THE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT

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Preamble: A lawyer's responsibilities.

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer

should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

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. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties

flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating

conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each rule is authoritative.

Rule 1.0. Terminology.

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] *Confirmed in Writing.* — If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in

reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

[2] *Firm.* — Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

[5] *Fraud.* — When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant

information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

[6] *Informed Consent.* — Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has

reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and(b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

[8] *Screened.* — This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Cross references. — As to the Statement of Principles of Lawyer Conduct, see Supreme Court Rule 71(b)(ii).

NOTES TO DECISIONS

Knowingly.

Lawyer engaged in knowing misconduct, for which suspension was the appropriate discipline, by: (1) assisting a suspended lawyer in the unauthorized practice of law when the lawyer engaged the suspended lawyer to work on cases without determining the applicable restrictions; (2) failing to supervise the suspended lawyer adequately; and (3) giving the suspended lawyer a percentage of a contingency fee that included work performed both before and after the suspension. In re Martin, 105 A.3d 967 (Del. 2014).

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.

COMMENT

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

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

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited

to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

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

[5] *Thoroughness and preparation.* — Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

[6] *Retaining or contracting with other lawyers.* — Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule

1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

[8] *Maintaining competence.* — To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

NOTES TO DECISIONS

Analysis

Client relations.

— Conflicts of interest.

— Effective representation.

Professional conduct.

— Candor toward the tribunal.

Sanctions.

— Reprimand.

— Suspension.

Client relations.

— Conflicts of interest.

Attorney failed to provide competent representation where the attorney failed to check files to determine if a conflict of interest existed as a result of the attorney's representation of the client's ex-spouse against the client in a former proceeding involving the same issues. In re Mekler, 689 A.2d 1171 (Del. 1996).

Attorney was suspended from the practice of law for 3 months, followed by a 1-year period of probation, for violating Law. R. Prof. Conduct 1.1, 1.4(b), 1.7, and 1.16(a) (Interpretative Guideline Re: Residential real estate transactions); the attorney failed to obtain the clients' consent to a conflict of interest that arose when the attorney represented both the

borrower and the lender in a loan transaction, and failed to inform the clients of their 3-day right to rescind. In re Katz, 981 A.2d 1133 (Del. 2009).

Where an attorney committed violations of Law. R. Prof. Conduct 1.1, 1.4(b), and 1.16 during the course of 10 closings for a private money lender, a public reprimand was deemed the appropriate sanction; the attorney had ethical duties to disclose to the borrowers a conflict of interest and the fact that the loan documents were inadequate, even though the attorney did not represent them, as they had no attorneys. In re Goldstein, 990 A.2d 404 (Del. 2010).

— Effective representation.

Failure to promptly comply with court rules, even after notification from the court, is a violation of this Rule. In re Tos, 576 A.2d 607 (Del. 1990).

Failure to file an opening brief on behalf of a client, resulting in the dismissal of the client's appeal, was a violation of this rule. In re Sullivan, 727 A.2d 832 (Del. 1999).

Attorney violated this rule by failing to provide competent representation to client where attorney had the requisite legal knowledge and skills but did not exercise the thoroughness and preparation reasonably necessary to properly represent client in bankruptcy action. In re Benge, 754 A.2d 871 (Del. 2000).

Lawyer who violated numerous professional duties in real estate practice, and caused over $ 500,000 in damages to clients, was disbarred. In re Spiller, 788 A.2d 114 (Del. 2001).

Finding that attorney violated Law. R. Prof. Conduct 1.1 was warranted where the attorney failed to probate the estate in a timely manner. In re Wilson, 900 A.2d 102 (Del. 2006).

Attorney violated Law. R. Prof. Conduct 1.1 by: (1) failing to conduct an adequate investigation; and (2) failing to prepare and file a motion for reduction of sentence upon which a Superior Court might have relied to reduce the client's sentence. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney did not violate Law. Prof. Conduct R. 1.1 by failing to take time to explain various forms of joint ownership available and their legal implications or by failing to attend a settlement. In re Sisk, 54 A.3d 257 (Del. 2012).

Lawyer violated Law. Prof. Conduct R. 1.1 because the lawyer did not file a complaint or secure a tolling agreement to preserve the statute of limitations. In re Wilks, 99 A.3d 228 (Del. 2014).

Professional conduct.

— Candor toward the tribunal.

Attorney's misrepresentation to a Family Court that a client was not in arrears with regard to alimony and had paid the debt in full was determined to have been an act of dishonesty, fraud, deceit, or misrepresentation in violation of Law. Prof. Conduct R. 8.4(c) and (d), a failure to provide competent representation to the client, in violation of Law. Prof. Conduct R. 1.1, and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of Law. Prof. Conduct R. 1.4(b); the misrepresentation was found to have been knowingly made, but the recommended suspension of 2 years

was reduced to 6 months, because mitigating circumstances were found in the nature of the attorney providing the Family Court with correspondence, which would have permitted the Family Court and the adverse party an opportunity to verify the debt. In re Chasanov, 869 A.2d 327 (Del. 2005).

Sanctions.

— Reprimand.

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Suspension.

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a

record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Rule 1.2. Scope of representation.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

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

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT

Allocation of authority between client and lawyer. — [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the

client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

[5] *Independence from client's views or activities.* — Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[6] *Agreements limiting scope of representation.* — The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made

available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

[9] *Criminal, fraudulent and prohibited transactions.* — Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

NOTES TO DECISIONS

Analysis

Client relations.

— Effective representation.

— Perjury.

— Scope.

— — Authority.

— — Objectives of representation.

Employment contracts.

Sanctions.

— Reprimand.

— Suspension.

Client relations.

— Effective representation.

Evidence held sufficient to establish a violation of subsection (d) of this Rule where attorney prepared and filed certain deeds on behalf of a client in derogation of a final judgment concerning that client. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (U.S. 1999).

Attorney's failure to file an underinsured motorist claim on behalf of the client was in violation of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Defendant's motion for postconviction relief pursuant to Super. Ct. Crim. R. 61 was denied where defendant: (1) failed to show that trial counsel was ineffective for failing to request an accomplice level of liability jury instruction pursuant to 11 Del. C. § 274; (2) failed to rebut the presumption that not requesting an accomplice level of liability instruction was reasonable, professional trial conduct; (3) failed to adduce a reasonable probability that, but for the lack of jury instruction, the trial results would have been different; and (4) personally rejected a plea offering the same lesser included offenses that a level of liability instruction would have provided. State v. Dickinson, 2012 Del. Super. LEXIS 380 (Del. Super. Ct. Aug. 17, 2012), aff'd, 2013 Del. LEXIS 171 (Del. Mar. 28, 2013).

Delay of 18 days in extending a settlement offer did not satisfy Law. Prof. Conduct R. 1.2. In re Sisk, 54 A.3d 257 (Del. 2012).

— Perjury.

Defense counsel's refusal to cooperate with defendant's planned perjury (as was required by Law. Prof. Conduct R. 1.2) did not deprive defendant of right to counsel or the right to testify truthfully and did not give rise to a disqualifying conflict of interest. Riley v. State, 867 A.2d 902 (Del. 2004).

— Scope.

— — Authority.

In a matter before the Industrial Accident Board, attorney's agreeing to employer's petition to terminate total disability benefits without his client's consent violated subsection (a). In re Maguire, 725 A.2d 417 (Del. 1999).

Defendant's counsel had no authority to agree to giving of jury charge, in defendant's absence, where there was no showing that defendant expressly waived his right to be present; defendant's right to be present was personal and could not be waived by counsel. Bradshaw v. State, 806 A.2d 131 (Del. 2002).

Nothing in the constitution prevented defendant from choosing to have his fate tried before a judge without a jury even though, in deciding what was best for himself, defendant followed the guidance of his own wisdom and rejected the advice of his attorney; professional rule required defendant's attorney to abide by his client's decision to waive trial by jury. Davis v. State, 809 A.2d 565 (Del. 2002).

Attorney violated Law. R. Prof. Conduct 1.2(a) by failing to consult with a divorce client about the contents of a petitioner's answer to respondent's counterclaim, signing the client's name on the document, and filing it with the Family Court without the client's approval. In re Pankowski, 947 A.2d 1122 (Del. 2007).

— — Objectives of representation.

A defendant's wish to forego further appeals and accept the death penalty, like other decisions relating to the objectives of litigation, is essentially that of the client, whose decision the attorney must respect. Red Dog v. State, 625 A.2d 245 (Del. 1993).

Counsel representing a shareholder class in a derivative suit was not subject to being disqualified for advocating the adoption of a settlement proposal to which some members of the class objected, and there was no violation of Del. Law. R. Prof. Conduct 1.2(a). In re M&F Worldwide Corp. S'holders Litig., 799 A.2d 1164 (Del. Ch. 2002).

Employment contracts.

Discharge of legal counsel and vice president who was employed as a licensed professional and who claimed that the action for which she was discharged was required by her employment contract, but prohibited by her obligation under the Delaware Rules of Professional Conduct, stated a claim for breach of at-will employment contract. Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578 (Del. Ch. 1994).

Sanctions.

— Reprimand.

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

— Suspension.

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

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

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the

relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

NOTES TO DECISIONS

Analysis

Client relations.

— Diligence.

Sanctions.

— Disbarment.

— Reprimand.

— Suspension.

Client relations.

— Diligence.

Failure to promptly comply with requests of the Court, such as to prepay costs, is a violation of this Rule. In re Tos, 576 A.2d 607 (Del. 1990).

Failure either to file several dues collection cases, or keep client informed of his progress in relation to these cases, violated this Rule and Prof. Cond. Rule 1.4(a). In re McCann, 669 A.2d 49 (Del. 1995).

Failure to file an opening brief on behalf of a client, resulting in the dismissal of the client's appeal, was a violation of this rule. In re Sullivan, 727 A.2d 832 (Del. 1999).

Attorney violated this rule by failing to respond promptly to client's requests for information and by failing to promptly and properly determine the status of client's bankruptcy petition so that the client was subjected to sanctions. In re Benge, 754 A.2d 871 (Del. 2000).

Attorney violated Law. R. Prof. Conduct 1.3 by: (1) failing to conduct an adequate investigation; and (2) failing to prepare and file a motion for reduction of sentence upon which a Superior Court might have relied to reduce the client's sentence. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-

sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

Attorney failed to act with reasonable diligence in violation of Law. Prof. Conduct R. 1.3, where the attorney admitted conducting a real estate settlement while under the influence of alcohol. In re Davis, 43 A.3d 856 (Del. 2012).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney did not violate Law. Prof. Conduct R. 1.3, with respect to the delay in recording a deed, where the attorney was faced with the choice of preparing the deed in compliance with condominium council requirements or not settling on the purchase at all; the attorney acted in what was thought to be the best interests of the client. In re Sisk, 54 A.3d 257 (Del. 2012).

Lawyer violated Law. Prof. Conduct R. 1.3 because the lawyer did not diligently pursue a client's claims or timely file a complaint. In re Wilks, 99 A.3d 228 (Del. 2014).

Sanctions.

— Disbarment.

Lawyer who violated numerous professional duties in real estate practice, and caused over $ 500,000 in damages to clients, was disbarred. In re Spiller, 788 A.2d 114 (Del. 2001).

— Reprimand.

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client

Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

When an attorney handling 2 estates failed to act with reasonable diligence and promptness in probating the estates, the attorney violated Law. R. Prof. Conduct 1.3; attorney was publicly reprimanded, prevented from representing a personal representative or serving as 1, and required to cooperate and pay costs. In re Wilson, 886 A.2d 1279 (Del. 2005).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Suspension.

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Rule 1.4. Communication.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

[2] *Communicating with client.* — If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In

some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

[5] *Explaining matters.* — The client should have sufficient information to participate intelligently indecisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

[7] *Withholding information.* — In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

NOTES TO DECISIONS

Analysis

Client relations.

— Communication.

Sanctions.

— Reprimand.

— Suspension.

Client relations.

— Communication.

Lawyer's duty to communicate under subsection (b) runs only to a client and presupposes, for the duty to arise, the existence of a lawyer-client

relationship. In re Berl, 540 A.2d 410 (Del. 1988); In re Berl, 560 A.2d 1009 (Del. 1989).

Subsection (b) violation could not be sustained without more particularized findings by the Board on Professional Responsibility establishing that attorney, at a particular time, came under a lawyer-client relationship from which a duty arose to inform plaintiff of the application and relevance of 18 Del. C. § 6865, notwithstanding plaintiff's relationship with his attorney of record. In re Berl, 540 A.2d 410 (Del. 1988); In re Berl, 560 A.2d 1009 (Del. 1989).

Failure either to file several dues collection cases, or keep client informed of his progress in relation to these cases, violated Prof. Cond. Rule 1.3 and subsection (a) of this Rule. In re McCann, 669 A.2d 49 (Del. 1995).

Attorney's failing to consult with client prior to agreeing to dismiss a discrimination complaint violated subsection (b). In re Maguire, 725 A.2d 417 (Del. 1999).

Attorney's failure to keep a client informed about the status of her case and to explain certain matters violated this rule. In re Sullivan, 727 A.2d 832 (Del. 1999).

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

Attorney's failure over a period of six years to communicate with client, and failure to notify the client of the dismissal of the no-fault lawsuit were in violation subsection (a) of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Attorney's misrepresentation to a Family Court that a client was not in arrears with regard to alimony and had paid the debt in full was determined to have been an act of dishonesty, fraud, deceit, or misrepresentation in violation of Law. Prof. Conduct R. 8.4(c) and (d), a

failure to provide competent representation to the client, in violation of Law. Prof. Conduct R. 1.1, and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of Law. Prof. Conduct R. 1.4(b); the misrepresentation was found to have been knowingly made, but the recommended suspension of 2 years was reduced to 6 months, because mitigating circumstances were found in the nature of the attorney providing the Family Court with correspondence, which would have permitted the Family Court and the adverse party an opportunity to verify the debt. In re Chasanov, 869 A.2d 327 (Del. 2005).

Attorney's acceptance of a retainer of $250 from a client through a prepaid legal plan, while never contacting the client and refusing to refund the retainer until after the first disciplinary hearing, was held to have violated Law. Prof. Conduct R. 1.3, with regard to acting with reasonable diligence and promptness, Law. Prof. Conduct R. 1.4(a) and (b), with regard to failing to keep the client reasonably informed to the extent reasonably necessary to permit the client to make informed decisions, and, Law. Prof. Conduct R. 1.15(b) and (d), with regard to failing to safeguard the client's funds and deliver them upon request; the prepaid legal firm had refused to refund the retainer and, in fact, showed no record of the amount, which had been paid directly to the attorney. In re Chasanov, 869 A.2d 327 (Del. 2005).

Attorney violated Law. R. Prof. Conduct 1.4(a) by: (1) failing to consult with a divorce about the contents of the petitioner's answer to the respondent's counterclaim; (2) failing to respond to the client's attempts to inquire as to status of a Family Court case over a period of 2 weeks; and (3) failing promptly to inform the client that a final divorce decree and other orders had been entered by the Family Court. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Defendant's motion for postconviction relief was denied because defendant did not explain how counsel's attempt to reduce defendant's confusion over the term "evidentiary hearing" was objectively unreasonable or prejudicial to the case; where the attorney attempted to clarify that what defendant called an "evidentiary hearing" was, in fact, referred to as a motion to suppress, the failure of the attorney's attempt to clear up defendant's understanding of motions to suppress was not

evidence that counsel's actions were objectively unreasonable. State v. Addison, 2007 Del. Super. LEXIS 441 (Del. Super. Ct. June 15, 2007).

Attorney was suspended from the practice of law for 3 months, followed by a 1-year period of probation, for violating Law. R. Prof. Conduct 1.1, 1.4(b), 1.7, and 1.16(a) (Interpretative Guideline Re: Residential real estate transactions); the attorney failed to obtain the clients' consent to a conflict of interest that arose when the attorney represented both the borrower and the lender in a loan transaction, and failed to inform the clients of their 3-day right to rescind. In re Katz, 981 A.2d 1133 (Del. 2009).

Counsel for a disabled person was presumed to have had lawful authority to settle a personal injury action, where (1) the disabled person's guardian, did not successfully rebut that presumption by claiming the guardian either agreed to the settlement under duress or failed to agree to it at all; (2) counsel's notes and letters supported the finding of a settlement agreement; (3) counsel properly informed the guardian about the agreement pursuant to obligations under Law. R. Prof. Conduct 1.4(a)(1); and (4) the fact that the agreement was oral did not render it unenforceable under the statute of frauds, 6 Del. C. § 2714(a). Williams v. Chancellor Care Ctr., 2009 Del. Super. LEXIS 166 (Del. Super. Ct. Apr. 22, 2009).

Where an attorney committed violations of Law. R. Prof. Conduct 1.1, 1.4(b), and 1.16 during the course of 10 closings for a private money lender, a public reprimand was deemed the appropriate sanction; the attorney had ethical duties to disclose to the borrowers a conflict of interest and the fact that the loan documents were inadequate, even though the attorney did not represent them, as they had no attorneys. In re Goldstein, 990 A.2d 404 (Del. 2010).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced

engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

Attorney did not violate Law. Prof. Conduct R. 1.4(a)(4) for failing to explain to a client the various forms of joint ownership available and their legal implications; the attorney was not retained to do any more than take the matter to closing, which required compliance with condominium council titling requirements. In re Sisk, 54 A.3d 257 (Del. 2012).

Lawyer violated Law. Prof. Conduct R. 1.4(a)(3) and (4) by failing to provide information, including negotiations status and a client's file, despite client's multiple requests. In re Wilks, 99 A.3d 228 (Del. 2014).

Sanctions.

— Reprimand.

For the violation of both subdivision (b) of this Rule and Rule 1.5(e)(1), the appropriate sanction to be imposed is a public reprimand. In re Berl, 560 A.2d 1009 (Del. 1989).

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Suspension.

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the

Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in certificates of compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Rule 1.5. Fees.

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

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

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

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

(8) whether the fee is fixed or contingent.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation

and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

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

(2) a contingent fee for representing a defendant in a criminal case.

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

(1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and

(2) the total fee is reasonable.

(f) A lawyer may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that:

(1) The lawyer shall provide the client with a written statement that the fee is refundable if it is not earned,

(2) The written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, and

(3) All unearned fees shall be retained in the lawyer's trust account, with statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account.

COMMENT

[1] *Reasonableness of fee and expenses.* — Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor

be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] *Basis or rate of fee.* — When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[4] *Terms of payment.* — A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money

maybe subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

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

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

[7] *Division of fee.* — A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee without regard to whether the division is in proportion to the services each lawyer renders or whether each lawyer assumes responsibility for the representation as a whole, so long as the client is advised in writing and does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

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

[9] *Advance fees.* — A lawyer may require that a client pay a fee in advance of completing the work for the representation. All fees paid in advance are refundable until earned. Until such time as that fee is earned, that fee must be held in the attorney's trust account. An attorney who accepts an advance fee must provide the client with a written statement that the fee is refundable if not earned and how the fee will be considered earned. When the fee is earned and the money is withdrawn from the attorney's trust account, the client must be notified and a statement provided.

[10] Some smaller fees—such as those less than $2500.00—may be considered earned in whole upon some identified event, such as upon commencement of the attorney's work on that matter or the attorney's appearance on the record. However, a fee considered to be "earned upon commencement of the attorney's work on the matter" is not the same as a fee "earned upon receipt." The former requires that the attorney actually begin work whereas the latter is dependent only upon payment by the client. In a criminal defense matter, for example, a smaller fee—such as a fee under $2500.00—may be considered earned upon entry of the attorney's appearance on the record or at the initial consultation at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. a co-defendant). Nevertheless, all fees must be reasonable such that even a smaller fee might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[11] As a general rule, larger advance fees—such as those over $2500.00—will not be considered earned upon one specific event. Therefore, the attorney must identify the manner in which the fee will be considered earned and make the appropriate disclosures to the client at the outset of the representation. The written statement must include a reasonable method of determining fees earned at a given time in the representation. One method might be calculation of fees based upon an agreed upon hourly rate. If an hourly rate is not utilized, the attorney is required to identify certain events which will trigger earned fees. For

example, in a criminal defense matter, an attorney might identify events such as entry of appearance, arraignment, certain motions, case review, and trial as the events which might trigger certain specified earned fees and deduction of those fees from the attorney trust account. Likewise, in a domestic matter, an attorney might identify such events as entry of appearance, drafting petition, attendance at mediation conference, commissioner's hearing, pre-trial conference, and judge's hearing as triggering events for purposes of earning fees. It might be reasonable for an attorney to provide that a certain percentage of this fee will be considered earned on a monthly basis, for any work performed in that month, or upon the completion of an identified portion of the work. Nevertheless, all fees must be reasonable such that even a fee considered earned in full per the written statement provided to the client might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[12] In contrast to the general rule, a larger advance fee may, under certain circumstances, be earned upon one specific event. For example, this fee or a large portion thereof could become earned upon an attorney's initial consultation with a client in a bankruptcy matter at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. the client's creditors). In this context, the attorney must provide a clear written statement that the fee, or a portion thereof, is earned at time of consultation as compensation for this lost opportunity. Likewise, a criminal defense attorney might outline in the written agreement that the entire fee becomes earned upon conclusion of the matter—in the case of negotiation and acceptance of a plea agreement prior to trial. Both of these examples are tempered, however, by the reasonableness requirement set forth above.

[13] It is not acceptable for an attorney to hold earned fees in the attorney trust account. See Rule 1.15(a). This is commingling. Once fees are earned, those fees must be withdrawn from the attorney trust account. Typically, it is acceptable to draw down earned fees from an attorney trust account on a monthly or some other reasonable periodic basis. Similarly, monthly/periodic statements are considered an acceptable method of notifying one's clients that earned fees have been withdrawn from a trust

account. For those attorneys earning fees on a percentage basis, wherein the fee would be considered earned upon the completion of an identified portion of the work, a statement to that effect upon completion of that work would satisfy this requirement.

[14] *Disputes over fees.* — If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

NOTES TO DECISIONS

Analysis

Arbitration.

— Fees.

Attorneys' fees.

— Allocation in Family Court.

— Contingency fees.

— Fee agreements.

— Fee splitting.

— Prevailing party.

— Reasonableness.

— Retainer.

— Standard of review.

Sanctions.

— Reprimand.

— Suspension.

Arbitration.

— Fees.

Arbitrator's award of fees to law firm that represented the clients in an underlying complex and physically dangerous lawsuit was not manifestly violative of the terms of the arbitration agreement or Delaware law; although the court did not review the individual factual findings, it did find substantial evidence supporting the approach taken by the arbitrator in reviewing the reasonableness of various groups of charges according to rules of Delaware case law and ethical rules. Blank Rome, L.L.P. v. Vendel, 2003 Del. Ch. LEXIS 84 (Del. Ch. Aug. 5, 2003).

Attorneys' fees.

— Allocation in Family Court.

Husband's motion for counsel fees under 13 Del. C. § 1515 and Fam. Ct. Civ. R. 11 was granted in part in a wife's action, seeking specific performance under the parties' separation agreement, because the wife had changed her position with respect to selection of an appraiser; while the fees were reasonable under Fam. Ct. Civ. R. 88 and Law. Prof. Conduct R. 1.5(a), since it was unclear whether counsel made a reaonable inquiry, sanctions were not imposed directly against counsel. C.L.G. v. J.F.W., 2002 Del. Fam. Ct. LEXIS 111 (Del. Fam. Ct. June 3, 2002).

Based on consideration of 13 Del. C. § 1515, Fam. Ct. Civ. R. 88 and Law Prof. Conduct R. 1.5(a), it was not deemed appropriate to award counsel fees to either party in post-divorce ancillary proceedings; while the court must provide reasons for any award of fees, it need not justify a denial of counsel fees. N.M.B. v. C.R.B., 2002 Del. Fam. Ct. LEXIS 155 (Del. Fam. Ct. June 26, 2002).

Based on the financial circumstances, each party was to pay their own attorney's fees. R.A.C. v. V.M.E., 2002 Del. Fam. Ct. LEXIS 153 (Del. Fam. Ct. Mar. 7, 2002).

Mother was awarded counsel fees under 13 Del. C. § 1515 where the parties substantially agreed on visitation, making a court appearance unnecessary had the father informed the mother that he did not intend to

pursue primary residential custody; although the mother's counsel fees of $1,462 were reasonable under Fam. Ct. Civ. R. 88 and Law. Prof. Conduct R. 1.5(a), given the parties' finances, it was improper to order the father to pay the mother's fees in full. E.K. v. C.K., 2002 Del. Fam. Ct. LEXIS 163 (Del. Fam. Ct. Dec. 16, 2002).

Because both parties were difficult and contributed to unnecessary and excessive litigation, each party was to bear his or her own attorney's fees and costs pursuant to 13 Del. C. § 1515, Fam. Ct. Civ. R. 88, and Del. Law. Prof. Conduct R. 1.5. T.M. v. M.M., 2002 Del. Fam. Ct. LEXIS 250 (Del. Fam. Ct. Mar. 12, 2002); D. L. M. v. A. L. M., 2005 Del. Fam. Ct. LEXIS 35 (Del. Fam. Ct. June 6, 2005).

Trial court evaluated relevant evidence and 13 Del. C. § 1515 Del. Fam. Ct. Civ. R. 88, and Del. Law. R. Prof. Conduct 1.5 to conclude that each party was to pay their own attorneys' fees. R.D.L. v. C.M.U., 2003 Del. Fam. Ct. LEXIS 56 (Del. Fam. Ct. Apr. 30, 2003); S.W. v. S.W., 2003 Del. Fam. Ct. LEXIS 62 (Del. Fam. Ct. June 24, 2003); J. P. v. S. P., 2004 Del. Fam. Ct. LEXIS 189 (Del. Fam. Ct. Nov. 8, 2004); J.H. v. L.H., 2006 Del. Fam. Ct. LEXIS 267 (Del. Fam. Ct. Nov. 13, 2006); D.E. v. S.M.E., 2007 Del. Fam. Ct. LEXIS 38 (Del. Fam. Ct. Mar. 29, 2007).

Trial court entered orders, under 13 Del. C. § 1513, awarding 65 percent of marital assets and 35 percent of liabilities to the wife, under 13 Del. C. § 1512, and after making allowance for her mother's living with her, awarding the wife $ 241 monthly alimony for 8.5 years, 50 percent of their 17-year marriage; under 13 Del. C. § 1515, Del. Fam. Ct. Civ. R. 88, and Del. Law. R. Prof. Conduct 1.5, the court awarded no attorneys' fees. J.S. v. K.S., 2003 Del. Fam. Ct. LEXIS 54 (Del. Fam. Ct. May 12, 2003); K.D.R. v. C.P.R., 2003 Del. Fam. Ct. LEXIS 58 (Del. Fam. Ct. May 12, 2003).

The purpose of 13 Del. C. § 1515 is to equalize the parties' positions by providing a financially disadvantaged party with the financial means to prosecute or defend a divorce action; the court must provide reasons for any award of fees, and is also guided by Del. Fam. Ct. Civ. R. 88 and Del. Law. R. Prof. Conduct 1.5. S. S. v. C. S., 2003 Del. Fam. Ct. LEXIS 213 (Del. Fam. Ct. Aug. 22, 2003); M. B. v. P. B., 2005 Del. Fam. Ct. LEXIS 63 (Del. Fam. Ct. Apr. 21, 2005); D.B. v. N.D.B., 2006 Del. Fam. Ct. LEXIS

218 (Del. Fam. Ct. Jan. 31, 2006); N.P. v. S.B., 2007 Del. Fam. Ct. LEXIS 194 (Del. Fam. Ct. Oct. 24, 2007).

Del. Fam. Ct. Civ. R. 88 requires the Family Court of Delaware, in determining the reasonableness of litigation costs incurred by the parties, to consider: (1) the time and expense expended; (2) an itemization of services rendered; (3) relevant hourly rates; (4) an itemization of disbursements claimed; (5) any sums received or that will be received with respect to legal services and/or disbursements; and (6) any information that will enable the court to properly weigh the relevant factors set forth in this rule. L. E. B. v. J. J. B., 2004 Del. Fam. Ct. LEXIS 17 (Del. Fam. Ct. Mar. 25, 2004).

Family court awarded a mother attorney fees and costs because, in light of the factors enumerated in 13 Del. C. § 731 and Law. Prof. Conduct R. 1.5, the fees she incurred were reasonable, with the exception of charging the father with the travel time of the mother's counsel to and from the courthouse; the father was responsible for the remainder of the mother's fees, notwithstanding the disparity in the parties' incomes, because it was his refusal to exercise the visitation awarded him and to comply with his responsibilities as the joint custodian of the parties' sons that caused the mother to incur the fees that she did. M. D. H. v. G. S. H., 2004 Del. Fam. Ct. LEXIS 62 (Del. Fam. Ct. June 29, 2004), aff'd sub nom. Harold v. Harold, 867 A.2d 901 (Del. 2005); M.B.M. v. C.M., 2006 Del. Fam. Ct. LEXIS 10 (Del. Fam. Ct. Jan. 27, 2006); S.F.C. v. D.F.C., 2007 Del. Fam. Ct. LEXIS 164 (Del. Fam. Ct. Nov. 27, 2007); M.B. v. E.B., 28 A.3d 495 (Del. Fam. Ct. 2011).

Under the 13 Del. C. § 1515 factors (especially the financial conditions of both parties), Fam. Ct. Civ. R. 88 and Law. Prof. Conduct R. 1.5, it was appropriate for the husband and the wife to be responsible for their own attorneys' fees and costs; this was despite the fact that the husband refused to consider an offer to settle alimony until the day before the trial, leading to an eventual award of alimony at trial. K. A. D. v. F. W. D., 2005 Del. Fam. Ct. LEXIS 28 (Del. Fam. Ct. May 24, 2005); A.C.M.-W. v. S.W., 2009 Del. Fam. Ct. LEXIS 58 (Del. Fam. Ct. Feb. 2, 2009); In re C.M., 2011 Del. Fam. Ct. LEXIS 54 (Del. Fam. Ct. Aug. 22, 2011).

Wife's recalcitrant behavior regarding a sale of the marital home was excessively litigious behavior that increased litigation costs and warranted an attorney's fee award to husband; in finding that the requested fees were reasonable, the court considered the factors listed under Fam. Ct. Civ. R. 88, which incorporated consideration of any factors that would be relevant under Law. R. Prof. Conduct 1.5(a) to determine whether an attorney met the ethical duty to charge reasonable fees. D.L.D. v. N.M.D., 2005 Del. Fam. Ct. LEXIS 143 (Del. Fam. Ct. Nov. 7, 2005); D. E. v. S. M. E., 2003 Del. Fam. Ct. LEXIS 211 (Del. Fam. Ct. Dec. 19, 2003).

