EVERYDAY ETHICS

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Every day, private practitioners encounter ethical dilemmas wrapped around the business of practicing law. In interactions with opposing counsel, third parties, and one's own clients, these dilemmas may not appear to be "ethics" issues, but many are. This article discusses four topics that come up fairly routinely:

- How can a lawyer, as fiduciary, do business with his or her client and get a good deal?
- What do you have to do with your client's file when you no longer represent the client?
- How do you ethically handle the competing claims of multiple clients in a settlement discussion?
- What happens to your fee sharing agreement if the other lawyer is suspended or disbarred?

The Ethics of Business Deals With Your Client

We all like to do business with those who do business with us, and our clients like and appreciate that as well. Long-term, repetitive business transactions in any community—large or small—can occur between a lawyer and a client. When and how a lawyer goes about doing business with a client—apart from the legal business—would seem to be, on its face, a problem largely for lawyers who deal with business clients. That is actually the least problematic circumstance. Indeed, the ethical rules that govern the legal profession—the American Bar Association's Model Rules of Professional Conduct and the ethical rules governing lawyers in most states—have little concern for the business dealings between lawyers and their professional clients.

Most ethical violations faced by lawyers arise in transactions between lawyers and their "unsophisticated" clients, as they are commonly referred to—that is, clients who are not professional businessmen and businesswomen or corporations. The ethics cases that have been reported are dominated, for example, by business transactions between estate lawyers and their clients (often elderly or vulnerable clients), with clients who become involved in a lawyer's informal investment scheme, or with loans—both those made to a lawyer from a client and those from a lawyer to a client.

As an example, a lawyer, Bob Jones, prepares a will for an elderly couple, Ethel and James Smith. Neither Ethel nor James can any longer drive because of their advanced ages and physical impairments. The couple has no children and plans to leave all of their property to their church and the Rotary Club. They own a 2008 Cadillac sedan with about 1,000 miles on it. Mr. Jones just happens to need a new car, and this would be a great opportunity. The clients do not want the car, but the lawyer does. The clients offer the lawyer a great deal, and the lawyer takes it. The whole transaction is innocent enough, and it probably even made the clients happy. It certainly made the lawyer happy. But was it done in a way that comports with the lawyer's ethi-

cal obligations to the client, or was it overreaching and taking advantage of a fiduciary relationship?

The ABA's Model Rules forbid a lawyer from entering into a business transaction with a client. The base rule, ABA Model Rule 1.8—entitled "Conflicts of interests"—states, in pertinent part: "*(a)* A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client.*"* …Then we get to the "unlesses":

1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Comment (a) to Rule 1.8 makes it clear that this rule does not apply to commercial transactions between a business lawyer and the typical business client:

> the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.[1]

Clearly, Rule 1.8 is intended to protect the "unsophisticated" client. Rule 1.8(b), which states the following, fits into this theme: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."

The upshot the ABA's Model Rule 1.8 is that you cannot get a better deal from your client just because that person is your client, and you certainly cannot use what you learn in a fiduciary capacity to get that better deal. Many of us become not only lawyers to our clients but also friends with some of them. We might expect a friend to give us a deal on a car, but we cannot expect or extract a deal from our clients. The rules seem unwieldy and restrictive not because clients do not really feel it is fair and reasonable to, for example, give their lawyer a great deal on a car that they are not going to drive anyway but because of the dangers inherent in a transaction involving a person who stands in a fiduciary role with a client.[2]

The lawyer must be mindful that the determination is not a subjective one as to whether it is fair and reasonable to the client; rather, it is an objective determination. Most disciplinary proceedings are brought in circumstances in which lawyers are representing clients in estate matters. Elderly and unhealthy clients are typically in a position to be taken advantage of, and they often rely heavily on their counsel to protect them. A lawyer may, in reality, do no more than accept the largesse of a client. However, even though the lawyer may be able to explain the reason for doing so—and a client might even say that is what he or she *really, really* wants to do—the largesse often does not become an issue until the client has passed away and the heirs come around and wonder why Grandma's life savings were given to the lawyer. Whether or not the now-departed client thought it was perfectly fair at the time the deal was struck, because he or she did not want the ne'er-do-well son to have the car anyway, the ne'er-do-well son will take a very different legal position in the complaint he files with the bar.

In the situation above, if estate lawyer Bob Jones really wants to buy that Cadillac, he needs to pay a price that any third party would pay—that is, a price the Ethel and James Smith would otherwise find fair and reasonable if they were dealing with someone other than their lawyer. If that means paying "Blue Book" value, pay it, and document it. As Ronald Mallen and Jeffrey Smith have succinctly stated in their 2012 book, "An attorney is not free to use the skills of an advocate in negotiating with a client. Shrewdness and advantageous bargains are antithetical to the fiduciary obligation of undivided loyalty. The arm's-length rule, applicable to ordinary business transactions, does not apply to business dealings between an attorney and a client."[3]

When examining transactions between attorney and clients, courts approach the issue with the presumption of undue influence and improper self-dealing on the part of the lawyer. Therefore, as soon as the objecting party shows that there was an attorney-client relationship—and courts will often take a very "expansive" view as to whether the relationship exists[4]—the burden shifts to the attorney to present evidence that "the transaction was fair, equitable and just and that the benefit did not proceed from undue influence."[5] Some courts refer to the examination as applying "close scrutiny" or "strict scrutiny."[6] Because such a strong presumption of undue influence arises when an attorney engages in a transaction with a client and benefits from it, courts require clear and convincing evidence to rebut this presumption,[7] and "the attorney must 'prove complete good faith and the total absence of fraud or overreaching.'"[8]

