Legal Ethics
in the Practice of Music Law

Rules & Realities

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WELLS KAPPEL

Background

- 2004 - Middle Tennessee State University
- 2009 - Loyola Law
- 2009 - 2013 Solo Practice in Nashville
- 2013 - 2019 Of Counsel to several Nashville firms
- 2019 - joined Pierson // Wells and opened New Orleans office
- 2021 - launched Wells & Kappel LLP

Teaching Experience

- 2012 - 2015 **Adjunct Professor of Law**
- 2016 - Present **Music Industry Studies**

Ethics

Source of Obligations

Rules of Professional Conduct

- Disciplinary Proceedings
  - Client reporting
  - Attorney/3rd Party reporting
- Judicial Proceedings
  - Substantive rights enforceable by client (only 4 states)
    - This is not what's envisioned by the MRPC

Fiduciary Duties

- Substantive Rights
  - Enforceable by clients

Personal Integrity

- Moral obligations

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

complex and specialized

- Entertainment Law
  - Other bodies of law as applied to an industry and its participants
    - Agency, Antitrust, Bankruptcy, Constitutional, Contract, Copyright, Corporate, Criminal, Employment, Estate, Immigration, Insurance, Labor, Personality Rights, Privacy, Securities, Tax, Tort, Trademark and Unfair Competition
  - International in scope
- Custom
  - "In-Context" application of law
  - Accepted practices
  - Expectations and norms

association and consultation

- Expertise "may be required"
  - Competence (particularly in the context of custom) comes with time and experience
- Temptation to "do it all"
  - Client expectations
  - Fear of losing clients to referral
  - $$$ Realities $$$ (*see* 1.5(a))
- Consultation
  - Other lawyers (your competition)
  - Other business professionals
  - No substitute for association
  - Confidentiality considerations (*see* 1.6)
- Association
  - Requires informed consent of client
  - Fee sharing considerations (*see* 1.5(e))

Rule 1.2 Scope of Representation

1.2(c) - A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

reasons to limit

- Limited objective
  - Particularly useful in receiving referrals
  - Initial consultations
- Competence
- Conflicts
  - Former clients materially adverse in a "substantially related"
  - Avoid conflicts with current clients
- Fee arrangements
  - fee structure for different matters
    - e.g., 5% for "general entertainment legal" representation -- must define what falls within the scope of that
  - staged fee structure
    - e.g., $X for review, $Y for negotiation

methods to limit

- Must be communicated to client
  - Engagement documents
    - Initial consult agreement
    - Non-representation agreement
    - Retainer agreement
    - Closing letters
- Specific exclusions
  - e.g., no tax advice, fee doesn't cover appeal, etc.
- Specific inclusions
  - "As needed and available"
  - Each matter must be agreed

Rule 1.5 Fees

1.5(a) - A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

fee structure

- Hourly
  - $150 - $1,000+/hour
    - Prior Work Product - ABA Op. 93-379
    - Advance payment retainer (IOLTA)
- Fixed Fee
  - $X for a document or task
    - Useful when relying on prior work product
  - “Value Billing” % of the value of agreement
    - Often based on the Advance or a specific “legal fee” advance
- Ongoing Representation Retainer
  - $X (usually for first priority availability)
  - 5 - 10% of Gross Revenue
    - Post representation revenues?

reasonableness factors

- Requisite time, labor, and skill
- Novelty and difficulty involved
- Preclusion of other employment
- Customary fees
- Amount involved and the results obtained
- Time limitations imposed
- Nature and length of the professional relationship with the client
- Experience, reputation, and ability of the lawyer or lawyers performing the services
- Whether the fee is fixed or contingent

Rule 1.5 Fees

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.

payment issues

- Adverse Payors
  - Label or Publisher
- Nonadverse Payors
  - Parents
  - Joint client
- Others via Letters of Direction
  - Placing business manager in the middle
  - Sometimes attorneys attempt to have fees forwarded at the source
- Requirements (Rule 1.8(f))
  - the client gives informed consent;
  - no interference with the lawyer's independence of professional judgment or the loyalty owed to client
  - confidentiality maintained

other issues

- Business Transactions with a Client
  - Ownership (equity), possessory, security or other pecuniary interest adverse to client
    - fair and reasonable
    - fully disclosed in writing
    - advised in writing of the desirability of seeking advice of independent legal counsel on the transaction
    - the client gives informed consent
- Fee Splitting (1.5(e))
  - Assume responsibility for representation
  - Proportional to the services performed
  - Client must agree in writing
  - Must be reasonable

Rule 1.6 Confidentiality

1.6(a) - A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation

scope

- Very broad
  - The confidentiality rule is broader than attorney client privilege
  - all information relating to the representation, whatever its source (not just information disclosed in confidence)
- Hypotheticals
  - Use to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.
- Prospective and Former Clients
  - Exception for "generally known" info (note this is more than public record)

implications

- Representatives
  - Managers, Agents, Business Managers
- "Who else do you represent?"
  - Client identity is covered by Rule 1.6
- War stories
  - Public record doesn't mean it's not subject to the rules
- Third party payors
  - Billing statements very clearly disclose matters of representation
- Consent
  - Disclosure requires that client give informed consent
  - The disclosure may be impliedly authorized in order to carry out the representation

Rules 1.7, 1.8, 1.9, and 1.18 Conflicts of Interest

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.

identifying client

- Current
  - Agreement to render professional services
  - Implied when lawyer gives legal advice and the lawyer can reasonably foresee that the prospective client will rely on that advice, or the client reasonably believes he was being represented by the lawyer
- Former
  - Express withdrawal or termination
  - Implied when assistance has concluded
  - Ongoing relationship may lead to mistaken belief of continuing representation
- Prospective
  - A person who consults about the possibility of forming a client-lawyer relationship

identifying conflict

- Determine if a conflict of interest exists
  - Current - 1.7, 1.8
    - Direct adversity
  - Former - 1.9 and Prospective 1.18
    - Materially adverse
    - Substantially related matter
    - Unless screened (prospective only)
- Consentable
  - Reasonable belief that the lawyer can provide competent and diligent representation
- Non-consentable
  - Prohibited by law
  - Current client against current client in litigation

Rules 1.7, 1.8, 1.9, and 1.18 Conflicts of Interest

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.

informed consent

- Material risks
  - Loyalty
  - Confidentiality
  - Privilege
  - Costs
- Advantages
  - Costs
  - Leverage
- Reasonably available alternatives
  - Obtain separate counsel
- Consider the sophistication of the client
- Advise to obtain independent counsel to review waiver

confirmed in writing

- Agreement confirmed in writing.
  - Document executed by the client
  - Writing prepared by lawyer transmits to the client following an oral consent
- Revoking consent
  - Client may revoke at anytime
  - Effect on representation of other clients depends
    - Material change in circumstance?
    - Expectations of other client
    - Detriment to other client or lawyer?
- Prospective waivers
  - Reasonable understanding of material risk
  - Specific drafting and discussion crucial
  - Client sophistication matters!

Rule 1.7 Conflicts (current clients)

1.7(a) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest [without first getting the informed consent of the affected clients]

simultaneous representation

- Direct Adversity
  - Advocating against a client
    - Related or unrelated matter
    - Requires more than economic adversity (competitors are not inherently in direct adversity)
- Litigation
  - Client v. Client (nonconsentable)
- Transactions
  - Agreement between clients
    - fundamentally antagonistic (nonconsentable)
    - generally aligned, but differing interests (e.g., co-write agreement; operating agreement; WFH)

joint representation

- Material Limitation
  - Significant risk (not just possibility) that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.
- Litigation
  - Clients v. Someone
    - Substantial discrepancy in the parties' testimony
    - Likely incompatibility in positions
    - Substantially different possibilities of settlement of the claims or liabilities
- Transactions
  - Representing multiple clients in agreement with another party

Rule 1.9 Conflicts (former clients)

1.9(a) - A lawyer shall not represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client.

substantially related matter

- Matter
  - Look to scope of representation
  - When the lawyer's representation is not limited to a particular matter a question of fact can arise about whether the representation has terminated (client's reasonable subjective belief)
- Substantially related
  - Involve the same transaction or legal dispute
  - Substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter

materially adverse

- Freivogel on Conflicts says: "Materially adverse" under 1.9 means that there is a significant risk that the client information you have could be used in a manner that would harm that client.
  - More permissive standard than "direct adversity".
  - Split of authority on "playbook" information

Rule 1.18 Conflicts (prospective clients)

1.18(a) - A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

duties owed

- When does the a/c relationship arise?
  - "Reasonable reliance" on advice
  - "Reasonable subjective belief" of representation
- Confidentiality
  - Information from a prospective client shall not be used or revealed except as Rule 1.9 would permit with respect to information of a former client.
- Conflicts
  - Materially adverse
  - Same or a substantially related matter
  - Lawyer received information from the prospective client that could be significantly harmful to prospective client

exceptions

- When the lawyer has received disqualifying information, representation is permissible if:
  - both the affected client and the prospective client have given informed consent, confirmed in writing, or:
  - the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary
  - the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
  - written notice is promptly given to the prospective client.