Taking into account Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5, the court denied mother's request for attorney's fees and costs in a custody modification action under 13 Del. C. § 731; the mother did not prevail in her requests for sole legal custody of her minor daughter, for permission to relocate with the child to Utah or a neighboring state, or for restrictions on the location of the father's visits with the child, and she and the child's father were in comparable financial positions. K.J.G. v. J.M., 2005 Del. Fam. Ct. LEXIS 164 (Del. Fam. Ct. Nov. 1, 2005).

Family Court declined to award attorneys' fees to either a wife or husband in an ancillary order following the dissolution of their 35-year marriage; both parties worked and had sufficient income or assets to pay their own legal fee obligations. S.C. v. D.C., 2006 Del. Fam. Ct. LEXIS 232 (Del. Fam. Ct. Nov. 20, 2006).

Parties' requests for attorneys' fees were denied as an interim agreement did not prohibit a husband from making a claim against the increased equity in the wife's home, even though the trial court ruled that the parties could keep the appreciation in their respective properties, and neither party took an overly litigious position. K. C. S. v. S. H. S., 2006 Del. Fam. Ct. LEXIS 160 (Del. Fam. Ct. Sept. 7, 2006).

As a wife in a divorce proceeding was extremely litigious, took unreasonable positions and incurred a significant amount of attorneys' fees as a result, and was relentless with numerous filings that proved baseless and bordered on harassment, the wife's request under 13 Del. C. § 1515 for attorneys' fees, as well as based on considerations of Fam. Ct. Civ. R. 88 and Law R. Prof. Conduct was 1.5, was not deemed meritorious.

C.G.B. v. P.C.B., 2006 Del. Fam. Ct. LEXIS 255 (Del. Fam. Ct. Dec. 4, 2006).

Because the wife received a substantial portion of the marital estate, the wife was required to pay her own attorneys' fees pursuant to 13 Del. C. § 1515, Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5. S.C.B. v. L.A.S., 2007 Del. Fam. Ct. LEXIS 138 (Del. Fam. Ct. June 7, 2007).

Because a wife was to receive a large portion of the marital estate, it would not have been appropriate to award attorneys' fees, under 13 Del. C. § 1515, Fam. Ct. Civ. R. 88, and Law R. Prof. Conduct 1.5. E.F.F. v. A.J.O., 2007 Del. Fam. Ct. LEXIS 165 (Del. Fam. Ct. Nov. 15, 2007); C.F.M. v. S.R.M., 2007 Del. Fam. Ct. LEXIS 250 (Del. Fam. Ct. Oct. 31, 2007); E.F.F. v. A.J.C., 2008 Del. Fam. Ct. LEXIS 17 (Del. Fam. Ct. Jan. 29, 2008).

Because a husband's request for a continuance resulted not from an intentional attempt to cause delay but rather the unforeseen unavailability of witnesses and the husband's position regarding the wife's alleged cohabitation was not frivolous, it would be inequitable to order attorneys' fees merely because the wife prevailed. M.D. v. C.D., 2007 Del. Fam. Ct. LEXIS 11 (Del. Fam. Ct. Mar. 15, 2007).

Pursuant to 13 Del. C. § 1515, Fam. Ct. Civ. R. 88, and Law. R. Prof. Conduct 1.5, a wife was entitled to an award of reasonable attorneys' fees from the husband in the parties' divorce action, as the wife did not have sufficient income or ability to pay her own fees. W.J.F. v. K.F., 2008 Del. Fam. Ct. LEXIS 88 (Del. Fam. Ct. Jan. 15, 2008), aff'd sub nom. Fanin v. Fanin, 3 A.3d 1096 (Del. 2009).

As parties in a divorce proceeding were not overly litigious and did not take unreasonable positions, neither party was entitled to an award of attorneys' fees from the other pursuant to 13 Del. C. § 1515; the court considered the financial circumstances of the parties in denying the fee awards, as well as Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5. K.T. v. Y.T., 2008 Del. Fam. Ct. LEXIS 39 (Del. Fam. Ct. Feb. 8, 2008), rev'd, 963 A.2d 1128 (Del. 2008).

Since both the husband and wife had some income even though they were in dire financial straits, the trial court decided not to award

attorneys' fees and costs to either party following the end of their 16-year marriage; pursuant to 13 Del. C. § 1515, and considering reasonable fee award factors set forth in Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5, the trial court directed each party to pay his or her own fees and costs, as the husband had limited income because the husband was disabled and only receiving weekly workers' compensation payments, while the wife although working had been bearing the brunt of paying the bills and rearing the parties' 2 children even before the husband left the marital residence. K.F. v. L.F., 2008 Del. Fam. Ct. LEXIS 10 (Del. Fam. Ct. Mar. 10, 2008).

Upon evaluation by a court of each party's assets, debts, and financial circumstances in their divorce and ancillary relief proceeding, each party was responsible for their own attorneys' fees pursuant to Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5. N.P. v. J.L.P., 2008 Del. Fam. Ct. LEXIS 20 (Del. Fam. Ct. Mar. 11, 2008).

Husband was not entitled to counsel fees under 13 Del. C. § 1515, Fam. Ct. Civ. R. 88 or Law. R. Prof. Conduct 1.5, given the de minimis size of the marital estate ($645 equity in a car), the 25-year length of the marriage and the substantial difference in income and earning capacity of the parties; the husband took unreasonable positions, leading to excessive litigation. N.J.H. v. J.H.H., 2008 Del. Fam. Ct. LEXIS 128 (Del. Fam. Ct. Nov. 26, 2008).

Wife was not awarded attorney fees and costs under 13 Del. C. § 1515, Fam. Ct. Civ. R. 88, and Law. R. Prof. Conduct 1.5, even though the wife was disabled and the husband was in good health, as the parties had been essentially placed in equal financial positions through the payment of alimony and the disposition of the marital home. A.S. v. R.S., 2010 Del. Fam. Ct. LEXIS 39 (Del. Fam. Ct. May 12, 2010).

Based on the counsel fees incurred by the husband in successfully defending the wife's appeal on the issue of the validity of the parties' divorce, and upon consideration of Fam. Ct. Civ. R. 88 and Law Prof. Conduct R. 1.5, there was no basis to support an award of fees. M.R. v. B.R., 2012 Del. Fam. Ct. LEXIS 51 (Del. Fam. Ct. May 23, 2012).

Although a decision on attorney's fees was deferred, the court was inclined to require that each party be responsible for payment of their

respective counsel fees and costs because, although the wife was the economically weaker party, she was receiving 60% of the marital estate and 50% of tax-deferred assets, in addition to alimony and child support. E.K. v. M.K., 2013 Del. Fam. Ct. LEXIS 55 (Del. Fam. Ct. Mar. 28, 2013), amended, 2013 Del. Fam. Ct. LEXIS 60 (Del. Fam. Ct. June 13, 2013).

Wife was awarded attorneys' fees in a divorce action based upon the husband's unreasonable conduct of dissipation, but not based upon her economic state (due to the substantial award of marital property and alimony to her). In re J-M-R, 2013 Del. Fam. Ct. LEXIS 50 (Del. Fam. Ct. July 29, 2013), amended, 2013 Del. Fam. Ct. LEXIS 48 (Del. Fam. Ct. Sept. 23, 2013).

Award of attorneys' fees in the wife's favor was appropriate because the Family Court on several occasions acknowledged the husband's delay in litigation and the wife's need to continually resort to motions to compel discovery for litigation. Weiner v. Weiner, 2015 Del. Fam. Ct. LEXIS 34 (Del. Fam. Ct. July 13, 2015).

Family Court limited the award of fees to the mother only to the narrow issue covered under the rule to show cause (RTSC) because: (1) the testimony regarding the father's use and/or possession of alcohol in the home was easily divisible from the rest of the testimony; and (2) the time spent at trial limited to the RTSC did not exceed 3%, resulting in the father paying $1,005 in fees and costs. K.W. v. S.W., — A.3d —, 2019 Del. Fam. Ct. LEXIS 35 (Del. Fam. Ct. July 16, 2019).

— Allocation in Family Court.

Family Court did not abuse its discretion in awarding a wife attorneys' fees after finding the wife's former husband in contempt for disobeying a property division stipulation and order; the award was based on an extensive record developed at trial and attorney fee affidavits. Cook v. Cook, — A.3d —, 2022 Del. LEXIS 65 (Del. Feb. 23, 2022).

— Contingency fees.

Attorney's failing to put a contingency fee arrangement in writing violated subsection (c). In re Maguire, 725 A.2d 417 (Del. 1999).

Attorney was entitled to quantum meruit fees up to a 1/3 contingency fee from former clients because: (1) the attorney was not fired for cause;

(2) the issues were not complex; (3) the clients pressed the attorney to settle quickly; (4) nothing showed the attorney was precluded from other employment; (5) the fee was contingent and based on 1/3 of the recovery; and (6) the clients' subsequent attorney could pay the fee based on a charging lien on recovered fees. Murrey v. Shank, 2011 Del. Super. LEXIS 431 (Del. Super. Ct. Aug. 30, 2011), aff'd, 41 A.3d 430 (Del. 2012).

Law firm was entitled to the full amount of requested fees in a contractual fee-shifting case because: (1) the requested fees were not unreasonable; (2) the parties' one-third contingent fee arrangement was quite typical and commercially reasonable; (3) there was nothing inherently unreasonable in including prejudgment interest when calculating the appropriate amount of fees; (4) the law firm did not include late fees in the proceeds; and (5) the requested fees were on par with, or less than, awards the court had previously deemed reasonable. S'holder Representative Servs. LLC v. Shire US Holdings, Inc., — A.3d —, 2021 Del. Ch. LEXIS 81 (Del. Ch. Apr. 27, 2021).

— Fee agreements.

Attorney was suspended for 3 months, followed by 18 months of conditional probation, for having violated Law Prof. Conduct R. 1.5(f), 1.7(a), 1.15(a), 1.16(d) by: (1) having a conflict of interest with 2 clients; (2) having a personal interest in a loan transaction; (3) failing to safeguard client funds; and (4) failing to provide a new client with a fee agreement. In re O'Brien, 26 A.3d 203 (Del. 2011).

The Delaware Supreme Court accepted the Board on Professional Responsibility's findings and recommendation for discipline, publicly reprimanding and placing the attorney on a 2-year period of probation with the imposition of specific conditions, because the attorney failed to provide the client with a fee agreement and/or statement of earned fees withdrawn from the trust account, to identify and safeguard client fund, to maintain financial books and records or to supervise nonlawyer assistants; the attorney had engaged in conduct involving misrepresentation, prejudicial to the administration of justice. In re Malik, 167 A.3d 1189 (Del. 2017).

— Fee splitting.

Finding of attorney's violation of subdivision (e)(1) was supported by substantial evidence. In re Berl, 540 A.2d 410 (Del. 1988); In re Berl, 560 A.2d 1009 (Del. 1989).

Fee division agreement between a law firm and its former associate was valid and enforceable and did not violate the disciplinary rules; it is not common for a law firm and a departing attorney to divide the fees resulting from contingent fee cases which the attorney has been handling and will continue to handle after he leaves. Tomar, Seliger, Simonoff, Adourian & O'Brien v. Snyder, 601 A.2d 1056 (Del. Super. Ct. 1990).

A Delaware lawyer may not assert non-compliance with Rule 1.5(e) as a defense to an oral agreement with an out-of-state lawyer who is not charged with compliance with that rule or a similar rule of another jurisdiction. Potter v. Peirce, 688 A.2d 894 (Del. 1997).

Attorney's failing to obtain a written agreement with the client regarding joint representation with another lawyer and his attempting to divide a prospective fee violated subsection (e). In re Maguire, 725 A.2d 417 (Del. 1999).

Assuming that there was a contract by which a law firm engaged a representative plaintiff to perform legal work in class action litigation, any purported contract would have been void and unenforceable as it was unethical and in violation of the principles governing representative actions in Delaware; in particular, the agreement would have violated Law. R. Prof. Conduct 1.5(e) as the representative plaintiff did not advise the class, either in writing or orally, of the alleged fee-sharing agreement. Fuqua Indus. S'holder Litig. v. Abrams (In re Fuqua Indus.), 2006 Del. Ch. LEXIS 167 (Del. Ch. Sept. 7, 2006), aff'd, 922 A.2d 414 (Del. 2007).

— Prevailing party.

Pursuant to Law. Prof. Conduct R. 1.5(a)(4), an award for fees, costs, and expenses incurred in the Chancery Court was not warranted to an investment company, because it was not the prevailing party there; rather, the company's claims in that Court were dismissed. Shore Invs., Inc. v. Bhole, Inc., 2012 Del. Super. LEXIS 621 (Del. Super. Ct. Apr. 9, 2012).

Mother found in contempt of a custody order was required to reimburse the father $2,520 in attorney fees because: (1) the father's application

complied with both Law. Prof. Cond. R. 1.5 and Fam. Ct. Civ. R. 88; (2) the rate charged and time spent by the father's attorney were reasonable in light of the work performed; (3) the father's attorney was unavailable for other work; (4) the father prevailed on his contempt claims; and (5) the court reduced the father's fee request by 2.4 hours in light of duplicative work. A.K. v. A.K., — A.3d —, 2020 Del. Fam. Ct. LEXIS 40 (Del. Fam. Ct. Oct. 6, 2020).

Court determined that having each party bear their own attorneys' fees, costs and expenses incurred during the litigation was equitable because: (1) neither party "prevailed," as each party won on some claims and lost on others, with each party recovering far less than they sought; and (2) as a result, shifting would not have been equitable under the purchase and sale agreement at issue. In re Facchina Constr. Litigs., — A.3d —, 2021 Del. Super. LEXIS 239 (Del. Super. Ct. Mar. 24, 2021).

— Reasonableness.

Although the fees incurred by a mother in an expedited custody proceeding were reasonable in light of the factors enumerated in Law. Prof. Conduct R. 1.5, pursuant to 13 Del. C. § 731, the father was not responsible for fees that the mother would have incurred regardless of his obstreperous conduct. M.D.H. v. G.S.H., 2003 Del. Fam. Ct. LEXIS 6 (Del. Fam. Ct. Feb. 28, 2003).

Court granted the father's motion for attorney fees because the mother violated the court's order granting the father joint legal custody of and visitation with the parties' children in several respects; in setting the fees, the court considered the factors enumerated in Del. Law. R. Prof. Conduct 1.5. D.M.E. v. M.B.S.E., 2003 Del. Fam. Ct. LEXIS 119 (Del. Fam. Ct. Sept. 11, 2003).

Although the insured was entitled to an attorney fee award as the prevailing party against the insurer, its fee request was excessive and had to be reduced to a reasonable amount. Nassau Gallery, Inc. v. Nationwide Mut. Fire Ins. Co., 2003 Del. Super. LEXIS 401 (Del. Super. Ct. Nov. 18, 2003).

Exercising its broad 13 Del. C. § 731 discretion and considering Del. Fam. Ct. Civ. R. 88, Del. Law. R. Prof. Conduct 1.5, and related factors to

determine a reasonable fee, the court allowed the mother's $412 and father's $275 attorney fee requests and ordered the father to pay $100 of the mother's fee; the court specifically mentioned it took into account the father's intransigent position violating Del. Fam. Ct. Civ. R. 16(b) policy that contemplated the parties' participation in mediation to mediate to settle unresolved issues, the positions taken by the parties, the discrepancy in counsel's experience, and the parties' incomes. N. J. G. v. J. J. G., 2004 Del. Fam. Ct. LEXIS 18 (Del. Fam. Ct. Mar. 2, 2004); L D M v. R L, 2006 Del. Fam. Ct. LEXIS 131 (Del. Fam. Ct. June 1, 2006); D.G.C. v. R.C., 2006 Del. Fam. Ct. LEXIS 260 (Del. Fam. Ct. Aug. 30, 2006), aff'd sub nom. Chasin v. Chasin, 940 A.2d 945 (Del. 2007); R.U. v. R.L.U., 2008 Del. Fam. Ct. LEXIS 26 (Del. Fam. Ct. Jan. 22, 2008).

After plaintiffs voluntarily dismissed their action against defendants for the interpretation of a partnership agreement, defendants were entitled to reasonable attorney fees for answering the complaint and responding to the motion to dismiss; however, the court declined to award fees for the preparation of defendants' counterclaims since these were voluntary in nature and were not necessarily incurred in defense of the action. Richmont Capital Ptnrs. I, L.P. v. J. R. Invs. Corp., 2004 Del. Ch. LEXIS 73 (Del. Ch. May 20, 2004).

Taking into account the Law. Prof. Conduct R. 1.5(a) factors, the trial court approved the reasonableness of the attorney fees the Special Master recommended in the Special Master's Final Report, as the coproate officer was due the advancement of funds (as provided for in the corporation's bylaws) in an investigation for possible accounting irregularities; however, the trial court had to modify the corporate officer's pre-judgment interest request because the corporate officer was only entitled to interest from the time the officer produced specific advancement expenses to the corporation. Tafeen v. Homestore, Inc., 2005 Del. Ch. LEXIS 41 (Del. Ch. Mar. 29, 2005).

Delaware Industrial Accident Board, in awarding minimal attorney's fee to the employee's counsel under 19 Del. C. § 2320, abused its discretion in failing to demonstrate that it had considered the requisite Cox factors, based on Law. R. Prof. Conduct 1.5(a), in making its award; the Board merely stated that it awarded a minimal fee due to the employee's counsel's failure to cooperate with the employer's counsel by refusing to

send photographs of the employee's disfigurement. Green v. ConAgra Poultry Co., 2005 Del. Super. LEXIS 321 (Del. Super. Ct. Sept. 8, 2005).

Wife's counsel's motion for attorneys' fees and costs in the parties' post-divorce proceedings was granted based upon consideration of the relevant factors under Fam. Ct. Civ. R. 88, as well as the reasonableness of the fee under Law. R. Prof. Conduct 1.5; the award was within the family court's authority under 13 Del. C. § 1515, and included consideration of the former husband's financial situation, his retention of a new attorney for a longer time than the wife, the extensiveness of the parties' litigation, and the necessity of the wife's retention of counsel to obtain a final resolution of pending matters. L. F. v. L. M. H., 2005 Del. Fam. Ct. LEXIS 73 (Del. Fam. Ct. June 3, 2005).

Because a mortgage agreement established a ceiling of 5 percent of the judgment amount which ultimately would be entered after trial and the lender could not recover attorneys' fees outside of the foreclosure, the requested attorneys' fees were unreasonable. Beneficial Delaware, Inc. v. Waples, 2006 Del. Super. LEXIS 274 (Del. Super. Ct. July 3, 2006).

When the court had held that a workers' compensation claimant was an employee and not an independent contractor, the claimant's attorney was awarded a fee of $29,053.19, representing $300 multiplied by 96 hours plus costs of $253.19, as the time expended and the hourly rate were reasonable given the nature of the case, counsel's experience, and community custom, and the employers had not supplied any evidence of their claimed inability to pay the fee; a ⅓ multiplier, however, was not justified, because if the issue was complex at all, it was factually, not legally, complex. Falconi v. Coombs & Coombs, Inc., 2006 Del. Super. LEXIS 471 (Del. Super. Ct. Nov. 21, 2006).

The employee was entitled to attorney's fees under 19 Del. C. § 2350(f) where: (1) the employee's total disability case presented relatively difficult questions on appeal; (2) the attorney's hourly rate was reasonable; (3) the attorney was successful on appeal; (4) pursuant to Law. Prof. Conduct R. 1.5, the employer was able to pay; and (5) the Industrial Accident Board's award was the only source of attorneys' fees. Smith v. Del. State Hous. Auth., 2006 Del. Super. LEXIS 624 (Del. Super. Ct. Feb. 14, 2006).

When an employer was partially successful in a suit against an employee for the employee's violation of a noncompetition agreement, an award to the employer of attorneys' fees exceeding the amount of damages awarded was not excessive under Law. R. Prof. Conduct 1.5 because the employee was responsible for delays resulting in increased fees, as: (1) the employee's motion for a continuance required counsel to prepare for trial twice; and (2) the employee could have minimized litigation costs but instead drew out the case by requiring the employer to prove every key issue of fact. EDIX Media Group v. Mahani, 2007 Del. Ch. LEXIS 17 (Del. Ch. Jan. 25, 2007), aff'd, 935 A.2d 242 (Del. 2007); Mahani v. EDIX Media Group, Inc., 935 A.2d 242 (Del. 2007); Weichert Co. v. Young, 2008 Del. Ch. LEXIS 51 (Del. Ch. May 1, 2008).

Attorney violated Law. R. Prof. Conduct 1.5(a) by charging a fee of $1,500 for the minimal legal services performed in connection with a motion for reduction of sentence. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Attorneys' total fees of $144,866.70 were reasonable as the case required a tenacious and highly-skilled lawyer with extensive understanding of employment law and, as a solo practitioner, the attorney's ability to take on other cases was severely limited by the obligations in the case; the amount involved and the amount recovered by the client, $252,416 on wrongful termination and bad faith claims, were both substantial. Bunting v. Citizens Fin. Group, 2007 Del. Super. LEXIS 205 (Del. Super. Ct. June 29, 2007).

The attorneys' request for the maximum fee allowed by law was unsupported because: (1) motion practice was a normal part of litigation; (2) movant attorneys offered no reason why their motions were so complex as to justify an attorneys' fee award of 33%; and (3) the fact that the county vigorously opposed the motion was irrelevant. Korn v. New Castle County, 2007 Del. Ch. LEXIS 139 (Del. Ch. Oct. 3, 2007).

Although an attorney fee award in a workers' compensation case could be based on nonmonetary benefits, the Industrial Accident Board had nothing before it other than the employee's monetary award from which to calculate the attorney fee award; however, applying Del. Law. R. Prof. Conduct 1.5, regarding reasonable attorney fees, and the General Motors

Corporation v. Cox, 304 A.2d 55, 57 (Del. 1973) factors that included the amount involved and the results obtained, there existed no basis for overturning the Board's attorney fee award. Pugh v. Wal-Mart Stores, Inc., 945 A.2d 588 (Del. 2008).

Reimbursement of defense fees and costs pursuant to an indemnification provision in a stock purchase agreement of a manufacturing entity by the former manufacturer was warranted where the fees were reasonable based on consideration of the reasonableness factors under Law. R. Prof. Conduct 1.5(a)(1) and (4); such fees included work done prior to the time when the underlying environmental litigation was commenced, as there were subpoenas and information requests that served as the basis for the lawsuit against the new manufacturing entity and others. Rexnord Indus., LLC v. RHI Holdings, Inc., 2009 Del. Super. LEXIS 47 (Del. Super. Ct. Feb. 13, 2009).

Attorney fees and expert witness fees incurred by former executives in their action against a corporation, seeking payment of certain options that they were allegedly promised, were ordered to be paid by the corporation where the executives were awarded judgment after trial and the sums sought were, for the most part, reasonable, not duplicative, and not excessive under Law. R. Prof. Conduct 1.5(a); the executives were also entitled to fees for the prosecution of their action seeking payment of fees. Lillis v. AT&T Corp., 2009 Del. Ch. LEXIS 34 (Del. Ch. Feb. 25, 2009).

Treatment center that failed to comply with subpoenas duces tecum for substance and alcohol abuse records of an indigent parent involved in a child dependency case, and which was ultimately found in contempt for its misconduct, was ordered to pay the parent's attorney that attorney's reasonable attorneys' fees under Fam. Ct. Civ. R. 88; such attorneys' fees, based on what the attorney would have earned if the attorney was working for a private client, were reasonable in the circumstances pursuant to Law. R. Prof. Conduct 1.5. A.B. v. Thresholds, Inc., 982 A.2d 295 (Del. Fam. Ct. 2009).

Plaintiffs' request for $83,980 in attorneys' fees was reduced by 30 percent where: (1) the disputed fees pertained directly to plaintiffs' efforts to gain possession of and ability to inspect a defendant's computer which that defendant had already modified, losing or disposing of, the hard drive;

(2) the time spent by the most junior and senior attorneys was disallowed; (3) it was reasonable under Law. R. Prof. Conduct 1.5(a) to allow a weighted average rate of approximately $340 per hour for the other 2 attorneys who spent almost 240 hours on the claimed work, given their level of experience; and (4) much of the requested relief was denied; and (5) the award was directed to the prejudice caused by the spoliation. Beard Research, Inc v. Kates, 2009 Del. Ch. LEXIS 170 (Del. Ch. Oct. 1, 2009).

Condominium code and declaration authorized attorneys' fees to a prevailing party, such that a condominium council that was awarded partial summary judgment in its debt action against condominium owners was awarded its reasonable fees; the fees were reasonable under Law. R. Prof. Conduct 1.5(a), based on the amount charged, the hours worked, the owners' willingness to pursue litigation, and their ability to pay. Dixon v. Council of the Cliff House Condo., 2009 Del. C.P. LEXIS 71 (Del. C.P. Dec. 8, 2009).

Although the first party's attorneys' fees were reasonable under the factors set forth in Law. Prof. Conduct R. 1.5(a), the first party's expenses related to photocopying, transcripts, travel, and computer research were not to be included because: (1) the terms "costs" and "expenses" had different meanings; and (2) the parties' asset purchase agreement only provided for payment of costs, pursuant to Ch. Ct. R. 54. Ivize of Milwaukee v. Compex Litig. Support, 2009 Del. Ch. LEXIS 251 (Del. Ch. June 24, 2009).

Attorneys' fees based on Law. R. Prof. Conduct 1.5(a) were reduced partially where the amount of time spent by partners in 1 law firm was deemed an artificial inflation of a company's requested fees; the company was awarded fees based on another company's breach of a noncompetition provision in the parties' asset purchase agreement. Concord Steel, Inc. v. Wilmington Steel Processing Co., 2010 Del. Ch. LEXIS 18 (Del. Ch. Feb. 5, 2010), aff'd, 7 A.3d 486 (Del. 2010).

Because the plaintiffs' fees were reasonable as to the amount involved, and because the time expended was justifiable based on the amount of money involved, the number of the defendants, and the vigor with which the arbitration was contested, the plaintiffs were entitled to their attorneys' fees and costs under Law. R. Prof. Conduct 1.5(a). Global Link

Logistics, Inc. v. Olympus Growth Fund III, L.P., 2010 Del. Ch. LEXIS 30 (Del. Ch. Feb. 24, 2010).

With the exception of certain expenses that fell outside the fee award, a corporation's attorneys' fees were reasonable as to the number of attorneys involved and the related dollar amounts; therefore, pursuant to Law. R. Prof. Conduct 1.5(a) and Ch. Ct. R. 88, a shareholder was obligated to pay the corporation's expenses incurred by the shareholder's contempt. Aveta Inc. v. Bengoa, 2010 Del. Ch. LEXIS 175 (Del. Ch. Aug. 13, 2010).

Former officer of a corporation reasonably requested $292,019.91 for fees and expenses incurred in connection with the officer's defense of claims asserted against the officer by the corporation's parent in an underlying action; the record in the underlying action strongly suggested that the parent adopted a litigation strategy designed to overwhelm the officer by forcing the officer to incur significant expenses defending a wide-ranging, unfocused action. Danenberg v. Fitracks, Inc., 58 A.3d 991 (Del. Ch. 2012).

Attorneys' fees and costs of $3,267,355 requested were reasonable and were awarded to a fund under a contractual fee-shifting provision because: (1) the attorneys' fee component was calculated using the rates the fund's counsel customarily charged the fund, which were their standard hourly rates discounted by 10%; (2) the lawyers who staffed the matter were able and experienced practitioners and charged what were readily recognizable as reasonable rates for complex commercial litigation; (3) that the opponents' attorneys charged lower rates did not render the fund's counsel's rates unreasonable in light of the fund's counsel's prominence, the qualifications of its practitioners and the legal market in which the firm provided services; and (4) that the opponents' attorneys incurred fewer hours working on the case did not undercut the reasonableness of the fund's request. ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC, 50 A.3d 434 (Del. Ch. 2012), aff'd in part and rev'd in part, 68 A.3d 665 (Del. 2013).

Trial court properly awarded a minority stockholder's attorney a fee of $304 million (15% of a $2.031 billion judgment) in a derivative suit since Law Prof. Conduct R. 1.5(c) contemplated fees that were based on a percentage; the trial court properly made a reasonableness determination

based on the Sugarland Indus. v. Thomas, 420 A.2d 142 (Del. 1980) factors. Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

The extraordinary benefit that was achieved by plaintiff minority shareholder in a derivative suit merited a very substantial award of $304 million in attorneys' fees where: (1) plaintiff's attorneys pursued the case on a contingent fee basis, invested a significant number of hours, incurred more than $1 million in expenses, attorneys reviewed approximately 282,046 pages in document production and traveled outside the United States to take multiple depositions; (2) plaintiffs indisputably prosecuted the action through trial and secured an immense economic benefit; (3) plaintiff had to deal with very complex financial and valuation issues, while being up against major league, first-rate legal talent; (4) with prejudgment interest, the benefit achieved through the litigation amounted to more than $2 billion; and (5) postjudgment interest accrued at more than $212,000 per day. Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

Award of $304 million in attorneys' fees in a derivative suit was properly based upon the total damage award, which included prejudgment interest; the Court of Chancery's decision to include prejudgment interest in its determination of the benefit achieved was not arbitrary or capricious, but rather was the product of a logical and deductive reasoning process which took into account the slow pace of litigation and any part plaintiffs might have played in that pace. Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

Award of $304 million in attorneys' fees in a derivative suit, based upon a calculation of 15% of a $2.031 billion judgment, was proper due to the complexity of the case and valuable benefits conferred; the fact that plaintiff's counsel spent 8,597 hours on this case, meaning that the award would represent a per hour payment of approximately $35,000 an hour, was irrelevant because the benefit achieved by the litigation was the common yardstick by which a plaintiff's counsel should be compensated in a successful derivative action. Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

Pursuant to Law. Prof. Conduct R. 1.5, an award for fees, costs and expenses incurred in a breach of lease claim was reasonable and

appropriate where an investment company prevailed on that claim; the court allocated the percentage to be awarded for each item, because other claims had also been pursued. Shore Invs., Inc. v. Bhole, Inc., 2012 Del. Super. LEXIS 621 (Del. Super. Ct. Apr. 9, 2012).