In accord with the "unlesses" of Model Rule 1.8(a), the following factors can overcome the presumption of undue influence:

- whether the attorney made a full and frank disclosure of all relevant information,[9]
- whether adequate consideration was given,[10] and
- whether the client had independent advice before completing the transaction.[11]

An attorney who is involved in such a transaction must

show not only that he or she exercised no undue influence but also that he or she gave the client all the information and advice that would have been the attorney's duty to give his client if the transaction had been undertaken between the client and a third party.[12] The information may include all the risks involved in the transaction, even those that would otherwise be obvious to another in an arm's-length transaction.[13] Even though "full and frank" disclosure of information is required, a hindsight examination does not require that "absolute clarity" of terms exists, but rather, when viewed from the client's perspective, "reasonable clarity" existed. Not every dispute over the meaning of a contract must be resolved in a way that goes against the lawyer. "[T]he object is that the client be informed, and thus whether the lawyer has been reasonably clear must be determined from the client's perspective. … 'A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.'"[14] However, even if the contract is clear and unambiguous on its face, the client may still demonstrate that he or she did not have the same understanding of the terms of the contract as the attorney had; but, in those circumstances, the client will have the burden of persuasion.[15]

Counsel cannot safely rely on a written disclosure of the terms of the deal that a third party has provided to the client. At least one court suggests that the writing may have to come from the lawyer himself or herself and cannot even have been drafted by the client.[16]

Even when a transaction is seen as being fair in fact and the terms fully disclosed, and even when the attorney's motives are squeaky clean, a failure to give the client a reasonable opportunity to consult independent counsel can lead to a finding of breach of fiduciary duty.[17] It is not a defense that failing to document the advice to the client of the advisability of getting the advice of independent counsel was a mere "technical failure."[18]

In sum, in any dealings with one's clients—whether they be in the legal business or in business—one must act with utmost good faith. One must also document that good faith behavior because it is in the client's best interest as well as the attorney's interest.

Obligation To Transfer Files Upon Termination of Legal Representation

Claims of legal malpractice first started to become common in the legal profession in the 1970s.[19] Today, one only needs to speak with his or her colleagues to conclude that legal malpractice claims continue to increase exponentially, particularly during economic downturns.

A legal malpractice claim is often preceded by the client's request for his or her "entire file." In other situations, the client may want to switch counsel and therefore requests the file for the new lawyer's use. The client may even request the file after counsel's legal representation has come to an end with no motive other than pure curiosity. Regardless of the motivation behind the client's request, however, the lawyer must still assess his or her obligations to the former client.

ABA Model Rule of Professional Conduct 1.16(d) and the corresponding state rules govern an attorney's obligations when it comes to transferring a client's file. Model Rule 1.16(d) provides the following:

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

Model Rule 1.16(d) raises as many questions as it answers, such as the following:

- To what lengths must the lawyer go in order to identify file materials?
- Must the lawyer perform more than a reasonable search for file materials? In other words, does the lawyer need to ensure that he or she has identified every last scrap of paper or byte of data that constitutes the file?
- When must the file be surrendered?
- To whom must the file be surrendered?
- Where must the file be produced?
- Who is responsible for copying costs?
- How do electronic portions of the file need to be transferred?
- Do the electronic portions of the file need to be printed before being transferred?
- In what circumstances is it permissible for the lawyer to withhold the file or a portion thereof from the client?
- Does the lawyer have any rights or remedies vis-à-vis the file when the client has unpaid invoices?

This article discusses only some of these questions, but the lawyer nevertheless should consider them when responding to a client's request for his or her file.

When a client requests his or her file, the most commonly asked question is: What constitutes the "papers and property to which the client is entitled" under Model Rule 1.16(d)? In other words, what part of the file materials are the client's property? Some jurisdictions have enacted amended versions of Model Rule 1.16(d) to clarify this issue. For instance, Louisiana has struck the last sentence of Model Rule 1.16(d), appending the following language in its place: "Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding."[20]

Other jurisdictions have explained the breadth of the transfer obligation in the comments to the rule. For instance, Comment 10 to North Carolina Rules of

Professional Conduct 1.16 provides the following:

> Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

Most jurisdictions have not amended the rule; instead, they have left it to the courts and bar associations to clarify what should be considered to be part of the file under Model Rule 1.16(d). Courts have taken two main approaches to defining the scope of attorneys' obligations related to transferring files. Most of the jurisdictions follow the "entire file" approach, under which the attorney is generally obligated to surrender everything in the client's file, including that attorney's work product.[21]

The seminal case on the "entire file" approach is *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP,*[22] in which the plaintiff retained the Proskauer law firm in connection with a mortgage financing. After the transaction closed, Sage replaced Proskauer with Nixon, Hargrave, Devans & Doyle LLP. When asked by Nixon to turn over the file it generated in connection with the mortgage financing, Proskauer complied for the most part, but the firm withheld "a large number of internal legal memoranda, drafts of instruments, mark-ups, notes on contracts and transactions and ownership structure charts." Sage also alleged that Proskauer refused to turn over its correspondence with third parties and certain notes on the negotiations that had been conducted. After a thorough discussion of the majority and minority positions on the issue, the New York Court of Appeals adopted the majority position, holding that "[b]arring a substantial showing by the Proskauer firm of good cause to refuse client access, petitioners should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation."[23]

