ETHICS, SCHMETHICS: ETHICAL CONSIDERATIONS IN COMMERCIAL REAL ESTATE TRANSACTIONS

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Introduction

Black's Law Dictionary defines legal ethics as, "The minimum standards of appropriate conduct within the legal profession, involving the duties that its members owe one another, their clients, and the courts." This is often also termed the "etiquette of the profession." There are multiple sources which provide the Georgia attorney and real estate practitioner support with regard to ethical concerns. Most notable are The Georgia Rules of Professional Conduct (the "Rules" or the "GRPC") and the Georgia Title Standards (the "Standards") which assist in outlining a Georgia attorney's duties to clients, the courts, and to others as well. The Standards are often referred to as, "a crystallization of the practice of title attorneys." These standards delineate concerns and recurring scenarios with explanations and solutions regarding various title issues. Both resources supply a foundation for the real estate practitioner dealing with the ethical problems that often arise during the transaction. By utilizing these and other tools, a real estate practitioner can successfully navigate the often troublesome ethical situations that occur between the examination of title and the delivery of the title commitment.

Prior to 2001, Georgia attorneys were governed by the Canons of Ethics. These ethical tenets provide the basis for The GRPC and are often called upon for reference. The GRPC can be found at http://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm. In the Preamble to the GRPC, the ethical boundaries are clearly defined:

> In the nature of law practice conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the legal

> system and to the lawyer's own interest in remaining an upright person. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

This "exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules" is what every real estate professional needs to practice regularly in their transactional dealings. This is the ethical professionalism for which every person in the real estate industry should strive, in order to not only better serve the client, but also the real estate community as a whole.

Like The GRPC, The Standards provide a safe harbor for professionals who encounter moral quandaries. The Standards may be found at http://garealpropertylaw.com/wp-content/uploads/2011/10/Title-Standards-Revised-2010.pdf. These standards outline situations which arise during the title search and closing processes to assist the real estate specialist in overcoming everything from title defects to closing procedures. As the comment to the opening title standard notes:

> Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misapprehension of the law. The examining attorney, by way of a test, may ask after examining the title, what defects and irregularities have been discovered by the examination, and as to which irregularity or defect, who, if anyone can take advantage of it as against the purported owner...Title Standards, if properly utilized, should reduce to a bare minimum, if not eliminate, "fly specking and overmeticulousness.

It is the examining attorney or real estate professional who receives the benefit of uniformity that the title standards provide, but the industry as a whole better serves the community at large based on the support provided by the Standards.

A. <u>Rights of Redemption</u>

Black's defines the equity of redemption as "the right of a mortgagor in default to recover property before a foreclosure sale by paying the principal, interest, and other costs that are due. A defaulting mortgagor with an equity of redemption has the right until the foreclosure sale, to reimburse the mortgagee and cure the default." The Standards support this as well, "a valid foreclosure sale terminates the debtor's interest in the property at the foreclosure sale and there is no right of redemption in favor of the debtor or junior lienholders, except for those of the United States..."

With regard to the period of time from examination to commitment, the ethical ramifications of rights of redemption are quite profound. Note that the Title Standards indicate that the foreclosure sale must be valid. The Title Standards also provide that:

> A deed under power of sale executed by the grantee of a security instrument or any subsequent assignee thereof pursuant to a valid power of attorney contained in the security instrument conveys marketable title (provided title was marketable at the time the security instrument was given) to the property described therein if the deed under power of sale contains recitals to the security instrument containing the power of sale, default, proper legal advertisement, the time, place and results of the sale and compliance with notice requirements of O.C.G.A. Section 44-14-162.2 or facts which render such notice inapplicable. All such recitals in a deed under power of sale may be relied on if there is no irregularity on its

face and no other matters appear of record which would render any such recital questionable and necessitate further inquiry.

What if there is some latent irregularity that the closing attorney discovers with regard to the deed under power of sale while reviewing the completed title search which would have allowed the foreclosed debtor the opportunity to exercise the right of redemption? Disclosure of defects in property will be outlined in Section D below, but the right of redemption of the debtor should be considered when analyzing title from title search to commitment.

B. Formation of the Attorney-Client Relationship

Real estate transactions often involve many layers of relationships and purposes. Often attorneys serve many roles within a single deal, or multiple parties may handle each aspect unilaterally. When entering into a real estate matter, a well-defined grasp of who represents each of the parties and what obligations are owed to clients and non-clients is paramount. Disputes often arise when the arrangement between lawyer and client are not well documented in written form. There are some instances that exist where even when the attorney-client relationship does not exist, there may be duties owed to a non-client. Often the role and duties of an attorney change as the transaction evolves. This is likely why one of the most regular areas for litigation for a closing attorney is closing table representation.

