

# TOPICS IN ETHICS AND IMMIGRATION LAW

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# TOPICS

1. Overview of Common Disciplinary Issues
2. Effective Assistance of Counsel (Rules 1.1, 1.3, etc.)
3. Handling of Client Funds (Rule 1.15, etc.)
4. Unauthorized Practice of Law (Rule 5.5)

# COMMON DISCIPLINARY ISSUES

D.C. Office of Disciplinary Counsel

Overview of 2017 Disciplinary Cases:

- 13% (34) Immigration matters
- 40% Solo/Small firm
- 21 case involving bank overdraft
- 19 Immigration cases of neglect
- 7 Immigration cases of ineffective assistance
- 2 Immigration fee dispute
- 2 Immigration return of fee/file
- 1 Immigration dishonesty; 1 conduct prejudicial; 1 breach of confidence

# HYPOTHETICAL – ROSA #1

- You are representing Rosa in her asylum case. She has three children, two with her in the US and one who is still in Guatemala.
- Rosa was physically, sexually, and verbally abused by her husband in Guatemala for 10 years before she fled.
- Rosa misses multiple appointments with you.
- Rosa calls multiple times a day to ask what is happening with her case at times, then goes weeks without returning your calls.
- Rosa's facts seem to shift and change every time you interview her. She remembers some things, but then dates, times, and other facts shift or are forgotten in your next meeting.

# TRAUMA

- Results from an event, series of events or set of circumstances that is experienced by an individual as physically or emotionally harmful or threatening and that has lasting adverse effects on the individual's functioning and physical, social, emotional, or spiritual well-being.

Substance and Mental Health Services Administration –  
[www.samhsa.gov/traumajustice/traumadefinition/definition.aspx](http://www.samhsa.gov/traumajustice/traumadefinition/definition.aspx)



# WHY DOES TRAUMA MATTER?

- The impact of trauma your client has and continues to experience creates challenges in our work with them as attorneys
- It may affect
  - How she perceives and interacts with others
  - Her style and ability to communicate
  - Her decision-making
  - The ability to build trust between her and you
  - Her physical and emotional ability to engage in case preparation

# TRAUMA-INFORMED LAWYERING IS ETHICAL LAWYERING

- ABA Rule 1.1. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ABA Model Rule 1.3 A lawyer shall act with reasonable diligence and promptness in representing a client.

# TRAUMA-INFORMED LAWYERING IS ETHICAL LAWYERING

- Trauma impacts trust, and a lawyer operates best when there is trust in the attorney-client relationship. Without a trauma-informed lens, Rosa's lawyer is unlikely to build sufficient trust with Rosa to understand her case and effectively strategize with Rosa.
- Rosa's lawyer may be competent in asylum law, but if (s)he can't engage in a trauma-informed way with Rosa, (s)he is unlikely to get consistent facts that Rosa can credibly testify to.

# TRAUMA-INFORMED LAWYERING IS ETHICAL LAWYERING

- ABA Model Rule 1.5: (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.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# TRAUMA-INFORMED LAWYERING IS ETHICAL LAWYERING

- Trauma impacts memory and may impact other executive functioning. A highly traumatized client's brain is operating more frequently from the limbic stem and amygdala, not the neocortex. Traditional approaches of “call me if you have questions” may not work. Instead consider:
  - Regularly scheduled check ins, even if brief. But stick to them.
  - Written follow ups to conversations.
  - Regular and consistent communication of prior discussions and decisions.
  - Allowing plenty of time and space for follow up. Rosa is not going to tell her attorney everything in one or even two meetings.

# KEY TAKEAWAYS FOR ETHICAL LAWYERING WITH TRAUMATIZED CLIENTS

- Transparency
- Predictability
- Client Control
- Reliability
- Clearly defined and communicated roles
- Build relationships with mental health professionals and advocates

# HYPOTHETICAL – ROSA #2

## FLAT FEES AND TRUST ACCOUNTS

- Rosa retains you to file an Adjustment of Status. Your retainer agreement says: “The fee is to be \$2,000. The client provides \$1,000 now and agrees to pay another \$1,000 once the petition is filed.”
  - The client pays \$1,000. Before doing any work, you deposit \$500 in your trust account and put \$500 directly in your operating account to pay some of your firm’s overhead expenses. A week later, you begin to review Rosa’s paperwork. The transfer additional funds from your trust account to your operating account. Another week later, Rosa calls and requests a refund of her money. She wants to hire a new attorney. You return the \$500 held in trust. Is your conduct ethical?
- A) Yes. This is how you’ve always handled flat fees paid in advance.
- B) No, this is misappropriation because you had not earned the \$500 before depositing it into your operating account. It was an unearned fee that should have remained in your escrow account until earned.
- C) No, this is commingling because the you hadn’t earned the full \$500 put into the operating account.
- D) No, this is misappropriation because you were unable to return more than the \$500 held in trust.

**ANSWER: B**

# SAFE-KEEPING PROPERTY: RULES & RESOURCES

## ABA Model Rule 1.15

### District of Columbia

- DCRPC Rule 1.15
- Ethics Opinion 355
- In re Mance, 980 A.2d 1196

### Maryland

- Maryland Rule 19-301.15 (Rule 1.15)
- Maryland Rule 19-403, et seq.
- Maryland Business Occupations and Professions § 10-301, et seq.

### Virginia

- Rule 1.15
- Frank A. Thomas, III, et al., *Lawyers and Other People's Money: A Resource for Maintaining Trust Accounts* (5<sup>th</sup> ed. 2012).

# UNAUTHORIZED PRACTICE OF LAW

- ABA Model Rule 5.5
- *Attorney Griev. Comm'n of MD v Lang*, 461 Md. 1, 191 A.3d 474 (2018).
- *Attorney Griev. Comm'n of MD v. Ndi*, 459 Md. 42, 184 A.3d 25 (2018).