The Restatement (Third) of the Law Governing Lawyers has endorsed the "entire file" approach and states: "On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse."[24] Comment (c) to this section makes it clear that this right extends not only to documents placed in the lawyer's possession but also to "documents produced by the lawyer"—that is, the work product. In addition, the comments provide several exceptions to the rule, noting that a lawyer may refuse disclosure when compliance would violate the lawyer's duty to another, when the lawyer is protecting the interests of the client, or when the documents were reasonably intended only for internal review. The exceptions set forth in the comments have been recognized by some jurisdictions.[25]

In addition to the exceptions recognized in the Restatement, in "most jurisdictions, a common-law retaining lien permits lawyers to retain client property as a means of securing payment of unpaid fees."[26] The retaining lien is thus considered an instance "permitted by other law" wherein a lawyer may retain certain file materials.[27] In fact, "[t]he retaining lien attaches to all papers, books, documents, securities, monies, and property of the client possessed by the firm."[28] The lien generally terminates as soon as the client pays the fees he or she owes.

The second (and minority)[29] approach to determining the file materials to which the client is entitled is the "end product" approach. According to this analysis, the client is entitled to documents that are the end product of an attorney's representation, such as pleadings

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and correspondence—in other words, documents that the attorney has "exposed to public light" in furtherance of the client's interests.[30]

Under an "end product" analysis, a client is not entitled to the attorney's work product, which includes the documents the attorney used "'to reach the end result,' such as internal legal memoranda and preliminary drafts of pleadings and legal instruments."[31] This view holds that the client is entitled to access the attorney's work product only "to the extent of a demonstrated need in order to understand the end product documents, with the burden of justification on the client."[32] In rejecting the "end product" approach, the *Sage* court criticized it as follows:

> [T]he minority position adopted by the courts below unrealistically and, in our view, unfairly places the burden on the client to demonstrate a need for specific work product documents in the attorney's file on the represented matter. Again, this case is illustrative that in a complex transaction where the file may be voluminous (commensurably increasing the likely usefulness of work product materials to advise the client concerning ongoing rights and obligations), the client's need for access to a particular paper cannot be demonstrated except in the most general terms, in the absence of prior disclosure of the content of the very document to which access is sought. The attorney in possession of the contents of the file is in a far better position to demonstrate that a particular document would furnish no useful purpose in serving the client's present needs for legal advice.[33]

Further confusing matters, some jurisdictions have not adopted either theory.[34] Other jurisdictions are unclear on which theory has been adopted,[35] further underscoring the need for attorneys to consult the law in their jurisdiction, including interpretive jurisprudence.

A client's request for his or her file should be taken seriously, because ignoring the request can lead to the imposition of discipline on the attorney.[36] Thus, as a general rule of thumb, it is best to act promptly and diligently in response to the former client's request. For instance, the District of Columbia Court of Appeals recently disciplined an attorney in part for his failure to surrender the file within a "reasonably practicable" time—even though the client had received the file only five days after he requested it.[37] There is no doubt, however, that the court's analysis was influenced by the finding that, during those five days, the attorney had repeatedly denied the client's requests for the file and had actively obstructed the efforts of his former client and successor attorney to obtain the file.[38]

Occasionally, lawyers resist producing their files. For example, the lawyer may have already provided file materials to the client during the course of the representation or the client may have not paid the attorney's invoices. In the former situation, the Arkansas Supreme Court rejected such an excuse when the attorney claimed that the client "had already received everything to which he was entitled, because he had been provided with copies of all the documents prepared on his behalf, including the end products, during the course of his representation."[39] Similarly, in the latter situation, refusal to transfer a client's file until certain conditions are met is generally frowned upon.[40]

The Ethics of Aggregate Settlements

As complicated as it can be to manage an ongoing case in which an attorney represents multiple parties who have aligned but individual interests, it can be just as complicated when the case is on the brink of resolution. The issue of how to resolve multiple claims—outside of the class action context—when presented with an aggregate settlement offer from an opposing party has complicated many an otherwise straightforward settlement.

In the context of civil cases, an aggregate settlement is one in which the entire case on behalf of multiple clients is settled without individual negotiations on behalf of any one client.[41] The defendants in such cases are most often determined to resolve claims universally, because it behooves a defendant little to dispose of a few claims yet still face a trial on the claims of others. It can be just as expensive to a defendant to try one claim as it is to try 10 claims. In particular, when a single attorney or firm represents the multiple claimants, aggregate settlements frequently are all-or-nothing propositions, where an offer must be accepted *by all* or there is no settlement *at all*.

The ABA's Model Rules—as well as state rules adopting them or similar to them—do not prohibit a lawyer from either representing multiple clients in one matter or transaction or ultimately negotiating an aggregate settlement on their behalf. Model Rules 1.7 and 1.8(g) form the bookends of ethical considerations in any multiparty representation. Model Rule 1.7 delineates the considerations that must be undertaken at the outset of and before engaging in multiparty representation:

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

(4) each affected client gives informed consent, confirmed in writing.[42]

Model Rule 1.8(g) provides the framework to be employed when a lawyer then undertakes to negotiate and secure a settlement of the claims of multiple clients in the aggregate:

> 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. 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.[43]

In any negotiation and acceptance of an aggregate settlement offer, or in the presentation of an aggregate settlement demand, Model Rule 1.8(g) and the analogs in individual jurisdictions require that the settlement be fair and reasonable to each individual claimant, that there be full disclosure, and that there be universal consent by each member of the group.