Wife's request for attorneys' fees was granted only in part because many of the entries by her attorney did not relate to the husband's dissipation of marital assets, which was the basis of the award; the amount awarded was deemed reasonable. J- M- R- v. K- J. R-, 2013 Del. Fam. Ct. LEXIS 48 (Del. Fam. Ct. Sept. 23, 2013).

In awarding fees and costs under the bad faith exception to the American Rule, an indication that the amount of the fee request was reasonable was that at the time the fees and expenses were incurred, plaintiffs had no guarantee of obtaining a fee-shifting award; further, the court determined that most prelitigation expenses were reasonable, considering that plaintiffs acted reasonably by seeking to resolve the matter before filing suit. Staffieri v. Black, 2013 Del. Ch. LEXIS 322 (Del. Ch. Aug. 8, 2013), aff'd, 2014 Del. LEXIS 88 (Del. Feb. 27, 2014).

While the attorney fee award was greater than the amount recovered for the breach of contract, the award was supported because: (1) the guarantor made many claims which were costly to defend against; (2) the lender hired a legal team and expert advisors necessary to tackle the numerous, difficult issues; (3) the fees charges were reasonable and less than those expended by the guarantor; and (4) the professionals chosen were well-qualified. Edgewater Growth Capital Partners L.P. v. H.I.G. Capital, Inc., 2013 Del. Ch. LEXIS 104 (Del. Ch. Apr. 18, 2013).

Defendant's attorneys' fees of $287,339 were reasonable because: (1) the litigation lasted over 3 years; (2) plaintiff repeatedly engaged in bad faith litigation tactic; (3) defense counsel's hourly rates were consistent with the rates generally charged in Delaware; and (4) the number of hours devoted to the litigation was not excessive, redundant, duplicative or otherwise unnecessary. Preferred Invs., Inc. v. T&H Bail Bonds, 2014 Del. Ch. LEXIS 43 (Del. Ch. Mar. 25, 2014).

Shifting attorneys' fees under the bad faith exception to the American Rule and awarding reasonable fees to an estate for defending against a challenger's exceptions to the final accounting was appropriate because:

(1) the challenger lacked standing to prosecute exceptions; (2) the litigation was vexatious and frivolous; and (3) the attorney's fees requested were reasonable and involved a modest hourly rate of $225 for over 20 hours in preparing for the exceptions. In re Estate of Branson, 2014 Del. Ch. LEXIS 57 (Del. Ch. Apr. 22, 2014), aff'd sub nom. Branson v. Branson, 105 A.3d 988 (Del. 2014).

In this contract action, defendant was entitled to an award of $700,000 for attorneys' fees, costs and expenses because defendant predominated in the litigation regarding the breach of contract issuea; the time and labor required in this suit were significant because the ownership and control of defendant was at stake. AFH Holding & Advisory, LLC v. Emmaus Life Scis., Inc., 2014 Del. Super. LEXIS 228 (Del. Super. Ct. Apr. 16, 2014).

Although plaintiff requested $374,128 in attorneys' fees and costs for misuse of computer system information, the award was reduced to $200,000 because: (1) the amount sought was unreasonable and disproportionate to the $87,016.25 awarded to plaintiff as nominal and unjust enrichment damages; and (2) not all of the time and labor expended by plaintiff's counsel on the computer misuse claim was necessary. Wayman Fire Prot., Inc. v. Premium Fire & Sec., LLC, 2014 Del. Ch. LEXIS 108 (Del. Ch. June 27, 2014).

Plaintiff was entitled to an award of reasonable attorneys' fees of $33,440 for defendant's refusal to comply with a discovery request because: (1) plaintiff's time entries sufficiently advised the court as to the task being completed; (2) plaintiff's explanations as to the nature of any disputed work were credible; (3) defendant was not paying for purely clerical tasks; and (4) defendant was not paying for redundant/unnecessary tasks or excessive time. Mine Safety Appliances Co. v. AIU Ins. Co., 2014 Del. Super. LEXIS 475 (Del. Super. Ct. Sept. 19, 2014).

While the amount of time law firms devoted to the representation of the trustees of a trust was reasonable, given that the beneficiaries vigorously contested numerous aspects of the action, and the amounts charged by the trustees' attorneys generally were reasonable, the court capped the reimbursable billing rates for one law firm when the court determined that the maximum rate for reasonable attorneys' fees was lower than that firm

charged. In re Hawk Mt. Trust, 2015 Del. Ch. LEXIS 236 (Del. Ch. Sept. 8, 2015).

Upon granting a mortgagee's foreclosure and breach of contract claims pursuant to a judgment on the pleadings, the court determined the reasonable amount of attorneys' fees to award, based upon consideration of the professional conduct factors, including the billing statements that detailed the hours worked, the nature of the representation and the amount of the judgment. CRELK Enters. v. Meris Props., 2016 Del. Super. LEXIS 180 (Del. Super. Ct. Apr. 21, 2016).

Nursing home's attorney was entitled to an award of fees and costs pursuant to the admission agreement because: (1) the attorney practiced law for more than 40 years, including the representation of nursing homes for about 20 years; (2) the attorney's discounted hourly rate of $270 was below those fees customarily charged by attorneys with similar experience; and (3) the attorney obtained a favorable result for the home. 810 South Broom St. Operations, LLC v. Daniel, 2016 Del. Super. LEXIS 332 (Del. Super. Ct. July 15, 2016), rev'd, 158 A.3d 884 (Del. 2017).

Trial court did not abuse its discretion in awarding attorneys' fees and costs in the amount of $10,296 to a nursing home because: (1) there was a contractual basis for shifting attorneys' fees; (2) the parties engaged in an unsuccessful mediation; (3) the nursing home was required to engage in motion practice; and (4) there was a 1-day trial. Miller v. Onix Silverside, LLC, 2016 Del. Super. LEXIS 434 (Del. Super. Ct. Aug. 26, 2016).

Although a commercial landlord sought $42,412 in attorneys' fees, the landlord was awarded $20,132 in fees because 32.5 hours billed for post-trial memoranda was unreasonable; the landlord was not permitted to bill for another trial that had to be held at a later date when 2 of the landlord's witnesses were unavailable for the original trial. J.M.L. Inc. v. Shoppes of Mount Pleasant, LLC, 2016 Del. Super. LEXIS 519 (Del. Super. Ct. Oct. 14, 2016).

Trial court did not abuse its discretion by awarding attorneys' fees to a maintenance company in its action against a property owner, arising from the property owner's alleged failure to pay annual assessment; the amount awarded was reasonable. Saunders-Gomez v. Rutledge Maint. Corp., 2017

Del. Super. LEXIS 164 (Del. Super. Ct. Apr. 3, 2017), aff'd, 189 A.3d 1288 (Del. 2018).

Defendant's motion for attorneys' fees was granted, in part, because: (1) tasks performed by defendant's attorneys were made necessary by counsel having had no part in negotiating the asset purchasing agreement; and (2) defendant's attorneys were required to research and understand a complex corporate transaction with little to no prior familiarity with what occurred. The Boeing Co. v. Spirit Aerosystems, Inc., 2017 Del. Super. LEXIS 630 (Del. Super. Ct. Dec. 5, 2017), aff'd, 190 A.3d 999 (Del. 2018).

In an action for breach of a commercial lease, the landlord's attorneys' fees were reasonable because counsel: (1) could not work on other matters while working on the instant litigation; (2) gave the landlord a discounted fee rate due to their continued business; (3) assigned different matters to associates and paralegals at a lower billable rate; and (4) never raised its rates throughout the 3-year litigation. Bridev One, LLC v. Regency Ctrs., L.P., 2017 Del. Super. LEXIS 729 (Del. Super. Ct. Dec. 1, 2017).

When a partnership official sought advancement of fees and costs, where the partnership objected that the official's counsel's fees exceeded rates charged by other law firms, the official was not entitled to summary judgment; a discrepancy between rates the official's counsel charged and rates other firms charged raised a fact question on the reasonableness of the firm's fees. Weil v. Vereit Operating P'ship, L.P., — A.3d —, 2018 Del. Ch. LEXIS 48 (Del. Ch. Feb. 13, 2018).

In light of the absence of any novel or complex issues on appeal from a decision of the Delaware Industrial Accident Board, a request for attorneys' fees was excessive (failing to justify a contingency multiplier). McCabe v. Bayside Roofing, Inc., — A.3d —, 2018 Del. Super. LEXIS 76 (Del. Super. Ct. Feb. 13, 2018).

Plaintiff's counsel's fees of $41,110 were reasonable, even though plaintiff's counsel spent 11 more hours working on the case than defendant's counsel, because: (1) plaintiff's counsel had to review and respond to defendant's affirmative defenses; (2) plaintiff showed that the services its attorneys rendered were thought prudent and appropriate at the time, in the good faith professional judgment of counsel; and (3) plaintiff's counsel successfully secured a $1,000,000 award and charged

less than 5% of that sum to do so. Bellmoff v. Integra Servs. Techs., — A.3d —, 2018 Del. Super. LEXIS 273 (Del. Super. Ct. June 22, 2018).

In response to competing motions for attorney fees and costs, the court held that shifting fees was inequitable and unwarranted in favor of any party because no bad faith existed; under Law Prof. Conduct R. 1.5(a), plaintiffs were entitled to fees and costs in the amount of $681,835 in light of the fees expended by them and the amount recovered. Brace Indus. Contr. v. Peterson Enters., — A.3d —, 2018 Del. Ch. LEXIS 567 (Del. Ch. Dec. 12, 2018), aff'd in part, rev'd, 224 A.3d 574 (Del. 2020).

Plaintiffs' request for $3,022 in fees, in connection with their motion for evidentiary relief, was reasonable given the Delaware legal market, the proximity of the motion to an important trial and the fact that the outcome of the motion would likely impact plaintiffs' pretrial briefing strategy. Greenstar IH Rep, LLC v. Tutor Perini Corp., — A.3d —, 2019 Del. Ch. LEXIS 1379 (Del. Ch. Dec. 4, 2019).

On plaintiff's action for advancement of fees and expenses, the fees invoiced by plaintiff's counsel were reasonable because: (1) the hourly rate charged by counsel was reasonable; (2) there was no suggestion that any amount invoiced failed to reflect legal services actually performed; (3) the amounts were reasonable in light of the damages pled by defendant in the substantive breach of loyalty action; and (4) the controversy was of great concern to the plaintiff, given that defendant had framed a complaint putting plaintiff in legal jeopardy for millions of dollars. Day v. Diligence, Inc., — A.3d —, 2020 Del. Ch. LEXIS 184 (Del. Ch. May 15, 2020).

In an action by an insured for declaratory relief against insurance companies for alleged breach of director and officer liability policies arising from a failure to defend the insured in an underlying suit, the court granted the insured's motion to recover costs and fees expended in that underlying action; the insured was to submit mostly unredacted historic invoices because attorneys' fees and other expenses submitted for advancement must be reasonable, as governed by the factors set out in the Rules of Professional Conduct. Ferrellgas Partners L.P. v. Zurich Am. Ins. Co., — A.3d —, 2020 Del. Super. LEXIS 2745 (Del. Super. Ct. Aug. 20, 2020).

Following a determination by the Industrial Accident Board (IAB) that an estate representative was entitled to compensation for the decedent's mesothelioma, the representative was entitled to attorney fees because the estate's position in the hearing before the IAB was affirmed on appeal; the court awarded the claimant $31,530 in fees based on the relevant General Motors Corporation v. Cox, 304 A.2d 55, 57 (Del. 1973) factors, including consideration of the fact that the underlying appeal involved novel issues of first impression requiring considerable time and labor, the experience of claimant's legal team and that customary rates for the legal services provided in this case were considerably lower than the rates requested. Weddle v. BP Amoco Chem. Co., — A.3d —, 2020 Del. Super. LEXIS 2756 (Del. Super. Ct. Aug. 26, 2020).

Defendants' requested fee award was prima facie reasonable because the litigation, which concerned ownership of a media conglomerate worth $27.3 million, was complex, contentious and time-consuming. the litigation was also expedited, meaning it incurred more substantial attorneys' fees than litigation proceeding at the customary pace. Lynch v. Gonzalez, — A.3d —, 2020 Del. Ch. LEXIS 292 (Del. Ch. Sept. 18, 2020).

Director and shareholder were entitled to recover legal fees and costs incurred in underlying litigation with a corporation because: (1) advancement was warranted under the indemnification agreement; (2) the legal expenses were reasonable where it was logical to retain Delaware counsel to defend an action in which Delaware law is at issue; (3) even if the director and shareholder were never served in the underlying New York action, it was reasonable to retain representation due to the threat of litigation (that threat also being a trigger to the advancement right); and (4) the filing of particular motions or the achievement of certain litigation milestones were not the only possible triggers of the right to advancement. Seiff v. Tokenize Inc., — A.3d —, 2020 Del. Ch. LEXIS 342 (Del. Ch. Nov. 19, 2020).

Claimant was entitled to an award of attorneys' fees because although the compensation owed to the claimant had not yet been determined by the Industrial Accident Board, the claimant's counsel obtained a favorable result for the claimant; counsel had shown that the rate charged was commensurate with those customarily charged in Delaware workers' compensation cases, as well as properly reflective of counsel's experience,

reputation and ability. Foraker v. Amazon.com, Inc., — A.3d —, 2021 Del. Super. LEXIS 30 (Del. Super. Ct. Jan. 12, 2021).

Trial court awarded attorneys' fees to a limited liability company (LLC) in a dispute involving contractual and tort claims because the parties' license agreement provided for an award of attorneys' fees to the LLC as the reasonably prevailing party on all contractual claims; although the LLC failed to segregate noncompensable hours, the court considered that the case lacked novelty, that the litigation prevented the attorneys from working on other remunerative work, that the fee was not contingent and that the hourly fee was reasonable. Optical Air Data Sys., LLC v. L-3 Communs. Corp., — A.3d —, 2021 Del. Super. LEXIS 113 (Del. Super. Ct. Feb. 8, 2021).

In an action by a condominium owner against a condominium association that retaliated against the owner by publicizing the owner's appeal from a fine, the owner was entitled to recover litigation expenses pursuant to the Delaware Uniform Common Interest Ownership Act ("DUCIOA," 25 Del. C. § 81-101 et seq.) because: (1) the association's declarations of covenants, conditions and restrictions did not conflict with the DUCIOA enforcement provision; (2) the owner established that the association breached both the declaration and DUCIOA; (3) fees were warranted due to the owner having been adversely affected by actions of the association; (4) it was an appropriate case for expense shifting under DUCIOA; and (5) the court considered reasonableness factors set out in this rule. Bragdon v. Bayshore Prop. Owners Ass'n, 251 A.3d 661 (Del. Ch. 2021).

In a condominium association's action alleging defendant failed to pay liens and assessments against defendant and defendant's townhouse unit, an award of attorneys' fees to the association in the amount of $34,307 was proper because: (1) the primary reason for the fees was the litigation strategy adopted by the defendant; (2) the record was replete with opportunities to end the litigation and mitigate liability for attorneys' fees; and (3) defendant eventually did what could have been done much earlier by paying the assessments. Linden Green Condo. Ass'n v. Larkin, — A.3d —, 2022 Del. Super. LEXIS 130 (Del. Super. Ct. Mar. 31, 2022).

— Retainer.

Attorney's acceptance of a $1,000.00 retainer, without providing the client with a written explanation of fees, was in violation of subsection (f) of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Attorney violated Law. R. Prof. Conduct 1.5(f) by: (1) failing to provide a client with a written statement that a $1,500 advance fee was refundable (if not earned) and stating the basis under which the fees would be considered to have been earned, whether in whole or in part; and (2) by failing to deposit, account for and retain the $1,500 in a client trust account as fees were earned. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Attorney did not violate Law. Prof. Conduct R. 1.5 where a retainer was deposited originally into a trust account and not into an operating account; because no fees were claimed to have been earned at the time the retainer was deposited, a written statement of the fees earned was not required. In re Sisk, 54 A.3d 257 (Del. 2012).

Attorney violated various disciplinary rules because the results of an audit showed the attorney's failure to adequately maintain books and records, to safeguard client funds or to indicate in the retainer that unearned fees were refundable. In re A Member of the Bar of the Supreme Court of Delaware: Fred Bar, 99 A.3d 639 (Del. 2013), cert. denied, 573 U.S. 916, 134 S. Ct. 2822, 189 L. Ed. 2d 785 (U.S. 2014).

— Standard of review.

For the court, 1 of the most important factors in reviewing and awarding attorneys' fees is if the attorneys cannot take on other work because of the requirements of the case for which fees are sought. Cuppels v. Mountaire Corp., — A.3d —, 2021 Del. Super. LEXIS 292 (Del. Super. Ct. Apr. 12, 2021).

Sanctions.

— Reprimand.

For the violation of both Rule 1.4(b) and subdivision (e)(1) of this Rule, the appropriate sanction to be imposed is a public reprimand. In re Berl, 560 A.2d 1009 (Del. 1989).

When respondent violated Law. Prof. Conduct R. 1.5(f), 1.15(a) and (d), 8.4(c) and (d) by failing to properly maintain law firm's books and records

for 3 consecutive years, filing inaccurate certificates of compliance for 3 consecutive years, and failing to give flat fee clients proper notice that the fee was refundable if not earned, a public reprimand with a 2-year period of probation was appropriate; this was true, even considering the mitigating factors, given a lawyer's obligation to maintain orderly books and records. In re Castro, 160 A.3d 1134 (Del. 2017).

— Suspension.

Where a lawyer engaged in a pattern of knowing misconduct over a period of several years by commingling client funds, failing to maintain the lawyer's law practice accounts, failing to pay taxes, falsely representing on certificates of compliance that the lawyer complied with the record-keeping requirements and paid taxes, the lawyer violated Del. Law. R. Prof. Conduct 1.5(f), 1.15(a), (b), (d), 8.4(b), (c), (d); as a result, the lawyer was suspended for 3 years. In re Garrett, 835 A.2d 514 (Del. 2003).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

There was substantial evidence to support the factual findings and conclusions of law of the Board on Professional Responsibility regarding an attorney's violations of Law Prof. Conduct R. 1.5(f), 1.15(a) and (b), and 8.4(c), based on the attorney's misappropriation of clients' fees on various occasions, and the attorney's failure to include the typical refund provision regarding unearned fees in the retainer agreements for other clients; a 1-year suspension was warranted. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18

months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Rule 1.6. Confidentiality of information.

(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, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating

to the representation of a client. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not

disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical 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.

[5] *Authorized disclosure.* — Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] *Disclosure adverse to client.* — Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Disclosure is not permitted under paragraph (b)(3) when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense if that lawyer's services were not used in the initial crime or fraud; disclosure would be permitted, however, if the lawyer's services are used to commit a further crime or fraud, such as the crime of obstructing justice. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, if commission of the initial act has already occurred without the use of the lawyer's services, the lawyer does not have discretion under this paragraph to use or disclose the client's information.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)
(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)
(6) permits the lawyer to make such disclosures as are necessary to comply with the law. See, e.g., 29 DEL. CODE ANN. § 9007A(c) (which

provides that an attorney acting as guardian ad litem for a child in child welfare proceedings shall have the "duty of confidentiality to the child unless the disclosure is necessary to protect the child's best interests").

[13] Paragraph (b)(6) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a)

prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[15] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the

other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

[18] *Acting competently to preserve confidentiality.* — Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or it may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the

sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

[20] *Former client.* — The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

NOTES TO DECISIONS

Analysis

Confidentiality.

Conflicts of interest.

Confidentiality.

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

Although the plaintiff's counsel should not have given the plaintiff a juror's phone number after trial, sanctions were not imposed on counsel because no convincing evidence showed that counsel suggested that plaintiff contact the juror; plaintiff was not sanctioned because no authority barred plaintiff from contacting the juror. Baird v. Owczarek, 2013 Del. Super. LEXIS 377 (Del. Super. Ct. Aug. 29, 2013), rev'd, 93 A.3d 1222 (Del. 2014).

There was no bona fide condition for the court's recusal limited to the issue of counsel's withdrawal, because counsel could strictly limit disclosures to the court to preserve the client's confidentiality pursuant to counsel's professional conduct obligations. State v. Pardo, 2015 Del. Super. LEXIS 548 (Del. Super. Ct. Oct. 27, 2015).

Conflicts of interest.

Because the defendant did not object to a law firm's representation of the plaintiff during the negotiations of a merger agreement, and failed to point to information or confidences obtained by the firm in its prior work for the defendant that would have a material influence on the proceedings, there was no basis to disqualify the firm. Rohm & Haas Co. v. Dow Chem. Co., 2009 Del. Ch. LEXIS 249 (Del. Ch. Feb. 12, 2009).

Rule 1.7. Conflict of interest: Current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

COMMENT

[1] *General Principles.* — Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek

court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[6] *Identifying conflicts of interest: Directly adverse.* — Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] *Identifying Conflicts of Interest: Material Limitation.* — Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint

venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

[9] *Lawyer's Responsibilities to Former Clients and Other Third Persons.* — In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

[10] *Personal Interest Conflicts.* — The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10(personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the

lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

[13] *Interest of Person Paying for a Lawyer's Service.* — A lawyer may be paid from a source other than the client, including a coclient, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

[14] *Prohibited Representations.* — Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude

that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

[18] *Informed Consent.* — Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses

to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[20] *Consent Confirmed in Writing.* — Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[21] *Revoking Consent.* — A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

[22] *Consent to Future Conflict.* — Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally

determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

[23] *Conflicts in Litigation.* — Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might

create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of there presentations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

[26] *Nonlitigation Conflicts.* — Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon

the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

[29] *Special Considerations in Common Representation.* — In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed

antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than

when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] *Organizational Clients.* — A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

NOTES TO DECISIONS

Analysis

Civil liability.

Client relations.

— Class actions.

— Conflicts of interest.

— Disqualification.

— Joint representation.

Enforcement.

Sanctions.

— Determining factors.

Civil liability.

Client's claim that a lawyer and law firm acted in contravention of the client's best interest by maintaining representation (notwithstanding an alleged conflict of interest) was not actionable because the client's "conflict of interest" claim was predicated on this rule; a violation of the Rules of Professional Conduct did not provide the basis for civil liability, however the violation could be utilized as evidence in the client's negligence claim. Dickerson v. Murray, 2015 Del. Super. LEXIS 49 (Del. Super. Ct. Feb. 3, 2015).

Client relations.

— Class actions.

Counsel representing a shareholder class in a derivative suit was not subject to being disqualified for advocating the adoption of a settlement proposal to which some members of the class objected. In re M&F Worldwide Corp. S'holders Litig., 799 A.2d 1164 (Del. Ch. 2002).

Assuming that there was a contract by which a law firm engaged a representative plaintiff to perform legal work in class action litigation, any purported contract would have been void and unenforceable as it was unethical and in violation of the principles governing representative

actions in Delaware; in particular, the agreement would have violated Law. R. Prof. Conduct 1.7(a) as there was an inherent conflict of interest in the representative plaintiff serving both as the class representative and as an attorney for the class. Fuqua Indus. S'holder Litig. v. Abrams (In re Fuqua Indus.), 2006 Del. Ch. LEXIS 167 (Del. Ch. Sept. 7, 2006), aff'd, 922 A.2d 414 (Del. 2007).

Appellant class representative's alleged contract to share fees with class counsel was unenforceable under Emerald Partners v. Berlin, 564 A.2d 670 (Del. Ch. 1989), because appellant succeeded appellant's wife as the representative plaintiff in the class action suit and did not obtain consent of all class members to waive the conflict of interest under Law. R. Prof. Conduct 1.7. Abrams v. Sachnoff & Weaver, Ltd., 922 A.2d 414 (Del. 2007).

— Conflicts of interest.

Duty involved in this rule is one of loyalty to client. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986), disapproved, Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir. 1988).

This rule applies to both simultaneous representation of two clients, or successive representation, where the attorney-client relationship has been formally terminated. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986), disapproved, Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir. 1988).

The threshold question in determining the applicability of subsection (a) is whether an attorney-client relationship existed. Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992).

In a matter before the Industrial Accident Board, attorney violated subsection (b) by representing a client in a particular motion when the client's position on the matter was directly adverse to the attorney's interests. In re Maguire, 725 A.2d 417 (Del. 1999).

Positional conflict of interest required granting of defense attorney's motion to withdraw, and appointment of new appellate counsel, where the attorney's representation of another client facing the death penalty

required that attorney to take a contrary position before the Supreme Court of Delaware. Williams v. State, 805 A.2d 880 (Del. 2002).

Defense counsel's nomination, by the murder victim's aunt, for the position of a family court commissioner during the guilt phase of defendant's trial did not violate defendant's right to effective assistance of counsel free from conflicts of interest or divided loyalties, as the trial court properly determined that the attorney did not have a conflict of interest, under the former version of subsection (b) of this rule. Swan v. State, 820 A.2d 342 (Del. 2003), cert. denied, 540 U.S. 896, 124 S. Ct. 252, 157 L. Ed. 2d 174 (U.S. 2003), overruled in part, Baker v. State, 906 A.2d 139 (Del. 2006).

Plaintiffs, two directors of a family corporation and the corporation, failed to prove third director's use of long-time corporation and family attorneys to defend against that director's removal by shareholders in a declaratory judgment action threatened to undermine fairness and integrity of proceeding or violate Del. Law. R. Prof. Conduct 1.7, 1.9, 1.13(e), and 1.16(b)(1). Unanue v. Unanue, 2004 Del. Ch. LEXIS 37 (Del. Ch. Mar. 25, 2004).

Inmate's ineffective assistance of counsel claim failed, as: (1) the inmate offered no evidence that counsel had a conflict of interest under Law. R. Prof. Conduct 1.7(a)(2); (2) there was no evidence of counsel's innappropriate familiarity with the victims; (3) the inmate's plea colloquy stated that the plea was entered knowingly, voluntarily, and intelligently; (4) there was no significant risk that counsel's relationship with the victims materially affected counsel's representation of the inmate; and (5) the inmate was not prejudiced by receiving the minimum mandatory sentence. State v. Mobley, 2007 Del. Super. LEXIS 326 (Del. Super. Ct. Nov. 2, 2007).

There was no evidence that an attorney breached the duty under Law. R. Prof. Conduct 1.7-1.9 to an insolvent entity by obtaining any confidential information during the attorney's representation of the entity that would have been relevant to the audio business of a former director and officer of the insolvent entity; the attorney was thus free to act in an individual capacity as the attorney saw fit with respect to the former director's offer

of a partnership in the audio business. Gen. Video Corp. v. Kertesz, 2008 Del. Ch. LEXIS 181 (Del. Ch. Dec. 17, 2008).

Because the defendant did not object to a law firm's representation of the plaintiff during the negotiations of a merger agreement, and failed to point to information or confidences obtained by the firm in its prior work for the defendant that would have a material influence on the proceedings, there was no basis to disqualify the firm. Rohm & Haas Co. v. Dow Chem. Co., 2009 Del. Ch. LEXIS 249 (Del. Ch. Feb. 12, 2009).

Denial of an inmate's postconviction relief motion was proper as there was no per se ethical bar, and no actual conflict under Law. R. Prof. Conduct 1.7(a)(2), to defense counsel representing an inmate where that counsel was married to the inmate's former attorney in an unrelated matter. Runyon v. State, 968 A.2d 492 (Del. 2009).

Attorney was suspended from the practice of law for 3 months, followed by a 1-year period of probation, for violating Law. R. Prof. Conduct 1.1, 1.4(b), 1.7, and 1.16(a) (Interpretative Guideline Re: Residential real estate transactions); the attorney failed to obtain the clients' consent to a conflict of interest that arose when the attorney represented both the borrower and the lender in a loan transaction, and failed to inform the clients of their 3-day right to rescind. In re Katz, 981 A.2d 1133 (Del. 2009).

Attorney was suspended for 3 months, followed by 18 months of conditional probation, for having violated Law Prof. Conduct R. 1.5(f), 1.7(a), 1.15(a), 1.16(d) by: (1) having a conflict of interest with 2 clients; (2) having a personal interest in a loan transaction; (3) failing to safeguard client funds; and (4) failing to provide a new client with a fee agreement. In re O'Brien, 26 A.3d 203 (Del. 2011).

Although an attorney who represented the State was married to the homicide unit chief at the public defender's office, there was no concurrent conflict of interest because: (1) the unit chief was not personally involved; and (2) the familial relationship was not imputed to other members of the public defender's office. State v. Swanson, 2015 Del. Super. LEXIS 508 (Del. Super. Ct. Sept. 29, 2015).

There was no basis to disqualify a former paramour's attorney in a support action, because although the attorney was employed in a law firm also employing an attorney currently dating the former paramour: (1) there was no a significant risk of material limitation to the representation; (2) there was no conflict of interest; and (3) the attorney's testimony about attorneys' fees was within an exception under the professional conduct rules. Bark v. May, 2015 Del. Super. LEXIS 530 (Del. Super. Ct. Sept. 28, 2015).

Temporary stay of a garnishor's fraudulent transfer case, until issues in a judgment action to collect on a debt (Case #2) were resolved, was in the interest of justice and an effective safeguard of the parties' rights; although this section did not appear to prohibit a party from simultaneously proceeding in a fraudulent transfer action while a judgment/garnishment action was ongoing, the parties' roles in Case #2 created an unusual situation in relation to the fraudulent transfer case. White v. Preferred Inv. Servs., — A.3d —, 2019 Del. Super. LEXIS 297 (Del. Super. Ct. Apr. 26, 2019).

Temporary stay of a garnishor's fraudulent transfer case, until issues in a judgment action to collect on a debt (Case #2) were resolved, was in the interest of justice and an effective safeguard of the parties' rights because: (1) allowing the garnishor's action to proceed could cause potential conflicts in Case #2 to spill over and impact the orderly progress of the action; (2) the garnishor's dual roles were competing ones that could adversely affect the garnishor's, judgment debtor's and its debtor's rights in Case #2; (3) standing had not yet been finally determined; and (4) the garnishor's concurrent participation in more than 1 case created divided loyalties. White v. Preferred Inv. Servs., — A.3d —, 2019 Del. Super. LEXIS 297 (Del. Super. Ct. Apr. 26, 2019).

— Conflicts of interest.

Because a sale order both empowered the custodian to hire counsel for plaintiff, and required that the custodian be paid fees, it was not reasonably conceivable that payment of the custodian's fees gave rise to a concurrent conflict of interest preventing the custodian from retaining defendants to represent plaintiff under this rule. TransPerfect Glob., Inc. v.

Ross Aronstam & Moritz LLP, — A.3d —, 2022 Del. Ch. LEXIS 62 (Del. Ch. Mar. 17, 2022).

— Disqualification.