"The basic question in regard to the formation of the attorney-client relationship is whether it has been sufficiently established that advice or assistance of the attorney is both sought and received in matters pertinent to his profession." Guillebeau v. Jenkins, 182 Ga. App. 225, 229, 355 S.E.2d 453, 457 (1987). In the real estate transaction of today, it is often difficult for parties to know whether they are being represented or not. While the general rule for legal employment is the tender of fees, the maker of the payment will not always be the party who has employed the attorney. Also, there are many exceptions to the general rule

involving the payment of attorney's fees. Typically in transactions with a loan, the closing lawyer is retained by the lender and represents only the lender. However, this is often clouded by actions made by the closing attorney at closing, such as offering to file certain documents or affirming that the closing attorney will correct a defect in the title. Simmerson v. Blanks, 149 Ga. App 478 (1979) and Wright v. Cook, 252 Ga. App. 759 (2001).

It is fairly simple to confirm when the closing attorney is representing the lender, but it is slightly more difficult in all-cash transactions. "In a cash transaction, the closing attorney represents the party who contacted him to effect the conveyance." Cleveland Campers, Inc. v. R. Thad McCormack, P.C., 280 Ga. App. 900 (2006). But what is the case when the broker is driving the transaction and the parties appear to be unrepresented? The impending setback is the legal counsel the buyer believes he is to receive. Furthermore, does the closing attorney take on legal representation for all parties when he answers legal questions, especially about surveys, title, documents, and other facets of closing?

The answer to most of these queries is the old law school answer, "It depends." However there are a few tried and true methods in order to limit exposure and to ensure that each party in the transaction understands the scope of your representation. Since this seminar is limited to the period of time from examination to commitment, the focus shall remain on that limited period. As noted above, often brokers facilitate the execution of the contract by buyer and seller and send that on to the closing attorney's office to have title searched and the commitment drafted. During that time it is common for the buyer or seller to reach out to the closing attorney for information regarding the title search and commitment. Most notably this contact is to "check on the commitment" or to "see what is holding up closing," but often, especially in commercial transactions, sophisticated buyers call in with focused questions that push the limits of general inquiry and move into representation. If the survey comes in prior to the delivery of the commitment and the survey is reviewed in conjunction with same, does your

review except to all matters or limit to specific ones? Do you draft the initial commitment with affirmative coverage that a represented buyer would want? Do you draft the commitment to call for a General or Limited Warranty Deed when the contract is silent to same? The best advice that one could be provided is to make sure the parties know what your role is, and when you can, get it in writing. These forms should provide some assistance in managing the expectations of the parties. In some instances, it is best to take every opportunity to simply tell the parties how you fit into the transaction. In many commercial closings, the closing attorney may represent the insurance company as agent while lender, buyer and seller are all separately represented. This is often the case in commercial deals. When an unrepresented party or a party from another place in the country is a party to the transaction in Georgia, the closing attorney may appear to be representing the unrepresented party based on the closing attorney's responsiveness and alertness with regard to the transaction. The best way to avoid a gaffe at closing is to affirm your role early on and to make sure the other party knows that the closing attorney is the agent for the Company. By making sure everyone "knows their role" the transaction will be much more successful.

C. Conflicts of Interest

Pursuant to Rule 4-101, the State Bar of Georgia is authorized to maintain and enforce rules of professional conduct. Included in the GRPC are rules governing what circumstances constitute conflicts of interest and what steps should be taken to waive a possible conflict.

Rule 1.7: General Rule.

Rule 1.7(a) states that:

> (a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

Absent proper consent from the prospective client (discussed below), Rule 1.7 states that if representing a potential client will "adversely affect" the lawyer's duties to a current client, former client, or a third party, the lawyer cannot represent the potential client. Likewise, the Rules do not prohibit a lawyer from simultaneously representing two clients in unrelated matters where the client's interests are merely "generally adverse." See GRPC 1.7 cmt. 3.

Rule 1.7 (b-c): Conflict Waiver.