As stated in the relevant Comments to Rule 1.8:

> [13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

As is the theme of many rules governing legal ethics, in any circumstance where a conflict of interest can be waived, all things are possible when an agreement is fair and reasonable to the client, when there is full disclosure of the terms and risks of a course of action, and when a client gives express consent as a result—all preferably in writing. The risk of failing to adhere to these principles as to any one of the multiple clients represented is that any resulting aggregate settlements can be deemed unenforceable in total.[44]

As to the nature of the information that must be conveyed to a client to ensure that the consent to any settlement is informed, it is suggested that, at a minimum, each client must be told:

- the total amount of the aggregate settlement or the result of the aggregated agreement;
- the existence and nature of all of the claims, defenses, or pleas involved in the aggregate settlement or aggregated agreement;
- the details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution (for example, if one client is favored over the other(s) by receiving nonmonetary remuneration, that fact must be disclosed to the other client(s));
- the total fees and costs to be paid to the lawyer as a result of the aggregate settlement if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties; and
- the method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.[45]

Notwithstanding the ethical ability to represent multiple clients and make aggregate settlements, representing clients who desire a settlement as well as clients who oppose it necessarily puts the attorney in an untenable situation.[46] Indeed, tactically, a defendant often hopes to cause a schism among an opposing multiparty group through an aggregate settlement. To avoid a likely argument among clients as to whether to settle and how much to settle for—an argument that may force the lawyer to step back from the representation—it may be attractive for an attorney to consider or propose in advance of any settlement offer that acceptance by a group be determined by majority vote. It is generally accepted, however, that, because clients are entitled to accept or reject offers based on the terms actually offered, such advanced consent to abide by a majority vote is not acceptable ethically.[47] Instead, all parties much reach universal consent of fully disclosed terms of an aggregate settlement offer after it has actually been made.

Even when an attorney has received clear instructions from a client as to an acceptable settlement and is presented with an offer that achieves the desired result, the duty to abide by Model Rule 1.8(g) and fully disclose the terms of the offer arises once the actual offer is made. In a Louisiana case, for example, six plaintiffs retained a single attorney to contest a will.[48] The six agreed that one of

them would be the "primary contact" for the lawyer in the litigation. Two of the six signed an affidavit that expressly authorized the attorney to negotiate and settle their claims for any amount that exceeded what they would otherwise have received under the contested will. In accord with that authorization, the attorney accepted an aggregate settlement on behalf of all six clients, under which each would receive an amount in excess of his or her respective gifts under the will, then he disbursed the proceeds as directed by his "primary contact." The two clients who had executed the affidavit authorizing a settlement in advance under defined parameters, despite having received their accurate share of the settlement payment, then filed a complaint with the Louisiana Office of Disciplinary Counsel, claiming that they "were not consulted on [the] division of proceeds by [the attorney] nor did [they] consent to it." Notwithstanding the prior consent given by the two complaining clients, the Louisiana Supreme Court held that Model Rule 1.8(g) had been violated. The court ruled that, even though the clients had authorized the settlement that was ultimately accepted, the lawyer had still failed to fulfill his obligation to convey the offer to the clients prior to acceptance or rejection. The court observed that "[u]nanimous informed consent by the lawyer's clients is required before an aggregate settlement may be finalized. The requirement of informed consent cannot be avoided by obtaining client consent in advance to a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement."[49]

As to the lawyer's disbursement of the proceeds, the court counseled that "it is of no moment whether the [clients] had actually agreed to divide the settlement funds equally. Prior to accepting the settlement offer, respondent should have resolved with all of his clients the issue of the allocation of the settlement proceeds."[50] It is very likely that, if the attorney had provided full contemporaneous disclosure of the terms of the offer and suggested an allocation in line with the allocation among his clients that was actually made, the client matter would have been resolved in the very same way and a bar complaint and discipline would have been avoided.

Other courts have found no issue with a plaintiff's group's appointment of a single plaintiff to act on behalf of the group, including for the authorization of the settlement—at least in cases when the group is closely aligned.[51]

The most fundamental disclosures in any legal representation of multiple parties consistent with Model Rule 1.7 is that the firm is representing multiple parties in the first place.[52] When time comes for settlement, the most fundamental disclosure to the client is that the client's claim is being aggregated with the claims of others for settlement.[53] In addition, a group of clients cannot merely be told of the aggregate total settlement; they must be told, in short, what is in it for them and what the other clients will receive if the settlement offer is accepted.[54] Absent that information, no client can know if the settlement is fair and reasonable.[55] Nonetheless, not all information about a settlement must be conveyed as long as sufficient information is conveyed to allow for "an intelligent decision to consent."[56]

Nothing prevents the clients from resolving issues of settlement authority and division and allocation of proceeds among themselves in advance of a settlement offer, albeit without the attorney's involvement. Because a possible dispute among the clients may arise in the face of an aggregate settlement, even at the urging of the attorney, the clients may arrive at an agreement either delineating in advance a division of any settlement proceeds or establishing a method for making the determination, including through arbitration or mediation. To be sure, this adds a level of complexity, but, by removing the lawyer from a circumstance in which bias or favoritism can be charged, the lawyer, the clients, and the profession are well served.