Rule 1.13 Organizational Client

1.13(a) - A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents

identify the client

- Legal entity is the client
  - Entity acts through its constituents
  - Representing an entity does not mean that the lawyer necessarily represents any constituent or affiliated organization, such as a parent or subsidiary.
- Loan Out / Furnishing Entities
  - company is wholly-owned by the artist
  - the company “loans out” or furnishes the services of the artist to a third party.
  - historically, loan-out companies have been corporations, but more recently artists are using limited liability companies as well.
- Group Entity
  - Band members

duties owed

- Dual Representation
  - A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.
- Clarifying Role
  - Must explain the identity of the client when organization's interests are adverse to those of the constituents with whom the lawyer is dealing
- Complicating Traditional Rules
  - Loyalty
  - Confidentiality (1.6) and Privilege
  - Communication (1.4)

Rule 1.14 Diminished Capacity (Minors)

1.14(a) - When capacity to make adequately considered decisions in connection with a representation is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client

identify the client

- Minor is the client
  - Even if the minor has a representative, the lawyer should as far as possible accord the represented person the status of client particularly in maintaining communication
- Role of Parents
  - The client *may* wish to have family members participate in discussions
  - When *necessary* to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client privilege.
  - Conflicts of interest
    - Parental Guarantee / Assent?
    - Loyalty
    - Confidentiality (1.6) and Privilege

duties owed

- Decision Making
  - Lawyer should not assume that children lack capacity to make decisions
    - Ability to articulate reasoning leading to a decision
    - Ability to appreciate consequences of a decision;
    - Substantive fairness of a decision;
    - Consistency of a decision with the known long-term commitments and values of the client.
  - Whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

Rule 5.5 Multijurisdictional Practice

5.5(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so

general restrictions

- Unless licensed in a jurisdiction
  - No law office
  - No other systematic and continuous presence for the practice of law
    - Does not require physical presence
  - hold out to the public or otherwise represent that the lawyer is admitted
    - Some states allow “dining room” practice in a state that you’re not licensed with disclaimer (so long as it’s not clients in unlicensed state)
- Rules are generally easier to apply in the context of litigation as opposed to transactions.
- Protectionism over “client choice”

exceptions

- Associate with licensed lawyer
- Reasonably related to the lawyer's practice in a licensed jurisdiction
  - Previously represented the client.
  - Client is a resident in or has substantial contacts in the licensed state
  - Matter has a significant connection with the licensed jurisdiction
  - The client’s activities or the legal issues involve multiple jurisdictions
  - Services involve body of federal law, nationally-uniform, foreign, or international
  - Generally no “prior relationship” exception!
- In house counsel

Rule 7.3 Solicitation

A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain

prohibited conduct

- Solicitation
  - Communication initiated by a lawyer that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.
- No in-person solicitation allowed
  - Face-to-face, live telephone and other real-time visual or direct personal encounter without time for reflection.
- Known to be represented (4.2)

exceptions

- In person solicitation is permissible when person:
  - Is a lawyer
  - Has a family, close personal, or prior business or professional relationship with the lawyer
  - Routinely uses for business purposes the type of legal services offered by the lawyer.
- ALLOWED in most states (not all): emails, text messages, direct messages, or similar communications
- No pecuniary gain
- Solicitation through representatives?

Engagement Documents

initial consult

- Scope / general information only
- No reliance
- Right to terminate
- Revealing confidential information
- Conflict waiver (prospective)
- Fee

declining representation

- Responsibility to protect interest
- No reliance
- Deadlines and/or statutes of limitation
- Need to retain counsel

representation

- Scope
- Fee basis
- Conflict waiver
- Marketing
- Dispute resolution (ADR)
- Monitoring deadlines

termination

- Confirming scope and conclusion
- Need to withdraw from proceedings
- Deadlines and/or statutes of limitation
- Right to files
- Return of unbilled retainer / other funds
- Conflict waiver (or reminder of waiver)

Intersection of Ethics and Professionalism

rule 3.4 - litigation fairness

- unlawfully obstruct another party's access to evidence
- alter, destroy or conceal a document
- falsify evidence
- knowingly disobey an obligation
- make a frivolous discovery request or fail to make reasonably diligent effort to comply with a proper discovery request
- allude in a trial to any matter that the lawyer does not reasonably believe is relevant
- request a person other than a client (or relative, employee, or agent) to refrain from voluntarily giving relevant info

rule 4.1 - truthfulness in statements

- make a false statement of material fact or law to a third person
  - no affirmative duty to inform an opposing party of relevant facts.
- Puffing and posturing is permissible
  - Estimates of price or value placed on the subject of a transaction
  - party's intentions as to an acceptable settlement of a claim
  - existence of an undisclosed principal

Intersection of Ethics and Professionalism

rule 4.2 - known to be represented

- A lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer
- Applies even though the represented person initiates or consents to the communication.
- A lawyer must immediately terminate communication with a person once representation is known
- May not make a prohibited communication through another person

rule 4.4 - respect for 3rd party rights

- A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Questions?

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 497 **February 10, 2021**

Conflicts Involving Materially Adverse Interests

Rules 1.9(a) and 1.18(c) address conflicts involving representing a current client with interests that are "materially adverse" to the interests of a former client or prospective client on the same or a substantially related matter.[1] *But neither Rule specifies when the interests of a current client are "materially adverse" to those of a former client or prospective client. Some materially adverse situations are typically clear, such as, negotiating or litigating against a former or prospective client on the same or a substantially related matter, attacking the work done for a former client on behalf of a current client, or, in many but not all instances, cross-examining a former or prospective client.*[2] *Where a former client is not a party to a current matter, such as proceedings where the lawyer is attacking her prior work for the former client, the adverseness must be assessed to determine if it is material. General economic or financial adverseness alone does not constitute material adverseness.*

Introduction

ABA Model Rule of Professional Conduct 1.9(a) addresses conflicts between current clients and former clients of a lawyer. It reads:

> (a) 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 gives informed consent, confirmed in writing.

(Emphasis added).

Model Rule 1.18 addresses prospective clients and its paragraph (c) similarly requires analysis when a lawyer subsequently represents another person with "interests materially adverse to those of the prospective client." Rule 1.18(c) provides:

> (c) A lawyer subject to paragraph (b) shall not represent a client *with interests materially adverse to those of a prospective client* in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph,

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Typically, the lawyer does not perform legal work for a prospective client, and therefore it is unlikely the lawyer would "attack" work done for a prospective client.

> no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(Emphasis added). This Opinion addresses how to construe the language "interests [that] are materially adverse to the interests of the former client" in Rule 1.9(a) and similar language used in Rule 1.18(c).

I. The origins of the "materially adverse" standard

The language "interests [that] are materially adverse to the interests of the former client" has roots in Canon 6 of the ABA's 1908 Canons of Ethics. Canon 6 prohibited, in relevant part, "the subsequent acceptance of retainers or employments from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Under the ABA Model Code of Professional Responsibility, "there was no direct corollary to" Model Rule 1.9(a).[3] Instead, "former client conflicts were sometimes treated under Canon 9 of the Code under the appearance of impropriety standard."[4] The current language was crafted by the 1977 Commission on the Evaluation of Professional Standards, frequently referred to as the Kutak Commission. Initial ideas appear in the Commission's January 1980 and May 1981 Reports, but the current formulation was not proposed until the August 1982 draft, with non-substantive wording changes made in advance of final adoption of Rule 1.9 in August 1983.[5] Rule 1.18 was adopted in 2002 and appears simply to have borrowed the language "materially adverse to those [the interests] of the former client" from Rule 1.9(a).

As adopted in 1983, Comment [1] to Rule 1.9 stated that "[t]he principles in Rule 1.7 determine whether the interests of the present and former client are adverse."[6] Citing this language, ABA Formal Op. 99-415 (1999) concluded that "a lawyer must look to Rule 1.7 to determine . . . whether the interests of the parties are materially adverse."

Rule 1.7 prohibits the representation of interests that are "directly" as opposed to "materially" adverse. As a result, ABA Op. 99-415 concluded that "only direct adverseness of interest meets the threshold of 'material adverseness' sufficient to trigger the prohibitions established in Rule

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[3] Peter Geraghty, *Ethics Tip - August 2017*, A.B.A. (Aug. 1, 2017). https://www.americanbar.org/groups/professional_responsibility/services/ethicssearch/ethicstipaugust2017/.

[4] *Id.*

[5] The January 1980 and May 1981 drafts proposed that lawyers be prohibited from representing clients in the same or substantially related matters where the interest of the client "is adverse in any material respect to the interest of the former client." *See, e.g.*, A.B.A. COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS DISCUSSION DRAFT, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_1-80.pdf (Jan. 30, 1980); A.B.A. COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS PROPOSED FINAL DRAFT https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.pdf (May 30, 1981); A.B.A. COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS REPORT TO THE HOUSE OF DELEGATES, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_8-82.pdf (last visited Jan. 26, 2021). *See also* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982 – 2013, 901 (Art Garwin ed. 2013) [hereinafter A LEGISLATIVE HISTORY] (Rules as adopted).

[6] A LEGISLATIVE HISTORY, *supra* note 5, at 901.

1.9."[7] However, as part of the Ethics 2000 revisions to the Rules, Comment [1] to Rule 1.9 was changed. The sentence relied upon in ABA Op. 99-415 in Comment [1] to Rule 1.9—that Rule 1.7 governed the issue of adverseness—was deleted, without specific explanation.[8]

II. Subsequent interpretation of the language "materially adverse to the interests of the former client" in Rule 1.9

Subsequent to the Ethics 2000 amendments, courts, regulatory authorities, and ethics scholars have interpreted the meaning of "material adverseness" in Rule 1.9. These authorities have generally concluded that "material adverseness" includes, but is not limited to, matters where the lawyer is directly adverse on the same or a substantially related matter. While material adverseness is present when a current client and former client are directly adverse, material adverseness also can be present where direct adverseness is not.

However, "material adverseness" does not reach situations in which the representation of a current client is simply harmful to a former client's economic or financial interests, without some specific tangible direct harm. In *Gillette Co. v. Provost*, the court concluded that "[w]ith respect to the 'material adverse' prong of Rule 1.9, representation of one client is not 'adverse' to the interests of another client, for the purposes of lawyers' ethical obligations, merely because the two clients compete economically."[9] As noted in New York State Bar Association Ethic Opinion 1103, "[j]ust as competing economic interests do not create [a Rule 1.7 conflict] so they do not create a 'material adverse' interest within the meaning of Rule 1.9(a)."[10] Thus, a lawyer does not have a Rule 1.9 conflict solely because the lawyer previously represented a competitor of a current client whose economic interests are adverse to the current client. Material adverseness, referred to by the *Gillette* court, "requires a conflict as to the legal right and duties of the clients, not merely conflicting or competing economic interests."[11]

As the Court of Appeals for the Eighth Circuit explained in *Zerger & Mauer LLP v. City of Greenwood*:

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[7] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-415 (1999).

[8] The minutes of the Commission's December 12, 1998, meeting note that one member observed: "that the organization and content of the comment to Rule 1.9 should be revised." He noted the illogical organization of the comment, the irrelevance of some comments (e.g., Comments [4] and [5] regarding legal history), the use of the term 'material adversity' with no explanation, and the incomplete definition of 'substantial relationship'. *See* Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), *Meeting Minutes Friday Dec. 11 & Saturday Dec. 12, 1998,* A.B.A. (last visited Jan. 26, 2021), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/121198mtg/. The next reference to Rule 1.9's Comment [1] by the Ethics 2000 Commission was in the Minutes from the May 7, 2000 meeting: "A member noted that two stricken sentences in Comment [1] were relied on in a recent ethics opinion, 99-415. The Commission felt that no action was necessary in response." But there was no explanation about why the two sentences (including the reference to "direct adversity") were stricken. *See* Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), *Meeting Minutes Friday May 5 – Sunday May 7, 2000,* A.B.A. (last visited Jan 26, 2021), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/050500mtg/.