Notwithstanding a significant risk of material and adverse effect to a client, a lawyer is allowed to represent clients where a conflict of interest is present if the lawyer obtains proper consent under Rule 1.7(b):

> (b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:
>
> *(1)* consultation with the lawyer,
>
> *(2)* having received in writing reasonable and adequate information about the material risks of the representation, and
>
> *(3)* having been given the opportunity to consult with independent counsel.

Rule 1.7(c) addresses certain circumstances that pose such an inherent risk that a client's interests will be adversely affected that a waiver is not permitted:

> (c) Client consent is not permissible if the representation:
>
> *(1)* is prohibited by law or these rules;
>
> *(2)* includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
>
> *(3)* involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

Rule 1.9: Former Clients.

In addition to Rule 1.7, the Rules also provide more specific instructions when a lawyer has formerly represented a client in the same or in a substantially related matter. Such instructions are set forth in Rule 1.9:

> *(b)* 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 consents after consultation.
>
> *(c)* 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: Confidentiality and 1.9(c): Conflict of Interest: Former Client, that is material to the matter; unless the former client consents after consultation.

As shown by Rule 1.9(b)(2), of particular concern is a lawyer using confidential information obtained in a previous representation that is material to a current representation. Rule 1.9(c) provides further that:

> *(d)* 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 Rule 1.6: Confidentiality of Information or Rule 3.3: Candor Towards the Tribunal 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 Rule 1.6: Confidentiality of Information or Rule 3.3: Candor Towards the Tribunal would permit or require with respect to a client.

(See also Rule 1.8(b), which provides that "[a] lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client consents after consultation, except as allowed in Rule 1.6").

Within the bounds of this seminar, conflicts of interest can occur from the examination period to commitment preparation when an attorney has represented both buyer and seller in the past. Very recently a closing occurred that had a seller and buyer who were consistently represented by the same real estate attorney. In this instance, the attorney represented the buyer but was very careful to make sure he had a waiver from the seller due to the consistent representation. The same can be true for a sophisticated commercial buyer who has participated in many transactions with many different attorneys. It is best to get a waiver to avoid the conflict.

D. Duties of Competence and Diligence

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation as used in this Rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1A] The purpose of these rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached. These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

[1B] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person subject to Rule 6.2: Accepting Appointments.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this Rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer. The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyers duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load should be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable

delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable competence, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will serve on a continuing basis. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

The period from title search to commitment is especially profound when considering duties of competence and diligence. First of all, there is no body that governs who can search title. The State of Georgia licenses people to cut hair and fish, but no special license is required to search title. While the Georgia Bar outlines duties of competence and diligence as noted above, the title search, essentially the most important part of the real estate transaction is often treated as a procedural hump to quickly be overcome so the magic of closing can commence. This logic is folly and only leads to a dereliction of the duties of competence and diligence outlined above. The title search is the time to really dig into the essence of the property and confirm what it is all about. Doing so thoroughly and promptly only adds to the value of your service, and the closing as a whole.

E. Disclosure of defects in property

Letting the client know the items which affect title is essential. The failure to disclose a defect in title is one of the chief errors a closing attorney can make with regard to the title search and commitment. This failure can expose the closing attorney to potential monetary sanctions, claims on the title policy, and perhaps even an ethical violation for failure to properly represent your client.

One area which the failure to disclose is often missed is with regard to deeds to secure debt which are removed from the title search pre-commitment based upon the twenty year rule (title standard 14.6 (c)) or more recently, the seven year rule (title standard 14.6 (f)). Removal of an un-cancelled security deed would seem to benefit all parties to the transaction and the deal as a whole, but same can cause issues for a subsequent buyer. Title is insurable based upon the seven or twenty year rule, but marketability problems may arise. The best course is to note the deed to secure debt as open of record but likely insurable based upon the twenty or seven year rule. Same can be denoted as a matter of information in the commitment.

In the same sense, missing interests, legal description issues, open liens, and other title defects are best disclosed in the initial commitment rather than underwritten before the parties have an opportunity to review. By doing so, the real estate professional has disclosed to the parties the existence of the defect, even if same is to be subsequently insured over. This is crucial during the phase between title search and commitment.

F. Special Responsibilities to Sellers and Borrowers

Rule 1.15 Safekeeping Property – Trust Account and IOLTA

Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary

capacity, shall maintain or have available a trust account as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from such account.