Fundamentally, Model Rule 1.7 and Model Rule 1.8(g) provide the bookend principles for representation of multiple clients by a single attorney or law firm. Model Rule 1.7 tells us to evaluate potential conflicts very carefully before representation is undertaken in order to ensure that each client will receive the same level of representation and due consideration in the group as each client would receive individually. Model Rule 1.8(g) tells us that, when the time comes to resolve a multiparty case, the lawyer must ensure that any result is fair and reasonable to each client and that each client has consented to the result after full disclosure of the benefits and risks to each client. The result must be no less fair and reasonable to the client when settling as part of a group than it would be were the client settling alone.

Ethics of Dealing With Suspended or Disbarred Lawyers and Sharing Fees With Them

Lawyers can become ineligible to practice law for any number of reasons: suspension, disbarment, resignation (either voluntary or in lieu of discipline), or, under the rules in some states, transfers to disability or inactive status. Questions often arise as to permissible compensation of the former lawyer. For instance, one's law partner may be suspended or disbarred and the question becomes how to compensate the former partner for the work he or she did before being suspended or disbarred. In such situations— particularly when allegations of misconduct were made against the former lawyer—it is best to proceed with caution before entering into any arrangement or making any agreement with the former lawyer.

Several bar associations have issued advisory opinions concerning such situations. For instance, the Louisiana State Bar Association recently issued the following opinion:

> While a lawyer may only share legal fees with another lawyer who is a member of the bar in good standing, the lawyer can—and may even have an obligation to—pay the disciplined lawyer as a "creditor" according to a valid contractual agreement for services rendered or for fees earned prior to the suspension or disbarment. In absence of a clear written contractual agreement, the disciplined lawyer may

be paid based on quantum meruit. Regardless of the existence of a valid contractual agreement, however, the lawyer's fee may be subject to reduction if the case or client in question is the underlying basis for the lawyer's discipline.[57]

Other states have reached similar results. The Florida Professional Ethics Committee has concluded that "it is ethically permissible for an attorney to pay, pursuant to a properly executed fee-division agreement, a suspended or disbarred referring attorney for the responsibility that the attorney did assume and the time that he or she was available for consultation prior to suspension or disbarment. This quantum meruit approach is both logical and reasonable."[58] Thus, in Florida, "where a lawyer succeeds a disbarred lawyer in representing a client, the successor lawyer may divide the fee with the disbarred lawyer to the extent realistically and fairly earned by the disbarred lawyer for services and responsibility before (but not after) his disbarment."[59]

Similarly, the Rhode Island Ethics Advisory Panel has concluded the following:

> The fee division contract cannot be carried out after the date of the other attorney's suspension since an attorney cannot work on cases once he is suspended. The fees should be divided according to the fair value of the services rendered before suspension. Both attorneys should try to reach agreement on the reasonable value of services prior to the suspension and division of fees and if that fails, then a court may have to make the determination. The suspended attorney is entitled to his/her share of the fees, as long as the fee is calculated according to the work performed before suspension. There is no need for an escrow account to separate the fees, but they should be kept in a client fund account. Normally maintained time and work records should be kept to support actions taken in respect to fees.[60]

The Indiana State Bar Association's Legal Ethics Committee has also reached a consistent conclusion: "Attorney B may not divide fees with Attorney A [a disbarred attorney]; however, Attorney B ethically may pay Attorney A on a quantum meruit basis for services provided prior to disbarment."[61] The opinion further elaborated that "[a]ny fee Attorney A receives on a quantum meruit basis must be in accordance with the reasonableness requirements set forth in Rule 1.5. Such fee may well be less than any amount stated in the fee agreements inasmuch as representation apparently was prematurely terminated due to the disbarment."

In fact, 50 years ago, the American Bar Association issued an informal opinion sanctioning payment of a former attorney in quantum meruit for work performed while the attorney was still licensed:

> On the assumption that the disbarment of the attorneys has nothing to do with the pending litigation and that there is no reason to believe that there was professional misconduct by the referring attorneys in connection with these cases, we can see no reason why you should be under any ethical limitations of such a nature so as to prevent your seeing that the referring attorneys are compensated for the work performed and are reimbursed for any advances made while they were acting as attorneys at law. In no sense, however, should fees be divided as to work performed, if any, after disbarment. As of that time they were only laymen. Division of fees is proper only with another lawyer based on a division of services and responsibility. Canon 34.[62]

OPINIONS ISSUED BY STATE BAR ASSOCIATIONS OR COMMITTEES AND THE ABA ARE ONLY PERSUASIVE; THEY ARE NOT BINDING ON A GIVEN STATE'S ATTORNEY DISCIPLINARY AUTHORITY. TREATMENT OF IN QUANTUM MERUIT IS NOT UNIFORM; SOME STATES HAVE PERMITTED AN ATTORNEY TO RECOVER IN QUANTUM MERUIT, WHILE OTHERS HAVE NOT.