[9] Gillette Co. v. Provost, 2016 WL 2610677 (Mass. Feb. 11, 2019).

[10] N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1103 (2016).

[11] *See Gillette Co.*, 2016 WL 2610677, at *3.

> Generally, whether a former client and current client have materially adverse interests is not a difficult question, as the situation usually involves a new client suing a former client. However, the question is more complicated when a former client, "although not directly involved in the [current] litigation may be affected by it in some manner. When such is the case . . . a fact-specific analysis is required in order to evaluate 'the degree to which the current representation may actually be harmful to the former client.' This analysis focuses on 'whether the current representation may cause legal, financial, or other identifiable detriment to the former client.'"[12]

Such detriment has it limits, otherwise the concept of materiality would have no meaning. Further, in the absence of direct adverseness, generalized financial harm or a claimed detriment that is not accompanied by demonstrable harm to the former or prospective client's interests does not constitute "material adverseness."

The following are types of situations where "material adverseness" may be found.

A. Suing or negotiating against a former client

Suing a former client or defending a new client against a claim by a former client (*i.e.*, being on the opposite side of the "v" from former client) on the same or on a substantially related matter is a classic example of representing interests that are directly adverse and therefore "materially adverse" to the interests of a former client.[13] In assessing whether a lawyer has represented parties on both sides of the "v," the analysis of who or what the lawyer at issue formerly represented may

[12] Zerger & Mauer LLP v. City of Greenwood, 751 F.3d 928, 933 (8th Cir. 2014) (internal citations omitted). *See, e.g.*, Plotts v. Chester Cycles LLC, 2016 WL 614023 *7-8 (D. Ariz. Feb. 16, 2016) (stating that "[w]hile the existence of possible personal liability [as to a former client] would establish material adversity [in a substantially related matter], the non-existence of personal liability does not necessarily dictate a different result."). In *Plotts*, an adverse financial impact on an entity in which the former client had an ownership interest and that had been the subject of the prior representation constituted material adverseness. *See also*, *In re* Carpenter, 863 N.W. 2d 223 (N.D. 2015). In *Carpenter*, an individual met with a lawyer about representation in a matter adverse to the Christian Science Church of Boston. Through extensive research, the prospective client had discovered that the mineral rights to 300 acres of North Dakota land had been left by a decedent to the Church and hoped for a fee or other compensation from the Church for bringing the information to its attention. The individual briefed the attorney on his research and conclusions. The attorney, after declining to represent the individual, promptly took the information that he had been given and contacted the Church, offering to represent it with respect to the mineral rights. The lawyer's representation of the Church was found to be "materially adverse" to the prospective client's interests. Carpenter was found to have violated Rule 1.18 and was suspended for 90 days.

[13] *See, e.g.*, Persichette v. Owners Insurance Co., 462 P.3d 581, 585-86 (Colo. 2020) (law firm representing plaintiff in lawsuit against former client was "materially adverse" to the interests of such former client); Anderson & Anderson LLP v. North American Foreign Trading Corp., 3 N.Y.S.3d 284 (Sup. Ct. 2014) ("direct adversity in litigation meets the definition of 'materially adverse interests.'"); Jordan v. Philadelphia Housing Authority, 337 F. Supp. 2d 666, 672 (E.D. Pa. 2004) ("There is no situation more 'materially adverse' than where a lawyer's former client is in a suit against lawyer's current client . . ."); Disciplinary Counsel v. Broyles, 49 N.E.3d 1238 (Ohio 2015) (lawyer disciplined for representing bank at a default hearing in a foreclosure case and then seeking to vacate the default on behalf of the property owners).

be important.[14] In addition, being across the table, so to speak, from a former client and negotiating against that former client in transactional matters typically constitutes "material adverseness."[15]

B. Attacking lawyer's own prior work

Another type of "material adverseness" exists when a lawyer attempts to attack her own prior work.[16] For example, one court held that a lawyer cannot challenge a patent that the lawyer previously obtained for a former client.[17] Another court found that a lawyer may not challenge a real estate restrictive covenant for a new client that the lawyer previously drafted for the prior seller of the land.[18] When a lawyer represents a current client challenging the lawyer's own prior work done for a former client on the same or a substantially related matter, the situation creates a materially adverse conflict.

Even when lawyers are not directly attacking their own prior work, but instead seeking to undermine that work or the result achieved for a former client, material adverseness may exist. These situations, however, do not lend themselves to a "bright line" test of when there is and is not material adverseness. An examination of the facts in three cases provides guidance as to what circumstances may constitute material adverseness.

In *Zerger & Mauer*,[19] the City of Greenwood prosecuted and settled a nuisance claim against Martin Marietta involving the latter's truck traffic to a local quarry. As part of the settlement, the City could designate the specific route that Martin Marietta's trucks took on the way to the quarry. The law firm of Zerger & Mauer represented the City in this litigation. Thereafter, Zerger & Mauer brought a private nuisance action against Martin Marietta on behalf of various individuals with property interests along the route designated by the City for Martin Marietta's traffic to the quarry. The City was not a part of the private nuisance action but sought to disqualify Zerger & Mauer from representing the private plaintiffs in that case. The court disqualified the firm, finding that it

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[14] Delso v. Trustees for the Retirement Plan for Hourly Employees of Merck, 2007 WL 766349 *10-11(D. N.J. Mar. 6, 2007) (finding no past attorney-client relationship between current lawyer for plaintiff and the defendant); *see also* Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2005-61 (2005) (concluding that there was likely no conflict as law firm represented seller, not corporation being sold).

[15] Sylvia Stevens, *Conflicts Part II: Former Client Conflicts*, OR. STATE BAR BULLETIN (Dec. 2009) ("Where the current and former clients are opposing parties in litigation or in a transaction, the adversity of their interests is obvious."), https://www.osbar.org/publications/bulletin/09dec/barcounsel.html.

[16] Franklin v. Callum, 146 N.H. 779, 782-83 (2001) (plaintiff's lawyer disqualified because case "may require her to interpret" an agreement drafted by one of her partners for a non-party to the litigation). Typically, the lawyer does not perform legal work for a prospective client, so it is unlikely the lawyer could "attack" work done for such a client.

[17] Sun Studs, Inc. v. Applied Theory Associates, 772 F.2d 1557, 1566-68 (Fed. Cir. 1985); Nasdaq, Inc. v. Miami International Holdings, 2018 WL 6171819 *4-6 (D. N.J. Nov. 26, 2018) (failure to disqualify law firm "would allow the same law firm that argued for the patentability of Nasdaq's inventions to represent parties adverse to Nasdaq in this suit who are arguing those very same patents are invalid.") (internal quotations omitted).

[18] North Carolina Bar Association v. Sossomon, 197 N.C. App. 261, 266-67, 676 S.E.2d 910 (2009) (lawyer who previously represented seller of land in drafting of restrictive covenant disciplined for, in part, violation of Rule 1.9 for materially adverse representation on the very same matter by attempting to negotiate a waiver of the restrictive covenant from the former client for a new client, without getting a waiver of the conflict of interest or even disclosing that he was representing the other party).

[19] 751 F.3d 928 (8th Cir. 2014).

was "advocate[ing] a position that contradicts a term in [the City's] settlement."[20] The court also found that Zerger & Mauer's current clients "have an interest in . . . disrupting Martin's use of the [City's] designated route" and "there is a very real possibility that other routes will come into play."[21] The City also "may demand that its former counsel not advocate positions that pose the serious threat of once again embroiling [it] in protracted litigation."[22] The court upheld the lower court's finding that the interests of the City and the private plaintiffs "remain[ed] materially adverse."[23]

National Medical Enterprises, Inc. v. Godfrey,[24] is another example of circumstances in which a non-party, non-witness former client nevertheless had materially adverse interests to a lawyer's current client.[25] In this case, a lawyer represented a former hospital administrator for National Medical Enterprises (NME). NME was accused of mistreating patients and defrauding insurers in a criminal investigation and parallel civil actions. The former client (the hospital administrator) had denied any wrongdoing, had not been charged with any crime, and had been dismissed from dozens of civil actions. About seventeen months after the lawyer and his firm withdrew from the representation of the former client, the lawyer's firm brought an action against NME on behalf of some ninety former patients making the same types of allegations of physical and mental abuse at various NME facilities, including facilities under the administrative responsibility of the former client. The claims brought against NME did not include any allegations of misconduct by the former client. The lawyer for the former client was screened from the action against NME. The appellate court, reversing the district court, found the requisite adverseness to exist and ordered NME's law firm disqualified citing the risk of renewed allegations or inquiries into the former client's conduct as a result of the new action.[26]

Not every situation involving adverseness constitutes material adverseness. There is a threshold below which adverseness is not material. In *Simpson Performance Products, Inc. v. Robert W. Horn, PC.*,[27] for instance, seat belt manufacturer Simpson Performance Products (SSP) hired lawyer Horn to investigate and evaluate and the possibility of a lawsuit by SPP against NASCAR when NASCAR alleged that SSP's defective product was partially responsible for the death of Dale Earnhardt at the NASCAR Daytona 500 in 2001. To preserve a good relationship with NASCAR, SSP decided not to bring suit to challenge NASCAR's allegations that SSP's product was at fault. Thereafter, however, the retired founder of the company hired lawyer Horn to represent the founder in a suit against NASCAR on his own. When SSP refused to pay Horn, he sued SSP for unpaid fees. In response, SSP alleged that Horn violated Rule 1.9(a). The court found no material adverseness existed because the record demonstrated that the manufacturer's

[20] *Id.* at 934.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] 924 S.W.2d 123 (Tex. 1996)
[25] It is not entirely clear from the court's opinion whether the former client would be a witness in the proceedings at issue, but the court's analysis of material adverseness does not rely on potential testimony of the former client or cross-examination by the client's former law firm.
[26] *See also* Ill. State Bar Ass'n Comm. on Prof'l Conduct Advisory Op. 16-03 (2016) (representation of a second spouse in child support proceedings was "materially adverse to the interests" of the first spouse, a former client previously represented by lawyer, because recovery for current client could reduce husband's ability to pay support to former client).
[27] 92 P.3d 283, 287-89 (Wyo. 2004).