No personal funds shall ever be deposited in a lawyer's trust account, except that unearned attorney's fees may be so held until the same are earned. Sufficient personal funds of the lawyer may be kept in the trust account to cover maintenance fees such as service charges on the account. Records on such trust accounts shall be so kept and maintained as to reflect at all times the exact balance held for each client or third person. No funds shall be withdrawn from such trust accounts for the personal use of the lawyer maintaining the account except earned attorney's fees debited against the account of a specific client and recorded as such.

All client's funds shall be placed in either an interest-bearing account with the interest being paid to the client or an interest-bearing (IOLTA) account with the interest being paid to the Georgia Bar Foundation as hereinafter provided.

With respect to funds which are not nominal in amount, or are not to be held for a short period of time, a lawyer shall, with notice to the clients, create and maintain an interest-bearing trust account in an approved institution as defined in Rule 1.15(III)(c)(1), with the interest to be paid to the client. No earnings from such an account shall be made available to a lawyer or law firm.

With respect to funds which are nominal in amount or are to be held for a short period of time, a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) in compliance with the following provisions:

No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

The account shall include all clients' funds which are nominal in amount or which are to be held for a short period of time.

An interest-bearing trust account may be established with any approved institution as defined in Rule 1.15(III)(c)(1). Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.

The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depositor institution to regular, non-lawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minimum, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

Lawyers or law firms shall direct the depository institution:

to remit to the Georgia Bar Foundation interest or dividends, net of any charges or fees on that account, on the average monthly balance in that account, or as otherwise computed in accordance with a financial institution's standard accounting practice, at least quarterly. Any bank fees or charges in excess of the interest earned on that account for any month shall be paid by the lawyer or law firm in whose names such account appears, if required by the bank;

to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the average monthly balance against which the interest rate is applied, the service charges or fees applied, and the net interest remittance;

to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, the average account balance of the period for which the report is made, and such other information provided to non-lawyer customers with similar accounts.

No charge of ethical impropriety or other breach of professional conduct shall attend the determination that such funds are nominal in amount or to be held for

a short period of time, or to the decision to invest clients' funds in a pooled interest-bearing account.

Whether the funds are designated short-term or nominal or not, a lawyer or law firm may elect to remit all interest earned, or interest earned net of charges, to the client or clients.

The maximum penalty for a violation of Rule 1.15(II)(a) and Rule 1.15(II)(b) is disbarment. The maximum penalty for a violation of Rule 1.15(II)(c) is a public reprimand.

Comment

[1] The personal money permitted to be kept in the lawyer's trust account by this Rule shall not be used for any purpose other than to cover the bank fees and if used for any other purpose the lawyer shall have violated this Rule. If the lawyer wishes to reduce the amount of personal money in the trust account, the change must be properly noted in the lawyer's financial records and the monies transferred to the lawyer's business account.

[2] Nothing in this Rule shall prohibit a lawyer from removing from the trust account fees which have been earned on a regular basis which coincides with the lawyer's billing cycles rather than removing the fees earned on an hour-by-hour basis.

G. Attorney's Fees

Rule 1.6 Fees

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

the fee customarily charged in the locality for similar legal services;

the amount involved and the results obtained;

the time limitations imposed by the client or by the circumstances;

the nature and length of the professional relationship with the client;

the experience, reputation, and ability of the lawyer or lawyers performing the services; and

whether the fee is fixed or contingent.

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:

the outcome of the matter; and,

if there is a recovery showing:

the remittance to the client;

the method of its determination;

the amount of the attorney fee; and

if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.

A lawyer shall not enter into an arrangement for, charge, or collect:

any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

a contingent fee for representing a defendant in a criminal case.

A division of a fee between lawyers who are not in the same firm may be made only if:

the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and

the total fee is reasonable.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[1A] A fee can also be unreasonable if it is illegal. Examples of illegal fees are those taken without required court approval, those that exceed the amount allowed by court order or statute, or those where acceptance of the fee would be unlawful, e.g., accepting controlled substances or sexual favors as payment.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be

provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns. See Formal Advisory Opinions 36 and 47.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Joint responsibility for the representation entails financial and ethical responsibility for the representation.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

The best advice one can give as to fees, especially during the interval between title search and commitment, is to provide a thoughtful estimate of charges prior to the search, and when the search is more extensive than expected, to update the client as to the issues and to the additional charges which may become due.

Conclusion

The period between title search and commitment has many ethical issues which need to be considered and analyzed before providing the commitment or other legal services to the client. By exercising reasonable diligence during this period, the title attorney and real estate professional can avoid many hindrances which may prevent the closing, or worse, cause ethical sanctions or other punishment.