In determining whether to disqualify an attorney under this Rule, the court should balance the purposes to be served by the Rule against such countervailing interests as a litigant's right to retain counsel of his choice. In re ML-Lee Acquisition Fund II, 848 F. Supp. 527 (D. Del. 1994).

In a custody modification proceeding between parents of a minor child, a father's request to disqualify the mother's counsel due to counsel's prior representation of the father's mother was denied, as there was no conflict of interest under Law. R. Prof. Conduct 1.7(a) and Law R. Prof. Conduct 1.9(a) where counsel had previously represented the father's mother in estate and divorce matters, the representation for the most part had occurred prior to the child's birth, counsel had not met the father during representation of the mother, and a balancing of the competing interests was in favor of the mother's retention of her counsel rather than the possible minimal prejudice that the father might suffer; the father failed to show that he would suffer prejudice as a result of the continued representation, and accordingly, he did not meet his burden of showing the need for disqualification by clear and convincing evidence. G. M. v. E. T. W., 2006 Del. Fam. Ct. LEXIS 153 (Del. Fam. Ct. Sept. 12, 2006).

As there was no other client, current or former, to cause a conflict of interest, the wife's attorney was not precluded from representing the wife, when another member of the attorney's firm took the stand as a witness for the wife during the hearing. L.L.L. v. W.B.L., 2007 Del. Fam. Ct. LEXIS 196 (Del. Fam. Ct. Jan. 17, 2007).

Lender was not entitled to disqualify the borrower's counsel due to failure to show by clear and convincing evidence the existence of any prejudice in the fairness of the proceedings or that an alleged conflict existed; an alleged corporate takeover of the borrower through the exercise of the lender's alleged rights under the pledge agreement did not form a proper basis for counsel's disqualification. Triumph Mortg. Corp. v. Glasgow Citgo, Inc., — A.3d —, 2018 Del. Super. LEXIS 178 (Del. Super. Ct. Apr. 19, 2018).

In an insolvent insurer's suit against its former president for breach of fiduciary duty and a declaratory ruling, the president's pro se motion to disqualify the insurer's counsel failed because: (1) the president could not show a violation of the rule so extreme it compromised the action; (2) the president could not be prejudiced by the president's own decision as acting controller to hire the firm; and (3) the firm was retained as company counsel, not as individual counsel. Indem. Ins. Corp., RRG v. Cohen, — A.3d —, 2019 Del. Ch. LEXIS 183 (Del. Ch. Apr. 22, 2019).

— Joint representation.

Where defendants are family members who may have varying levels of culpability in alleged conspiracy, the likelihood that a conflict will eventuate and that it will materially interfere with the lawyer's independent professional judgment in considering alternatives or will foreclose courses of action that reasonably should be pursued on behalf of each client is too great to permit joint representation. United States v. Cooper, 672 F. Supp. 155 (D. Del. 1987).

Enforcement.

A nonclient litigant has standing to enforce paragraph (a) when he or she can demonstrate that the opposing counsel's conflict somehow prejudiced his or her rights. The nonclient litigant does not have standing to merely enforce a technical violation of the Rules. In re Infotechnology, Inc., 582 A.2d 215 (Del. 1990).

In enforcing paragraph (a), the burden of proof must be on the nonclient litigant to prove by clear and convincing evidence the existence of a conflict and to demonstrate how the conflict will prejudice the fairness of the proceedings. In re Infotechnology, Inc., 582 A.2d 215 (Del. 1990).

District courts are authorized to supervise the conduct of attorneys who practice before them. This power includes the authority to disqualify those whose conduct breaches the norms as established by the bar. Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992).

Sanctions.

— Determining factors.

The maintenance of the integrity of the legal profession and its high standing in the community are important factors to be considered in determining the appropriate sanction for a code violation. The maintenance of public confidence in the propriety of the conduct of those associated with the administration of justice is so important a consideration that a court may disqualify an attorney for failing to avoid even the appearance of impropriety. Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992).

Rule 1.8. Conflict of interest: Current clients: Specific rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include aspouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigations, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine, and other basic living expenses. The lawyer:

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

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

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

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

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

COMMENT

[1] *Business transactions between client and lawyer.* — A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they

represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosureis satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

[5] *Use of Information Related to Representation.* — Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information isused to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

[6] *Gifts to Lawyers.* — A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached

advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[9] *Literary Right.* — An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

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

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, and a

lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine, and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

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

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

[14] *Person Paying for a Lawyer's Services.* — Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and

there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who

recommends, employs or pays the lawyer to render legal services for another).

[15] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

[16] *Aggregate Settlements.* — Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking there presentation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other

procedural requirements designed to ensure adequate protection of the entire class.

[17] *Limiting Liability and Settling Malpractice Claims.* — Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[18] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

[19] *Acquiring Proprietary Interest in Litigation.* — Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions

developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's feesor expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

[20] *Client-Lawyer Sexual Relationships.* — The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[21] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer

relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[22] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

[23] *Imputation of Prohibitions.* — Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

NOTES TO DECISIONS

Analysis

Client relations.

— Business transactions.

— Confidentiality.

— Gifts.

— Sexual relations.

Client relations.

— Business transactions.

Although any business transaction between an attorney and client is presumptively invalid unless there is clear and convincing evidence showing full and complete disclosure of all facts known to the attorney and absolute independence of action on the part of the client, the court declined to invalidate the transaction which would preclude the plaintiff

from recovering feed moneys. Burger v. Level End Dairy Investors, 125 B.R. (Bankr. D. Del. 1991).

— Confidentiality.

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

— Gifts.

Attorney violated this Rule when, upon learning of client's intent to leave him ten percent of her estate, he did not advise her to obtain independent counsel to handle this matter. In re McCann, 669 A.2d 49 (Del. 1995).

— Sexual relations.

Three-year suspension, along with other conditions, was the appropriate sanction for an attorney who admitted having had a sexual relationship with a client (who claimed to have felt pressured into it) that had not pre-existed representation of the client, and where the attorney was also shown by clear and convincing evidence to have engaged in conduct with clients and employees of the firm that amounted to the Delaware misdemeanors of sexual harassment and offensive touching. In re Tenenbaum, 880 A.2d 1025 (Del. 2005).

Rule 1.9. Duties to former clients.

(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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person

could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to there assignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] 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. For example, a lawyer who has represented a business person and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the

public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[4] *Lawyers Moving Between Firms.* — When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later

joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

NOTES TO DECISIONS

Analysis

Client relations.

— Conflicts of interest.

— Disqualification.

— "Former client status".

— Shareholders' derivative suits.

Professional conduct.

— Candor to the tribunal.

Client relations.

— Conflicts of interest.

Because the defendant did not object to a law firm's representation of the plaintiff during the negotiations of a merger agreement, and failed to point to information or confidences obtained by the firm in its prior work for the defendant that would have a material influence on the proceedings, there was no basis to disqualify the firm. Rohm & Haas Co. v. Dow Chem. Co., 2009 Del. Ch. LEXIS 249 (Del. Ch. Feb. 12, 2009).

Public defender's office failed to prove an actual conflict of interest existed in the office's prior representation of a State's witness and defendant, and was not entitled to withdraw as counsel for defendant, because: (1) the office's representation of the witness and defendant were not substantially related; and (2) the witness was represented by a different public defender than those representing defendant. State v. Kent, 2014 Del. Super. LEXIS 558 (Del. Super. Ct. Sept. 3, 2014).

Law firm who had helped a corporate debtor sell a portfolio of leases, and who was later hired by real estate professionals, was not disqualified from representing the professionals in an adversary proceeding filed by California limited liability companies (LLCs) alleging that the professionals committed fraud to obtain a higher price for the portfolio merely because the firm had represented the LLCs in other cases; the LLCs failed to show that there was a substantial relationship between

cases where the law firm served as the LLCs' counsel and the adversary proceeding the LLCs filed against the debtors' professionals, or that the law firm obtained information about the LLCs while representing them in other cases that it could not use without violating Law. Prof. Conduct R. 1.9. Alamo Group, LLC v. A&G Realty Partners, LLC, 2015 Bankr. LEXIS 467 (Bankr. D. Del. Feb. 2, 2015), dismissed without prejudice, 529 B.R. 825 (Bankr. D. Del. 2015).

Trust beneficiaries' defense of counsel's conflict of interest was waived because the beneficiaries failed to raise this issue as a defense to the trustees' application for attorneys' fees in a timely manner, despite multiple opportunities to do so. In re Hawk Mt. Trust, 2015 Del. Ch. LEXIS 236 (Del. Ch. Sept. 8, 2015).

— Disqualification.

An attorney's representation of a client who was suing a former client on a matter substantially related to one on which the attorney previously worked was an ethical violation resulting in the attorney's disqualification. Webb v. E.I. Du Pont De Nemours & Co., 811 F. Supp. 158 (D. Del. 1992).

Defendant's motion to disqualify plaintiff's counsel under the former version of this rule was denied, as defendant had no reasonable basis to conclude that an attorney-client relationship had been established with plaintiff's counsel at an earlier meeting, and defendant failed to show prejudice from disclosure of information exchanged at the meeting because defendant later disclosed much of this information in a proxy statement and in discussions with plaintiff. Benchmark Capital Ptnrs. IV, L.P. v. Vague, 2002 Del. Ch. LEXIS 108 (Del. Ch. Sept. 3, 2002).

Trial court denied a motion to disqualify plaintiff's counsel, as prior representation of a defendant by the same law firm involved a case that was not at all substantially related; any alleged release of confidential information was deemed minimal by the trial court. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

Violation of Law. Prof. Conduct R. 1.9 does not require automatic disqualification; a court reviewing the motion must weigh the effect of any alleged conflict upon the fairness and integrity of the proceedings

before disqualifying the challenged counsel. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

Party seeking to disqualify opposing council based on council's prior representation of it is not required to point to specific confidential information that it believes the council possesses. Acierno v. Hayward, 2004 Del. Ch. LEXIS 138 (Del. Ch. July 1, 2004).

State Department of Transportation (DOT) presented evidence that arguably supported disqualification of plaintiff's lawyer based on a conflict of interest (in that the attoney inevitably would be placed in a position where confidential information obtained from prior representation of DOT would be used to its disadvantage in the litigation) under Law Prof. Conduct R. 1.9.; the threat to the fair and efficient administration of justice was sufficiently palpable to support the court's exercise of jurisdiction over DOT's motion to disqualify. Acierno v. Hayward, 2004 Del. Ch. LEXIS 138 (Del. Ch. July 1, 2004).

In a suit for a declaratory judgment as to a lessee's obligations under a lease, counsel for the lessor was not subject to disqualification under Model Rules Prof'l Conduct R. 1.9 because: (1) counsel's prior representation of the lessee was limited to regulatory findings and terminated upon the closing of a transfer of stock; (2) the nature of the current litigation was a landlord-tenant dispute that was unrelated to the prior representation; and (3) the information provided to counsel in the prior representation was not likely to be relevant to the current litigation. Integrated Health Servs. v. THCI, Co. LLC, 327 B.R. 200 (D. Del. 2005).

In a real estate dispute, the mere fact that counsel for one party had once advised a long-dead partner of an opposing party in entirely unrelated matters was not grounds for disqualification of counsel; there was simply no basis for supposing any impropriety or unfairness. Hendry v. Hendry, 2005 Del. Ch. LEXIS 187 (Del. Ch. Dec. 1, 2005).

Where attorney disqualification was sought under Model Rules of Prof'l Conduct R. 1.9, which Delaware had adopted, plaintiff's argument that no conflict arose from the representation of defendant by plaintiff's former attorney, until the earlier case involving plaintiff was brought up in a deposition, failed, as Rule 1.9 covered more than the disclosure of

confidential information. Conley v. Chaffinch, 431 F. Supp. 2d 494 (D. Del. 2006).

In a custody modification proceeding between parents of a minor child, a father's request to disqualify the mother's counsel due to counsel's prior representation of the father's mother was denied, as there was no conflict of interest under Law. R. Prof. Conduct 1.7(a) and Law R. Prof. Conduct 1.9(a) where counsel had previously represented the father's mother in estate and divorce matters, the representation for the most part had occurred prior to the child's birth, counsel had not met the father during representation of the mother, and a balancing of the competing interests was in favor of the mother's retention of her counsel rather than the possible minimal prejudice that the father might suffer; the father failed to show that he would suffer prejudice as a result of the continued representation, and accordingly, he did not meet his burden of showing the need for disqualification by clear and convincing evidence. G. M. v. E. T. W., 2006 Del. Fam. Ct. LEXIS 153 (Del. Fam. Ct. Sept. 12, 2006).

During challenge to merger process, defendant merger parties moved to disqualify the law firm retained to advise plaintiff merger challengers because the law firm had access to confidential information regarding 1 of the merger parties from a prior merger case; the court declined to determine whether a conflict of interest existed, but denied the motion to disqualify due to the delay in raising the issue, plus the harm that would result to 1 merger challenger if forced to change law firms. Express Scripts, Inc. v. Crawford, 2007 Del. Ch. LEXIS 18 (Del. Ch. Jan. 25, 2007).

Counsel representing the wife in a divorce proceeding did not have to be disqualified from that representation where a paralegal in the husband's firm stopped working for that firm and went to work for the law firm representing the wife as: (1) the paralegal had performed a minimal amount of work on the case; (2) the paralegal and wife's counsel had maintained a "cone of silence" on the matter by not speaking about it, minimizing the possibility that confidential information could be passed along; and (3) no showing had been made regarding a breach of client confidentiality in violation of Law R. Prof. Conduct 1.9(b) or 1.10(c). In re Marriage of C., 2008 Del. Fam. Ct. LEXIS 124 (Del. Fam. Ct. Oct. 6, 2008).

Attorney who previously represented a doctor in a medical negligence claim against the doctor was disqualified from representing a patient and that patient's spouse in their medical negligence claim against the doctor, as there was an irreconcilable conflict of interest under Law. R. Prof. Conduct 1.9(a); the 2 actions were substantially related and the gravamen of the claims were the same. Fernandez v. St. Francis Hosp., 2009 Del. Super. LEXIS 287 (Del. Super. Ct. Aug. 3, 2009).

In a patent infringement suit against an electronics company, an attorney and the attorney's firm were disqualified under Law. R. Prof. Conduct 1.9 from representing plaintiff where: (1) the attorney had represented the company in an earlier suit, while working at a second firm; (2) the subject matter of the earlier suit concerned the same memory chip technology at issue in instant suit; (3) the appearance of impropriety was reflected in the fact that the attorney's representation of the company was not thoroughly vetted at the time the attorney began working at the firm; (4) the firm's conflict review was limited to what amounted to a word search; and (5) the company was not alerted to the attorney's representation of plaintiff in the case at bar. Apeldyn Corp. v. Samsung Elecs. Co.., 660 F. Supp. 2d 557 (D. Del. 2009).

Even if there was a conflict between counsel's present and former clients' interests pursuant to Law. Prof. Conduct R. 1.9(a), where defendants failed to show a violation so extreme that it called into question the fairness or the efficiency of the proceeding involving the validity of a corporate loan, disqualification of counsel under Ch. Ct. R. 170 was not warranted. Manning v. Vellardita, 2012 Del. Ch. LEXIS 59 (Del. Ch. Mar. 28, 2012).

Nonparties were not entitled to disqualify an attorney or a law firm from representing a seized insurer based on the attorney's former representation of 1 of the nonparties, a limited liability company (LLC) that purportedly owned 99% of the insurer, because: (1) the firm would have acquired knowledge of who controlled the LLC through representation of the insurer; and (2) vague and unsupported allegations of what the attorney "knew" were insufficient to justify disqualification. In re Rehab. of Indem. Ins. Corp., 2014 Del. Ch. LEXIS 23 (Del. Ch. Feb. 19, 2014).

No conflict of interest existed in a slip and fall case because counsel's previous representation of the property owner in an unrelated case was not shown to create a substantial risk of disclosure of material confidential information; indirect advantage from knowing the owner's settlement philosophy, and a likelihood the owner had mentioned the slip and fall incident, would be mitigated by an insurer's assuming the defense. Harper v. Beacon Air, Inc., 2017 Del. Super. LEXIS 99 (Del. Super. Ct. Mar. 2, 2017).

Lender was not entitled to disqualify the borrower's counsel due to failure to show by clear and convincing evidence the existence of any prejudice in the fairness of the proceedings or that an alleged conflict existed; an alleged corporate takeover of the borrower through the exercise of the lender's alleged rights under the pledge agreement did not form a proper basis for counsel's disqualification. Triumph Mortg. Corp. v. Glasgow Citgo, Inc., — A.3d —, 2018 Del. Super. LEXIS 178 (Del. Super. Ct. Apr. 19, 2018).

Defendant's motion to disqualify counsel based on a conflict of interest was granted because: (1) the law firm employed by plaintiff had previously represented the ultimate beneficiary of the insurance policy issued by plaintiff; (2) plaintiff's interests were directly adverse to the ultimate beneficiary's interests; (3) the law firm's inquiry into the ultimate beneficiary's practices in 2010 potentially uncovered conduct that informed the truth or falsity of the allegations in the current suit, constituting the same matter and not merely a similar matter; (4) no purported consent from defendant relieved the law firm of its obligations under this rule; and (5) the prejudice to defendant outweighed the inconvenience to plaintiff. Sun Life Assur. Co. of Can. v. Wilmington Sav. Fund Soc'y, F.S.B., — A.3d —, 2019 Del. Super. LEXIS 663 (Del. Super. Ct. Dec. 19, 2019).

Trial court adhered to its prior determination to disqualify plaintiff's counsel because: (1) counsel previously represented the ultimate beneficiary of a life insurance policy issued by plaintiff; (2) counsel's work product and even attorney testimony, were potentially pivotal evidence; and (3) given that counsel argued that its former client, the beneficiary, was illegally wagering on the lives of others, the evidence amply demonstrated materially adverse interests between counsel's former

client and plaintiff. Sun Life Assur. Co. v. Wilmington Sav. Fund Soc'y, — A.3d —, 2020 Del. Super. LEXIS 158 (Del. Super. Ct. Apr. 9, 2020), vacated, dismissed, — A.3d —, 2021 Del. Super. LEXIS 294 (Del. Super. Ct. 2021).

— "Former client status".

In order to disqualify an attorney more facts of a relationship are needed than a simple statement of prior work done in a superficially similar area. Satellite Fin. Planning Corp. v. First Nat'l Bank, 652 F. Supp. 1281 (D. Del. 1987).

Attorney who represented a parent in a custody hearing violated this Rule where the attorney had previously represented the opposing parent in a custody matter involving the same child and no consent was obtained from the opposing parent. In re Mekler, 689 A.2d 1171 (Del. 1996).

General information regarding a corporate client's business practices is not enough to deny representation by a present party's chosen counsel; knowledge of specific facts gained in a prior representation, relevant to the matter in question, ordinarily will preclude representation. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

An appropriate test for determining whether matters are substantially related for conflict purposes involves a court considering the nature and scope of the prior representation, the nature and scope of the present lawsuit, and whether the client may have revealed relevant confidential information to its counsel during the prior representation, and if so, whether the confidential information could be used against the former client in the current lawsuit; two matters may also be substantially related if there 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. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

— Shareholders' derivative suits.

Counsel representing a shareholder class in a derivative suit was not subject to being disqualified for advocating the adoption of a settlement

proposal to which some members of the class objected. In re M&F Worldwide Corp. S'holders Litig., 799 A.2d 1164 (Del. Ch. 2002).

Plaintiffs, two directors of a family corporation and the corporation, failed to prove third director's use of long-time corporation and family attorneys to defend against that director's removal by shareholders in a declaratory judgment action threatened to undermine fairness and integrity of proceeding or violate Del. Law. R. Prof. Conduct 1.7, 1.9, 1.13(e), and 1.16(b)(1). Unanue v. Unanue, 2004 Del. Ch. LEXIS 37 (Del. Ch. Mar. 25, 2004).

In a derivative action, defendants' assertions failed to demonstrate that representation by the former chief legal counsel of a parent company was substantially related to the instant lawsuit involving a sale of the parent's and non-wholly owned subsidiary's assets, because the counsel was not challenging a series of transactions in which counsel was a key participant, but rather was challenging the allocation in a single transaction from whose negotiations counsel was actively excluded; additionally, counsel had a role as a member of the subsidiary in approving the transactions, distinct from the role as counsel of the parent. Bakerman v. Sidney Frank Importing Co., 2006 Del. Ch. LEXIS 180 (Del. Ch. Oct. 10, 2006).

Professional conduct.

— Candor to the tribunal.

Even though there was no cause to disqualify counsel or revoke counsel's admission pro hac vice status, where counsel failed to disclose a colorable claim of conflict between former and present clients pursuant to Law. Prof. Conduct R. 1.9(a), such evidenced a lack of candor to the court and warranted referral to the disciplinary authorities. Manning v. Vellardita, 2012 Del. Ch. LEXIS 59 (Del. Ch. Mar. 28, 2012).

Rule 1.10. Imputation of conflicts of interest: General rule.

(a) Except as otherwise provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a client in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the affected former client.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

COMMENT

[1] *Definition of "firm".* — For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2]-[4].

[2] *Principles of imputed disqualification.* — The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter

to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the

effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

NOTES TO DECISIONS

Analysis

Conflicts of interest.

Imputed conflicts.

Screening.

Conflicts of interest.

Where a driver's parent had been previously represented by a member of the injured parties' law firm, but the driver was not previously represented by the injured parties' attorney or the attorney's law firm, the driver did not show a sufficient basis to disqualify the attorney or the firm based on a conflict of interest. Deptula & Swontek v. Steiner, 2003 Del. Super. LEXIS 412 (Del. Super. Ct. Dec. 15, 2003).

An appropriate test for determining whether matters are substantially related for conflict purposes involves a court considering the nature and scope of the prior representation, the nature and scope of the present lawsuit, and whether the client may have revealed relevant confidential information to its counsel during the prior representation, and if so, whether the confidential information could be used against the former client in the current lawsuit; 2 matters may also be substantially related if

there 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. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

General information regarding a corporate client's business practices is not enough to deny representation by a present party's chosen counsel; knowledge of specific facts gained in a prior representation, relevant to the matter in question, ordinarily will preclude representation. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

Trial court denied a motion to disqualify plaintiff's counsel, as prior representation of a defendant by the same law firm involved a case that was not at all substantially related; any alleged release of confidential information was deemed minimal by the trial court. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

Counsel representing the wife in a divorce proceeding did not have to be disqualified from that representation where a paralegal in the husband's firm stopped working for that firm and went to work for the law firm representing the wife as: (1) the paralegal had performed a minimal amount of work on the case; (2) the paralegal and wife's counsel had maintained a "cone of silence" on the matter by not speaking about it, minimizing the possibility that confidential information could be passed along; and (3) no showing had been made regarding a breach of client confidentiality in violation of Law R. Prof. Conduct 1.9(b) or 1.10(c). In re Marriage of C., 2008 Del. Fam. Ct. LEXIS 124 (Del. Fam. Ct. Oct. 6, 2008).

Public defender's office failed to prove an actual conflict of interest existed in the office's prior representation of a State's witness and defendant, and was not entitled to withdraw as counsel for defendant, because: (1) the office's representation of the witness and defendant were not substantially related; and (2) the witness was represented by a different public defender than those representing defendant. State v. Kent, 2014 Del. Super. LEXIS 558 (Del. Super. Ct. Sept. 3, 2014).

Imputed conflicts.

Where plaintiff had an attorney-client relationship for almost two years before entering into a service agreement for dairy farm with another attorney in the same firm, the original attorney-client relationship must be imputed to the second contracting attorney. Burger v. Level End Dairy Investors, 125 B.R. 894 (Bankr. D. Del. 1991).

Duty of loyalty to a former client not only applies to the individual attorney, but is imputed to the law firm, as a firm of lawyers is essentially considered one lawyer for purposes of the rules governing loyalty to the client; as members of the same law firm, attorneys are expected to avoid conflicts of interests that arise not only with their own former clients, but all former clients of the firm. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

There was no basis to disqualify a former paramour's attorney in a support action, because although the attorney was employed in a law firm also employing an attorney currently dating the former paramour: (1) there was no a significant risk of material limitation to the representation; (2) there was no conflict of interest; and (3) the attorney's testimony about attorneys' fees was within an exception under the professional conduct rules. Bark v. May, 2015 Del. Super. LEXIS 530 (Del. Super. Ct. Sept. 28, 2015).

Disqualification of a patient's chosen law firm was warranted because: (1) the patient's attorney and another attorney were partners during previous representation of the doctor at issue in a separate matter; (2) the attorneys continued to be partners in the instant matter; and (3) the remedy of "screening off" did not apply in cases of a long-standing partnership. Bleacher v. Bose, 2017 Del. Super. LEXIS 223 (Del. Super. Ct. May 3, 2017).

Screening.

An appropriate screening mechanism, in the proper circumstances, may rebut the presumption of shared confidences that arises under this rule in cases where the disqualified attorney's conflict of interest originated in private practice. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F.

Supp. 418 (D. Del. 1986), disapproved, Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir. 1988).

The screening procedure relating to lawyers in conflict of interest areas should be referred to figuratively as a "cone of silence" rather than a "Chinese wall"; the conical image more appropriately describes the responsibility of the individual attorney to guard the secrets of his former client. He is commanded by the ethical rules to seal, or encase, these particular confidences within his own conscience. The latter term is suggestive of attempts in the context of a large law firm to physically cordon off attorneys possessing information from the other members of the firm who represent clients whose interests are adverse to interests of these attorneys' former clients. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986), disapproved, Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir. 1988).

Although an attorney who previously represented a doctor in a medical negligence claim against the doctor was disqualified from representing a patient and that patient's husband in their medical negligence claim against the doctor, there was no conflict that prevented the attorney's firm from continuing to represent the patient and the patient's husband provided that the appropriate steps were taken to "wall off" the attorney from further representation pursuant to Law. R. Prof. Conduct 1.10(c). Fernandez v. St. Francis Hosp., 2009 Del. Super. LEXIS 287 (Del. Super. Ct. Aug. 3, 2009).

Rule 1.11. Special conflicts of interest for former and current government officers and employees.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or

employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and

substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

NOTES TO DECISIONS

Analysis

Conflicts of interest.

Screening.

Conflicts of interest.

Although sentencing counsel had personally prosecuted defendant in defendant's original criminal case, counsel was not involved as a prosecutor in the violation of probation (VOP) case in which defendant was found to have violated defendant's probation, and the VOP case was not the same "matter" as the original criminal case for purposes of Law. Prof. Conduct R. 1.11(e), as the VOP case involved defendant's subsequent conduct; even assuming that the VOP proceeding involved the same matter, defendant failed to show actual prejudice as defendant admitted that counsel vigorously represented defendant. Hitchens v. State, 931 A.2d 437 (Del. 2007).

Screening.

An appropriate screening mechanism, in the proper circumstances, may rebut the presumption of shared confidences that arises under Rule 1.10 in cases where the disqualified attorney's conflict of interest originated in private practice. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986), disapproved, Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir. 1988).

The screening procedure relating to lawyers in conflict of interest areas should be referred to figuratively as a "cone of silence" rather than a "Chinese wall"; the conical image more appropriately describes the responsibility of the individual attorney to guard the secrets of his former client. He is commanded by the ethical rules to seal, or encase, these particular confidences within his own conscience. The latter term is

suggestive of attempts in the context of a large law firm to physically cordon off attorneys possessing information from the other members of the firm who represent clients whose interests are adverse to interests of these attorneys' former clients. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986), disapproved, Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir. 1988).

Rule 1.12. Former judge, arbitrator, mediator or other third-party neutral.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member

court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.13. Organization as client.

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) 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. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

[1] *The Entity as the Client.* — An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or

prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

[5] *Relation to Other Rules.* — The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

[6] *Government Agency.* — The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of

these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

[7] *Clarifying the Lawyer's Role.* — There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

[9] *Dual Representation.* — Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

[10] *Derivative Actions.* — Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the

organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

NOTES TO DECISIONS

Shareholders' derivative suits.

Plaintiffs, two directors of a family corporation and the corporation, failed to prove third director's use of long-time corporation and family attorneys to defend against that director's removal by shareholders in a declaratory judgment action threatened to undermine fairness and integrity of proceeding or violate Del. Law. R. Prof. Conduct 1.7, 1.9, 1.13(e), and 1.16(b)(1). Unanue v. Unanue, 2004 Del. Ch. LEXIS 37 (Del. Ch. Mar. 25, 2004).

Rule 1.14. Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some

persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, 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. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

[5] *Taking Protective Action.* — If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective

agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

[8] *Disclosure of the Client's Condition.* — Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the

risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

[9] *Emergency Legal Assistance.* — In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unableto establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

NOTES TO DECISIONS

Analysis

Basis for inquiry.

Protective action.

Basis for inquiry.

Where a lawyer's actions appear contrary to the client's stated decision, the lawyer who moves for a determination of his client's competency, presumably in good faith, must, at a minimum, demonstrate an objective and reasonable basis for believing that the client cannot act in his own interest. Red Dog v. State, 625 A.2d 245 (Del. 1993).

Protective action.

Although members of defendant's defense team did not act in bad faith nor were motivated by other than the best interests of their client, the differences of opinion among the members led to inconsistent positions and a changing strategy, and did not meet the requirements of reasonableness under subsection (b) of this Rule. Red Dog v. State, 625 A.2d 245 (Del. 1993).

Rule 1.15. Safekeeping property.

(a) 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. Funds shall be kept in a separate account designated solely for funds held in connection with the practice of law in Delaware. Except as provided in (g) with respect to IOLTA-eligible funds, such funds shall be maintained in the state in which the lawyer's office is situated, or elsewhere with the consent of the client or third person. Funds of the lawyer that are reasonably sufficient to pay financial institution charges may be deposited in the separate account; however, such amount may not exceed $2,000 and must be separately stated and accounted for in the same manner as clients' funds deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the completion of the events that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer engaged in the private practice of law in Delaware, whether in an office situated in Delaware or otherwise, must maintain on a current basis financial books and records relating to such practice, and shall preserve the books and records for at least five years following the completion of the year to which they relate, or, as to fiduciary books and records, five years following the completion of that fiduciary obligation. The maintenance of books and records must conform with the following provisions:

(1) All bank statements, cancelled checks (or images and/or copies thereof), records of electronic transfers, and duplicate deposit slips relating to fiduciary and non-fiduciary accounts must be preserved. Records of all electronic transfers from fiduciary accounts shall include the name of the person authorizing transfer, the date of transfer, the name of recipient and confirmation from the banking institution confirming the number of the fiduciary account from which the funds are withdrawn and the date and time the request for transfer was completed.

