agreement to limit the scope of the representation of the multiple clients to a drafting or intermediary role. Rule 1.2(c) permits such a limitation on the scope of representation:

> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

The best practice under these circumstances is to have a written engagement agreement, signed or acknowledged by each client, that clearly defines the scope and limitations on what the lawyer is undertaking, and how to handle disagreements or different perspectives among the clients.

Finally, a lawyer can incur obligations to a person even without that person becoming a client. A prospective client may call for advice or a possible appointment or may schedule an initial consultation. In the process, the client will disclose facts that could later result in

[12] Former Rule 2.2 provided:
(a) A lawyer may act as intermediary between clients if: (1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation; (2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and (3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in Paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

misunderstandings or claims of conflict of interest. Rule 1.18 deals with the duties of a lawyer to prospective clients:

> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
>
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (ii) written notice is promptly given to the prospective client.

Note that this rule permits "screening" of a lawyer who may receive information from a prospective client when the law firm undertakes representation of a client with an adverse interest.

Communications with Non-Clients

For fairness and to protect the reputation both of the profession and the legal system, the LRPC also regulate communications between a lawyer and persons who are not clients of the

lawyer. The first circumstance involves communication with persons represented by counsel.

Rule 4.2 governs those communications:

> Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order, a lawyer in representing a client shall not communicate about the subject of the representation with:
>
> (a) a person the lawyer knows to be represented by another lawyer in the matter; or
>
> (b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and
>
> (1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;
>
> (2) who has the authority to obligate the organization with respect to the matter; or
>
> (3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Sometimes lawyers must communicate with persons who are not represented by counsel. The persons may be unsophisticated as well as unrepresented; they may not understand the role of the lawyer in the circumstances. Failure to follow Rule 4.3, "Dealing with Unrepresented Person," could result in ethical problems for the lawyer. Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Conclusion

The practice of law has become more hectic and more complicated than it was decades ago. No lawyer wants to add to the pressure and stress by having to respond to an ethical complaint. Taking note of the Rules discussed in this article hopefully will help lawyers avoid those things that go bump in the night.