



Legal Ethics for Lawyers and Non-Lawyers December 14, 2021

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Preamble and Scope

- Traditionally, Ethical Rules only applied in disciplinary proceedings, and expressly did not set a standard of conduct.
- This changed with the “Ethics 2000” set of rule changes.

Preamble and Scope

- Comment [20]:
- “Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.”

Terminology

- “Believe” is subjective, but can be inferred from the circumstances.
- “Document” and “writing” are both very broad and include electronic documents.
- “Know” means actual knowledge (which can be inferred from the circumstances).

Terminology

- “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.”

Terminology

- “Informed consent” requires lawyer to communicate
 - adequate information and explanation
 - about the material risks of and
 - reasonably available alternatives.”
- This was modeled after SEC concept of full disclosure in an offering.

Rule 1.1 Competence

- You have to be competent.
- If you don't know how to do it, and there is no one to train you to do it, you should not do it.

Rule 1.2 Scope

- Client decides goals; lawyer decides means and methods.
- Cannot advise client to commit crime nor help client do so (exception for marijuana-related advice in Colorado).
- Note this is broader prohibition than engaging in criminal conduct yourself under Rule 8.4.

Rule 1.3 and 1.4

Diligence and Communication

- Have to keep after a matter.
- Have to apprise client as to material developments.

Rule 1.5 Fees and Costs

- Basis of fees for new clients has to be disclosed in writing.
- For most fee agreements, client does not have to sign.
- For contingency fee agreements, client has to sign.

Rule 1.5 Fees and Costs

- Rule 1.5 (a): “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee”
- Suppose an agreement for a fee includes some kind of upside “kicker” (such as an interest in a start-up client) that results in a very high fee for minimal work.

Rule 1.5 Fees and Costs

- Typical Rule 1.5 analysis looks at reasonableness of fees at time agreement is made (just like other contracts).
- Argument: 10% of zero is zero, and when stock issued it was worthless, so fee must be reasonable.

Fees and Costs

- Counter argument: Many of the factors under Rule 1.5(a) can only be addressed in hindsight (difficulty, novelty, time consumed, etc.).
- So there is some chance this fee would be determined to be unreasonable after stock skyrocketed, not at time of issuance.

Fees and Costs

- Rule 1.5 also prohibits a lawyer “an unreasonable amount for expenses.”
- This rule arose out of an article in the ABA Journal over 30 years ago referring to “Skaddenomics,” the practice of charging clients for donuts at meeting at a 60% mark up.
- Outside counsel can mark up costs a small amount, but it has to be a reasonable approximation of actual costs.

Rule 1.6 Confidentiality

- Much broader the “confidences and secrets” under former Code of Professional Responsibility.
- With few exceptions, simply cannot talk about client matters, even if they are discussed in the local newspaper.

Rule 1.6 Confidentiality

- This rule can be complied with by “informed consent” from the client.
- This does NOT have to be confirmed in writing.

Rule 1.6 Confidentiality

- Exceptions include:
 - (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;

Rule 1.6 Confidentiality

- Exceptions include:
- (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;
- This grew out of post-Enron hearings.

Rule 1.6 Confidentiality

- Exceptions include:
- (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;

Rule 1.6 Confidentiality

- Exceptions include:
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Rule 1.7 Conflicts

- Two types of conflicts:
 - Directly adverse (Rule 1.7(a)(1)); and
 - Material limitation conflict (Rule 1.7(a)(2)).

Rule 1.7 Conflicts

- Directly adverse means exactly what it sounds like.
- Cannot be adverse to client.
- In negotiation setting, this can be consented to by client.
- In litigation, it cannot be consented to by client.

Rule 1.7 Conflicts

- Also need to be sensitive to material limitation conflicts (Rule 1.7(a)(2)).
- Anytime something materially limits your ability to give objective advice.

Rule 1.7 Conflicts

- Material limitation are real conflicts; just like directly adverse conflicts.
- If you have either type, you have to go through the same conflict waiver analysis.
- Consent from a client must be confirmed in writing.

Rule 1.7 Conflicts

- “Confirmed in writing” means:
 - Client sends writing to you (email fine).
 - You have oral conversation with client, and then you confirm to client in writing within reasonable time.

Rule 1.7 Conflicts

- “Confirmed in writing” does NOT mean:
 - “We’ve worked together a while, and I don’t think you’ll see this as a problem. If I am wrong, let me know.”
 - Must be confirmation not assumption.

1.8 Special Conflicts of Interest

- This provides both procedural and substantive steps for a lawyer who is going into business with a client.
- No sex with a client unless sexual relationship predated legal relationship.

Rule 1.9 Duties to Former Clients

- Rule 1.6 continues to apply to former clients.
- Conflicts rules apply if new matter is “substantially related” to the former matter.
- If so, have to get client consent (confirmed in writing) from both clients to represent new client.
- If not, do not even mention to either client.

Rule 1.10 Imputed Conflicts

- If a lawyer is disqualified for a business reason, entire firm is disqualified.
- If the lawyer is disqualified for a personal reason, then entire firm is not disqualified.

Rule 1.10 Imputed Conflicts

- Rule 1.10 (Imputed Conflicts) is the only substantive rule that refers directly to in-house counsel.
- Comment [1] reiterates from definitions that “firm” for purposes of imputed disqualification includes in-house department.
- So not only is attorney disqualified, but entire in-house department is.