relationship with NASCAR had not been adversely affected by the founder's lawsuit—the very reason SSP declined to sue NASCAR—and that the "company is doing just fine."[28]

C. Examining a former client

Rule 1.9(c)(1) prohibits using information from a former client "to the disadvantage of the former client." If a lawyer must use information relating to the former representation to the disadvantage of a former client to competently examine the former client, the lawyer has a conflict, unless that information has become "generally known."[29] However, even if a lawyer ethically can use the information or does not need to use information, the lawyer still may have a conflict of interest in examining a former client under Rule 1.9(a) if the former client's interests are "materially adverse" to the current client *and* the current matter is substantially related to the prior matter. Courts have sometimes found "material adverseness" when the lawyer proposes to examine a former client, where no information from the prior representation will be used.[30]

In ABA Opinion 92-367, this Committee considered the question of whether examining a current client in another client's matter created a conflict under ABA Model Rule 1.7. Discussing adverseness, the Opinion stated that "[i]t should be emphasized that the degree of adverseness of interest involved . . . will depend on the particular circumstances in which the question arises." In order to avoid this conflict, the current client could retain separate counsel from a different firm just for the cross-examination and screen the conflicted lawyer from the examination.[31] Similarly in the former client examination situation a lawyer may avoid the potential conflict altogether by having the current client retain separate counsel to examine the former client, and screen the lawyer

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[28] Comment [1] to Wyoming Rule 1.9 contained the sentence adopting Rule 1.7's "directly adverse" provision as the standard for the term "materially adverse" in Rule 1.9 that had been deleted from the Model Rules in 2002. The Court's analysis of "materially adverse" does not appear to hinge on that comment and the discussion in *Simpson* of the materially adverse issue has been noted by one commentator as unusual in its "care and precision." FREIVOGEL ON CONFLICTS, FORMER CLIENT, PART I, *available at* http://www.freivogelonconflicts.com/formerclientparti.html (last visited Jan. 27, 2021).

[29] *See* Supreme Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2013-4 (2013) (lawyer may impeach former client with criminal conviction only if conviction is "generally known" under Rule 1.9(c)); Utah State Bar Ethics Advisory Opinion Comm. Op. 02-06 (2002) (permitting lawyer to cross examine former client if matters are not substantially related and lawyer does not disclose or use information from former client to such client's disadvantage); Ill. State Bar Ass'n Comm. on Prof'l Conduct Advisory Op. 05-01 (2006) (same). *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) for an explanation about what information is "generally known."

[30] In Illaraza v. Hovensa LLC, 2012 WL 1154446 *6-10 (D. V.I. Mar. 31, 2012), the plaintiffs' lawyer was disqualified from representing plaintiffs in action against their employer and others for wrongful discharge and defamation stemming from an incident in which plaintiffs and another employee-manager were prosecuted for grand larceny for stealing employer's property. The charges against the two plaintiffs were dismissed, but the third individual pled guilty to possession of stolen property. The plaintiffs' lawyer had represented the employee-manager in his criminal case. In the wrongful discharge and defamation action, the plaintiffs contended in their summary judgement submission that the employee-manager defamed them. The court found that this constituted "material adverseness" that could not be alleviated by various promises by the plaintiffs' lawyer not to use confidential information against the former client, employee-manager. The court rejected the lawyer's offer not to cross examine her former client on any topics in which the lawyer had confidential information.

[31] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-367 (1992).

with the conflict from participating in the examination of the former client or sharing with separate counsel any information from the prior representation.[32]

III. Waiver of materially adverse conflicts

If a reasonable lawyer reviewing the situation would conclude that the representation of a current client is "materially adverse" to a former client, the lawyer may still represent the current client, even if the current and prior matters are "substantially related,"[33] provided the lawyer obtains the informed consent of the former client (or prospective client), to waive the potential conflict of interest and that consent is confirmed in writing.[34] Thus, even if a lawyer is hired to sue a former client on behalf of a current client, or negotiate against a former client, or take the deposition of a former client on a substantially related matter, the lawyer may ask for the former client's informed consent to waive the conflict and permit the lawyer's representation of the current client. Informed consent to waive a conflict under Rule 1.9(a) will not, however, waive the lawyer's obligation to maintain the confidentiality of all information learned during the prior representation. To allow the use or disclosure of information protected by Rule 1.6, the former client also must provide informed consent pursuant to Rule 1.6(a).

Similarly, if a lawyer seeks to represent a current client in a matter that is materially adverse to a prior prospective client in the same or substantially related matter on which that prospective client consulted the lawyer, and the lawyer has received "significantly harmful" information from the prior prospective client,[35] Rule 1.18(d)(1) permits representation of the current client if the current client and the prospective client give informed consent, confirmed in writing. Alternatively, the firm of the lawyer who received the "significantly harmful" information from the prospective client can represent the current client if the information-receiving lawyer is screened from the current representation and is apportioned no part of the fee from the representation and written notice is promptly provided to the prospective client pursuant to Rule 1.18(d)(2).[36]

IV. Conclusion

"Material adverseness" under Rule 1.9(a) and Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on

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[32] *See* N.Y. City Bar Ass'n Formal Ethics Op. 2017-6 (suggesting that lawyer may associate with separate counsel to subpoena a current client).

[33] MODEL RULES OF PROF'L CONDUCT R. 1.9, cmt. [3] (2020). "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

[34] Informed consent may also need to be obtained from the lawyer's current client if there is a "significant risk" that the lawyer's representation of such client "will be materially limited" by the lawyer's responsibilities to the former client. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2).

[35] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 492 (2020) for a discussion of "significantly harmful information."

[36] In addition, the information-receiving lawyer must have taken "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client." MODEL RULES OF PROF'L CONDUCT R. 1.18(d)(2).

behalf of a current client in the same or a substantially related matter.[37] It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client. "Material adverseness" may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffices.

[37] Typically, the lawyer does not perform legal work for a prospective client and therefore there are unlikely to be situations where the lawyer "attacks" work done for such a client.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 503 **November 2, 2022**

"Reply All" in Electronic Communications

In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in the matter impliedly consent to receiving counsel's "reply all" to the communication. Thus, unless that result is intended, lawyers should not copy their clients on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients. Alternatively, lawyers may communicate in advance to receiving counsel that they do not consent to receiving counsel replying all, which would override the presumption of implied consent.

I. Introduction

Lawyers now commonly use electronic communications like email and text messaging in their law practice.[1] Subject to handling, security, and maintenance considerations beyond this opinion's scope,[2] the Model Rules permit these forms of electronic communication. This permissible communication extends to communications with counsel representing another person in the matter.

Under Rule 4.2 of the ABA Model Rules of Professional Conduct, in representing a client, a lawyer may not "communicate" about the subject of the representation with a represented person absent the consent of that person's lawyer, unless the law or court order authorizes the communication.[3]

When a lawyer ("sending lawyer") copies the lawyer's client on an electronic communication to counsel representing another person in the matter ("receiving counsel"), the sending lawyer creates a group communication.[4] This group communication raises questions under the "no contact" rule because of the possibility that the receiving counsel will reply all, which of course will be delivered to the sending lawyer's client. This opinion addresses the question of whether sending lawyers, by copying their clients on electronic communications to receiving counsel, *impliedly* consent to the receiving counsel's "reply all" response.

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021) (discussing ethical considerations in virtual law practice); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (discussing lawyers' obligations in response to data breaches); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (discussing reasonable security precautions when communicating through email).

[3] The authorized-by-law exception is not the focus of this opinion.

[4] Throughout this opinion, the lawyer who sends the electronic communication is referred to as the "sending lawyer." The lawyer who represents another person in the matter and who receives the communication on which the sending lawyer's client is copied is referred to as the "receiving counsel."

Several states have answered this question in the negative, concluding that sending lawyers have *not* impliedly consented to the reply all communication with their clients. Although these states conclude that consent may not be implied solely because the sending lawyer copied the client on the email to receiving counsel, they also generally concede that consent may be implied from a variety of circumstances beyond simply having copied the client on a particular email.[5] This variety of circumstances, however, muddies the interpretation of the Rule, making it difficult for receiving counsel to discern the proper course of action or leaving room for disputes.

II. Copying a Client on Emails and Texts Is Implied Consent to a Reply All Response

We conclude that given the nature of the lawyer-initiated group electronic communication, a sending lawyer impliedly consents to receiving counsel's "reply all" response that includes the sending lawyer's client, subject to certain exceptions discussed below. Several reasons support this conclusion, and we think that this interpretation will provide a brighter and fairer line for lawyers who send and receive group emails or text messages.

First, Model Rule 4.2 permits lawyers to communicate about the subject of the representation with a represented person with the "consent" of that person's lawyer. Consent for purposes of Rule 4.2 may be implied; it need not be express.[6] Similar to adding the client to a videoconference or telephone call with another counsel or inviting the client to an in-person meeting with another counsel, a sending lawyer who includes the client on electronic communications to receiving counsel generally impliedly consents to receiving counsel "replying all" to that communication.[7] The sending lawyer has chosen to give receiving counsel the impression that replying to all copied on the email or text is permissible and perhaps even encouraged. Thus, this situation is not one in

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[5] *See, e.g.*, Wa. State Bar Ass'n Advisory Op. 202201 (2022); S.C. Bar Advisory Op. 18-04 (2018). For a list of the factors bearing on implied consent, *see* Cal. Standing Comm. on Prof'l Responsibility & Conduct Formal Op. 2011-181 ("Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.").

[6] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. j (2000) ("[A] lawyer . . . may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.").

