

Disciplinary Rules and Procedures Committee
Meeting of January 7, 2022
Zoom meeting

MINUTES

Chair Michael Bagley called the meeting to order at 1:06 p.m.

Attendance:

Committee members: Michael Bagley, R. Gary Spencer, Hon. J. Antonio DelCampo, Erin H. Gerstenzang, Mazie Lynn Guertin, John G. Haubenreich, Patrick H. Head, R. Javoyné Hicks, William D. James, Seth D. Kirschenbaum, Catherine Koura, Edward B. Krugman, David N. Lefkowitz, David S. Lipscomb, Patrick E. Longan, David O’Neal, Jabu M. Sengova, William Thomas, Jr., Peter Werdesheim, Patrick Wheale, and Hon. Paige Reese Whitaker.

Staff: Paula Frederick, William D. NeSmith, III, and Kathya S. Jackson.

Guests: Supreme Court Justice Peterson, Kimberly Dymecki, Jill Travis, and Olivia Williams.

Approval of Minutes:

The Committee approved the Minutes from the October 22, 2021 meeting.

Action Items:

Formal Advisory Opinion Board request:

After a thorough discussion, there is an apparent consensus to adopt the revisions to Rules 1.5 and 1.8 as presented.

The Committee agreed to wait until after the Supreme Court enters a ruling on the proposed fee arbitration rules before voting on the proposed revisions to Rules 1.5 and 1.8. The Committee will consider adding a sentence to proposed Rule 1.5 addressing the fee arbitration rules at its next meeting.

Rule 3.4:

The Committee voted to amend section (f) to correct a typo and bring it in line with the ABA rule. Mazie Lynn Guertin opposed. A copy of the Rule as amended appears at the end of these minutes.

Rule 1.8(e)(3):

By unanimous vote, the Committee voted to add section (e)(3), comments 5-8, and amend comment 4 to bring it in line with the ABA rule. The Committee voted to replace “and” with “or” after “public interest organization...” and add a comma after medicine. A copy of the Rule as amended appears at the end of these minutes.

Information Items:

Registration of In-House Counsel:

Paula Frederick reported that Elizabeth Fite, State Bar President, might create a new committee or add an in-house counsel to this Committee to address this matter. Paula Frederick will provide an update at the next meeting.

Report:

Paula Frederick provided the Committee with a report regarding the status of previously amended rules.

The meeting adjourned at 3:25 p.m.

Rule 3.4 (f)

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; ~~or~~ and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; ~~and~~
- ~~(2) the information is not otherwise subject to the assertion of a privilege by the client.~~

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

e. A lawyer shall neither enter into a business transaction with a client if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client, nor shall the lawyer knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

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 to the client in a manner which 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 counsel in 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.

- f. A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.
- g. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- h. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- i. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - 1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; ~~or~~
 - 2. a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client; ~~or~~
 - 3 a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization or a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine, and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

- j. A lawyer shall not accept compensation for representing a client from one other than the client unless:
1. the client gives informed consent;
 2. there is no interference with the lawyer's independence of 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.
- k. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor 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 lawyers disclosure shall include the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.

1. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- m. A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.
- n. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
 1. acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation; and
 2. contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

The maximum penalty for a violation of Rule 1.8 (b) is disbarment. The maximum penalty for a violation of Rule 1.8 (a) and 1.8 (c)-(j) is a public reprimand.

Comment

Transactions Between Client and Lawyer

[1A] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. The client should be fully informed of the true nature of the lawyer's interest or lack of interest in all aspects of the transaction. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's informed consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, 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.

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Use of Information to the Disadvantage of the Client

[1B] It is a general rule that an attorney will not be permitted to make use of knowledge, or information, acquired by the attorney through the professional relationship with the client, or in the conduct of the client's business, to the disadvantage of the client. Paragraph (b) follows this general rule and provides that the client may waive this prohibition. However, if the waiver is

conditional, the duty is on the attorney to comply with the condition.

Gifts from Clients

[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the objective advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the subject of the representation creates a conflict between the interest of the client and the personal interest of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j) of this rule.

Financial Assistance to Clients

[4] Paragraph (e) eliminates the former requirement that the client remain ultimately liable for financial assistance provided by the lawyer. ~~It further limits permitted assistance to court costs and expenses directly related to litigation. Accordingly, permitted expenses would include~~

~~expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses would not include living expenses or medical expenses other than those listed above.~~

[5] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[6] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[7] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[8] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Payment for a Lawyer's Services from One Other Than The Client

[59] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that

there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4 (c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Settlement of Aggregated Claims

[610] Paragraph (g) requires informed consent. This requirement is not met by a blanket consent prior to settlement that the majority decision will rule.

Agreements to Limit Liability

[711] A lawyer may not condition an agreement to withdraw or the return of a client's documents on the client's release of claims. However, this paragraph is not intended to apply to customary qualifications and limitations in opinions and memoranda.

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[12] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability

partnership, professional association, limited liability company, or professional corporation.

Family Relationships Between Lawyers

[~~9~~13] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

Acquisition of Interest in Litigation

[~~10~~14] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in the common law prohibition of champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for lawyer's fees and for certain advances of costs of litigation set forth in paragraph (e).