Opinions issued by state bar associations or committee and the ABA are only persuasive, however; they are not binding on a given state's attorney disciplinary authority.[63] Treatment of the issue is not uniform; some states have permitted an attorney to recover in quantum meruit, while others have not. For instance, in New York, "a plaintiff may recover on his breach of contract claims for cases he referred and which were disposed of prior to his disbarment … and on a quantum meruit basis, for cases on which he worked and were still pending at the time of his disbarment."[64]

However, in Texas,

> when an attorney—prior to the completion of his contingent-fee contract—is disbarred or suspended, he is not entitled to collect either on the contract or in quantum meruit for the services, if any, that have

been rendered. … [A]n attorney's disbarment or suspension is considered tantamount to and to have the same effect as a voluntary abandonment, for the attorney by knowingly and willfully practicing such a course of conduct that would lead to the termination of his right to practice, renders it impossible to complete the work that he engaged to perform. In *Lee v. Cherry*, this court held that voluntary abandonment only applies to those situations in which the attorney has not completed the legal services prior to disbarment. *See* 812 S.W.2d at 363.[65]

Accordingly, when a lawyer finds himself or herself dealing with a suspended or disbarred lawyer in some form or fashion, the active lawyer is advised to consult the ethical rules for the applicable jurisdiction carefully. **TFL**

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Endnotes

[1]*See also* Comments to California Rules of Professional Conduct 3-300 ("Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof.").

[2]*In the Matter of Harper*, 485 S.E.2d 376, 380 (N.C. 1997) ("In view of the trust placed in attorneys by their clients and attorneys' often superior expertise in complicated financial matters, attorneys must take every possible precaution to ensure that clients are fully aware of the risks inherent in a proposed transaction and of the need for independent and objective advice.").

[3]Ronald E. Mallen and Jeffrey M. Smith, 2 Legal Malpractice, § 16:5 (2012 ed.).

[4]*Hunniecutt v. State Bar of California*, 749 P.2d 1161 (Cal. 1988).

[5]*Klaskin v. Klepak*, 534 N.E.2d 971, 975 (Ill. 1989); *Cavaliere v. Plaza Apartments Inc.*, 922 N.Y.S.2d 531, 533 (2011).

[6]*In re Pace*, 456 B.R. 253, 281 (Bankr. W.D. Tex. 2011).

[7]*Klaskin v. Klepak*, 971, 975.

[8]*B & C Investors Inc. v. Vojak*, 79 So. 3d 42, 47 (Fla. App. 2011).

[9]*Berner Cheese Corp. v. Krug*, 752 N.W.2d 800, 810 (Wisc. 2008).

[10]*Brigham v. Brigham*, 11 So. 3d 374, 387 (Fla. App. 2009).

[11]*Klaskin v. Klepak*, 971, 975.

[12]*Abstract & Title Corp. of Fla. v. Cochran*, 414 So.2d 284, 285 (Fla. App. 1982); *Iowa Supreme Court Attorney Disciplinary Bd. v. Wintroub*, 745 N.W.2d 469, 474 (Iowa 2008).

[13]*In the Matter of Harper*, 376, 380.

[14]*Anglo-Dutch Petroleum Int'l Inc. v. Greenberg Peden PC*, 352 S.W.3d 445, 451 (Tex. 2011), *reh'g denied* (Dec. 16, 2011); *Weiner v. Burr, Pease & Kurtz PC*, 221 P.3d 1, 8 (Alaska 2009); California Rules of Professional Conduct 3-300 (terms must be disclosed "in a manner which should reasonably have been understood by the client").

[15]*In re Tom Nebel, P.C.*, 409 B.R. 873, 888–889 (Bankr. M.D. Tenn. 2009).

[16]*Florida Bar v. Ticktin*, 14 So. 3d 928, 936 (Fla. 2009).

[17]*Ritter v. State Bar of Calif.*, 40 Cal. 3d 595, 602 (1985).

[18]*Id.*; *Iowa Supreme Court Attorney Disciplinary Bd. v. Wintroub*, 469, 474.

[19]*See* Ronald E. Mallen and Jeffrey M. Smith, 1 Legal Malpractice § 1:6 (2012 ed.) ("Legal malpractice claims, particularly those based on professional negligence, did not become a subject of significance for the legal professional until the 1970s. Until then, few practitioners were concerned about claims or the cost of liability insurance.").

[20]This language "clarifies that client files belong to clients, and that lawyers must promptly and unconditionally return any client files upon request." Dane Ciolino, La. Prof. Responsibility Law & Practice § 1.16, available at www.lalegalethics.org (last visited June 25, 2012).

[21]*See, e.g., Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812 (Iowa 2007) (the attorney's conduct violated a rule providing that "a lawyer shall promptly deliver to the client or third person any funds or other property" that the client is entitled to receive); *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 666 N.Y.S.2d 985 (1997) (civil action between firm and its former client over right to client's papers where court looked to other states interpreting their rules).

[22]*Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 689 N.E.2d 879, 881 (N.Y. 1997).

[23]*Id.* at 883.

[24]Restatement (Third) of the Law Governing Lawyers § 46(2).

[25]*See,* e.g., *In re ANR Advance Transp. Co.*, 302 B.R. 607, 614 (E.D. Wisc. 2003) ("[E]ven under the majority rule a lawyer may withhold some non-end product documents (*e.g.,* internal memoranda discussing assignment of lawyers, whether the lawyer must withdraw, or possible malpractice liability; or private notes) …"); La. State Bar Assoc. Pub. Op. No. 05-RPCC-003, at 3 (April 4, 2005) ("The basis for these [the Restatement's] exceptions is that they are necessary for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation, and the materials are not needed by the client in

order to be able to continue to pursue the legal matter for which the client originally retained the attorney.").