[7] *See, e.g.*, N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021) ("While under RPC 4.2 it would be improper for another lawyer to initiate communication directly with a client without consent, by email or otherwise, nevertheless when the client's own lawyer affirmatively includes the client in an email thread by inserting the client's email address in the 'to' or 'cc' field, we think the natural assumption by others is that the lawyer intends and consents to the client receiving subsequent communications in that thread."); *see also* Va. Legal Ethics Op. 1897 (2022) ("A lawyer who includes their client in the "to" or "cc" field of an email has given implied consent to a reply-all response by opposing counsel."); N.Y.C. Bar Formal Ethics Op. 2022-3 (similar).

which the receiving counsel is overreaching or attempting to pry into confidential lawyer-client communications, the prevention of which are the primary purposes behind Model Rule 4.2.[8]

This conclusion also flows from the inclusive nature and norms of the group electronic communications at issue. It has become quite common to reply all to emails. In fact, "reply all" is the default setting in certain email platforms. The sending lawyer should be aware of this context,[9] and if the sending lawyer nonetheless chooses to copy the client, the sending lawyer is essentially inviting a reply all response. To be sure, the sending lawyer's implied consent should not be stretched past the point of reason.[10] Unless otherwise explicitly agreed, the consent covers only the specific topics in the initial email; the receiving counsel cannot reasonably infer that such email opens the door to copy the sending lawyer's client on unrelated topics.[11]

Second, we think that placing the burden on the initiator – the sending lawyer – is the fairest and most efficient allocation of any burdens. The sending lawyer should be responsible for the decision to include the sending lawyer's client in the electronic communication, rather than placing the onus on the receiving counsel to determine whether the sending lawyer has consented to a communication with the sending lawyer's client. Moreover, in a group email or text with an extensive list of recipients, the receiving counsel may not realize that one of the recipients is the sending lawyer's client.[12] We see no reason to shift the burden to the receiving counsel, when the sending lawyer decided to include the client on the group communication in the first instance.

Furthermore, resolving the issue is simpler for the sending lawyer. If the sending lawyer would like to avoid implying consent when copying the client on the electronic communication, the sending lawyer should separately forward the email or text to the client. Indeed, we think this practice is generally the better one. By copying their clients on emails and texts to receiving counsel, sending lawyers risk an imprudent reply all from their clients. Email and text messaging replies are often generated quickly, and the client may reply hastily with sensitive or compromising information.[13] Thus, the better practice is not to copy the client on an email or text to receiving

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[8] Model Rules of Prof'l Conduct R. 4.2 cmt. [1].

[9] *See* Model Rules of Prof'l Conduct R. 1.1, cmt. [8] ("To maintain the requisite level of knowledge and skill, a lawyer should keep abreast of the changes in law and its practice, including the benefits and risks of relevant technology[.]").

[10] *Cf.* Model Rules of Prof'l Conduct, Scope [14] ("The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.").

[11] *See also* Va. Legal Ethics Op. 1897 (2022) ("The reply must not exceed the scope of the email to which the lawyer is responding . . . as the sending lawyer's choice to use 'cc' does not authorize the receiving lawyer to communicate beyond what is reasonably necessary to respond to the initial email."); N.Y.C. Bar Ethics Op. 2022-3 ("Where an attorney sends an email copying their client, such communication gives implied consent for other counsel to reply all on the same subject within a reasonable time thereafter.").

[12] *See* N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021) ("[M]any emails have numerous recipients and it is not always clear that a represented client is among the names in the 'to' and 'cc' lines. The client's email address may not reflect the client's name, making it difficult to ascertain the client's identity. Rather than burdening the replying lawyer with the task of parsing through the group email's recipients, the initiating lawyer who does not consent to a response to the client should bear the burden of omitting the client from the group email or blind copying the client.").

[13] *See, e.g.*, N.Y.C. Bar Ethics Op. 2022-3 (discussing the lawyer competence and client risk issues arising when lawyers copy their clients on emails to opposing counsel).

counsel; instead, the lawyer generally should separately forward any pertinent emails or texts to the client.[14]

III. The Presumption of Implied Consent to Reply All Communications Is Not Absolute

The presumption of implied consent to reply all communications may be overcome. We highlight several common examples to guide lawyers.

First, an express oral or written remark informing receiving counsel that the sending lawyer does not consent to a reply all communication would override the presumption of implied consent. Thus, lawyers who do not wish for their client to receive a "reply all" communication should communicate that fact in advance to receiving counsel, preferably in writing.[15] This communication should be prominent; lawyers who simply insert this preference in a long list of boilerplate disclaimers in their email signature area run the risk of the receiving counsel missing it. Although such disclaimers are better than nothing, a more effective approach would be to inform the receiving counsel - at the beginning of the email or in an earlier, separate communication - that including the client in the communication does not signify consent (or as noted above, not copy the client at all).

Second, the presumption applies only to emails or similar group electronic communications, such as text messaging, which the lawyer initiates. It does not apply to other forms of communication, such as a traditional letter printed on paper and mailed. Implied consent relies on the circumstances, including the group nature and other norms of the electronic communications at issue. For paper communications, a different set of norms currently exists. There is no prevailing custom indicating that by copying a client on a traditional paper letter, the sending lawyer has impliedly consented to the receiving counsel sending a copy of the responsive letter to the sending lawyer's client. Accordingly, receiving counsel generally should not infer consent and reply to the letter with a copy to the sending lawyer's client simply because the sending lawyer copied that lawyer's client on a traditional paper letter. The sending lawyer, as a matter of prudence, should consider forwarding the letter separately, instead of copying the client, but failing to do so does not itself provide implied consent to the receiving counsel to copy the sending lawyer's client on a responsive letter. In sum, although Model Rule 4.2 applies equally to electronic and paper communications, only in group emails or text messages does copying the client convey implied consent for the receiving counsel to reply all to the communication.

Finally, although the act of "replying all" is generally permitted under Model Rule 4.2, other Model Rules restrict the content of that reply.[16]

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[14] A separate forward is safer than "bcc'ing" the client because in certain email systems, the client's reply all to that email would still reach the receiving counsel.

[15] As in many other areas of professional responsibility and the law generally, written communications are advisable because they create an accurate record and help to prevent misunderstandings. Moreover, to avoid implied consent, an oral statement of course would need to be made in advance of the email communication at issue.

[16] *See, e.g.*, Model Rules of Prof'l Conduct R. 4.4(a) cmt. [1] (prohibiting "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship"); Model Rules of Prof'l Conduct R. 4.4(b)

IV. Conclusion

Absent special circumstances, lawyers who copy their clients on emails or other forms of electronic communication to counsel representing another person in the matter impliedly consent to a "reply all" response from the receiving counsel. Accordingly, the reply all communication would not violate Model Rule 4.2. Lawyers who would like to avoid consenting to such communication should forward the email or text to the client separately or inform the receiving counsel in advance that including the client on the electronic communication does not constitute consent to a reply all communication.

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cmt. [2] ("If a lawyer knows or reasonably should know that [an email] was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures."); Model Rules of Prof'l Conduct R. 8.4(c) (prohibiting counsel from making misrepresentations).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 505 **May 3, 2023**

Fees Paid in Advance for Contemplated Services

Under the Model Rules of Professional Conduct, a fee paid to a lawyer in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned by the performance of the contemplated services. This protects client funds and promotes client access to legal services in the event the representation terminates before all contemplated services have been rendered. All fees must be reasonable, and unearned fees must be returned to the client. Therefore, it is not accurate to label a fee "nonrefundable" before it actually has been earned, and labels do not dictate whether a fee has been earned.

This opinion examines a lawyer's obligations under the ABA Model Rules of Professional Conduct with respect to fees paid in advance for legal work to be performed by the lawyer in the future.[1] In particular, this opinion seeks to clarify the proper handling and disposition of fees paid in advance for legal work to be performed in the future, including where the lawyer must deposit and maintain the funds and when the lawyer may treat them as earned. The opinion also explains when a lawyer must refund all or a portion of fees paid in advance and discusses whether such a payment may be, or can even be labeled, "nonrefundable." The answers are derived from the application of several Model Rules, including: 1.5(a), 1.5(b), 1.15(a), 1.15(c), 1.15(d), and 1.16(d).

Fees for services may be paid after completion of the services, of course. However, for certain matters, many lawyers request or require that funds in a certain amount be paid to the lawyer at the outset of the representation to secure payment for the lawyer's later work. Under the Model Rules such fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned. This is to protect the client from the risk that the lawyer may not be able to refund the prepaid fee in the event the representation terminates before the contemplated work is completed. The Model Rules protect the lawyer from the risk of nonpayment by allowing advance fees to be received and protect the client by requiring that the funds are kept safe and separate from the funds of the lawyer or firm.

I. Terminology

As a preliminary matter, it is useful to define terms commonly used to label certain client-lawyer fee arrangements: advances, retainers, flat or fixed fees, and "nonrefundable" or "earned-on-receipt" fees.

[1] This opinion is based on the American Bar Association Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling. This is especially noteworthy for this opinion as jurisdictions have adopted substantially different rules relating to the management of client property including fees paid in advance for legal work to be performed in the future.

A. Advances v. Retainers

Fees paid by a client to a lawyer in advance for legal work to be performed by the lawyer in the future are sometimes referred to as an "advance fee," an "advanced fee," an "advance fee payment," an "advance fee deposit," a "fee advance," or simply an "advance." Advances are also sometimes called "special retainers," "security retainers," or simply "prepaid fees." To be consistent and clear, this opinion will use the term "advance" when discussing fees paid to the lawyer for legal work to be performed in the future.

When a client pays an advance to a lawyer, the lawyer takes possession – but not ownership – of the funds to secure payment for the services the lawyer will render to the client in the future.

This opinion will also refer to the term "retainer" fee. Neither the term "retainer" nor "retainer fee" is found in the Model Rules of Professional Conduct. Regrettably, many lawyers use the term loosely to mean any sum of money paid to the lawyer at or near the commencement of representation.[2] Whereas an advance is a deposit of money with the lawyer to pay for services to be rendered in the future, there is another type of payment that is not for services. Rather, "[t]he purpose of [a retainer] is to assure the client that the lawyer will be contractually on call to handle the client's legal matters."[3] This type of agreement and payment is variously referred to as a "general retainer," "classic retainer," "true retainer," "availability retainer," or an "engagement retainer."[4] Because all of these terms mean the same thing, this opinion will use the term "general retainer" to refer to this arrangement.[5] A general retainer is paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client.[6] Thus, a general retainer has been conceptualized as a form of an option

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[2] There is widespread agreement that the word "retainer" has been used so inconsistently that is has practically lost all definable meaning. BLACK'S LAW DICTIONARY (11th ed. 2019) ("Over the years, lawyers have used the term 'retainer' in so many conflicting senses that it should be banished from the legal vocabulary.") (quoting Mortimer D. Schwartz & Richard C. Wydick, PROBLEMS IN LEGAL ETHICS 100, 101 (2d ed. 1988)).