(2) Bank accounts maintained for fiduciary funds must be specifically designated as "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," and must be used only for funds held in a fiduciary capacity. A designation of the account as a "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," must appear in the account title on the bank statement. Other related statements, checks, deposit slips, and other documents maintained for fiduciary funds, must contain, at a minimum, a designation of the account as "Attorney Trust Account" or "Attorney Escrow Account."

(3) Bank accounts and related statements, checks, deposit slips, and other documents maintained for non-fiduciary funds must be specifically designated as "Attorney Business Account" or "Attorney Operating Account," and must be used only for funds held in a non-fiduciary capacity. A lawyer in the private practice of law shall maintain a non-fiduciary account for general operating purposes, and the account shall be separate from any of the lawyer's personal or other accounts.

(4) All records relating to property other than cash received by a lawyer in a fiduciary capacity shall be maintained and preserved. The records must describe with specificity the identity and location of such property.

(5) All billing records reflecting fees charged and other billings to clients or other parties must be maintained and preserved.

(6) Cash receipts and cash disbursement journals must be maintained and preserved for each bank account for the purpose of recording fiduciary and non-fiduciary transactions. A lawyer using a manual system for such purposes must total and balance the transaction columns on a monthly basis.

(7) For manually maintained records, a monthly reconciliation for each bank account, matching totals from the cash receipts and cash disbursement journals with the ending check register balance, must be performed. The reconciliation procedures, however, shall not be required for lawyers using a computer accounting system or a general ledger.

(8) The general ledger balance for each bank account must be reconciled monthly to the bank reconciliation balance.

(9) Copies of retainer and compensation agreements with clients shall be maintained and preserved as required by Rule 1.5.

(10) Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf shall be maintained and preserved.

(11) Copies of records showing disbursements on behalf clients shall be maintained and preserved.

(12) With respect to all fiduciary accounts:

(A) A subsidiary ledger must be maintained and preserved with a separate account for each client or third party in which cash receipts and cash disbursement transactions and monthly balances are recorded.

(B) Monthly listings of client or third party balances must be prepared showing the name and balance of each client or third party, and the total of all balances.

(C) No funds disbursed for a client or third party should be in excess of funds received from that client or third party. If, however, through error funds disbursed for a client or third party exceed funds received from that client or third party, the lawyer shall transfer funds from the non-fiduciary account in a timely manner to cover the excess disbursement.

(D) The monthly bank reconciliation must agree with the total of the client or third party balance listing and the general ledger balance. The monthly cash receipts journal total and the bank statement monthly deposits must be reconciled. There shall be no unidentified client or third party funds. The bank reconciliation for a fiduciary account is not complete unless there is agreement with the total of client or third party accounts.

(E) If a check has been issued in an attempt to disburse funds, but remains outstanding (that is, the check has not cleared the trust or escrow bank account) six months or more from the date it was issued, a lawyer shall promptly take steps to contact the payee to determine the reason the check was not deposited by the payee, and shall issue a replacement check, as necessary and appropriate.

(F) A lawyer, law firm, or estate of a deceased lawyer who cannot, after using reasonable efforts, identify or locate the owner of funds in the law firm's or lawyer's trust account or escrow account shall hold such unidentifiable or unclaimed funds for twelve months and then remit the funds to the Lawyers' Fund for Client Protection of the Delaware Supreme Court (the "LFCP") as provided in the LFCP rules. Requests for refunds of funds remitted under this rule may be made as provided in the LFCP rules. Unidentifiable or unclaimed funds of less than $1.00 need not be remitted to the LFCP and may be deposited into the lawyer's or law firm's operating account. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph.

(G) No funds of the lawyer shall be placed in or left in the account except as provided in Rule 1.15(a).

(H) No funds which should have been disbursed shall remain in the account, including, but not limited to, earned legal fees, which must be transferred to the lawyer's non-fiduciary account on a prompt and timely basis when earned.

(I) When a separate real estate bank account is maintained for settlement transactions, and when client or third party funds are received but not yet disbursed, a listing must be prepared on a monthly basis showing the name of the client or third party, the balance due to each client or third party, and the total of all such balances. The total must agree with the reconciled cash balance and general ledger balance. Real estate accounts do not need to have cash receipts/disbursements journals.

(J) Only a lawyer admitted to practice law in Delaware or a person

under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account.

(K) Withdrawals from a client trust account shall be made only by check payable to a named payee and not to cash, or by authorized electronic transfer.

(13) If a lawyer maintains financial books and records using a computer system, the lawyer must cause to be printed each month a hard copy of all monthly journals, ledgers, reports, and reconciliations, and/or cause to be created each month an electronic backup of these documents to be stored in such a manner as to make them accessible for review by the lawyer and/or the auditor for the Lawyers' Fund for Client Protection.

(e) A lawyer's financial books and records are subject to examination by the auditor for the Lawyers' Fund for Client Protection, for the purpose of verifying the accuracy of the certificate of compliance filed each year by the lawyer pursuant to Supreme Court Rule 69. The examination must be conducted so as to preserve, insofar as is consistent with these Rules, the confidential nature of the lawyer's books and records. If the lawyer's books and records are not located in Delaware, the lawyer may have the option either to produce the books and records at the lawyer's office in Delaware or to produce the books and records at the location outside of Delaware where they are ordinarily located. If the production occurs outside of Delaware, the lawyer shall pay any additional expenses incurred by the auditor for the purposes of an examination.

(f) A lawyer holding client or third-person funds must initially and reasonably determine whether the funds should or should not be placed in an interest or dividend-bearing account for the benefit of the client or third person. In making such a determination, the lawyer must consider the financial interests of the client or third person, the costs of establishing and maintaining the account, any tax reporting procedures or requirements, the nature of the transaction involved, the likelihood of delay in the relevant proceedings, and whether the funds are of a nominal amount or are expected to be held by the lawyer for a short period of time such that the costs incurred to secure income for the client or third person would exceed such income. A lawyer must at reasonable intervals consider whether changed circumstances would warrant a new determination with respect to the deposit of client or third-person funds. Except as provided in these Rules, interest or dividends earned on client or third-person funds placed into an interest or dividend-bearing account for the benefit of the client or third person (less any

deductions for service charges or other fees of the depository institution) shall belong to the client or third person whose funds are deposited, and the lawyer shall have no right or claim to such interest or dividends, and may not otherwise receive any financial benefit or other economic concessions relating to a banking relationship with the institution where any account is maintained pursuant to this Rule.

(g) A lawyer holding client or third person funds who has reasonably determined, pursuant to subsection (f) of this Rule, that such funds need not be deposited into an interest or dividend-bearing account for the benefit of the client or third-person must establish and maintain one or more pooled trust/escrow accounts in a financial institution in Delaware for the deposit of all client or third person funds held in connection with the practice of law in Delaware that are nominal in amount or to be held by the lawyer for a short period such that the costs incurred to secure income for the client or third person would exceed such income (IOLTA-eligible funds). This requirement shall not apply to a lawyer who either has obtained inactive status pursuant to Supreme Court Rule 69(d) or has obtained a Certificate of Retirement pursuant to Supreme Court Rule 69(f). Each pooled trust/escrow account must be established as a pooled interest or dividend-bearing account (IOLTA Account) in compliance with the provisions of this Rule, except those accounts exempted under section (h)(7) below. The lawyer shall have no right or claim to such interest or dividends, and may not otherwise receive any financial benefit or other economic concessions relating to a banking relationship with the institution where any account is maintained pursuant to this Rule.

(h) Lawyers may maintain IOLTA Accounts only in financial institutions that are approved by the Lawyers Fund For Client Protection pursuant to Rule 1.15A of these Rules, and are determined by the Delaware Bar Foundation (the Foundation) to be "eligible institutions". Eligible institutions are defined as those institutions that voluntarily offer a comparable interest rate on IOLTA Accounts and meet the other requirements of this Rule. A comparable interest rate on IOLTA Accounts means a rate that is no less than the highest rate of interest or dividends generally available from the institution to its non-IOLTA customers when IOLTA Accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. In determining the comparable interest rate or dividend, an eligible institution may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting rates of interest or dividends for its customers, provided that such factors do not discriminate against IOLTA Accounts.

(1) An eligible institution may satisfy the comparable interest rate requirement by electing one of the following three options:

(A) establish the IOLTA Account as the comparable interest rate product;

(B) pay the comparable interest rate on the IOLTA Account in lieu of actually establishing the IOLTA Account as the comparable interest rate product; or

(C) pay the "Safe Harbor Rate" on the IOLTA Account (as posted on the Foundation's website). Until redetermined by the Foundation, the Safe Harbor Rate is the higher of 0.65% per annum or 65% of the Federal Funds Target Rate as of the first day of the IOLTA Account earnings period, net of Allowable Reasonable Service Charges and Fees (as defined in section (h)(5) below). The Safe Harbor Rate shall be reevaluated periodically, but no more frequently than every six months, by the Foundation to reflect an overall comparable interest rate offered by financial institutions in Delaware and may be redetermined by the Foundation following such reevaluation. Upon any such redetermination, the Foundation shall give at least 90 days advance written notice of the effective date of such redetermination to all eligible institutions maintaining any IOLTA Accounts and by posting on its website. Election of the Safe Harbor Rate is optional and eligible institutions may instead choose to satisfy compliance with this Rule by electing instead either option (A) or (B) above.

(2) IOLTA Accounts may be established as:

(A) a business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution repurchase agreement shall be fully collateralized by U. S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government), and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in U.S. Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(B) a checking account paying preferred interest rates, such as market based or indexed rates;

(C) a public funds interest-bearing checking account such as an account used for governmental agencies and other non-profit organizations;

(D) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account; or business checking with interest; or

(E) any other interest or dividend-bearing account offered by the eligible institution to its non-IOLTA customers, which is commercially reasonable to use for a pooled account of short term or nominal amount funds.

(3) Nothing in this rule shall preclude an eligible institution from paying a higher rate of interest or dividends on IOLTA Accounts than described above or electing to waive service charges or fees on IOLTA Accounts.

(4) Interest and dividends on IOLTA Accounts shall be calculated in accordance with the eligible institution's standard practice for non-IOLTA customers.

(5) "Allowable Reasonable Service Charges or Fees" for IOLTA Accounts are defined as per check charges, per deposit charges, an account maintenance fee, automated transfer ("sweep") fees, FDIC insurance fees, and a reasonable IOLTA administrative fee for the direct costs of complying with the reporting and payment requirements of this rule. Allowable Reasonable Service Charges or Fees may only be deducted from interest or dividends on an IOLTA account at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No service charges or fees other than Allowable Reasonable Service Charges and Fees may be assessed against or deducted from the interest or dividends on an IOLTA Account. No Allowable Reasonable Service Charges or Fees on an IOLTA Account for any reporting period shall be taken from interest or dividends earned on other IOLTA Accounts, or from the principal balance of any IOLTA Account. Any fees and services charges (other than Allowable Reasonable Service Charges and Fees deducted from interest on an IOLTA Account), including but not limited to bank overdraft fees, wire transfer fees, remote deposit fees and fees for checks returned for insufficient funds, shall be the sole responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA Account. Nothing in this Rule shall prohibit a lawyer or law firm maintaining an IOLTA account from recouping fees charged to their IOLTA account from the appropriate client on whose behalf the fee was incurred and as otherwise provided for in the Rules of Professional Conduct.

(6) Lawyers or law firms depositing client or third party funds in an IOLTA Account under this paragraph (h) shall direct the eligible institution:

(A) to remit interest monthly, or, with the consent of the Foundation, quarterly (net of any Allowable Reasonable Service Charges or Fees), computed on the average monthly balance in the account or otherwise computed in accordance with the institution's standard practices, provided that the eligible institution may elect to waive any or all such charges and fees;

(B) to transmit with each remittance to the Foundation a report in a form and through any reasonable manner of transmission approved by the Foundation showing the name of the lawyer or law firm on each IOLTA Account whose remittance is sent, the IOLTA Account number for each account, the amount of interest attributable to each IOLTA Account, the time period covered by the report, the rate of interest or dividend applied, the amount and type of Allowable Reasonable Service Charges or Fees deducted, if any, the average account balance for the period for which the report was made, the net amount of interest remitted for the period and such other information as may be reasonably required by the Foundation; and

(C) to transmit to the depositing lawyer or law firm a statement in accordance with normal procedures for reporting to depositors of the eligible institution.

(7) Any IOLTA account which has not or cannot reasonably be expected to generate interest or dividends in excess of Allowable Reasonable Service Charges or Fees, may, under criteria established by the Foundation, be exempted by the Foundation from required participation in the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. The lawyer or law firm whose account has been exempted will annually certify to the Supreme Court, as part of its Annual Certificate of Compliance, that the lawyer or law firm expects no material increase in activity in its exempted trust/escrow account during the 12 months following the date of the filing of the Certificate. The Foundation will review exempted accounts and may revoke the exemption if it determines that the account can generate interest or dividends in excess of Allowable Reasonable Service Charges and Fees.

(8) In order for the Foundation to be able to determine that all pooled trust/escrow accounts are properly identified by the eligible institutions, each lawyer or law firm that maintains a pooled trust/escrow account is deemed to

have authorized the Foundation to have access to the pooled trust/escrow account-related information contained within its Annual Certificate of Compliance, filed annually with the Supreme Court. In addition, when a lawyer or law firm requests an eligible institution to open an IOLTA account, the lawyer or law firm will submit the request in writing to the institution, using the designated form letter located on the Foundation's website, with a copy of said letter to be sent to the Foundation by the lawyer or law firm.

(9) Should the Foundation determine that an IOLTA Account of a financial institution has failed to comply with the provisions of this Rule, the Foundation shall notify the affected lawyer or law firm and the financial institution of such failure to comply, specifying the corrective action needed, with a reasonable time specified by the Foundation for the compliance to be achieved, but no longer than 90 days. Should compliance not be achieved within the time specified, the Foundation shall notify the affected lawyer or law firm, the financial institution and the Office of Disciplinary Counsel.

(i) The funds transmitted to the Foundation shall be available for distribution for the following purposes:

(1) To improve the administration of justice;

(2) To provide and to enhance the delivery of legal services to the poor;

(3) To support law related education;

(4) For such other purposes that serve the public interest.

The Delaware Bar Foundation shall recommend for the approval of the Supreme Court of the State of Delaware, such distributions as it may deem appropriate. Distributions shall be made only upon the Court's approval.

(j) Lawyers or law firms, depositing client or third party funds in a pooled trust/escrow account under this paragraph shall not be required to advise the client or third party of such deposit or of the purposes to which the interest accumulated by reason of such deposits is to be directed.

(k) A lawyer shall not disburse fiduciary funds from a bank account unless the funds deposited in the lawyer's fiduciary account to be disbursed, or the funds which are in the lawyer's unrestricted possession and control and are or will be timely deposited, are good funds as hereinafter defined. "Good funds" shall mean:

(1) cash;

(2) electronic fund ("wire") transfer;

(3) certified check;

(4) bank cashier's check or treasurer's check;

(5) U.S. Treasury or State of Delaware Treasury check;

(6) Check drawn on a separate trust or escrow account of an attorney engaged in the private practice of law in the State of Delaware held in a fiduciary capacity, including his or her client's funds;

(7) Check of an insurance company that is authorized by the Insurance Commissioner of Delaware to transact insurance business in Delaware;

(8) Check in an amount no greater than $10,000.00;

(9) Check greater than $10,000.00, which has been actually and finally collected and may be drawn against under federal or state banking regulations then in effect;

(10) Check drawn on an escrow account of a real estate broker licensed by the state of Delaware up to the limit of guarantee provided pertransaction by statute.

(Amended, effective Jan. 1, 2004; Oct. 20, 2008, effective Jan. 1, 2009; Dec. 12, 2008, effective Jan. 1, 2009; Feb. 16, 2010, effective May 1, 2010; June 10, 2010, effective Nov. 1, 2010; effective Apr. 25, 2012; effective Jan. 21, 2015; effective Nov. 20, 2025.)

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against

funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[4] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[5] The extensive provisions contained in Rule 1.15(d) represent the financial recordkeeping requirements that lawyers must follow when engaged in the private practice of law in Delaware. These provisions are also reflected in a certificate of compliance that is included in each lawyer's registration statement, filed annually pursuant to Supreme Court Rule 69. Compliance with these provisions provides the necessary level of control to safeguard client and third party funds, as well as the lawyer's operating funds. When these recordkeeping procedures are not performed on a prompt and timely basis, there will be a loss of control by the lawyer, resulting in insufficient safeguards over client and other property.

[6] All Delaware lawyers engaged in the private practice of law in Delaware must maintain an operating/business account for that practice. Unlike Rule 1.15(a), which requires the property of clients or third persons to be held in a fiduciary account designated solely for funds held in connection with the practice of law in Delaware, there is no requirement that the Delaware operating/business account be maintained separately from the operating/business account for practice in another jurisdiction. However, if a firm does not maintain a separate operating/business account for the Delaware practice, the account that the firm uses for the Delaware practice will be subject to audit under the LFCP Rules.

[7] Unidentifiable Funds under Rule 1.15(d)(12)(F) are funds in a lawyer or law firm's fiduciary account that cannot be reasonably documented as belonging to a client, former client, third party, or the lawyer or law firm. A lawyer or law firm's reasonable efforts to identity the owner(s) of funds include a review of transaction records, client ledgers, case files, and any other relevant fee records.

Unclaimed Funds under Rule 1.15(d)(12)(F) are funds in which a client, former client, or third party appear to have an interest, but for which the interested party has not responded to the lawyer or law firm's reasonable

efforts to return the funds. A lawyer or law firm's reasonable efforts to locate the owner(s) and return the funds include periodic correspondence of the type contemplated by the lawyer or law firm's relationship with the client, former client, or third party owner of the funds. Should such correspondence prove unsuccessful, a lawyer or law firm's reasonable efforts include efforts similar to those that would be undertaken when attempting to locate a person for service of process, such as examinations of local telephone directories, courthouse records, voter registration records, local tax records, motor vehicle records, or the use of consolidated online search services that access such records. A greater outlay of time and expense may be warranted when larger amounts of money are at issue.

[8] Rule 1.15(d)(12)(J) and (K) enumerate minimal accounting controls for client trust accounts. They also enunciate the requirement that only a lawyer admitted to the practice of law in Delaware or a person who is under the direct supervision of the lawyer shall be the authorized signatory or authorize electronic transfers from a client trust account. While it is permissible to grant limited nonlawyer access to a client trust account, such access should be limited and closely monitored by the lawyer. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds. See, Rules 5.1 and 5.3 of the Delaware Lawyers Rules of Professional Conduct.

[9] Authorized electronic transfers shall be limited to

(1) money required for payment to a client or third person on behalf of a client;

(2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation;

(3) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; or

(4) money transferred from one client trust account to another client trust account.

[10] Some of the essential financial recordkeeping issues for lawyers under this Rule include the following:

(a) Segregation of funds. Improper commingling occurs when the lawyer's funds are deposited in an account intended for the holding of client and third party funds, or when client funds are deposited in an account intended for the holding of the lawyer's funds. The only exception is found in Rule 1.15(a), which allows a lawyer to maintain $2,000 of the lawyer's funds in the fiduciary account in order to cover possible bank service charges. Keeping an accurate account of each client's funds is more difficult if client funds are combined with the lawyer's own funds. The requirement of separate bank accounts for lawyer funds and non-lawyer funds, with separate bookkeeping procedures for each, is intended to avoid commingling.

(b) Deposits of legal fees. Unearned legal fees are the property of the client until earned, and therefore must be deposited into the lawyer's fiduciary account. Legal fees must be withdrawn from the fiduciary account and transferred to the operating or business account promptly upon being earned, to avoid improper commingling. The monthly listing of client and third party funds in the fiduciary account should therefore be carefully reviewed in order to determine whether any earned legal fees remain in the account.

(c) Identity of property. The identity and location of client funds and other property must be maintained at all times. Accordingly, every cash receipt and disbursement transaction in the fiduciary account must be specifically identified by the name of the client or third party. If financial books and records are maintained in the manner, the resultant control should ensure that there are no unidentified funds in the lawyer's possession.

(d) Disbursement of funds. Funds due to clients or third parties must be disbursed without unnecessary delay. The monthly listing of client funds in the fiduciary account should therefore be reviewed carefully in order to determine whether any balances due to clients or third parties remain in the account.

(e) Negative balances. The disbursement of client or third party funds in an amount greater than the amount being held for such client or third party results in a negative balance in the fiduciary account. This should never occur when the proper controls are in place. However, if a negative balance occurs by mistake or oversight, the lawyer must make a timely transfer of funds from the operating account to the fiduciary account in order to cover the excess disbursement and cure the negative balance. Such mistakes can be avoided by making certain that the client balance sufficiently covers a potential disbursement prior to making the actual disbursement

(f) Reconciliations. Fiduciary account bank reconciliations must agree with the totals of client balances held. Only by performing a reconciliation procedure will the lawyer be assured that the cash balance in the fiduciary account exactly covers the balance of client and third party funds that the lawyer is holding.

(g) Real estate accounts. Bank accounts used exclusively for real estate settlement transactions are fiduciary accounts, and are therefore subject to the same recordkeeping requirements as other such accounts, except that cash receipts and cash disbursements journals are not required.

[11] Illustrations of some of the accounting terms that lawyers need to be aware of, as used in this Rule, include the following:

(a) Financial books and records include all paper documents or computer files in which fiduciary and non-fiduciary transactions are individually recorded, balanced, reconciled, and totaled. Such records include cash receipts and cash disbursements journals, general and subsidiary journals, general ledger, periodic reports, monthly reconciliations, listings, and so on.

(b) The cash receipts journal is a monthly listing of all deposits made during the month and identified by date, source name, and amount, and in distribution columns, the nature of the funds received, such as “fee income” or “advance from client,” and so on. Such a journal is maintained for each bank account.

(c) The cash disbursements journal is a listing of all check payments made during the month and identified by date, payee name, check number, and amount, and in distribution columns, the nature of funds disbursed, such as “rent” or “payroll,”and so on. Such a journal is maintained for each bank account. Cash receipts and cash disbursement records may be maintained in one consolidated journal.

(d) Totals and balances refer to the procedures that the lawyer needs to perform when using a manual system for accounting purposes, in order to ensure that the totals in the monthly cash receipts and cash disbursements journal are correct. The cash and distribution columns must be added up for each month, then the total cash received or disbursed must be compared with the total of all of the distribution columns.

(e) The ending check register balance is the accumulated net cash balance of all deposits, check payments, and adjustments for each bank account. This balance will not normally agree with the bank balance appearing on the end-of-month bank statement because deposits and checks may not clear with the bank until the next statement period. This is why a reconciliation is

necessary.

(f) The reconciled monthly cash balance is the bank balance conformed to the check register balance by taking into account the items recorded in the check register which have not cleared the bank. For example:

Account balance, per bank statement	$2,000.00
Add—deposits in transit (deposits in check register that do not appear on bank statement)	$1,5000.00
Less—outstanding checks (checks entered in check register that do not appear on bank statement)	($1,800.00)
Reconciled cash balance	$1,700.00

(g) The general ledger is a record in which all of a lawyer's transactions are recorded and grouped by type, such as cash received, cash disbursed, fee income, funds due to clients, and so on. Each type of transaction recorded in the general ledger is also summarized as an aggregate balance. For example, the ledger shows cash balances for each bank account which represent the accumulation of the beginning balance, all of the deposits in the period, and all of the checks issued in the period.

(h) The subsidiary ledger is the list of transactions shown by each individual client or third party, with the individual balances of each (as contrasted to the general ledger, which lists the total balances in an aggregate amount "due to clients"). The total of all of the individual client and third party balances in the subsidiary ledger should agree with the total account balance in the general ledger.

(i) A variance occurs in a reconciliation procedure when two figures which should agree do not in fact agree. For example, a variance occurs when the bank reconciliation in a fiduciary account does not agree with the total of client and third party funds that the lawyer is actually holding.

[12] Accrued interest on client and other funds in a lawyer's possession is not the property of the lawyer, but is generally considered to be the property of the owner of the principal. An exception to this legal principle relates to nominal amounts of interest on principal. A lawyer must reasonably determine if the transactional or other costs of tracking and transferring such interest to the owners of the principal are greater than the amount of the interest itself. The lawyer's proper determination along these lines will result in the lawyer's depositing of fiduciary funds into an interest-bearing account for the benefit of the owners of the principal, or into a pooled interest-bearing account. If funds are deposited into a pooled account, the interest is to be transferred (with some exception) to the Delaware Bar Foundation pursuant to the Supreme Court's Interest On Lawyer Trust Accounts Program ("IOLTA").

[13] Implicit in the principles underlying Rule 1.15 is the strict prohibition against the misappropriation of client or third party funds. Misappropriation of fiduciary funds is clearly a violation of the lawyer's obligation to safeguard client and other funds. Moreover, intentional or knowing misappropriation may also be a violation Rule 8.4(b) (criminal conduct in the form of theft) and Rule 8.4(c) (general dishonest or deceptive conduct). Intentional or knowing misappropriation is considered to be one of the most serious acts of professional misconduct in which a lawyer can engage, and typically results in severe disciplinary sanctions.

[14] Misappropriation includes any unauthorized taking by a lawyer of client or other property, even for benign reasons or where there is an intent to replenish such funds. Although misappropriation by mistake, neglect, or recklessness is not as serious as intentional or knowing misappropriation, it can nevertheless result in severe disciplinary sanctions. See, e.g. Matter of Figliola, Del. Supr., 652 A.2d 1071, 1076-78 (1995).

Revisor's note.— The Report on compliance with Rule 1.15 of the Delaware Rules of Professional Conduct and the applicable guidelines and

audit program appear as Rule VII of the Regulations of the Trustees of the Lawyer's Fund for Client Protection.

NOTES TO DECISIONS

Analysis

Client relations.

— Client funds.

— — Delivery.

— — Safeguarding.

Law firms.

— Bookkeeping.

— Reprimand.

— Taxes.

Sanctions.

— Disbarment.

— Reprimand.

— Suspension.

Client relations.

— Client funds.

— — Delivery.

Respondent violated subsection (b) of this Rule by negligently failing to account for and deliver to daughter, upon her majority, the net proceeds of the wrongful death settlement arising from her mother's fatal automobile accident. In re Barrett, 630 A.2d 652 (Del. 1993).

When an attorney failed to distribute estate funds from the estate account to beneficiaries and other third persons for almost 3 years after the deceased's death, the attorney violated Law. R. Prof. Conduct 1.15(b). In re Wilson, 886 A.2d 1279 (Del. 2005).

— — Safeguarding.

The Client's Security Trust Fund's (CSTF) efforts to assist lawyers do not absolve lawyers of the duty to read and follow Interpretive Guideline No. 2, which provides for the preservation of funds and property of clients; compliance checks performed under CSTF's direction are not audits and are not intended to verify the correctness of entries in an attorney's books and records. In re Figliola, 652 A.2d 1071 (Del. 1995).

Attorney's failing to preserve complete records of account funds, his failing to safeguard a client's funds, and his loss of a file violated subsection (a). In re Maguire, 725 A.2d 417 (Del. 1999).

Attorney's failing to comply with requirements for keeping books and records as set forth in Interpretive Guideline No. 2 violated subsection (d). In re Maguire, 725 A.2d 417 (Del. 1999).

Lawyer was disbarred for the misappropriation of client funds for the lawyer's personal use, and the failure to establish a separate account for the proceeds of the sale of a client's house, despite evidence of the lawyer's personal and emotional problems. In re Carey, 809 A.2d 563 (Del. 2002).

When an attorney admitted that he had failed to keep his property separate from that of his clients, as there were negative balances in 41 client escrow accounts and significant unidentified client funds, and he failed to pay payroll taxes for his employees for five years, totaling approximately $64,000, with estimated penalties, he was suspended from the practice of law for 3 years, with the right to seek reinstatement in 6 months. In re Landis, 850 A.2d 291 (Del. 2004).

Attorney's acceptance of a retainer of $250 from a client through a prepaid legal plan, while never contacting the client and refusing to refund the retainer until after the first disciplinary hearing, was held to have violated Law. Prof. Conduct R. 1.3, with regard to acting with reasonable diligence and promptness, Law. Prof. Conduct R. 1.4(a) and (b), with

regard to failing to keep the client reasonably informed to the extent reasonably necessary to permit the client to make informed decisions, and, Law. Prof. Conduct R. 1.15(b) and (d), with regard to failing to safeguard the client's funds and deliver them upon request; the prepaid legal firm had refused to refund the retainer and, in fact, showed no record of the amount, which had been paid directly to the attorney. In re Chasanov, 869 A.2d 327 (Del. 2005).

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

Attorney was disbarred after having been found to have violated Law. R. Prof. Conduct 1.15 and Law. R. Prof. Conduct 8.4 by misappropriating clients funds and failing to identify a bank account as a law practice account; the attorney's conduct was found to have been intentional and no mitigating factors were present where it was shown that the attorney took a long time to provide a client with refinancing proceeds and, when the attorney did, the check was returned for insufficient funds, and the attorney used a septic system escrow deposit to cover another check that the attorney had written. In re Garrett, 909 A.2d 103 (Del. 2006).

Attorney violated Law. R. Prof. Conduct 1.15(a) by failing to deposit and safeguard an advance fee of $1,500 in a client trust account until earned. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Attorney whose child stole funds from the attorney's escrow account was publicly reprimanded for violating, inter alia, Law. Prof. Conduct R. 1.15(a), (b), and (d), by failing to safeguard client funds, failing to promptly deliver funds to clients and failing to maintain the attorney's books and records. In re Otlowski, 976 A.2d 172 (Del. 2009).

Attorney was suspended for 1 year, with the suspension to run retroactively to the date the attorney was transferred to disability inactive status, for violating Law. R. Prof. Conduct 1.15 by: (1) permitting checks to be issued to the attorney's operating account from client escrow

accounts that were not earned; (2) transferring unearned funds to the attorney's own self from client escrow accounts; and (3) failing to properly maintain books and records. In re Nowak, 5 A.3d 631 (Del. 2010).

Attorney was suspended for 3 months, followed by 18 months of conditional probation, for having violated Law Prof. Conduct R. 1.5(f), 1.7(a), 1.15(a), 1.16(d) by: (1) having a conflict of interest with 2 clients; (2) having a personal interest in a loan transaction; (3) failing to safeguard client funds; and (4) failing to provide a new client with a fee agreement. In re O'Brien, 26 A.3d 203 (Del. 2011).