Rule 1.10 Imputed Conflicts

- A confidentiality wall can work in some circumstances.
- If applicable, needs to be timely (better before lawyer changing firms even starts) and effective.

1.13 Organization as client

- Organization, not constituents you deal with, is client.
- If constituents get confused about this, the lawyer has to explain it to them.

1.13 Organization as client

- “Up the ladder” reporting can be required when company is engaged in unlawful conduct or constituent is violating duties to client.
- May have to report to the highest authority within the organization if conduct continues.

1.13 Organization as client

- If “up the ladder” reporting does not work, you may report outside the organization “only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization” even in violation of Rule 1.6.
- This will likely get you sued for malpractice, so make sure it is worth it.

1.13 Organization as client

- If you get fired for “up the ladder” reporting, you have to report that.
- “Whistle-blower” protection may or may not apply to lawyers depending on a lot of factors.

1.13 Organization as client

- Federal whistle-blower protections trump state ethics rules under standard Supremacy Clause analysis.
- If state protection, court must decide between competing public policies of ethical rules vs. whistle-blower protection.

1.14 Client with Diminished Capacity

- Try to keep relationship as “normal” as possible.
- If things get really bad (client at risk of harm), you may disclose Rule 1.6 information to get help for the client.

1.15 Trust Funds

- Money in trust account belongs to client.
- Money in operating account belongs to lawyer.
- Do not move money from trust account to operating account until it is earned.

1.16 Declining or Terminating Representation

- If you turn down a matter, tell (non) client in writing and advise that there may be time-related issues.
- When engagement is over, send letter saying so.
- Turn over any money left in trust account.

1.18 Duties to Prospective Client

- A lawyer has most of the same duties to prospective clients that the lawyer has to actual clients.
- This is why a lawyer should do a conflicts check before having even the briefest conversation with a prospective client.
- “Cocktail party” exception.

3.3 Candor to the Tribunal

- Cannot make false statements to tribunal.
- If client does, try to get client to correct false statements.
- If client won't, you must to tell court testimony was false—this trumps Rule 1.6.
- This is only time disclosure is required.
- This will probably create a conflict of interest.

3.4 Fairness to Opponent

- Cannot obstruct another's access to information.
- This is hot area in Electronically Stored Information (“ESI”)
- Many recent cases seriously sanctioning litigants for discovery abuses re: ESI.
- Sanctions often higher when in-house counsel involved.

Rule 4.2 Communications with Represented Persons

- You cannot communicate with a party known to be represented without opposing counsel's consent.
- “Known” is on a matter-by-matter basis.
- Does not matter who initiates the communication.

Rule 4.3 Communications with Unrepresented Persons

- You should not give advice to a lawyer that is not your client.
- Best, “You need to get your own lawyer for that.”
- Acceptable: “I am not your lawyer and do not represent you. But here is what it means to means to me”
- If going this route, doing it in writing is best.

Rule 4.4 Respect for Rights of Third Persons

- If you receive inadvertently produced document, only duty is disclosure to sender.
- Old days of “complying with instructions” of sender (such as to destroy) gone, unless you get the instructions before you receive the document.

Rule 4.5 Threatening Prosecution

- ABA has eliminated this Rule, but many states (including Colorado) still have it.
- Cannot threaten prosecution or a grievance to gain advantage in a civil case.
- Okay to notify lawyer that lawyer's conduct violates Rules.
- Okay for client to do this.

Rules 5.1 and 5.3 Supervisory Responsibilities

- Generally, senior lawyer's obligation to make sure junior lawyers and subordinates act consistently with rules.
- Areas of emphasis are confidentiality, conflicts, and avenues to express ethical concerns confidentiality.
- Junior lawyer generally cannot avoid discipline by saying "the boss told me to."

Rule 5.5 UPL

- Unauthorized practice of law:
 - is a crime.
 - is an ethical violation in the state where you are licensed.
 - can get your colleagues in ethical trouble.
 - can cause attorney-client privilege issues.

5.6 Restrictions on Right to Practice

- Unethical to sign covenant not to compete.
- Multiple state and local ethics opinions says this Rule applies to in-house counsel.
- Multiple court cases that say it does not apply to in-house counsel.

Rule 5.7 Law-related Services

- When you are in a law-related service, the Rules still have some application.
- If services “not distinct” from legal services, then Rules generally still apply.
- You can “opt out” of Rules by advising the customers (not clients) that you are not acting as a lawyer and the attorney-client privilege does not apply.
- This should be done carefully as can create privilege issues in the event legal advice is involved.

Rule 8.3 Reporting Misconduct

- Required to report misconduct of other lawyers if:
 - other lawyer's conduct "raises substantial question as to the lawyer's honesty, trustworthiness, or fitness to practice law."
- Generally this is:
 - Serious crimes;
 - Misuse of client funds; or
 - Substance abuse.

Rule 8.4 Misconduct

- Ethical violations are only crimes if conduct “reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”
- Driving 85 in a 65 is not an ethical violation.
- Driving 85 in a school zone is.
- Compare to Rule 1.2: advising a client to drive 85 in a 65 is an ethical violation.

Questions?

- Ask me.
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