[3] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 506 (West 1986).

[4] Some jurisdictions have commendably sought to define terms and draw distinctions in their court rules. *See* Ariz. Rules of Prof'l Conduct R. 1.5 cmt. [7] (*"*The 'true' or 'classic' retainer is a fee paid . . . merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. . . ."). *See also* Fla. State Bar R. 4-1.5(e)(2) (defining "retainer," "flat fee," and "advance fee") and Iowa R. Civ. P. 45.8-10 (defining "general retainer," "special retainer, and "flat fee").

[5] It is sometimes said that retainers come in two varieties: "general retainers" and "special retainers." A special retainer is simply an advance going by another, unfortunately misleading, name. *See* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 5-6 (1993) ("A special retainer is an agreement between lawyer and client in which the client agrees to pay the lawyer a specified fee in exchange for specified services to be rendered. The fee may be calculated on an hourly, percentage or other basis and may be payable either in advance or as billed.") (footnotes omitted). The Committee is of the opinion that a special retainer is the same thing as an "advance." To be consistent and clear, this opinion will use the term "advance" when referring to such arrangements, although some of the cited sources and authorities may use the term "special retainer."

[6] "Because the general retainer is not a payment for the performance of services, but rather is compensation for the lawyer's promise of availability, the fee is earned by the lawyer at the time the retainer is paid and thus should not be deposited into a client trust account. The general retainer is not an advance deposit against future legal services, which instead would be separately calculated and charged should the lawyer actually be called upon by the client to

contract.[7] In other words, hourly time is not billed against a general retainer and a general retainer is not a flat fee for a specific amount of the lawyer's time – it is solely to reserve the lawyer's availability. An important result of these related features is that the money paid by the client in connection with a general retainer should not be placed in a trust account since it is considered earned upon the commencement of the contract.[8]

Some authorities treat the term "general retainer" or "true retainer," etc., as synonymous with "nonrefundable." This is not correct. A general retainer may, by custom, be considered earned when paid, but this does not mean that it is forever exempt from scrutiny under the Rules. It may be determined to be an unreasonable fee, or even unearned if the lawyer does not make himself or herself available. For example, if a company retains a lawyer to handle a hostile takeover bid should one arise and the lawyer does not, in fact, accept the engagement, then the fee, which may have been paid many months earlier and treated as the lawyer's own property, may be determined to be unreasonable and/or unearned and therefore the subject of an order requiring it to be returned, refunded, or repaid to the client. Other circumstances requiring refund might include the death, disability, suspension, or disbarment of the lawyer. Like all fees, a general retainer must be reasonable under the circumstances.[9]

General retainers "are quite rare,"[10] and have "largely disappeared from the modern practice of law."[11] However, attempts to cast what is actually an advance payment of fees for services to be performed later as a general retainer are very much present today. Given the rarity and unusual nature of a general retainer, and the fact that very few clients would actually need or benefit from one, the nature of the fee and lawyer's obligations and client's benefits under such an agreement must be explained clearly and in detail, including the fact that fees for legal services performed will be charged in addition to the general retainer,[12] and use of the term should be restricted to its traditional definition.

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perform the legal services in the future." Gregory C. Sisk, *Duties to Effectively Represent the Client*, § 4-4.4(b) (A Retainer for Lawyer Availability), *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West 2016).

[7] Lester Brickman, *The Advance Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account*, 10 CARDOZO L REV. 647, 649 n.13 (1989). *See also In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011).

[8] This opinion does not attempt to exhaustively discuss general retainers. Though they can and do have legitimate uses, for years they have been criticized, disfavored, and narrowly construed based on contract law, public policy, and contemporary ethics principles. *See, e.g.*, Charles J. McClain, Jr., *The Strange Concept of the Legal Retaining Fee*, 8 J. LEGAL PROF. 123 (1983) (common law of retainers "rests on rather shaky conceptual foundations" full of "inconsistencies and contradictions" and "contributing yet another irritant to the already strained relations between the legal profession and the public at large"); Pamela S. Kunen, *No Leg to Stand on: The General Retainer Exception to the Ban on Nonrefundable Retainers Must Fall*, 17 CARDOZO L. REV. 719 (1996) (discussing "historical and descriptive misconceptions" and arguing that, in many instances, such retainers generate the fiduciary obligations attending other lawyer-client fee agreements); and Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 449-453 (1998).

[9] MODEL RULES OF PROF'L CONDUCT R. 1.5(a); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2001) [hereinafter RESTATEMENT].

[10] Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 116 (2009). *See also In re* O'Farrell, 942 N.E.2d at 804 n.5.

[11] Provanzano v. Nat'l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 (D. Mass. 1998).

[12] MODEL RULES OF PROF'L CONDUCT R. 1.5(b); RESTATEMENT, *supra* note 9, § 38.

This opinion focuses on advance fees paid by individual clients, usually for a single legal matter (or related matters) that will not recur on a regular basis. Examples include a divorce, defense of criminal charges, and discharge from employment or other civil matters not handled on a contingent fee basis. However, some clients may need legal services of a certain type on a repeat basis and may contract for such services. For example, the client and lawyer may enter into a renewable one-year agreement providing for a monthly payment to handle any or all collections arising out of one or more of the client's businesses. Some lawyers and clients may use the term "retainer" or "general retainer" to refer to such an arrangement. Such arrangements may be perfectly appropriate although they may not meet the definition of a general retainer even if "availability" is said to be a part of the arrangement. Perhaps the arrangement may best be understood as a fixed fee agreement, except that instead of handling one matter for a set fee no matter what services end up being required, the lawyer is handling several matters (subject to whatever limitations the parties place on the number, type, geography, etc., of the matters).[13]

B. Flat or Fixed Fees

Some lawyers prefer to charge their clients a flat or fixed fee for discrete legal services they provide. Examples include closing the purchase of a single-family home, incorporating a small business, drafting a will, or providing a defined, limited-scope service, such as drafting a motion. A flat fee is one that "embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted."[14]

If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term "flat fee" or "fixed fee" does not transform the arrangement into a fee that is "earned when paid." "Flat" or "fixed" does not even mean that the fee must be paid at the commencement of the representation, although most lawyers who do not have an existing relationship with a client may want to ensure payment and may, therefore, ask for the fee to be paid in advance before committing to the representation. If they do, as will be emphasized below, then that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Several courts and ethics opinions endorse the option of dividing the representation into segments such that certain portions of a flat fee advance are considered earned before completion

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[13] As we have noted, courts scrutinize purported general retainers to ensure that the lawyer is not attempting to circumvent the ethics rules requiring refund of unearned fees upon termination of the representation. The same is true with what are sometimes called "hybrid" fees or retainers. Such a fee is "a putative general retainer that is denominated as both for availability and for services," and it is likely to be considered by courts to be "fully refundable to the extent not earned by services rendered." Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11, 22 (1995). *See also* N.Y. City Bar Formal Op. 2015-2 (Nonrefundable Monthly Fee in a Retainer Agreement) (2015), *citing* Agusta & Ross v. Trancamp Contracting Corp., 193 Misc.2d 781, 785-86 (N.Y. Civ. Ct. 2002) for the proposition that "enforcement of a hybrid retainer 'should be subject to close scrutiny, governed by a rebuttable presumption that any moneys retained by counsel are for services, rather than availability.'"

[14] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1389 (1977).

of all the contemplated work.[15] Some jurisdictions have codified this approach in their rules.[16] Thus, if agreed to, the lawyer may remove such earned portions of a flat fee advance from trust prior to the completion of the full scope of the legal services to be performed as certain "milestones" or stages of the representation are reached or completed. This approach allows the lawyer to be paid in part before the end of the representation and provides some assistance in determining the refund amount in case of early termination. Of course, "extreme 'front-loading' of payment milestones in the context of the anticipated length and complexity of the representation" may not be reasonable.[17]

C. So Called "Nonrefundable" and "Earned Upon Receipt" Fees

Some lawyers use labels like "nonrefundable retainer," "nonrefundable fee," or "earned on receipt" in the body or title of a fee agreement. These are not actual types of fees. And use of these descriptors does not, in and of itself, make a fee arrangement a general retainer. In fact, these terms are most often used in an attempt to make an advance fee nonrefundable.

The Model Rules of Professional Conduct do not allow a lawyer to sidestep the ethical obligation to safeguard client funds with an act of legerdemain: characterizing an advance as "nonrefundable" and/or "earned upon receipt." This approach does not withstand even superficial scrutiny. A lawyer may not charge an unreasonable fee. See Model Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Comment [4] to Rule 1.5 provides this additional guidance: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." See also, Model Rule 1.15(c) and others discussed in connection with Hypothetical 1 below. Therefore, under the Model Rules, an advance fee paid by a client to a lawyer for legal services to be provided in the future cannot be nonrefundable. Any unearned portion must be returned to the client. Labeling a fee paid in advance for work to be done in the future as "earned upon receipt" or "nonrefundable" does not make it so.[18]

Hypothetical scenarios illustrating these concepts and applying the Model Rules are discussed in Section IV below.

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[15] *See, e.g.*, New Hampshire Bar Assoc. Ethics Committee Practical Ethics Article, *Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases* (Jan. 17, 2008). *See also In re* Mance, 980 A.2d 1196, 1202, 1204-1205 (D.C. 2009), *citing* Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 FLA. COSTAL L.J. 293, 323 (1999) for the proposition that some opinions "allow the lawyer to withdraw fees according to milestones 'based upon passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and client.'"

[16] *See, e.g.*, Colo. Rules of Prof'l Conduct R. 1.5(h) (defining a flat fee, explaining proper handling, setting forth required contents of the agreement, and appending an authorized form agreement).

[17] *In re* Mance, *supra* note 15.

[18] *See, e.g., In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011) ("Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase."); Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (labels not conclusive); *In re* Wintroub, 277 Neb. 787, 801; 765 N.W.2d 482 (2009) (citing cases from several jurisdictions for the proposition that "a lawyer may not retain an unearned fee, even if the fee agreement clearly provides that the fee is nonrefundable"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Turner, 918 N.W.2d 130, 147 (Iowa 2018) (simply labeling payment of advance fees as "nonrefundable" does not relieve attorney from obligation to deposit them into trust accounts).