[26]Donald R. Lundberg, *File, File, Who's Got the File?: Client Rights to Return of Property*, Res Gestae at 32 (Sept. 2007).

[27]*Defendant A v. Idaho State Bar*, 2 P.3d 147, 151–152 (Idaho 2000) (holding that a lawyer's assertion of a retaining lien did not violate Model Rule 1.16(d)); *Bennett v. NSR Inc.*, 553 N.E.2d 881, 884 (Ind. Ct. App. 1990) (holding that retaining liens do not violate Model Rule 1.16(d)).

[28]Allison D. Rhodes and Robert W. Hillman, *Client Files and Digital Law Practices: Rethinking Old Concepts in an Era of Lawyer Mobility*, 43 Suffolk U. L. Rev. 897, 908 (2010) (citing *Brauer v. Hotel Assocs. Inc.*, 192 A.2d 831, 833 (N.J. 1963)).

[29]Rhodes and Hillman, *supra,* note 28, 897, 905 ("The idea that an attorney or firm may have a proprietary interest in some portion of a client's file is a minority view in the United States."); *In re ANR Advance Transp. Co.*, 302 B.R. 607, 614 (Bankr. E.D. Wisc. 2003) (recognizing that the "end product" rule is the minority position).

[30]*Travis v. Supreme Court Comm. on Prof'l Conduct*, 306 S.W.3d 3, 7 (Ark. 2009); *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, at 820; *In re ANR Advance Transp.*, at 614.

[31]*Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, at 882 (quoting *Federal Land Bank v. Fed. Intermediate Credit Bank*, 127 F.R.D. 473, 479 (S.D. Miss. 1989)).

[32]*Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, at 882 (citing *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92 (Mo.App.1992)).

[33]*Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, at 882.

[34]*See, e.g., Travis v. Supreme Court Comm. on Prof'l Conduct*, at 3 ("Arkansas has not formally adopted either the 'entire file' or the 'end product' approach").

[35]*Compare Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, at 92 *with In re Cupples*, 952 S.W.2d 226 (Mo. 1997). For a discussion of the unsettled state of Missouri law on file transfer obligations, see Douglas R. Richmond, *Yours, Mine, and Ours: Law Firm Property Disputes*, 30 N. Ill. U. L. Rev. 1, 43 (2009).

[36]*In re Wharton*, 964 So. 2d 311, 315–316 (La. 2007) (disbarring a lawyer for failure to return unearned fees and failure to return a client's file subsequent to a three-year suspension for similar misconduct); *In re Turnage*, 790 So. 2d 620 (La. 2001) (finding a violation of Model Rule 1.16(d), where the lawyer failed to comply with the client's requests for the file).

[37]*In re Toan Q. Thai*, 987 A.2d 428 (D.C. 2009).

[38]*Id.*

[39]*Travis v. Supreme Court Comm. on Prof'l Conduct*, at 10.

[40]*In re Bernstein*, 707 A.2d 371 (D.C. 1998) (The attorney violated the professional conduct rule requiring the return of the client's papers upon termination of representation when he failed to surrender the former client's documents until the client signed a general release from liability); La. State Bar Assoc. Pub. Op. No. 05-RPCC-003, at 4 (April 4, 2005) ("Upon termination, a lawyer who receives a written request by the client for the file must promptly release it to the client or the client's new lawyer, and may not condition release *for any reason*.").

[41]*Authorlee v. Tuboscope Vetco Int'l Inc.*, 274 S.W.3d 111, 120 (Tex. App. 2008).

[42]ABA, Model Rules of Professional Conduct, Rule 1.7.

[43]ABA, Model Rules of Professional Conduct, Rule 1.8(g).

[44]*Tax Auth. Inc. v. Jackson Hewitt Inc.*, 898 A.2d 512, 518 (N.J. 2006).

[45]ABA, Committee on Ethics and Professional Responsibility, Formal Op. 06-438 (2006).

[46]*Hayes v. Eagle-Picher Indus. Inc.*, 513 F.2d 892, 894 (10th Cir. 1975).

[47]*Tax Auth. Inc. v. Jackson Hewitt Inc.*, at 512, 521–22.

[48]*In re Hoffman*, 883 So.2d 425, 433–34 (La. 2004).

[49]*In re Hoffman,* 883 So.2d 425, 433 (La. 2004).

[50]*In re Hoffman,* 883 So.2d 435, 433-34 (La. 2004).

[51]*Scott v. Randle*, 697 N.E.2d 60, 68 (Ind. App. 1998) ("we see no reason why an individual such as Ernest, who was acting as the spokesperson and final decision-maker for a small, close-knit client group, could not authorize that group's attorney to enter into a binding agreement.").

[52]*Johnson v. Nextel Communications Inc.*, 660 F.3d 131, 143 (2d Cir. 2011).

[53]*Waggoner v. Williamson*, 8 So. 3d 147, 157 (Miss. 2009).

[54]*Jenkins v. Jenkins*, 325 S.W.3d 924, 927 (Ky. Ct. App. 2010)

[55]*In re Guidant Corp. Implantable Defibrillators Products Liab. Litig.*, No. 05-1708, 2009 WL 5195841 (D. Minn. Dec. 15, 2009).