Attorney did not violate Law. Prof. Conduct R. 1.15, where the attorney not only refunded to a client the entire retainer of $1,500, but used $750 in personal funds to reimburse the client so that the client would not have to await the outcome of a receivership; the attorney undertook the burden of awaiting the outcome of the receivership from the client. In re Sisk, 54 A.3d 257 (Del. 2012).

Attorney who was involved in various real estate closings committed violations of the professional conduct rules by using other clients' funds in the firm's trust account to fund all or part of the buyer's contribution in certain settlements. In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Attorney violated the Rules of Professional Conduct in handling real estate closings by using other clients' funds in the firm's trust account to fund part (or all) of the buyer's contribution in certain settlements. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Based on a report by the Board on Professional Responsibility, there was clear and convincing evidence that an attorney engaged in criminal conduct worthy of suspension by: (1) misappropriating funds from the attorney's employer over a 5-year period; (2) engaging in dishonest conduct by lying to the attorney's mortgage company; and (3) forging the employer's signature. In re Lankenau, 138 A.3d 1151 (Del. 2016).

The Delaware Supreme Court accepted the Board on Professional Responsibility's findings and recommendation for discipline, publicly reprimanding and placing the attorney on a 2-year period of probation with the imposition of specific conditions, because the attorney failed to provide the client with a fee agreement and/or statement of earned fees

withdrawn from the trust account, to identify and safeguard client fund, to maintain financial books and records or to supervise nonlawyer assistants; the attorney had engaged in conduct involving misrepresentation, prejudicial to the administration of justice. In re Malik, 167 A.3d 1189 (Del. 2017).

Former client failed to sufficiently plead a counterclaim claim for misappropriation of client funds against the attorney because: (1) the instant action sought declaratory relief regarding the distribution of certain funds being lawfully held in the attorney's IOLTA trust account according to the retainer agreement; and (2) while the attorney attempted to distribute the funds in the account, the client contested the attorney's accounting. Pazuniak Law Office LLC v. Pi-Net Int'l, Inc., 2017 Del. Super. LEXIS 419 (Del. Super. Ct. Aug. 25, 2017).

Board on Professional Responsibility correctly assigned a 6-month suspension with conditions for violation of Law. Prof. Conduct R. 1.15, 5.3 and 8.4 because: (1) the Board considered the attorney's state of mind and concluded the attorney, as managing partner, was at least negligent in overseeing 2 non-attorneys to ensure the books and records were maintained in compliance with the rules; (2) the attorney knew of rule violations due to the negative balances in the account; (3) the attorney filed an inaccurate 2015 Certificate of Compliance with the Delaware Supreme Court that misrepresented the law firm's compliance with the rule on safekeeping property; (4) the covering funds relied on by the Board on Professional Responsibility should not have been considered a substitute for negative balances in the client subsidiary ledger; (5) the law firm had a duty to safeguard the clients' property but failed to do so; and (6) as a managing partner who failed to supervise non-attorney employees, the attorney was responsible for those deficiencies. In re Beauregard, 189 A.3d 1236 (Del. 2018).

Law firms.

— Bookkeeping.

Attorney was publicly reprimanded and subject to a public two-year period of probation for her violations of subsections (b) and (d) of this Rule, former Interpretive Guideline No. 2, and Rule 8.4(d), for failing to pay various federal and state employee and employer payroll taxes in a

timely manner, for failing to maintain her law practice books and records, by failing to file her 1998 and 1999 federal unemployment tax returns until October 2000, and by making consistently delinquent filings and payment in connection with other law practice payroll tax obligations, and for certifying to the court that her law practice books and records were in compliance with the requirements of this Rule and that her tax obligations were paid in a timely manner. In re Benson, 774 A.2d 258 (Del. 2001).

Where an attorney, the managing partner of a firm, admitted to violating Del. Law. R. Prof. Conduct 1.15 and multiple other provisions of the Rules of Professional Conduct, and where a witness testified unequivocally that the attorney instructed the witness to transfer escrow funds to the firm's operating account, and client trust funds had to be, and were, invaded, the Office of Disciplinary Counsel's recommended public reprimand was rejected, and the attorney was suspended from the practice of law for six months and one day; a managing partner of a law firm had enhanced duties to ensure that the law firm complied with its recordkeeping and tax obligations, and the managing partner had to discharge those responsibilities faithfully and with the utmost diligence. In re Bailey, 821 A.2d 851 (Del. 2003).

Attorney was publicly reprimanded and was ordered to serve a public 2-year probation period for violating Law. R. Prof. Conduct 1.15(d) by failing to properly maintain the attorney's law practice books, records and bank accounts; the attorney's substantial experience, multiple offenses and attitude toward the offenses offset the attorney's lack of a prior disciplinary record, extensive remedial efforts, full cooperation and lack of injury to a client. In re Member of the Bar of the Supreme Court, 985 A.2d 391 (Del. 2009).

Following a self-reported embezzlement by a member of the attorney's staff, the attorney failed to obtain court-ordered precertification by a licensed certified public accountant for 2 years of certificates of compliance, reporting the status of recordkeeping with regard to requirements of Law Prof. Conduct R. 1.15 and Law Prof. Conduct R. 1.15A; because the absence of any injury to clients did not excuse the misconduct, the attorney's repeated violations of Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 8.4(d) supported an imposition of a public reprimand with conditions. In re Holfeld, 74 A.3d 605 (Del. 2013).

Attorney violated various disciplinary rules because the results of an audit showed the attorney's failure to adequately maintain books and records, to safeguard client funds or to indicate in the retainer that unearned fees were refundable. In re A Member of the Bar of the Supreme Court of Delaware: Fred Bar, 99 A.3d 639 (Del. 2013), cert. denied, 573 U.S. 916, 134 S. Ct. 2822, 189 L. Ed. 2d 785 (U.S. 2014).

Attorney's admissions and the record established that the attorney violated Law. Prof. Conduct R. 1.5, 5.3, 8.4(c) and (d), resulting in 2 years' probation, by: (1) misrepresenting to the court the attorney's maintenance of records; and (2) failing to properly maintain them, to safeguard client funds, to provide for reasonable safeguards to assure accurate accounting, to supervise nonlawyer staff, and to timely file and pay taxes. In re Gray, 152 A.3d 581 (Del. 2016).

— Reprimand.

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

Attorney was publicly reprimanded and was ordered to serve a public 2-year probation period for violating Law. R. Prof. Conduct 8.4(c) by filing certificates of compliance containing inaccurate representations as to compliance with R. Prof. Conduct 1.15 with reference to the attorney's law practice bank accounts; the attorney's substantial experience, multiple offenses and attitude toward the offenses offset the attorney's lack of a prior disciplinary record, extensive remedial efforts, full cooperation and lack of injury to a client. In re Member of the Bar of the Supreme Court, 985 A.2d 391 (Del. 2009).

Attorney was publicly reprimanded and ordered to serve a public 2-year probation period for violating Law. R. Prof. Conduct 1.15(a) by failing to timely transfer earned attorneys' fees from the attorney's escrow account to the attorney's operating account, and by failing to ensure that negative client balances in the escrow account were corrected monthly; the

attorney's substantial experience, multiple offenses and attitude toward the offenses offset the attorney's lack of a prior disciplinary record, extensive remedial efforts, full cooperation and lack of injury to a client. In re Member of the Bar of the Supreme Court, 985 A.2d 391 (Del. 2009).

Attorney's failure to maintain law office books and records, filing certificates of compliance with annual registration statements that indicated maintenance of such documentation, and failure to file and pay taxes violated Law. R. Prof. Conduct 1.15(d) and Law. R. Prof. Conduct 8.4(c), (d); a public reprimand was imposed. In re Witherell, 998 A.2d 852 (Del. 2010).

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

The appropriate sanction was a public reprimand and 1 year probation period where: (1) an attorney violated the conditions of a previously imposed private admonition by failing to provide a required precertification and not promptly paying various payroll taxes; (2) the attorney admitted to violating Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 1.15(b), 1.15(d), 5.3, 8.4(c), and 8.4(d); (3) the attorney's violations were not isolated incidents but were repeat violations; (4) the attorney failed to adequately supervise a nonlawyer assistant to assure an accurate accounting of the firm's books and records; and (5) the attorney disregarded the conditions imposed on the private admonition. In re Martin, 35 A.3d 419 (Del. 2011).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Taxes.

Attorney who was delinquent in the payment of the attorney's law practice's federal, state, and local payroll tax obligations violated Law. R. Prof. Conduct 1.15(b), 5.3, 8.4(c) and (d); due to the attorney's prior disciplinary history with delinquent taxes, a public reprimand, 18-month probation and implementation of internal accounting controls were warranted. In re Finestrauss, 32 A.3d 978 (Del. 2011).

Charge that an attorney's failure to pay taxes violated the professional conduct rule regarding the handling of third-party funds was properly withdrawn; it did not apply to an attorney's failure to pay a personal obligation. In re Bria, 86 A.3d 1118 (Del. 2014).

Sanctions.

— Disbarment.

Disbarment is a possible sanction for knowing or reckless misappropriation of firm or client funds. In re Figliola, 652 A.2d 1071 (Del. 1995).

Lawyer who violated numerous professional duties in real estate practice, and caused over $ 500,000 in damages to clients, was disbarred. In re Spiller, 788 A.2d 114 (Del. 2001).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney committed multiple ethical violations by misappropriating fees received for legal services to clients while the attorney was engaged in the private practice of law and failing to disclose the fees during prior disciplinary proceedings; disbarment was warranted. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

— Reprimand.

Attorney committed professional misconduct by failing to comply with the conditions of private probation, by failing to maintain the firm's books and records properly, and by filing false certifications with respect to compliance with that obligation; public reprimand and probation for 3 years with conditions were imposed upon the attorney's immediate reinstatement to the practice of law. In re Woods, 143 A.3d 1223 (Del. 2016).

When respondent violated Law. Prof. Conduct R. 1.5(f), 1.15(a) and (d), 8.4(c) and (d) by failing to properly maintain law firm's books and records for 3 consecutive years, filing inaccurate certificates of compliance for 3 consecutive years, and failing to give flat fee clients proper notice that the fee was refundable if not earned, a public reprimand with a 2-year period of probation was appropriate; this was true, even considering the mitigating factors, given a lawyer's obligation to maintain orderly books and records. In re Castro, 160 A.3d 1134 (Del. 2017).

Attorney was publicly reprimanded, subject to specific conditions, because: (1) the attorney failed to maintain the firm's books and records, resulting in the firm's trust accounts being exposed to fraud; (2) the attorney's certificates of compliance contained misrepresentations concerning the status of the firm's books and records; and (3) the attorney was already the subject of discipline for similar conduct to the conduct at issue. In re A Mbr. of the Bar of the Supreme Court of Delaware Glancy, 246 A.3d 1140 (Del. 2021).

— Suspension.

A six month and one day suspension from the practice of law was proper punishment for unlawful disbursements from trust accounts. In re Figliola, 652 A.2d 1071 (Del. 1995).

Where a lawyer engaged in a pattern of knowing misconduct over a period of several years by commingling client funds, failing to maintain the lawyer's law practice accounts, failing to pay taxes, falsely representing on certificates of compliance that the lawyer complied with the record-keeping requirements and paid taxes, the lawyer violated Del. Law. R. Prof. Conduct 1.5(f), 1.15(a), (b), (d), 8.4(b), (c), (d); as a result, the lawyer was suspended for 3 years. In re Garrett, 835 A.2d 514 (Del. 2003).

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate

maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Attorney whose misconduct involved false notarizations, failure to safeguard fiduciary funds, failure to pay taxes on real estate transactions, and other misrepresentations committed violations Law. R. Prof. Conduct 1.15(a), (b), and 8.4(a), (c), and (d); based on knowing, rather than negligent, conduct in committing the violations, a 1-year suspension as well as a public reprimand and permanent practice restrictions were deemed appropriate sanctions to impose. In re Member of the Bar of the Supreme Court, 974 A.2d 170 (Del. 2009).

There was substantial evidence to support the factual findings and conclusions of law of the Board on Professional Responsibility regarding an attorney's violations of Law Prof. Conduct R. 1.5(f), 1.15(a) and (b), and 8.4(c), based on the attorney's misappropriation of clients' fees on various occasions, and the attorney's failure to include the typical refund provision regarding unearned fees in the retainer agreements for other clients; a 1-year suspension was warranted. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Rule 1.15A. Trust account overdraft notification.

(a) Every attorney practicing or admitted to practice in this jurisdiction shall designate every account into which attorney trust or escrow funds are deposited either as "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," pursuant to Rule 1.15(d)(2).

(b) Bank accounts designated as "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," pursuant to Rule 1.15(d)(2) shall be maintained only in financial institutions approved by the Lawyers' Fund for Client Protection (the "Fund"). A financial institution may not be approved as a depository for attorney trust and escrow accounts unless it shall have filed with the Fund an agreement, in a form provided by the Fund, to report to the Office of Disciplinary Counsel ("ODC") in the event any instrument in properly payable form is presented against an attorney trust or escrow account containing insufficient funds, irrespective of whether or not the instrument is honored.

(c) The Supreme Court may establish rules governing approval and termination of approved status for financial institutions and the Fund shall annually publish a list of approved financial institutions. No trust or escrow account shall be maintained in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days notice in writing to the Fund.

(d) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument to the ODC no later than seven (7) calendar days following a request for the copy by the ODC.

(2) In the case of instruments that are presented against insufficient funds, but which instruments are honored, the report shall identify the

financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby.

(e) Reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor. If an instrument presented against insufficient funds is honored, then the report shall be made within seven (7) calendar days of the date of presentation for payment against insufficient funds.

(f) Every attorney practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(g) Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable costs of producing the reports and records required by this rule.

(h) The terms used in this section are defined as follows:

(1) "Financial institution" includes banks, savings and loan associations, credit unions, savings banks and any other business or persons which accept for deposit funds held in trust by attorneys.

(2) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of Delaware.

(3) "Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of Delaware, upon presentation of an instrument which the institution dishonors. (Amended, effective Jan. 1, 2009.)

Revisor's note.— As adopted July 17, 2002, this rule was to become effective October 1, 2002. By order of the Supreme Court dated October 1, 2002, the effective date of this rule was extended to January 1, 2003, "in order to allow sufficient time for the preparation of the necessary forms and for the notification of all Delaware lawyers and financial institutions."

NOTES TO DECISIONS

Analysis

Bookkeeping.

Failure to designate account.

Fraud.

Bookkeeping.

Following a self-reported embezzlement by a member of the attorney's staff, the attorney failed to obtain court-ordered precertification by a licensed certified public accountant for 2 years of certificates of compliance, reporting the status of recordkeeping with regard to requirements of Law Prof. Conduct R. 1.15 and Law Prof. Conduct R. 1.15A; because the absence of any injury to clients did not excuse the misconduct, the attorney's repeated violations of Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 8.4(d) supported an imposition of a public reprimand with conditions. In re Holfeld, 74 A.3d 605 (Del. 2013).

Failure to designate account.

By failing to designate an estate account as a Law R. Prof. Conduct 1.15A account with the attorney's financial institution, thereby reducing the likelihood that the Office of Disciplinary Counsel would receive notice of any overdraft balances in this account, the attorney violated Law R. Prof. Conduct 1.15A. In re Wilson, 886 A.2d 1279 (Del. 2005).

Fraud.

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

Rule 1.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's service to perpetrate a crime or fraud;

(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

[2] *Mandatory Withdrawal.* — A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

[4] *Discharge.* — 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. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

[7] *Optional Withdrawal.* — A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

[9] *Assisting the Client upon Withdrawal.* — Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

INTERPRETIVE GUIDELINE.
Re: Residential real estate transactions.

The following statements of principles are promulgated as interpretive guidelines in the application to residential real estate transactions in The Delaware Lawyers' Rules of Professional Conduct:

(a) Before accepting representation of a buyer or mortgagor of residential property (including condominiums under the Unit Property Act of the State of Delaware), upon referral by the seller, lender, real estate agent, or other person having an interest in the transaction, it is the ethical duty of a lawyer to inform the buyer or mortgagor in writing at the earliest practicable time:

(1) That the buyer or mortgagor has the absolute right (regardless of any preference that the seller, real estate agent, lender, or other person may have and regardless of who is to pay attorney's fees) to retain a lawyer of his own choice to represent him throughout the transaction, including the examination and certification of title, the preparation of documents, and the holding of settlement; and

(2) As to the identity of any other party having an interest in the transaction whom the lawyer may represent, including a statement that such other representation may be possibly conflicting and may adversely affect the exercise of the lawyer's professional judgment on behalf of the buyer or mortgagor in case of a dispute between the parties. For the purpose of this Guideline, a lawyer shall be deemed to have a "possibly conflicting" representation if he represents the seller or has represented the seller on a continuing basis in the past; or if he represents the real estate agent or has represented the real estate agent on a continuing basis in the past; or if he represents the lender or has represented the lender on a continuing basis in the past.

(b) Unless a lawyer has been freely and voluntarily selected by the buyer or mortgagor after he has made to the buyer or mortgagor the statements and disclosures hereinabove required, the lawyer may not ethically:

(1) Certify, report, or represent for any purpose that the buyer or mortgagor is his client, or that the buyer or mortgagor is or was obligated

for any legal service rendered by him in the transaction; or

(2) Participate in causing the buyer or mortgagor, directly or indirectly, to bear any charge for his legal service; except that the lawyer for a lender may receive from the buyer or mortgagor, directly or indirectly, payment of the lender's reasonable and necessary legal expenses for preparation of documents at the request of the buyer's or mortgagor's lawyer, for attendance at settlement, and for title insurance properly specified by the lender (within the provisions of 18 Del. C. § 2305(a)(1)) but unobtainable by the buyer's or mortgagor's lawyer, provided that the buyer's or mortgagor's obligation to pay each such legal expense is particularized as a term and condition of the loan; or

(3) Participate as the buyer's or mortgagor's lawyer in any transaction in which his representation of the buyer or mortgagor has been made a term or condition of the transaction, directly or indirectly.

(c) The information supplied to the buyer or mortgagor in writing shall contain a description of the attorney's interest or interests sufficient to enable the buyer or mortgagor to determine whether he should obtain a different attorney.

NOTES TO DECISIONS

Analysis

Attorneys' fees.

— Retaining lien.

Client relations.

— Conflicts of interest.

— Shareholders' derivative suit.

— Withdrawal.

Sanctions.

— Reprimand.

— Suspension.

Attorneys' fees.

— Retaining lien.

Based on multiple factors, including the financial situations of the parties, the client's sophistication in dealing with lawyers, and the reasonableness of counsel's disputed fee, a former law client's subpoena and motion to compel production of documents obtained by former counsel through discovery in an underlying matter had merit, despite counsel's assertion of a retaining lien due to a fee dispute pursuant to Law Prof. Conduct R. 1.16(d). Judy v. Preferred Commun. Sys., 29 A.3d 248 (Del. Ch. 2011).

In determining the scope of a retaining lien due to a fee dispute between a former client and counsel pursuant to Law Prof. Conduct R. 1.16(d) with respect to the client's motion to compel counsel's production of documents secured in an underlying action through discovery, the ethics standard ("fraud and or gross imposition by the client") did not govern the legal question of whether the retaining lien could be maintained. Judy v. Preferred Commun. Sys., 29 A.3d 248 (Del. Ch. 2011).

Client relations.

— Conflicts of interest.

It was plain error for the scrivener of a contested will to testify at trial and also participate in the proceedings as an attorney for one of the parties. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

Attorney was suspended from the practice of law for 3 months, followed by a 1-year period of probation, for violating Law. R. Prof. Conduct 1.1, 1.4(b), 1.7, and 1.16(a) (Interpretative Guideline Re: Residential real estate transactions); the attorney failed to obtain the clients' consent to a conflict of interest that arose when the attorney represented both the borrower and the lender in a loan transaction, and failed to inform the clients of their 3-day right to rescind. In re Katz, 981 A.2d 1133 (Del. 2009).

Where an attorney committed violations of Law. R. Prof. Conduct 1.1, 1.4(b), and 1.16 during the course of 10 closings for a private money lender, a public reprimand was deemed the appropriate sanction; the attorney had ethical duties to disclose to the borrowers a conflict of interest and the fact that the loan documents were inadequate, even though

the attorney did not represent them, as they had no attorneys. In re Goldstein, 990 A.2d 404 (Del. 2010).

— Shareholders' derivative suit.

Plaintiffs, two directors of a family corporation and the corporation, failed to prove third director's use of long-time corporation and family attorneys to defend against that director's removal by shareholders in a declaratory judgment action threatened to undermine fairness and integrity of proceeding or violate Del. Law. R. Prof. Conduct 1.7, 1.9, 1.13(e), and 1.16(b)(1). Unanue v. Unanue, 2004 Del. Ch. LEXIS 37 (Del. Ch. Mar. 25, 2004).

— Withdrawal.

Lawyer dismissed by client violated this Rule by failing to: (1) Promptly move to withdraw or execute a stipulation for substitution; (2) promptly surrender the client's file; (3) provide an accounting of the client's funds, or refund the unearned portion of the advance fee paid by the client. In re Tos, 576 A.2d 607 (Del. 1990).

Appointed attorney's motion for leave to withdraw from representing a father in a dependency proceeding was denied, despite the attorney's claims that the father harassed, annoyed, cursed, and threatened the attorney and his staff, refused to heed legal recommendations, and verbally fired the attorney on several occasions; though the father's behavior could be considered repugnant or unreasonably difficult enough to allow permissive withdrawal under Law. Prof. Conduct R. 1.16(b)(4) and (6), the concern that withdrawal could materially adversely affect the father's interests, and the child advocate's suggestion that allowing the attorney to withdraw could have an adverse impact on the best interests of the child, led to denial of the motion. In re Div. of Family Servs. v. M. P., 2005 Del. Fam. Ct. LEXIS 111 (Del. Fam. Ct. May 25, 2005).

Court adopted Special Master's report that recommended that the motion of plaintiffs' counsel to withdraw from representation be granted, as there was abundant evidence to support the finding that adequate grounds existed for withdrawal of counsel under Law. R. Prof. Conduct 1.16(b)(4), (6), and (7), based on plaintiffs' own communications with

counsel. Parfi Holding AB v. Mirror Image Internet, Inc., 2006 Del. Ch. LEXIS 69 (Del. Ch. Apr. 3, 2006).

Where, after appellants' counsel withdrew, the trial court dismissed their case with prejudice on grounds that their new counsel would not enter an unconditional appearance that could not be withdrawn, the nonwithdrawable appearance order was an abuse of discretion because Law. R. Prof. Conduct 1.16(a)(1) requires attorneys to withdraw under specified circumstances. Parfi Holding AB v. Mirror Image Internet, Inc., 926 A.2d 1071 (Del. 2007).

Chancery Court permitted a law firm to withdraw as counsel for a client because the tenor of an opposition to the withdrawal which the client filed, in which the client excoriated lawyers from firm, especially when coupled with the history of frustration between the law firm and the client and an apparent disagreement over how to move forward with the client's actions, amply demonstrated that the attorney-client relationship between the parties could no longer function in any practical fashion; although the client suggested that there were other lawyers at the firm with whom the client might not had a problem, the notion that a law firm could not withdraw because not every lawyer in the firm had had problems with the client could not be the standard. Binks v. Megapath, Inc., 2008 Del. Ch. LEXIS 83 (Del. Ch. July 2, 2008).

There was no bona fide condition for the court's recusal limited to the issue of counsel's withdrawal, because counsel could strictly limit disclosures to the court to preserve the client's confidentiality pursuant to counsel's professional conduct obligations. State v. Pardo, 2015 Del. Super. LEXIS 548 (Del. Super. Ct. Oct. 27, 2015).

Trial court granted the motion to withdraw as counsel filed by plaintiff's attorney because: (1) an allegation of a material breakdown in the attorney's relationship with plaintiff and lead counsel, and their unjustifiable refusal to communicate with the attorney, established good cause for withdrawal; and (2) defendant did not oppose the motion. Griffith v. Wawa, Inc., 2017 Del. Super. LEXIS 344 (Del. Super. Ct. July 14, 2017).

Sanctions.

— Reprimand.

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a),(d), and Interpretive Guideline No. 2., Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

— Suspension.

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

As a result of a lawyer's repeated unethical conduct and admitted violation of Law. R. Prof. Conduct 1.16(d) in representation of a client while the attorney was on probation, the lawyer's failure to take the necessary and reasonable steps to protect that client's interest in withdrawing from representation, and due to lawyer's past disciplinary record, a 3-year suspension was ordered; further, said sanction protected the public by ensuring that prior to any reinstatement, the lawyer was required to establish rehabilitation before returning to active status. In re Solomon, 886 A.2d 1266 (Del. 2005).

Attorney was suspended for 3 months, followed by 18 months of conditional probation, for having violated Law Prof. Conduct R. 1.5(f), 1.7(a), 1.15(a), 1.16(d) by: (1) having a conflict of interest with 2 clients; (2) having a personal interest in a loan transaction; (3) failing to safeguard client funds; and (4) failing to provide a new client with a fee agreement. In re O'Brien, 26 A.3d 203 (Del. 2011).

Rule 1.17. Sale of law practice.

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold in the jurisdiction in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

In a matter of pending litigation, if a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file. If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.

(d) The fees charged clients shall not be increased by reason of the sale.

(e) The seller shall make appropriate arrangements for the maintenance of records specified in Rule 1.15(d). (Amended, July 1, 2003; effective Apr. 25, 2012.)

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[2] *Termination of Practice by the Seller.* — The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon failing to be reappointed or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a

substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves the jurisdiction typically would sell the entire practice, this rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

[6] *Sale of Entire Practice or Entire Area of Practice.* — The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

[7] *Client Confidences, Consent and Notice.* — Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of th files, the Rule requires an

order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

[10] *Fee Arrangements Between Client and Purchaser.* — The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

[11] Rule 1.17(a)(5) provides for the preservation of a lawyer's client trust account records in the event of sale of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the client trust records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with Rules 1.0(c), (g) and (h) of the Delaware Lawyers Rules of Professional Conduct.

[12] *Other Applicable Ethical Standards.* — Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[13] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is

pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

[14] *Applicability of the Rule.* — This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[15] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[16] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Rule 1.17A. Dissolution of law firm.

Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of the client trust account records specified in Rule 1.15(d). (Added, effective Apr. 25, 2012.)

COMMENT

[1] Rule 1.17A provides for the preservation of a lawyer's client trust account records in the event of dissolution of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the client trust records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with Rules 1.0(c), (g) and (h) of the Delaware Lawyers Rules of Professional Conduct.

Rule 1.18. Duties to prospective client.

(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.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(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, 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).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures

employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 2.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

[1] *Scope of Advice.* — A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social

work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

[5] *Offering Advice.* — In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.2. Intermediary [Deleted].

Revisor's note.— Former Rule 2.2, which pertained to an intermediary, was deleted effective July 1, 2003.

Rule 2.3. Evaluation for use by third persons.

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT

[1] *Definition.* — An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this rule.

The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

[3] *Duties Owed to Third Person and Client.* — When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

[4] *Access to and Disclosure of Information.* — The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding

circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

[5] *Obtaining Client's Informed Consent.* — Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

[6] *Financial Auditors' Request for Information.* — When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Rule 2.4. Lawyer serving as third-party neutral.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration

Association or the Model standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.1. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

NOTES TO DECISIONS

Frivolous claims.

Evidence held sufficient to establish a violation of this Rule where attorney and her clients demonstrated a history of bringing claims in one court intended to interfere with another court's jurisdiction and orders. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (U.S. 1999).

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial orother benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

NOTES TO DECISIONS

Frivolous claims.

Evidence held sufficient to establish a violation of this Rule where attorney demonstrated a history of bringing frivolous collateral claims. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (U.S. 1999).

Attorney's failure to respond to the Com. P. Ct. Civ. R. 41(e) notice of dismissal of the no-fault case, resulting in dismissal of the case for which the relevant limitations period had passed, was in violation of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Rule 3.3. Candor toward the tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an

ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

[3] *Representations by a Lawyer.* — An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the comment to Rule 8.4(b).

[4] *Legal Argument.* — Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed

by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

[5] *Offering Evidence.* — Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to

discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

[10] *Remedial Measures.* — Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

[12] *Preserving Integrity of Adjunctive Process.* — Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

[13] *Duration of Obligation.* — A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

[14] *Ex parte Proceedings.* — Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

[15] *Withdrawal.* — Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for

the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

NOTES TO DECISIONS

Analysis

Attorneys' fees.

— Retainers.

Client relations.

— Effective representation.

— Perjury.

Professional conduct.

— Candor toward the tribunal.

— Frivolous claims.

— Illegal conduct.

— Opposing counsel.

Attorneys' fees.

— Retainers.

Attorney's acceptance of a retainer of $250 from a client through a prepaid legal plan, while never contacting the client and refusing to refund the retainer until after the first disciplinary hearing, was held to have violated Law. Prof. Conduct R. 1.3, with regard to acting with reasonable diligence and promptness, Law. Prof. Conduct R. 1.4(a) and (b), with regard to failing to keep the client reasonably informed to the extent reasonably necessary to permit the client to make informed decisions, and, Law. Prof. Conduct R. 1.15(b) and (d), with regard to failing to safeguard the client's funds and deliver them upon request; the prepaid legal firm had refused to refund the retainer and, in fact, showed no record of the

amount, which had been paid directly to the attorney. In re Chasanov, 869 A.2d 327 (Del. 2005).

Client relations.

— Effective representation.

Attorney's misrepresentation to a Family Court that a client was not in arrears with regard to alimony and had paid the debt in full was determined to have been an act of dishonesty, fraud, deceit, or misrepresentation in violation of Law. Prof. Conduct R. 8.4(c) and (d), a failure to provide competent representation to the client, in violation of Law. Prof. Conduct R. 1.1, and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of Law. Prof. Conduct R. 1.4(b); the misrepresentation was found to have been knowingly made, but the recommended suspension of 2 years was reduced to 6 months, because mitigating circumstances were found in the nature of the attorney providing the Family Court with correspondence, which would have permitted the Family Court and the adverse party an opportunity to verify the debt. In re Chasanov, 869 A.2d 327 (Del. 2005).

— Perjury.

An attorney should have knowledge beyond a reasonable doubt before determining under this Rule that his client has committed or is going to commit perjury. Shockley v. State, 565 A.2d 1373 (Del. 1989).

Counsel adequately performed his duty as officer of court by disclosing to the court what he believed beyond a reasonable doubt to be his client's proposed perjury; counsel's resort to narrative testimony when client insisted on testifying was reasonable under the circumstances and did not prejudice client's case. Shockley v. State, 565 A.2d 1373 (Del. 1989).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and

reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

Professional conduct.