II. Model Rule of Professional Conduct 1.15: The Anti-commingling Rule and the Need to Protect Client Funds, Including Advances

Rules of professional conduct exist for the protection of the public. That purpose is well served when the rules are designed and enforced to prevent concrete financial harm to clients. The anti-commingling principle, embodied in Rule 1.15, is a longstanding and effective component in the client protection arsenal. This is why, since their inception in 1908, the American Bar Association's model codes and rules of ethics have prohibited lawyers from commingling their property (including funds) with the property of clients and third parties.[19]

Under the general anti-commingling rule, Model Rule 1.15(a), client property, which includes unearned fees paid in advance, must be held in an account separate from the lawyer's own property.[20] In 2002, Model Rule 1.15 was amended to address specifically the issue of advance fees in a new paragraph (c): "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." Therefore, advances must be placed into a lawyer's trust account until those fees are earned.

The Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), which recommended the addition of this paragraph, did so in response to reports "that the single largest class of claims made to client protection funds is for the taking of unearned fees."[21] Accordingly, paragraph (c) "provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses."[22] Stated simply, under the Model Rules advance fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Some jurisdictions have authorized lawyers to treat advances as the lawyer's property upon payment, so long as the client signs a fee agreement designating the sum as "nonrefundable" or

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[19] *See* ABA CANONS OF PROFESSIONAL ETHICS, Canon 11 (1908); ABA MODEL CODE OF PROF'L RESPONSIBILITY, DR 9-102 (1969); ABA MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983, revised 2002). One treatise explains the nature and breadth of this key obligation:

> One of the core fiduciary duties of a lawyer is to safeguard the property that the lawyer receives from the client or from other sources but that belongs to the client or third persons. Property received from a client may include funds to be applied to a transaction, a payment in satisfaction of a judgment or settlement, an advance deposit against lawyer's fees, valuable documents to be analyzed, or property of evidentiary value. Under Rule 1.15(a) of the Model Rules of Professional Conduct, "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." The lawyer therefore must keep the property in a secure location and segregate those assets from the lawyer's own property. Gregory C. Sisk, Duties to Effectively Represent the Client, § 4-5.6 (The Duty to Safeguard Client Funds and Property), in Legal Ethics, Professional Responsibility, and the Legal Profession (West Academic Publishing, 2016).

[20] *In re* Kendall, 804 N.E.2d 1152, 1161 (Ind. 2004). Also, Rule 1.15(a)'s predecessor was applied to advance fees. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003) (failure to place advance fee in a trust account violated DR 9-102(A)).

[21] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 342 (ABA 2006).

[22] *Id.*

"earned on receipt" or some other variation on this theme.[23] This approach departs from the safekeeping policy of the Model Rules described herein and creates unnecessary risks for the client.[24]

III. Model Rule of Professional Conduct 1.16: Declining or Terminating Representation

Model Rule 1.16(d) requires that, upon termination of representation, a lawyer shall refund "any advance payment of fee or expense that has not been earned or incurred." This Rule, and Rule

[23] *See, e.g.*, Or. Rules of Prof'l Conduct R. 1.5(c)(3). That jurisdiction's version of Rule 1.15(c) contains an exception to the anti-commingling rule for advance fees when "the fee is denominated as 'earned on receipt,' 'nonrefundable' or similar terms and complies with Rule 1.5(c)(3)." Or. Rules of Prof'l Conduct R. 1.15-1(c). A considerable minority of U.S. jurisdictions have authorized this variant approach to advances by rule, ethics opinion, or judicial decree. *See, e.g.*, State Bar of Ariz. Op. 99-02 (1999) (non-refundable, earned-upon-receipt fee is ethical if reasonable under Rule 1.5 and client is fully informed about and expressly agrees to such a fee, preferably in writing; such a fee does not go into a lawyer's trust account); Fla. Rules of Prof'l Conduct R. 4-1.5(e)(2)(B) and Comment (nonrefundable flat fee is the property of the lawyer and should not be held in trust); Wash. State Rules of Prof'l Conduct R. 1.5(f)(2) (if agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt and shall not be deposited into a trust account); and N.Y. St. Bar. Assn. Comm. Prof'l Ethics Op. 816 (2007) (reaffirming 1985 opinion concluding that "fees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in client trust account"). Such jurisdictions typically provide, via rule or otherwise, that advance fees must be refunded if unreasonable or work remains to be done even if language to the contrary is used and the funds have been taken by the lawyer pursuant to a rule and/or agreement.

[24] See *In re* Long, 368 Or. 452, 455–56, 474-75, 491 P.3d 783, 788–89, 798-99 (2021), cert. denied 142 S. Ct. 2685 (2022), in which the court candidly discussed the rule and its fallout:

> Respondent's limited financial resources also led to his extensive use of fee agreements that allowed him to access advance fees before completing the promised services. . . . The [Oregon] Rules of Professional Conduct allow for alternative fee agreements, under which advance fees become the lawyer's property at the time the fees are received—that is, before the lawyer has performed the promised services. RPC 1.5(c)(3). In those instances, the advance fees are not placed in the lawyer's trust account and are sometimes referred to as "earned on receipt." Fees may be "earned on receipt" only pursuant to a written fee agreement disclosing that "the funds will not be deposited into the lawyer trust account" and that "the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed." *Id.* [¶] According to respondent, because he frequently had pressing personal and business costs, he would not have been able to operate his legal practice if he could access a client's fees only after he completed the promised services. . . . [¶] Although respondent's handling of those advance fees did not itself violate a Rule of Professional Conduct, it nevertheless left respondent's clients vulnerable. "Earned on receipt" fee agreements shift the risk of loss to the client. If the client relationship ends before the lawyer has performed the services needed to keep the advance fees, then the lawyer is required to return the fees for the uncompleted work. If the lawyer has already spent the advance fees and has no other financial resources upon which to draw, then the lawyer may be unable to provide the client with the required refund. [¶] That is what happened to many of respondent's clients. . . . [¶] Respondent's misconduct caused extensive injuries, which were not merely financial. Many of respondent's clients had limited financial means and needed their advance fees returned before they could afford to hire new lawyers. When respondent failed to return those advance fees, some clients simply went without legal representation.

1.15, work in tandem to achieve the regulatory objective of protection of the public from financial harm caused by inattentive or unscrupulous lawyers.[25]

Advances are unearned because they are payment today for work to be performed in the future. They were unearned upon receipt and remain unearned until the work is performed. The Model Rules mandate that advances belong to the client, must be preserved until they are actually earned, and must be refunded if the representation terminates before the fees are earned.

As a practical matter it may be somewhat more difficult to determine what has been earned and what is unearned when a representation ends before completion of the contemplated services when the client pays a flat or fixed fee instead of an hourly rate. However, courts routinely apportion the services completed and sum earned when a representation terminates before a lawyer has completed all of the contemplated work.[26]

IV. Hypothetical Scenarios Involving Client Payments at the Commencement of a Specific Representation.

Hypothetical 1 ("Nonrefundable Retainer")

A lawyer is consulted by a client seeking to terminate her marriage. The lawyer informs the client that the lawyer requires a $6,000 "retainer" to cover the filing of a divorce complaint, preparing a motion to enjoin the transfer of assets and a possible motion for a protective order, attending hearings relative to those motions, and any negotiations or related work until the lawyer expends 20 hours. The client was also informed that additional "retainers" may be required to complete the matter, and that the retainers will be credited toward payment for the lawyer's services at the reasonable rate of $300 per hour. The lawyer's fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a nonrefundable retainer fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours on Client's matter, Client shall pay additional retainers as requested by Lawyer which shall be

[25] Nothing tarnishes the profession's reputation like a lawyer who takes an advance fee for legal services to be performed in the future, does not complete the work contemplated by the fee arrangement, and does not refund the money, perhaps because he or she cannot. Once the money has been spent by the lawyer, it may never be recovered by the client (or by the client protection fund which may have reimbursed the client). Even if a civil judgment or disciplinary order of restitution is entered it may do little good if the lawyer is impecunious, judgment-proof, or bankrupt. Discipline in that case may offer a measure of public protection through deterrence, but it does not recompense the client. That client's access to justice may also be impeded. The client may be unable to pay another advance fee and may, therefore, be unrepresented if legal aid or pro bono assistance is unavailable. Model Rules 1.15 and 1.16 exist to protect a client from these consequences.

[26] *See, e.g.*, *In re* O'Farrell, 942 N.E.2d 799, 808 (Ind. 2011) (quantum meruit available upon client termination of flat fee agreement). *Cf.* Plunkett & Cooney, PC v. Capitol Bancorp Ltd, 212 Mich. App. 325, 331; 536 N.W.2d 886 (1995) (discharged lawyer with fixed-fee agreement entitled to compensation for services rendered calculated by percentage of services required under contract, unless lawyer and client have agreed to other terms for valuing work completed).

applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

Three weeks after signing the agreement and paying the $6,000, Client notified Lawyer that she wanted to reconcile with her husband and asked for an itemization of Lawyer's time and expenses and a refund of any unearned fees. Lawyer had filed the complaint, but it had not been served. Lawyer had also prepared but had not filed a motion to enjoin the transfer of certain assets. Lawyer had spent 5.5 hours on the file and $150 to file the complaint, but responded to the Client that no refund was due because the $6,000 was a nonrefundable fee.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes, Lawyer owes Client a refund. First, the $6,000 paid by Client to the Lawyer are fees paid in advance not a general retainer. Under this agreement, Lawyer is rendering legal services at the rate of $300 per hour. This is true from the outset as is established by simply reading the portion of the agreement quoted above and performing some simple math. The $6,000 entitles Client to 20 hours of Lawyer's work on the matter.

Second, lawyer was required to have placed the $6,000 of advanced fees into the Lawyer's client trust account. Model Rule 1.15(c) provides that: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by Lawyer only as fees are earned or expenses incurred." The so-called nonrefundable fee here is an advance payment of fees that may only be withdrawn from the client trust account as earned by Lawyer. The facts of this hypothetical are silent as to whether Lawyer placed the $6,000 in the trust, operating, or personal account and as to whether it was spent in whole or in part. Lawyers may be disciplined for treating advance fees as their own property before the fees are earned, i.e., before the contemplated legal services are rendered.[27] Commingling and perhaps misappropriation may have occurred here if Lawyer deposited the $6,000 into an account other than a client trust account and spent it.