[56]*See In re Petition of Mal de Mer Fisheries Inc.*, 884 F. Supp. 635, 639–640 (D. Mass. 1995) (upholding settlement even though fact of aggregate settlement was not disclosed); *In re Anonymous Member of the South Carolina Bar*, 377 S.E.2d 567, 568 (S.C. 1989) (stating in dictum that safeguards to the fairness of the settlement were adequate, despite the fact that attorney failed to disclose names and settlement amounts of other parties to aggregate settlement); *cf. Acheson v. White*, 487 A.2d 197, 199–200 (Conn. 1985) (upholding the conclusion that "the appellant's consent to the terms of the stipulated judgment as they affected her interest [in the property at issue] did not necessarily depend upon her specific knowledge of what interests in that property might be retained by other defendants not similarly situated").

[57]La. State Bar Assoc. Pub. Op. No. 12-RPCC-018, at 1 (Jan. 30, 2012).

[58]Florida Ethics Op. No. 90-3 (July 15, 1990, revised Aug. 24, 2011).

[59]*Chastain v. Cunningham Law Group PA*, 16 So. 3d 203, 206 (Fla. Dist. Ct. App. 2009) (citing Fl. Ethics Op. 66-20).

[60]Rhode Island Op. No. 91-71 (Oct. 29, 1991).

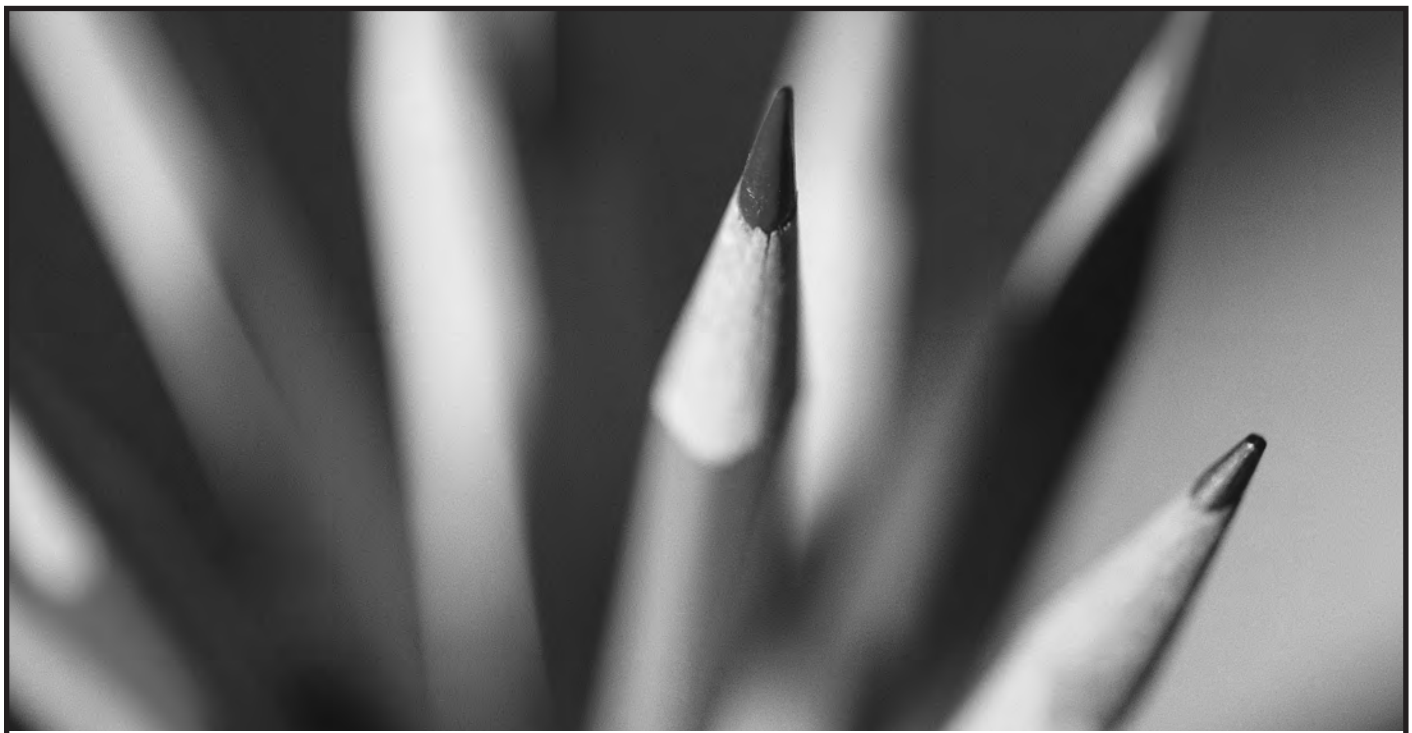
[61]Indiana Op. No. 9 (1991).

[62]ABA Informal Op. No. 628 (Dec. 31, 1962).

[63]*See, e.g.*, *In re Admonition Issued in Panel File No. 99-42*, 621 N.W.2d 240, 244 (Minn. 2001); Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 326 (1997) ("ABA opinions are binding upon no one. ABA opinions represent the views of a small committee of a private association, and they construe that private association's Model Rules and Model Code. The power to determine whether and to what extent either of these model documents will be put into force in any state is exercised by a state authority, most commonly the state's highest court.").

[64]*Eisen v. Feder*, 47 A.D.3d 595, 596 (N.Y. App. 2008).

[65]*Cruse v. O'Quinn*, 273 S.W.3d 766, 772 (Tex. App. 2008) (citing *Royden v. Ardoin*, 160 Tex. 338 (1960)) (internal quotations omitted).



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