— Candor toward the tribunal.

An attorney, acting as an officer of the court, has a duty to respond with complete candor to court inquiries; counsel may not, knowingly or otherwise, engage in conduct which may reasonably be perceived as misleading either to the court or to opposing counsel. State v. Guthman, 619 A.2d 1175 (Del. 1993).

Attorney violated subsection (a)(1) of this Rule and Prof. Cond. Rules 3.4(b) and 8.4(c) when he identified himself as client's "nephew" and submitted falsified evidence to the tribunal in the form of a petition which identified him as such. In re McCann, 669 A.2d 49 (Del. 1995).

Defense counsel has a responsibility not only to the defendant-client, but to the trial court, as well. State v. Grossberg, 705 A.2d 608 (Del. Super. Ct. 1997).

An attorney's duty to respond with complete candor to the court includes a responsibility to promptly inform the court and opposing counsel of any development that renders a material representation to the court inaccurate. State v. Grossberg, 705 A.2d 608 (Del. Super. Ct. 1997).

The Sixth Amendment right to counsel was never intended to override the court's broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. State v. Grossberg, 705 A.2d 608 (Del. Super. Ct. 1997).

Evidence held sufficient to establish a violation of subsections (a)(1) and (4) of this Rule where attorney inconsistently informed the trial court that she did as to whether she did or did not represent a client. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (U.S. 1999).

Although a trial court did not abuse its discretion in denying defendant's motion to withdraw defendant's guilty plea, defendant, defense counsel, and the prosecutor improperly failed to disclose an oral side agreement as required by Super. Ct. Crim. R. 11(e)(2), as the failure to disclose the side

agreement violated Law. R. Prof. Conduct 3.3(a)(3) in the face of defendant's misrepresentation, under oath, about the plea agreement's actual terms in open court; if defendant proved that the terms of the oral side agreement were fulfilled, then the State could be barred from requesting that defendant be declared a habitual offender. Scarborough v. State, 938 A.2d 644 (Del. 2007).

Based on an attorney's false statements to a Virginia court regarding delivery of legal documents to a party-opponent, and misleading statements in a Virginia disciplinary proceeding constituting violations of Law. Prof. Conduct R. 3.3(a)(1), 4.1, and 8.4(c), a 30-day suspension was imposed; rather than imposing an "admonishment with terms," as Virginia did, a "substantially different discipline" was warranted pursuant to Bd. Prof. Resp. 18(4). In re Amberly, 996 A.2d 793 (Del. 2010).

Claim by automobile purchasers that a dealership and a financing company committed a "fraud upon the court" in violation of Law. Prof. Conduct R. 3.3(a)(2) lacked merit; the purchasers actually alleged that lawyers for the dealership and financing company failed to inform the court of a third-party beneficiary theory for recovery prior to dismissing a party for lack of standing, but the dealership and financing company did not misinform the court regarding the law. Gibson v. Car Zone, 2011 Del. Super. LEXIS 627 (Del. Super. Ct. May 3, 2011), aff'd, 31 A.3d 76 (Del. 2011).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good

character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

There was no bona fide condition for the court's recusal limited to the issue of counsel's withdrawal, because counsel could strictly limit disclosures to the court to preserve the client's confidentiality pursuant to counsel's professional conduct obligations. State v. Pardo, 2015 Del. Super. LEXIS 548 (Del. Super. Ct. Oct. 27, 2015).

Attorney was suspended for an additional 6 months where: (1) the attorney filed 2 complaints in Superior Court without maintaining a Delaware office, conduct prejudicial to the administration of justice; (2) the attorney created a false impression by testifying in a prior disciplinary matter that the attorney did not currently have any suits pending in Delaware; (3) the violations were knowing and caused potential harm to the legal system; (4) suspension was the presumptive sanction; and (5) the aggravating factors did not sufficiently outweigh the mitigating factors to warrant disbarment. In re Lankenau, 158 A.3d 451 (Del. 2017).

— Frivolous claims.

Where the bulk of the claims and legal contentions asserted by the attorney had no foundation in existing law, nor were they supported by a nonfrivolous argument for reversal or modification of existing law, the attorney proceeding pro se failed to act appropriately as an officer of the Superior Court of Delaware by violating Super. Ct. Civ. R. 11 and Law. Prof. Conduct R. 3.3(a)(1); as neither the county nor county officials which the attorney sued requested sanctions or a fee-shifting award in the

case, the trial court did not impose any. Abbott v. Gordon, 2008 Del. Super. LEXIS 103 (Del. Super. Ct. Mar. 27, 2008), aff'd, 957 A.2d 1 (Del. 2008).

— Illegal conduct.

Attorney violated Law. R. Prof. Conduct 3.3(a)(1) by filing with the Family Court a petitioner's answer to a respondent's counterclaim, on which the attorney had signed the client's name and had falsely notarized the signature. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney committed multiple ethical violations by misappropriating fees received for legal services to clients while the attorney was engaged in the private practice of law and failing to disclose the fees during prior disciplinary proceedings; disbarment was warranted. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

— Opposing counsel.

Because Law. R. Prof. Conduct 3.3(a)(2) did not require defense counsel to develop and advance potential legal claims for the plaintiff, there was no support for a finding of fraud or other misconduct by opposing counsel. Gibson v. Car Zone, 31 A.3d 76 (Del. 2011).

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

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

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by the prohibitions against destruction or concealment of evidence, improperly

influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

NOTES TO DECISIONS

Analysis

Client relations.

— Conflicts of interest.

Enforcement.

Professional conduct.

— Candor toward the tribunal.

— Illegal conduct.

— Obligations to tribunal.

— Opposing counsel.

— Witnesses.

Client relations.

— Conflicts of interest.

It was plain error for the scrivener of a contested will to testify at trial and also participate in the proceedings as an attorney for one of the parties. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

Enforcement.

When a plaintiff, acting pro se, alleged that plaintiff's former spouse's attorney had violated the Lawyers' Rules of Professional Conduct, the plaintiff did not have standing to recover damages, even if there had been ethical violations; there was no basis for enforcement of a lawyer's ethical duties outside the framework of disciplinary proceedings. Buchanan v. Gay, 2006 Del. Super. LEXIS 382 (Del. Super. Ct. Sept. 20, 2006), aff'd, 929 A.2d 783 (Del. 2007).

Attorney who had knowingly violated a protective order was properly sanctioned to public reprimand because the misconduct was serious, caused potential injury to the vulnerable teenage victim and caused actual injury to the legal system. In re Koyste, 111 A.3d 581 (Del. 2015).

Because the integrity of the proceedings and the court's truth-finding function involving company management disputes between the parties was threatened by plaintiffs' actions, based on their payments to witnesses in exchange for certain testimony, threats against witnesses and threats of civil litigation on baseless claims, their conspiracy claims were dismissed against all defendants; certain adverse inferences were also drawn as to other claims. OptimisCorp v. Waite, 2015 Del. Ch. LEXIS 222 (Del. Ch. Aug. 26, 2015), aff'd on other grounds, 137 A.3d 970 (Del. 2016).

Professional conduct.

— Candor toward the tribunal.

Attorney violated subsection (b) of this Rule and Prof. Cond. Rules 3.3(a)(1) and 8.4(c) when he identified himself as client's "nephew" and submitted falsified evidence to the tribunal in the form of a petition that identified him as such. In re McCann, 669 A.2d 49 (Del. 1995).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

Attorney was suspended for an additional 6 months where: (1) the attorney filed 2 complaints in Superior Court without maintaining a Delaware office, conduct prejudicial to the administration of justice; (2) the attorney created a false impression by testifying in a prior disciplinary matter that the attorney did not currently have any suits pending in Delaware; (3) the violations were knowing and caused potential harm to the legal system; (4) suspension was the presumptive sanction; and (5) the aggravating factors did not sufficiently outweigh the mitigating factors to warrant disbarment. In re Lankenau, 158 A.3d 451 (Del. 2017).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

— Illegal conduct.

Court imposed an 18-month suspension from the practice of law upon a lawyer who, inter alia, had concealed or destroyed potential evidence

relevant to criminal charges against lawyer. In re Melvin, 807 A.2d 550 (Del. 2002).

In an attorney disciplinary matter, an attorney was disbarred as a result of committing various felonies (violently physically attacking that attorney's spouse in front of their children, destruction of evidence and continual violation of a protective order) in the State of Maine which violated Law. R. Prof. Conduct 3.4(a) and (c) and 8.4(b), (c), and (d); the Supreme Court of Delaware rejected the attorney's defense that the conduct was the result of 2 brain injuries, as the medical evidence did not address mental state at the time of the crimes and there was nothing in the record to suggest that the attorney raised any defense to those crimes based on the claimed infirmity. In re Enna, 971 A.2d 110 (Del. 2009).

Because there was evidence to support the finding that a suspended attorney knowingly practiced law multiple times over more than 1 year during a disciplinary suspension, the lawyer violated multiple disciplinary rules; the appropriate sanction in the circumstances was disbarment. In re Member of the Bar of the Supreme Court of Del. Feuerhake, 89 A.3d 1058 (Del. 2014).

— Obligations to tribunal.

Failure to comply with directions of Court in relation to pleadings is a violation of this Rule. In re Tos, 576 A.2d 607 (Del. 1990).

Attorney violated subsection (c) when, in connection with the receivership of his law practice, he failed to cooperate with the receiver's efforts to gain control over the books and records of the practice. In re Maguire, 725 A.2d 417 (Del. 1999).

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

Where attorney failed to timely file the affidavit required by Rule 4(a)(1) of the Delaware Rules for Mandatory Continuing Legal Education, he

violated subsection (c) of this section; thus, a public reprimand was the appropriate sanction, as the attorney had received a prior private admonition for similar misconduct in the past. In re McDonald, 755 A.2d 389 (Del. 2000).

Where attorney who had practiced for over 20 years and was found to be a good lawyer committed professional misconduct by failing to appear at a scheduled family court hearing and by failing to reschedule two other teleconferences in family court, which constituted violations of Del. Law. R. Prof. Conduct 3.4(c) and 8.4(d), the public probation period that attorney was already serving for prior misconduct was extended for an additional year. In re Solomon, 847 A.2d 1122 (Del. 2004).

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

When an attorney handling 2 estates, inter alia, failed to probate the estates in a timely manner, the attorney violated Law. R. Prof. Conduct 3.4(c). In re Wilson, 886 A.2d 1279 (Del. 2005); In re Wilson, 900 A.2d 102 (Del. 2006).

Attorney, who was not authorized to practice law in Delaware, was disbarred for violating Law. R. Prof. Conduct 3.4(c) as, even if the attorney contacted Pennsylvania authorities to determine whether the attorney's conduct violated Delaware law, the attorney was told to contact Delaware authorities, and did not do so; the attorney knowingly violated a cease and desist order that prohibited the conduct. In re Tonwe, 929 A.2d 774 (Del. 2007).

While an attorney's violation of a cease and desist order would have supported a finding of contempt under Bd. Unauthorized Prac. L. R. 19, the Delaware Office of Disciplinary Counsel did not abuse its discretion in proceeding under the attorney disciplinary rules as the same conduct also constituted knowing disobedience of a court order in violation of Law. R. Prof. Conduct 3.4(c). In re Tonwe, 929 A.2d 774 (Del. 2007).

Attorney's conduct in meeting with a former client to provide legal advice, discussing legal services and fees with a potential client which led the client to believe that the attorney's residential services company could provide legal services and using the attorney's former law firm email address in communications with the public at least 6 weeks after a suspension order violated Law. Prof. Conduct R. 3.4(c). In re Davis, 43 A.3d 856 (Del. 2012).

The Board on Professional Responsibility did not find by clear and convincing evidence a violation of Law Prof. Conduct R. 3.4(c) where: (1) the attorney constructively refused court-ordered appointments by presenting that attorney's own abilities in such a poor light to clients as to encourage them to seek other representation; but (2) the attorney requested documentation and continuances in both cases, a nominal sign of a willingness to proceed as attorney of record. In re Murray, 47 A.3d 972 (Del. 2012).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney admittedly committed disciplinary violations by failing to comply with continuing legal education (CLE) requirements, and by failing to respond to communications with the CLE Commission about that deficiency. In re Poverman, 80 A.3d 960 (Del. 2013).

Attorney who committed various disciplinary violations with respect to the failure to complete continuing legal education requirements and reporting obligations relating thereto was publicly reprimanded with conditions, because: (1) the attorney acted knowingly and had no remorse; (2) the attorney did not cause injury to a client; and (3) the aggravating factors outweighed the mitigating ones. In re Poverman, 80 A.3d 960 (Del. 2013).

Where an attorney, in order to benefit a client, knowingly violated the Chancery Court's seizure order enjoining persons from bringing claims relating to an insurer except in that Court, thereby causing injury to the insurer and the Insurance Commissioner and prejudice to the judicial system, the presumptive sanction of suspension was nevertheless reduced to public reprimand; mitigating factors outweighed the aggravating factors in the case. In re Brown, 103 A.3d 515 (Del. 2014).

Lawyer engaged in knowing misconduct, for which suspension was the appropriate discipline, by: (1) assisting a suspended lawyer in the unauthorized practice of law when the lawyer engaged the suspended lawyer to work on cases without determining the applicable restrictions; (2) failing to supervise the suspended lawyer adequately; and (3) giving the suspended lawyer a percentage of a contingency fee that included work performed both before and after the suspension. In re Martin, 105 A.3d 967 (Del. 2014).

It was prosecutorial misconduct to vouch for 1 of the State's 2 key witnesses, a friend of the victim, by stating in an objection during cross-examination that the witness had not spoken to defendant since the point in time defendant shot the victim. McCoy v. State, 112 A.3d 239 (Del. 2015).

Office of Disciplinary Counsel proved by clear and convincing evidence that an attorney committed professional conduct violations by knowingly causing images from a sexual abuse victim's cell phone to be shown to both the victim's parent and defendant in violation of a protective order. In re Koyste, 111 A.3d 581 (Del. 2015).

— Opposing counsel.

While an attorney has duties of fairness to an opposing party and may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, an attorney need not affirmatively reveal the weakness of his case to his opponent. In re Enstar Corp., 593 A.2d 543 (Del. Ch. 1991), rev'd, 604 A.2d 404 (Del. 1992).

New trial was granted where defense counsel's comments to jury included an unjustified attack on the integrity of opposing counsel. Putney v. Rosin, 791 A.2d 902 (Del. Super. Ct. 2001).

— Witnesses.

All Delaware lawyers are bound by the Delaware Lawyers' Rules of Professional Conduct to refrain at trial from expressing a personal opinion on the credibility of a witness. Trump v. State, 753 A.2d 963 (Del. 2000), overruled in part, Baker v. State, 906 A.2d 139 (Del. 2006).

Defense counsel did not violate subsection (e) of this rule when, during closing argument, counsel made comments which compared a witness' testimony on the stand to information provided during meetings conducted prior to trial. Russo v. Medlab Clinical Testing, Inc., 2001 Del. Super. LEXIS 464 (Del. Super. Ct. Nov. 14, 2001).

First corporation's motion to approve its designation of a consultant was granted because, although the consultant was also to be a fact witness, the compensation the first corporation proposed to pay to the consultant related to that consultant's work as such, and not to any willingness to testify as to the facts underlying the claims; there was no Prof. Conduct R. 3.4(b) violation. BAE Sys. Info. & Elec. Sys. Integration v. Lockheed Martin Corp., 2011 Del. Ch. LEXIS 117 (Del. Ch. Aug. 10, 2011).

Rule 3.5. Impartiality and decorum of the tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate or cause another to communicate ex parte with such a person or members of such person's family during the proceeding unless authorized to do so by law or court order; or

(c) communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule;

(d) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to void contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate or cause another to communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, or with members of such person's family, unless authorized to do so by law or court order. Furthermore, a lawyer shall not conduct or cause another to conduct a vexatious or harassing investigation of such persons or their family members.

[3] A lawyer may not communicate with a juror or prospective juror after the jury has been discharged unless permitted by court rule. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on

behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

NOTES TO DECISIONS

Analysis

Decorum toward tribunal.

Ex parte communications.

Opposing counsel.

Standard of review.

Witnesses.

Decorum toward tribunal.

Revocation of an attorney's admission pro hac vice was authorized for his failure to control his client's behavior during a deposition. State v. Mumford, 731 A.2d 831 (Del. Super. Ct. 1999).

Evidence held sufficient to establish a violation of subsection (c) of this Rule where attorney filed a reply brief castigating the trial judge in personal terms. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (U.S. 1999).

In an appeal taken to the trial court from a licensing board, attorney's written arguments suggesting that the trial court would not rule on the merits, an unfounded accusation, violated Law R. Prof. Conduct 3.5(d), conduct degrading to a tribunal, and Law R. Prof. Conduct 8.4(d), conduct prejudicial to the administration of justice; the trial court had to waste judicial resources striking the offending arguments sua sponte and writing an opinion explaining its actions, and warranted a public reprimand of the

attorney. In re Abbott, 925 A.2d 482 (Del.), cert. denied, 552 U.S. 950, 128 S. Ct. 381, 169 L. Ed. 2d 263 (U.S. 2007).

Attorney engaged in undignified and discourteous conduct, in violation of Law Prof. Conduct R. 3.5(d), through: (1) the language and tenor of the attorney's communications with the court and with clients; (2) persistent efforts to be excused from appointments; (3) failure to obtain substitute counsel; and (4) actions which were disruptive to the tribunal. In re Murray, 47 A.3d 972 (Del. 2012).

While it was true that an attorney's language did not amount to the inflammatory language of other cases where public reprimand was ordered, the attorney did send discourteous letters to the court in 3 different cases and violated Law Prof. Conduct R. 3.5 and 6.2 in each of those cases; because the Law Prof. Conduct R. 8.4(d) violation for the wasting of judicial resources in attempting to avoid court appointment was not de minimus, public reprimand was appropriate. In re Murray, 47 A.3d 972 (Del. 2012).

Prosecutor's conduct did not comport with fundamental professional requirements because, rather than ensure that justice be done, the prosecutor: (1) appeared to prevent a self-representing defendant's proper defense; (2) mocked defendant during cross-examination; (3) attempted to prevent defendant from using standby counsel for legal research and logistical assistance; and (4) actively generated a level of cynicism that permeated the trial. McCoy v. State, 112 A.3d 239 (Del. 2015).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

Thirty-day suspension of a deputy attorney general was appropriate because the attorney's conduct, cajoling a bailiff to enter a room in a courthouse brandishing a firearm as an ill-conceived prank, involved

breaches of duties owed to the legal system and to the legal profession. In re Gelof, 142 A.3d 506 (Del. 2016).

Ex parte communications.

Attorney for a family did not have to be disqualified pursuant to Law R. Prof. Conduct 3.5 for sending ex parte communications to the prior trial court, as the prior trial court recused itself based on such communications and no such communications were made to the current trial court in a case involving the family's claim that an insurer breached the implied covenant of good faith and fair dealing. Dunlap v. State Farm Fire & Cas. Co., 955 A.2d 132 (Del. Super. Ct. 2007).

Superior Court properly affirmed the Delaware State Public Integrity Commission's dismissal of a state attorney's complaint because the Commission did not commit a manifest error in law in concluding a state's attorney's allegations of ex parte communications failed to state a violation; ex parte communications in a matter pending before a state tribunal are not the type of misconduct that the State Ethics Code is designed to cover. Abbott v. Del. State Pub. Integrity Comm'n, 206 A.3d 260 (Del. 2019).

Opposing counsel.

An attorney who referred to opposing counsel in a crude, but graphic, anal term while in an office conference with a judge violated subsection (c) of this Rule and 11 Del. C. § 1271(1). In re Ramunno, 625 A.2d 248 (Del. 1993).

Reply brief filled with abusive references to the opposing party and its counsel was so unprofessional and degrading to the court that it struck much of the brief, sua sponte, and directed the party to draft and submit a new one. 395 Assocs., LLC v. New Castle County, 2005 Del. Super. LEXIS 386 (Del. Super. Ct. Nov. 28, 2005).

Standard of review.

When the alleged misconduct of a state employee directly relates to a lawyer's conduct before a tribunal, the standard governing the lawyer's conduct is likely to be supplied by the Lawyers' Rules of Professional Conduct; any violation of those rules should be addressed by that tribunal

or the Board of Professional Responsibility. Abbott v. Del. State Pub. Integrity Comm'n, 206 A.3d 260 (Del. 2019).

Witnesses.

Although the State's questioning of the witnesses was improper to the extent that the witnesses indicated that defendant was on probation, as the trial court had specifically instructed the State not to reveal that fact, the error was harmless under an analysis pursuant to Baker v. State, 906 A.2d 139 (Del. 2006), as defendant's substantial rights were not affected and doubt was not cast on the integrity of the judicial process. Bunting v. State, 907 A.2d 145 (Del. 2006).

Rule 3.6. Trial publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding inthe matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph

shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial

likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party of witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the

likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

NOTES TO DECISIONS

Analysis

Gag orders.

Public facts.

Gag orders.

Court denied motion for a gag order where the disputed statements were made to protect the plaintiff from the substantial undue prejudicial effect of recent publicity initiated when an email containing a confidential Internal Affairs file was released to a Delaware newspaper, in violation of the confidentiality provisions of 11 Del. C. § 9200(c)(12); as such, plaintiff's attorney's statements fell under the "safe haven" of the Law. Prof. Conduct R. 3.6. Conley v. Chaffinch, 2005 U.S. Dist. LEXIS 3279 (D. Del. Mar. 2, 2005).

While keeping a court record sealed was not warranted, an order limiting publicity was entered; given the subject matter of the case, child sex abuse, media coverage was certainly possible. Sokolove v. Marenberg, 2013 Del. Super. LEXIS 598 (Del. Super. Ct. Dec. 20, 2013).

Commissioner properly issued a limited gag order prohibiting property owners, operators of chicken processing plants, attorneys, experts, consultants, witnesses and any persons or entities acting on behalf of the operators in a public relations capacity from publicly commenting on a case, except in accordance with Law. Prof. Conduct R. 3.6; the order was balanced and was designed to ensure a fair trial by restricting language designed to influence the potential jury pool. Cuppels v. Mountaire Corp., — A.3d —, 2019 Del. Super. LEXIS 66 (Del. Super. Ct. Feb. 5, 2019).

Public facts.

There was no showing, and no factual assertion to support, that the prosecution knew or reasonably should have known that the statements, referring to defendant as a "cold-blooded killer," would have a substantial likelihood of materially prejudicing the proceedings nor that the proceedings were likely to be prejudiced, and the statements mirrored language used by the prosecution in its closing argument and did not appear in the newspaper until after defendant was found guilty of first-degree murder; therefore, the statement that was published in the newspaper described information that the prosecution had put into the public record of the trial. State v. Ploof, 2003 Del. Super. LEXIS 285 (Del. Super. Ct. Aug. 20, 2003).

Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

[2] *Advocate-Witness Rule.* — The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to

testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

[6] *Conflict of Interest.* — In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the

client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

NOTES TO DECISIONS

Analysis

Employer and employee relations.

Enforcement.

Ex parte communications.

Family law.

Personal injuries.

Standard of review.

Stock derivative suits.

Trusts and estates.

Employer and employee relations.

In an unemployment benefits matter the employer's attorney was not disqualified under a former version of this rule from serving as counsel even though the attorney was a part-time employee of the employer because the attorney did not serve in any managerial capacity and could not provide testimony regarding any of the contested issues in the case, therefore, was not a necessary witness in the case. Brighton Hotels v. Gennett, 2002 Del. Super. LEXIS 372 (Del. Super. Ct. Oct. 23, 2002).

Enforcement.

A non-client litigant does have standing to enforce the Delaware Rules of Professional Conduct in a trial court when he or she can demonstrate to the trial judge that the opposing counsel's conflict somehow prejudiced his or her rights and calls into question the fair or efficient administration of justice. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

There was no basis to grant a protective order precluding the testimony of an attorney as a rebuttal witness because: (1) the attorney was timely identified on the trial witness list based on a reservation of right; (2) there was no prejudice shown with respect to a sequestration order; and (3) the attorney's testimony as a fact witness did not violate the witness-as-advocate rule where the attorney did not serve as an advocate at trial. In re Oxbow Carbon LLC Unitholder Litig., 2017 Del. Ch. LEXIS 135 (Del. Ch. July 28, 2017).

Ex parte communications.

Attorney for a family did not have to be disqualified pursuant to Law R. Prof. Conduct 3.5 for sending ex parte communications to the prior trial court, as the prior trial court recused itself based on such communications and no such communications were made to the current trial court in a case involving the family's claim that an insurer breached the implied covenant of good faith and fair dealing; however, that attorney did have to be disqualified pursuant to Law R. Prof. Conduct 3.7 because the attorney could be called to testify about negotiations that occurred related to the family's claim. Dunlap v. State Farm Fire & Cas. Co., 955 A.2d 132 (Del. Super. Ct. 2007).

Family law.

Chancery Court denied a former husband's motion to disqualify his former wife's attorney, on the ground that the attorney may have been required to testify in the husband's action to rescind transfers of property between the former husband and his former wife; Law. Prof. Conduct R. 3.7(a) was not so rigid as to require the counsel's immediate withdrawal or to deny her the opportunity to present a motion on behalf of the former wife to dismiss for lack of subject matter jurisdiction. Benge v. Oak Grove Motor Court, Inc., 2006 Del. Ch. LEXIS 5 (Del. Ch. Jan. 13, 2006), aff'd, 903 A.2d 322 (Del. 2006).

As there was no other client, current or former, to cause a conflict of interest, the wife's attorney was not precluded from representing the wife, when another member of the attorney's firm took the stand as a witness for the wife during the hearing. L.L.L. v. W.B.L., 2007 Del. Fam. Ct. LEXIS 196 (Del. Fam. Ct. Jan. 17, 2007).

There was no basis to disqualify a former paramour's attorney in a support action, because although the attorney was employed in a law firm also employing an attorney currently dating the former paramour: (1) there was no a significant risk of material limitation to the representation; (2) there was no conflict of interest; and (3) the attorney's testimony about attorneys' fees was within an exception under the professional conduct rules. Bark v. May, 2015 Del. Super. LEXIS 530 (Del. Super. Ct. Sept. 28, 2015).

Personal injuries.

In a personal injury action wherein an adult child alleged childhood sexual abuse by a parent, the child was not entitled to disqualify the parent's attorney under this rule because: (1) the child did not present clear and convincing evidence that the attorney had information regarding alleged abuse of the child's sibling; (2) there was no evidence the attorney became friends with the sibling; and (3) the child failed to demonstrate the attorney's testimony would be necessary to the resolution of the suit. McLeod v. McLeod, 2014 Del. Super. LEXIS 662 (Del. Super. Ct. Dec. 20, 2014).

Standard of review.

In determining whether to disqualify an attorney under this Rule, the court should balance the purposes to be served by the Rule against such countervailing interests as a litigant's right to retain counsel of his choice. In re ML-Lee Acquisition Fund II, 848 F. Supp. 527 (D. Del. 1994).

Stock derivative suits.

When, in a derivative action, plaintiffs' counsel was disqualified because of the possibility that he could be a witness in the action, and plaintiffs did not subsequently retain substitute counsel or appear at the trial court's calendar call, resulting in the dismissal of their action, the trial court's prior disqualification of counsel was not evidence of

plaintiffs' bad faith justifying an award to defendant of attorney's fees or costs. Mainiero v. Tanter, 2003 Del. Ch. LEXIS 43 (Del. Ch. Apr. 25, 2003).

When, in a derivative action, plaintiffs' counsel was disqualified because of the possibility that he could be a witness in the action, the failure of plaintiffs to appear, through counsel, more than four months later, at the trial court's calendar call, as required by Del. Ch. Ct. R. 40(c), justified dismissal of plaintiffs' case, under Del. Ch. Ct. R. 41(b), due to their failure to comply with the Delaware Chancery Court Rules. Mainiero v. Tanter, 2003 Del. Ch. LEXIS 43 (Del. Ch. Apr. 25, 2003).

Trusts and estates.

It was plain error for the scrivener of a contested will to testify at trial and also participate in the proceedings as an attorney for one of the parties. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d)(1) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(2) when the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or, where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. (Amended, effective Sept. 21, 2009.)

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The duty of disclosure described in paragraph (d) does not end with the conviction of the criminal defendant. The prosecutor also is bound to disclose after-acquired evidence that casts doubt upon the correctness of the conviction. If a prosecutor becomes aware of new, material and

credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose such evidence to the appropriate court and, unless the court authorizes a delay, to the defense attorney, or, if the defendant is not represented by counsel, to the defendant. If the conviction was obtained outside the prosecutor's jurisdiction, disclosure should be made to the chief prosecutor of the jurisdiction where the conviction occurred. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligation of paragraph (d), even if subsequently determined to have been erroneous, does not constitute a violation of this Rule. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extra judicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making

improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

NOTES TO DECISIONS

Analysis

Hindering defense.

Lend-A-Prosecutor Program.

Hindering defense.

Prosecutor's conduct did not comport with fundamental professional requirements because, rather than ensure that justice be done, the prosecutor: (1) appeared to prevent a self-representing defendant's proper defense; (2) mocked defendant during cross-examination; (3) attempted to prevent defendant from using standby counsel for legal research and logistical assistance; and (4) actively generated a level of cynicism that permeated the trial. McCoy v. State, 112 A.3d 239 (Del. 2015).

Lend-A-Prosecutor Program.

Under 29 Del. C. § 2505, the Attorney General is authorized to appoint a part-time prosecutor employed and compensated by a private law firm to prosecute criminal cases for the state. There is no bar to this Lend-A-Prosecutor Program on ethical grounds where no actual conflict between the public and private interest is presented. Seth v. State, 592 A.2d 436 (Del. 1991).

Rule 3.9. Advocate in nonadjudicative proceedings.

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through(c) and 3.5(a) and (c).

COMMENT

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Rule 3.10. Communication with or investigation of jurors [Deleted].

Revisor's note.— Former Rule 3.10, which concerned communication with or investigation of jurors, was deleted effective July 1, 2003.

Cross references. — As to current provisions concerning communication with (or investigation of) jurors, see Rule 3.5.

Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT

[1] *Misrepresentation.* — A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

[2] *Statement of Fact.* — This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

[3] *Crime or Fraud by Client.* — Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation.

Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

NOTES TO DECISIONS

Analysis

Candor toward the tribunal.

Truthfulness.