In this scenario, assuming that the legal work performed was appropriate and useful, Lawyer has earned $1,650.00 in legal fees. Lawyer also spent $150 for the expense of filing the complaint. Failure to return the balance of $4,200 is a violation of Model Rule 1.16(d) (upon termination of representation, a lawyer shall refund any advance payment of fee or expense that has not been earned or incurred). Comment [4] to Rule 1.16(d) explains the fundamental legal principle underlying this requirement: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Lawyer's failure to provide an accounting for the fees paid in advance also constitutes a violation of Rule 1.15(d).

[27] "A lawyer misappropriates client funds in violation of DR 1–102(A)(3), (4), (5), and (6)DR 1–102(A)(3), (4), (5), and (6) when special retainers and flat fees paid in advance are treated as money belonging to the lawyer and not maintained in a trust account until the fee has been earned." Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 475 (Iowa 2003). *See also In re* Fazande, 290 So. 3d 178, 185 (La. 2020) (lawyer violated Rule 1.15(c) by failing to deposit into his client trust account advance fees and costs).

Model Rule 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Comment [4] to Rule 1.5 states: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." Thus, keeping the balance ($4,200) violates Rule 1.5(a) on these facts. Because Rule 1.5 precludes a lawyer from agreeing to an unreasonable fee, it is also violated by the Lawyer's inclusion of the following provision in the fee agreement: "Client agrees to pay Lawyer a nonrefundable fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason."[28]

Finally, because a lawyer may, in fact, be required to refund an advance payment of fees in various situations, characterizing such an advance as "nonrefundable" may also amount to a violation of Rule 1.4 (communication) and Rule 8.4(c) (misrepresentation) as the mischaracterization of the funds may have a chilling effect on a client seeking a refund of unearned fees upon termination of the representation.[29]

Lawyer and the fee agreement use the words "retainer" and "fee" interchangeably. In this hypothetical it appears that the word "retainer" is used incorrectly to refer to the advance payment of legal fees at the initiation of a matter, or, really, at any time during the representation as is suggested by the agreement's provision that additional "retainers" may be required.

Hypothetical 2 (Purported General Retainer)

The facts are the same as in Hypothetical 1, except that the lawyer's standard fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a non-refundable engagement fee of $6,000 which shall be deemed earned upon receipt by Lawyer. This engagement fee is for the purpose of retaining Lawyer and assuring the availability of Lawyer in this matter. Client understands that no portion of the engagement fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours, Client shall pay upon request an additional retainer in an amount determined by Lawyer which shall be applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

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[28] *In re* Kendall, 804 N.E.2d 1152, 1160 (Ind. 2004) ("We hold that the assertion in a lawyer fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee 'shall be reasonable.'"). *See also* N.Y. City Bar Ass'n Formal Opinion 1991-3 (in light of reasonableness requirement, duty to refund unearned fees, and client's "essentially absolute" right to discharge counsel, "a lawyer may not properly denominate or characterize a fee as 'nonrefundable' or otherwise use words that could reasonably be expected to convey to the client the understanding that a fee paid before the services are performed will not be subject to refund or adjustment under any possible circumstance").

[29] *See, e.g.*, *In re* Sather, 3 P.3d 403, 415 (Colo. 2000) (knowing use of misleading language, i.e., describing flat advance fee as "nonrefundable," violated Colo. RPC 8.4(c)) and Ala. State Bar Op. RO-93-21 (1993) ("Any indication by the lawyer that the fee is non-refundable is inaccurate and inherently misleading and would violate Rule 1.4(b) Communication; Rule 1.5(b) Fees; and Rule 8.4(c) Misrepresentation."). *See also* Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (in various situations "the description of the fee as 'nonrefundable' is misleading").

Again, the facts are the same: Lawyer spent 5.5 hours and a filing fee for the complaint, and Client reconciles and seeks a refund. Lawyer declines to refund any portion of the fee, claiming it is nonrefundable.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes. The answer and analysis for Hypothetical 1 apply here as well. The only difference ("retainer" and "engagement fee" language) makes no difference at all. The fee arrangement still has the same basic structure and, for the reasons discussed above, the $6,000 is clearly an advance payment for the future performance of legal services, not an actual "retainer" because the lawyer contemplates billing time against the advance.[30] Accordingly, the $6,000 must be held in trust until earned and any unearned portion properly refunded to the client.

Under the Model Rules, there are no magic words that a lawyer can use to change what is actually an advance payment for fees into a general retainer: "an attorney cannot treat a fee as 'earned' simply by labeling the fee 'earned on receipt' or referring to the fee as an 'engagement retainer.'"[31] Notwithstanding the use of the terms "engagement fee," "retainer," and "availability," the fee in Hypothetical 2 is still not a general retainer fee and is, therefore, not deemed earned on receipt. The purpose of the fee dictates its character and treatment irrespective of labels or terminology used.

Courts examine the transaction and agreement very carefully to ensure that the purported general retainer is not an attempt to charge and retain unearned advance fees.[32] Accordingly, a lawyer claiming to have a general retainer must be prepared to demonstrate a valuable benefit to the client and/or an actual detriment to the lawyer.[33] It is easy to recite that the lawyer is prioritizing the client's work, turning away other work, keeping up on the relevant law, etc. However, it must be shown that such things were not only actually done, but that they were necessary for the representation and not part of the lawyer's basic responsibilities.[34]

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[30] *Cf. In re* Lais, No. 91-O-08572, 1998 WL 391171, at *14-15 (Cal. Bar Ct. July 10, 1998) (characterization as "'fixed, non-refundable retaining fee' paid 'for the purpose of assuring the availability of [respondent] in this matter'" was "not determinative" and the fee was not a "true" (general) retainer, but actually payment for the first 10 hours of lawyer's services).

[31] *In re* Sather, 3 P.3d 403, 412 (Colo. 2000). *See also* note 18, *supra*.

[32] Richmond, *supra* note 10, at 116: "As a practical matter, general retainers are rare. . .. The types of representations that justify or require general retainers are also scarce. Courts hearing fee related controversies are therefore properly skeptical of general retainer claims." *See also* RESTATEMENT, *supra* note 9, § 34 ("Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees.")

[33] Att'y Grievance Comm'n of Maryland v. Stinson, 428 Md. 147, 183-185, 50 A.3d 1222, 1244-1245 (2012) (purported engagement fee for "willingness and availability" to represent client not a true general retainer where no benefit to client or detriment to lawyer established and lawyer "produced no useable work").

[34] *See Stinson*, 50 A.3d at 1243 (benefits offered to the client in exchange for the nonrefundable fee were "nothing more than the ethical obligation imposed on all lawyers when they agree to provide legal services to a client. . . . A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services."), *citing* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 24 (1993), and Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003).

Hypothetical 3 (Flat Fee)

A client seeks to hire a lawyer for representation in a criminal matter. The fee agreement provides: "Client shall pay Lawyer the sum of $15,000 for representation in the matter of State v Client, and that no part of the flat fee shall be refunded for any reason. Client understands that the flat fee is the agreed upon amount due Lawyer regardless of the time expended on the matter or how it is resolved." Client signed the agreement and paid the full $15,000. Lawyer deposited the $15,000 into his firm's operating account. Lawyer reviewed the police report, left a message for the prosecutor and law enforcement officer, appeared on behalf of the defendant at the arraignment, and filed an appearance with the court. A few weeks after the arraignment, Client discharged Lawyer and requested an accounting and partial refund. Lawyer refused, stating that the flat fee was earned when it was paid.

As we noted above, flat fees paid in advance of performing the work are subject to Rule 1.15(c) and the other rules set forth in the analyses in Hypotheticals 1 and 2. In other words, the foregoing rules regarding safekeeping, refundability, and reasonableness apply.

Flat fees are not general retainers and must not be treated as such. That the price set for the representation is not based on hours worked but is instead based on the completion of certain described services does not mean that the fee must be considered earned on receipt or nonrefundable when there is work yet to be done. Of course, if the flat fee is paid *after* the work is completed, the funds are earned and are not deposited into the trust account.

V. Conclusion

The Model Rules protect a client's right to terminate the fiduciary relationship with a lawyer and have the money to which the client is entitled available to obtain successor counsel if desired. Rule 1.15 requires that fees paid in advance must be held in a trust account until the services for which the fees will be paid are actually rendered, thereby allocating various risks to lawyer and client. The lawyer does not have to bear the risk of nonpayment after the work is completed; Rule 1.15 provides a process for withdrawal of earned fees and even for disputes, should they arise. And the client does not have to bear the risk that the funds will be spent, attached by the lawyer's creditors, or otherwise dissipated before the legal work is performed due to a lawyer's unwillingness or inability to do so.

Other ethics opinions and resources discuss good billing practices and fee agreement drafting tips. However, we offer the following suggestions in relation to the matters addressed in this opinion. Use plain language. Thus, instead of "retainer" say "advance" and explain that it is a "deposit for fees."[35] Explain that the sum deposited will be applied to the balance owed for work on the matter, and how and when this will happen. For example, the fee agreement could provide

[35] GEOFFREY C. HAZARD, JR., PETER R. JARVIS, TRISHA THOMPSON & W. WILLIAM HODES, THE LAW OF LAWYERING §9.07 (4th ed. 2022-2 Supp. 2014). Of course, the applicable Rules of Professional Conduct must be consulted, and it may be prudent or required to use certain terms. However, accurately translating legal terms of art is not only helpful to the client but also assists with interpretation and enforcement. So, if the term "advance" or "special retainer" is used in the applicable rules, the lawyer will want to use it in the fee agreement. However, consider also adding an explanation that it is functionally a deposit to cover fees for work in the future.

that on a monthly basis the client will be invoiced for the time expended by the lawyer and state when the sum reflected in the invoice will be withdrawn from the trust account. When the arrangement is for hourly billing, explain that if the deposit exceeds the final billing any balance will be remitted to the client. If the advance fee is fixed and the representation may continue for some time or involve several stages, consider dividing the representation into reasonable segments and providing for withdrawal of a reasonable portion of the deposited fee as the representation progresses and the fee becomes partially earned.[36] Finally, it may be wise to recognize the reality that many relationships do not last and include a provision explaining what will happen if the representation is terminated before the matter is completed.[37]

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[36] *See supra* notes 15 & 16.

[37] Again, see Colo. R. Prof'l Conduct R. 1.5(h) and accompanying flat fee form providing helpful language for dividing a representation into increments and explaining a method of calculating the fees the lawyer has earned should the representation terminate prior to completion of the tasks or events specified in the agreement.