Candor toward the tribunal.

Based on an attorney's false statements to a Virginia court regarding delivery of legal documents to a party-opponent, and misleading statements in a Virginia disciplinary proceeding constituting violations of Law. Prof. Conduct R. 3.3(a)(1), 4.1, and 8.4(c), a 30-day suspension was imposed; rather than imposing an "admonishment with terms," as Virginia did, a "substantially different discipline" was warranted pursuant to Bd. Prof. Resp. 18(4). In re Amberly, 996 A.2d 793 (Del. 2010).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

Truthfulness.

Attorney committed violations of the professional conduct rules by making false statements of material fact to lenders on Department of

Housing and Urban Development settlement statements ("HUD-1 statements") filed on behalf of the attorney and the attorney's clients as borrowers in residential real estate matters; the attorney's certification of the HUD-1 statements was not a true and accurate account of the transactions. In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Attorney who violated the Delaware Rules of Professional Conduct, as well as 18 U.S.C. § 1010, by making false certifications in Department of Housing and Urban Development settlement statements (HUD-1 statements) was disbarred; the attorney acted with the intent of facilitating 22 real estate closings that defrauded those who relied on the accuracy of the HUD-1 statements. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Inmate did not show ineffective assistance of counsel; the inmate did not allege a specific instance in which counsel violated this rule or prove that the guilty plea at issue was unknowingly or involuntarily entered. State v. Pickle, 2017 Del. Super. LEXIS 634 (Del. Super. Ct. Dec. 4, 2017).

Rule 4.2. Communication with person represented by counsel.

In representing a client, 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 or is authorized to do so by law or a court order.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may

communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

NOTES TO DECISIONS

Analysis

Applicability.

Intent of rule.

Represented parties.

Applicability.

This Rule relates only to present principals, officers, employees, agents, etc., of a represented entity and does not prohibit ex parte communications with former employees of a represented entity. DiOssi v. Edison, 583 A.2d 1343 (Del. Super. Ct. 1990).

A relevant inquiry is whether an individual is represented since this Rule is only applicable if the lawyer "knows" that the individual is "represented by another lawyer." Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990), vacated in part, 1990 Del. Super. LEXIS 421 (Del. Super. Ct. Dec. 4, 1990).

Intent of rule.

The clear purpose of this Rule is to foster and protect the attorney-client relationship, and not to provide protection to a party in civil litigation nor place a limit on discoverable material. DiOssi v. Edison, 583 A.2d 1343 (Del. Super. Ct. 1990).

This Rule is intended to preclude ex parte communications with those who could currently bind or admit liability for the represented entity. DiOssi v. Edison, 583 A.2d 1343 (Del. Super. Ct. 1990).

Represented parties.

When investigators did not determine if former employees were represented by counsel, did not clearly identify themselves as working for attorneys who were representing a client which was involved in litigation against their former employer, did not clearly state the purpose of the interview, and where affirmative misrepresentations regarding these matters were made, this Rule and Rule 4.3 were violated. Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990), vacated in part, 1990 Del. Super. LEXIS 421 (Del. Super. Ct. Dec. 4, 1990).

Rule 4.3, read in conjunction with this Rule, requires more than a simple disclosure by an investigator of his identity qua investigator. Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990), vacated in part, 1990 Del. Super. LEXIS 421 (Del. Super. Ct. Dec. 4, 1990).

Requiring that counsel representing a creditor in a bankruptcy proceeding be served with notice of a debtor's objections to the creditor's claim is consistent with this rule. In re Lomas Fin. Corp., 212 B.R. 46 (Bankr. D. Del. 1997).

Addresses and phone numbers of a corporation's employee eyewitnesses to an explosion were properly discoverable and motion to compel was granted where the employees were not deemed to be represented by corporate counsel, as there was no assertion that the employees at issue served in any type of managerial capacity and there were no allegations that any of these employees were negligent or that their acts or omissions contributed to the explosion; the claimant's need to uncover the truth and prepare for trial outweighed the corporation's interest in withholding the information. Showell v. Mountaire Farms, Inc., 2002 Del. Super. LEXIS 492 (Del. Super. Ct. Nov. 18, 2002).

Because a codefendant was represented by counsel, the public defender's office was not permitted to interview the codefendant. State v. Coleman, 2003 Del. Super. LEXIS 492 (Del. Super. Ct. Feb. 19, 2003).

Defendant's motion to suppress statements and derivative evidence was denied where, inter alia, the prosecutor disclosed that there was a potential conflict of interest between defendant and defendant's counsel, and the record did not reflect that the government's knowledge of counsel's possible breach of his ethical duties tainted defendant's interviews. United States v. Kossak, 275 F. Supp. 2d 525 (D. Del. 2003).

Purchasing corporation's (PC) motion for a protective order to preclude former shareholders of a sold corporation (SC) from conducting ex parte interviews with the PC's former management employees, who previously held shares in the SC and who were privy to privileged information regarding a merger agreement and a lawsuit by the shareholders thereunder, was denied where only key non-privileged information was sought from the former employees, they were key witnesses, and there was no violation of Law. R. Prof. Conduct 4.2. LaPoint v. Amerisourcebergen Corp., 2006 Del. Ch. LEXIS 134 (Del. Ch. July 18, 2006).

Attorneys for the buyers were guilty of litigation misconduct by failing to provide the necessary cautionary instructions to former employees of the sellers, whom the attorneys contacted, so that their actions at least created the appearance of violating the Delaware Rules of Professional Conduct, and undermined the integrity of the proceedings. Although the court did not conclude that the attorneys, in fact, violated the applicable Delaware Rules of Professional Conduct, the court found that the actions of the attorneys created a sufficient threat to the integrity of the proceedings that some form of sanction was warranted; accordingly, the court disqualified the attorneys, but not the attorneys' law firm, from representing the buyers and awarded the sellers a portion of the sellers' attorneys' fees and costs in bringing the sellers' motion for sanctions. Postorivo v. AG Paintball Holdings, Inc., 2008 Del. Ch. LEXIS 120 (Del. Ch. Aug. 20, 2008).

Rule 4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter

into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

NOTES TO DECISIONS

Analysis

Employer and employee relations.

Family law.

Insurance.

Employer and employee relations.

Addresses and phone numbers of a corporation's employee eyewitnesses to an explosion were properly discoverable and motion to compel was granted where employees were considered to be unrepresented by counsel; however, any interviews of such employees would have to be conducted in accordance with a former version of this rule. Showell v. Mountaire Farms, Inc., 2002 Del. Super. LEXIS 492 (Del. Super. Ct. Nov. 18, 2002).

Family law.

Given the inequity that would result if petitioner were forced to comply with a Commissioner's order to pay respondent's attorney's fees, as the respondent reasonably believed that an attorney from the Division of Child Support Enforcement was providing representation (even though the signed application for contained boilerplate language to the contrary), the order was rejected; the Division was relieved from the Commissioner's order despite its possible bad faith. DCSE v. W.C., 2007 Del. Fam. Ct. LEXIS 62 (Del. Fam. Ct. Sept. 21, 2007).

Wife's interpretation of a letter by the husband's attorney — that the attorney had accepted the role of securing the wife's interest in the husband's pension — was reasonable; however, the attorney made no efforts to correct this foreseeable misunderstanding when the qualified domestic relations order was not completed. Greater vigilance was necessary with regard to communications between attorneys and those unrepresented by counsel. J. T. E. v. D. K., 2008 Del. Fam. Ct. LEXIS 106 (Del. Fam. Ct. June 13, 2008).

Insurance.

When investigators did not determine if former employees were represented by counsel, did not clearly identify themselves as working for attorneys who were representing a client which was involved in litigation against their former employer, did not clearly state the purpose of the interview, and where affirmative misrepresentations regarding these matters were made, this Rule and Rule 4.2 were violated. Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990), vacated in part, 1990 Del. Super. LEXIS 421 (Del. Super. Ct. Dec. 4, 1990).

This Rule, read in conjunction with Rule 4.2, requires more than a simple disclosure by an investigator of his identity qua investigator. Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990), vacated in part, 1990 Del. Super. LEXIS 421 (Del. Super. Ct. Dec. 4, 1990).

Rule 4.4. Respect for rights of third persons.

(a) In representing a client, 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.

(b) 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. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the

privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

NOTES TO DECISIONS

Analysis

Attorney-client privilege.

Disrespectful communications.

Attorney-client privilege.

Attorneys for the buyers were guilty of litigation misconduct in failing to act sooner to provide appropriate notice to the sellers and to take reasonable steps in the meantime to avoid unwarranted intrusions upon the sellers' colorable claims of privilege. Although the court did not conclude that either attorney, in fact, violated the applicable Delaware Rules of Professional Conduct, the court found that the actions of the attorneys created a sufficient threat to the integrity of the proceedings that some form of sanction was warranted; accordingly, the court disqualified the attorneys, but not the attorneys' law firm, from representing the buyers

and awarded the sellers a portion of the sellers' attorneys' fees and costs in bringing the sellers' motion for sanctions. Postorivo v. AG Paintball Holdings, Inc., 2008 Del. Ch. LEXIS 120 (Del. Ch. Aug. 20, 2008).

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

Disrespectful communications.

Attorney was publicly reprimanded with conditions because the offensive portions of emails sent by the attorney to 4 different Deputy Attorneys Generals (DAGs) had no substantial purpose other than to embarrass, delay or burden opposing counsel; the comments included, calling a male DAG "a certified asshole," calling a female DAG "another beautiful, but arrogant female" and referring to another female DAG as "Kurvacious" and "Kooky." In re Memebr of the Bar of the Supreme Court: Hurley, 183 A.3d 703 (Del. 2018).

Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question off act. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of

misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional conduct. See Rule 5.2(a).

NOTES TO DECISIONS

Analysis

Law firms.

— Managing partners.

Law firms.

— Managing partners.

Effective on July 1, 2003, lawyers with managerial authority within a firm are required to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Delaware Lawyers' Rules of Professional Conduct; such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised. In re Bailey, 821 A.2d 851 (Del. 2003).

An attorney committed professional conduct violations with respect to engaging in various real estate closings because that attorney was the sole owner and managing partner of the firm and had supervisory authority over the questionable conduct of a second attorney (as well as over nonlawyer employees). In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Rule 5.2. Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rule 5.3. Responsibilities regarding non-lawyer assistance.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such

nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[3] *Nonlawyers outside the firm.* — A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet- based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

NOTES TO DECISIONS

Analysis

Law firms.

— Managing co-counsel.

— Managing of employees.

— Managing partners.

— Taxes.

Law firms.

— Managing co-counsel.

Lawyer engaged in knowing misconduct, for which suspension was the appropriate discipline, by: (1) assisting a suspended lawyer in the unauthorized practice of law when the lawyer engaged the suspended lawyer to work on cases without determining the applicable restrictions; (2) failing to supervise the suspended lawyer adequately; and (3) giving the suspended lawyer a percentage of a contingency fee that included work performed both before and after the suspension. In re Martin, 105 A.3d 967 (Del. 2014).

— Managing of employees.

Attorney whose child stole funds from the attorney's escrow account was publicly reprimanded for violating Law. Prof. Conduct R. 5.3 by failing to have reasonable safeguards in place to assure accurate accounting and by failing to supervise the attorney's child (who was working for the attorney). In re Otlowski, 976 A.2d 172 (Del. 2009).

Attorney was suspended for 1 year, with the suspension to run retroactively to the date the attorney was transferred to disability inactive status, for violating Law. R. Prof. Conduct 5.3 by: (1) failing to have reasonable safeguards in place to assure accurate accounting of the financial books and records; and (2) failing to supervise nonlawyer assistants. In re Nowak, 5 A.3d 631 (Del. 2010).

The appropriate sanction was a public reprimand and 1 year probation period where: (1) an attorney violated the conditions of a previously imposed private admonition by failing to provide a required precertification and not promptly paying various payroll taxes; (2) the attorney admitted to violating Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 1.15(b), 1.15(d), 5.3, 8.4(c), and 8.4(d); (3) the attorney's violations were not isolated incidents but were repeat violations; (4) the attorney failed to adequately supervise a nonlawyer assistant to assure an accurate accounting of the firm's books and records; and (5) the attorney disregarded the conditions imposed on the private admonition. In re Martin, 35 A.3d 419 (Del. 2011).

Attorney handling real estate closings violated the Rules of Professional Conduct by taking took no action to prevent a paralegal from issuing checks inconsistent with the disbursement amounts listed on Department of Housing and Urban Development settlement statements, while knowing that the checks received from the buyers (in most instances were never cashed) and that the lenders were not notified of any of these actions. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Attorney's admissions and the record established that the attorney violated Law. Prof. Conduct R. 1.5, 5.3, 8.4(c) and (d), resulting in 2 year's probation, by: (1) misrepresenting to the court the attorney's maintenance of records; and (2) failing to properly maintain them, to safeguard client funds, to provide for reasonable safeguards to assure accurate accounting, to supervise nonlawyer staff, and to timely file and pay taxes. In re Gray, 152 A.3d 581 (Del. 2016).

The Delaware Supreme Court accepted the Board on Professional Responsibility's findings and recommendation for discipline, publicly reprimanding and placing the attorney on a 2-year period of probation with the imposition of specific conditions, because the attorney failed to

provide the client with a fee agreement and/or statement of earned fees withdrawn from the trust account, to identify and safeguard client fund, to maintain financial books and records or to supervise nonlawyer assistants; the attorney had engaged in conduct involving misrepresentation, prejudicial to the administration of justice. In re Malik, 167 A.3d 1189 (Del. 2017).

— Managing partners.

Where an attorney, the managing partner of a firm, admitted to violating Del. Law. R. Prof. Conduct 1.15(a) by keeping more than $1700 of the firm's funds in the client escrow account for almost a year, admitted to violating Del. Law. R. Prof. Conduct 1.15(d), by failing, for almost a year, to maintain the firm's books and records in compliance with the rule's requirements, admitted to violating Del. Law. R. Prof. Conduct 5.3 by failing to have reasonable safeguards in place to ensure an accurate accounting of the firm's financial books and records in compliance with the Rules, by failing to supervise employees' conduct in reconciling books and records and filing and paying payroll taxes, and by knowing that payroll, gross receipts, and corporate taxes were not being timely filed and paid, admitted to violating Del. Law. R. Prof. Conduct 8.4(c) by filing a Certificate of Compliance for the year 2000, which falsely stated that the law practice's books and records were maintained in compliance with Del. Law. R. Prof. Conduct 1.15 and by falsely stating on the Certificates of Compliance for 1998, 1999, and 2000 that the attorney was meeting tax filing and payment obligations, admitted to violating Del. Law. R. Prof. Conduct 8.4(d) by failing to file and pay various taxes and by filing false Certificates of Compliance for the years 1997, 1998, 1999, 2000, and 2001, and where a witness testified unequivocally that the attorney instructed the witness to transfer escrow funds to the firm's operating account, and client trust funds had to be, and were, invaded, the Office of Disciplinary Counsel's recommended public reprimand was rejected, and the attorney was suspended from the practice of law for six months and one day; a managing partner of a law firm had enhanced duties to ensure that the law firm complied with its recordkeeping and tax obligations, and the managing partner had to discharge those responsibilities faithfully and with the utmost diligence. In re Bailey, 821 A.2d 851 (Del. 2003).

An attorney committed professional conduct violations with respect to engaging in various real estate closings because that attorney was the sole owner and managing partner of the firm and had supervisory authority over the questionable conduct of a second attorney (as well as over nonlawyer employees). In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Board on Professional Responsibility correctly assigned a 6-month suspension with conditions for violation of Law. Prof. Conduct R. 1.15, 5.3 and 8.4 because: (1) the Board considered the attorney's state of mind and concluded the attorney, as managing partner, was at least negligent in overseeing 2 non-attorneys to ensure the books and records were maintained in compliance with the rules; (2) the attorney knew of rule violations due to the negative balances in the account; (3) the attorney filed an inaccurate 2015 Certificate of Compliance with the Delaware Supreme Court that misrepresented the law firm's compliance with the rule on safekeeping property; (4) the covering funds relied on by the Board on Professional Responsibility should not have been considered a substitute for negative balances in the client subsidiary ledger; (5) the law firm had a duty to safeguard the clients' property but failed to do so; and (6) as a managing partner who failed to supervise non-attorney employees, the attorney was responsible for those deficiencies. In re Beauregard, 189 A.3d 1236 (Del. 2018).

— Taxes.

Attorney who was delinquent in the payment of the attorney's law practice's federal, state, and local payroll tax obligations violated Law. R. Prof. Conduct 1.15(b), 5.3, 8.4(c) and (d); due to the attorney's prior disciplinary history with delinquent taxes, a public reprimand, 18-month probation and implementation of internal accounting controls were warranted. In re Finestrauss, 32 A.3d 978 (Del. 2011).

Rule 5.4. Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of

the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

NOTES TO DECISIONS

Analysis

Attorneys' fees.

— Fee splitting.

Attorneys' fees.

— Fee splitting.

The fact that at the time of the fee splitting agreement the law firm had not registered with the Supreme Court of the state or that it was not registered to do business in the state pursuant to 8 Del. C. § 371 does not

change its status as "lawyer." Tomar, Seliger, Simonoff, Adourian & O'Brien v. Snyder, 601 A.2d 1056 (Del. Super. Ct. 1990).

Lawyer engaged in knowing misconduct, for which suspension was the appropriate discipline, by: (1) assisting a suspended lawyer in the unauthorized practice of law when the lawyer engaged the suspended lawyer to work on cases without determining the applicable restrictions; (2) failing to supervise the suspended lawyer adequately; and (3) giving the suspended lawyer a percentage of a contingency fee that included work performed both before and after the suspension. In re Martin, 105 A.3d 967 (Del. 2014).

Rule 5.5. Unauthorized practice of law; multijurisdictional practice of law.

(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.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates while in compliance with Supreme Court Rule 55.1 and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction. (Amended, effective Oct. 16, 2007; effective Jan. 7, 2008, effective July 14, 2025.)

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this

paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or

potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally- uniform, foreign, or international law. Lawyers desiring to provide *pro bono* legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should

consult Supreme Court Rule 58 on Provision of Legal Services Following Determination of Major Disaster.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or(d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

Cross references. — As to admission pro hac vice, see Supreme Court Rule 71.

NOTES TO DECISIONS

Analysis

Advertising.

Assisting unauthorized practice.

Multi-jurisdictional practice.

Sanctions.

Advertising.

Broadcast of legal service ads which did not include or reference an unlicensed foreign attorney, or any lawyer in the firm, did not establish a violation of the rule prohibiting the unauthorized practice of law. In re Edelstein, 99 A.3d 227 (Del. 2014).

Assisting unauthorized practice.

Lawyer engaged in knowing misconduct, for which suspension was the appropriate discipline, by: (1) assisting a suspended lawyer in the unauthorized practice of law when the lawyer engaged the suspended lawyer to work on cases without determining the applicable restrictions; (2) failing to supervise the suspended lawyer adequately; and (3) giving the suspended lawyer a percentage of a contingency fee that included work

performed both before and after the suspension. In re Martin, 105 A.3d 967 (Del. 2014).

Multi-jurisdictional practice.

No violation of subsection (a) established where attorney represented client who had moved to Florida. In re McCann, 669 A.2d 49 (Del. 1995).

Attorney, who was not authorized to practice law in Delaware, was disbarred for violating R. Prof. Conduct 5.5(b)(1) as the attorney lived in Delaware, was active in church groups, and worked in the medical office of the attorney's husband before and after the attorney was reinstated as an attorney in Pennsylvania; many of the attorney's Delaware clients were the patients of the attorney's husband, or people the attorney met through church activities, and while the attorney might not have engaged in formal advertising to attract clients, the attorney cultivated a network of Delaware contacts who accomplished the same result. In re Tonwe, 929 A.2d 774 (Del. 2007).

Attorney's actions in continuing to prepare documents for an accountant despite not being licensed in Delaware and the attorney's knowing violation of a cease and desist order violated the attorney's ethical duties and seriously undermined the legal system; the attorney's actions were in violation of Law. R. Prof. Conduct 5.5 and warranted disbarment. In re Kingsley, 950 A.2d 659 (Del. 2008).

While a liberal reading of a client's complaint signaled a violation of Law R. Prof. Conduct 5.5, such a violation in and of itself provided insufficient grounds for a suit based on legal malpractice. Brooks v. Quinn & Quinn, 2010 U.S. Dist. LEXIS 14206 (D. Del. Feb. 19, 2010).

Attorney's conduct in meeting with a former client to provide legal advice, discussing legal services and fees with a potential client which led the client to believe that the attorney's residential services company could provide legal services and using the attorney's former law firm email address in communications with the public at least 6 weeks after a suspension order violated Law. Prof. Conduct R. 5.5(a). In re Davis, 43 A.3d 856 (Del. 2012).

In determining reasonableness of an attorneys' fee award, an attorney did not act unethically in billing hours associated with an appeal in

anticipation of being admitted pro hac vice; further, fees charged by Delaware counsel for attending the trial were proper, where counsel filed the motion for the admission of the out-of-state attorney and was required to attend unless excused by the court. Staffieri v. Black, 2013 Del. Ch. LEXIS 322 (Del. Ch. Aug. 8, 2013), aff'd, 2014 Del. LEXIS 88 (Del. Feb. 27, 2014).

Attorney violated this rule by providing legal services to at least 75 Delaware residents involved in automobile accidents, covered by Delaware insurance policies; although the attorney did not go to court in Delaware, the attorney's meeting with clients in Delaware could have given the impression that the attorney was a Delaware lawyer. In re Nadel, 82 A.3d 716 (Del. 2013).

Sanctions.

An attorney's actions in engaging in the unauthorized practice of law in Delaware, which included establishing an office for the practice of law, were deemed knowingly conducted; the attorney's violation of the Rules of Professional Conduct warranted the sanction of a 1-year suspension from the practice of law. In re Pelletier, 84 A.3d 960 (Del. 2014).

Board on Professional Responsibility properly found that an attorney engaged in the unauthorized practice of law because by representing Delaware residents in over 100 matters involving Delaware motor vehicle accidents despite not being admitted to the Delaware Bar; the attorney was sanctioned with a 1-year suspension upon weighing of the mitigating and aggravating factors. In re Edelstein, 99 A.3d 227 (Del. 2014).

To award attorneys' fees or impose sanctions on a nonparty, for failure to comply with a subpoena to produce documents at a deposition, under Super. Ct. Civ. R. 45 was inappropriate; plaintiff's counsel was at least partially responsible for certain of the costs incurred and had not yet been admitted pro hac vice in Delaware when counsel took a deposition of the nonparty in violation of Super. Ct. Civ. R. 90.1 and Law. Prof. Conduct R. 5.5. Beresford v. Does, — A.3d —, 2019 Del. Super. LEXIS 435 (Del. Super. Ct. Sept. 12, 2019).

Rule 5.6. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

COMMENT

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

NOTES TO DECISIONS

Mootness agreement.

Even if the parties had a meeting of the minds regarding a fee award, the parties' purported fee agreement based on "mootness" of a failed merger attempt was void and unenforceable because the contract restricted the law firm's right to practice and, as such, violated this rule; the firm's initiation of some sort of litigation prevented or terminated the mootness fee arrangement. La. Mun. Police Emples. Ret. Sys. v. Black, 2016 Del. Ch. LEXIS 36 (Del. Ch. Feb. 19, 2016).

Rule 5.7. Responsibilities regarding law-related services.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional

Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-

related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law- related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship,

the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Rule 6.1. Voluntary pro bono publico service.

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

COMMENT

[1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through the disciplinary process.

[2] The rights and responsibilities of individuals and organizations in the United states are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services.

Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

Rule 6.2. Accepting appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

[2] *Appointed Counsel.* — For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

NOTES TO DECISIONS

Analysis

Avoiding appointment.

Public service.

Avoiding appointment.

While it was true that an attorney's language did not amount to the inflammatory language of other cases where public reprimand was ordered, the attorney did send discourteous letters to the court in 3 different cases and violated Law Prof. Conduct R. 3.5 and 6.2 in each of those cases; because the Law Prof. Conduct R. 8.4(d) violation for the wasting of judicial resources in attempting to avoid court appointment was not de minimus, public reprimand was appropriate. In re Murray, 47 A.3d 972 (Del. 2012).

While an attorney appointed by a Family Court possessed qualified immunity under 10 Del. C. § 4001, because a malpractice claim was subject to dismissal based upon that qualified immunity, the lack of professional malpractice insurance coverage by the attorney would not constitute good cause under Law Prof. Conduct R. 6.2(b) to withdraw from court-appointed service. Hanson v. Morton, 67 A.3d 437 (Del. 2013).

Public service.

The Board on Professional Responsibility found that the Office of Disciplinary Counsel established by clear and convincing evidence that an attorney sought to avoid appointment by the Family Court on 3 occasions, without good cause, in violation of Law Prof. Conduct R. 6.2. In re Murray, 47 A.3d 972 (Del. 2012).

While it was true that an attorney's language did not amount to the inflammatory language of other cases where public reprimand was

ordered, the attorney did send discourteous letters to the Court in 3 different cases and violated Law Prof. Conduct R. 3.5 and 6.2 in each of those cases; because the Law Prof. Conduct R. 8.4(d) violation for the wasting of judicial resources in attempting to avoid court appointment was not de minimus, public reprimand was appropriate. In re Murray, 47 A.3d 972 (Del. 2012).

Rule 6.3. Membership in legal services organization.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Rule 6.4. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

Rule 6.5. Non-profit and court-annexed limited legal-service programs.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

COMMENT

[1] Legal-service organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further

assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Rule 7.1. Communications concerning a lawyer's services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to

achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[5] *Paying Others to Recommend a Lawyer.* — Except as permitted under paragraphs (b)(1)-(b)(3), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or

client development services, such as publicists, public-relations personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance;

(iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

Rule 7.3. Solicitation of clients.

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone or real time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal

review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal

services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Rule 7.4. Communication of fields of practice and specialization.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

COMMENT

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.5. Firm names and letterheads.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law

firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests that they are practicing law together in a firm.

Rule 7.6. Political contributions to obtain government legal engagements or appointments by judges.

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

COMMENT

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from

influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Rule 8.1. Bar admission and disciplinary matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or

proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

NOTES TO DECISIONS

Analysis

Office for law practice.

Public service.

— Disbarment.

Sanctions.

— Public reprimand.

— Suspension.

Tribunals.

Office for law practice.

Attorney who failed to maintain a bona fide office for the practice of law in Delaware violated various disciplinary rules because the attorney's assurance to disciplinary counsel that the bona fide office requirement was satisfied was knowingly false and dishonest; merely being reachable by phone was not sufficient. In re A Member of the Bar of the Supreme Court of Delaware: Fred Bar, 99 A.3d 639 (Del. 2013), cert. denied, 573 U.S. 916, 134 S. Ct. 2822, 189 L. Ed. 2d 785 (U.S. 2014).

Public service.

— Disbarment.

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

When an attorney handling 2 estates, inter alia, failed to provide information and documents in a timely manner in response to a request by

the Office of Disciplinary Counsel, the attorney violated Law. R. Prof. Conduct 8.1(b). In re Wilson, 886 A.2d 1279 (Del. 2005).

Where the attorney was aware that the Office of Disciplinary Counsel was investigating the attorney's estate practice, and was aware of a particular estate because the attorney transferred its funds before preparing an inventory of open cases for the Office of Disciplinary Counsel, the attorney knew or should have known that the attorney was withholding information in violation of Law. R. Prof. Conduct 8.1. In re Wilson, 900 A.2d 102 (Del. 2006).

Attorney violated Law. Prof. Conduct R. 8.1(a) when the attorney knowingly made a false statement of material fact concerning a motor vehicle accident in a reinstatement questionnaire; with respect to the statement, "At the time of the accident I did not have my cell phone with me, so I walked home;" the police report indicated that the attorney informed the investigating officer that the attorney was distracted by talking on the cell phone. In re Davis, 43 A.3d 856 (Del. 2012).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney committed multiple ethical violations by misappropriating fees received for legal services to clients while the attorney was engaged in the private practice of law and failing to disclose the fees during prior disciplinary proceedings; disbarment was warranted. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

Sanctions.

— Public reprimand.

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds;

(2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Suspension.

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Tribunals.

Attorney's false statement to the Office of Disciplinary Council regarding his distribution of settlement funds to a client violated this rule. In re Maguire, 725 A.2d 417 (Del. 1999).

Where attorney's prior disciplinary record included public reprimands and private admonitions and attorney was found to have violated subsection (b) in five instances, attorney was suspended from the practice of law for seven months. In re Guy, 756 A.2d 875 (Del. 2000).

Attorney's failure to timely respond to the Office of Disciplinary Counsel's (ODC) letter, or to contact the client as requested by the ODC, violated subsection (b) of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Rule 8.2. Judicial and legal officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.3. Reporting professional misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by rule 1.6.

(d) Notwithstanding anything in this or other of the rules to the contrary, the relationship between members of either (i) the Lawyers Assistance Committee of the Delaware State Bar Association and counselors retained by the Bar Association, or (ii) the Professional Ethics Committee of the Delaware State Bar Association, or (iii) the Fee dispute Conciliation and Mediation Committee of the Delaware State Bar Association, or (iv) the Professional Guidance Committee of the Delaware State Bar Association, and a lawyer or a judge shall be the same as that of attorney and client.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

NOTES TO DECISIONS

Conflicts of interest.

Defendant's motion to suppress statements and derivative evidence was denied where, inter alia, the prosecutor disclosed that there was a potential conflict of interest between defendant and defendant's counsel, and the

record did not reflect that the government's knowledge of counsel's possible breach of his ethical duties tainted defendant's interviews. United States v. Kossak, 275 F. Supp. 2d 525 (D. Del. 2003).

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f)) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for

the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

INTERPRETIVE GUIDELINE.
Lawyer's income taxes.

The following statements of principles are promulgated as Interpretive Guidelines in the application of the Delaware Lawyers' Rules of Professional Conduct:

Criminal acts that reflect adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, as construed under these Rules, shall be deemed to include, but not limited to, the following:

(1) Willful failure to make and file federal, state, or city income tax returns or estimated income tax returns, or to pay such estimated tax or taxes, or to supply information in connection therewith at the time or times required by law or regulation;

(2) Willful attempt in any manner to evade any federal, state, or city income tax.

NOTES TO DECISIONS

Analysis

Attorneys' fees.

— Fee splitting.

Client relations.

— Client funds.

— — Accounting.

— — Misappropriation.

— — Safeguarding.

— Diligence.

— Sexual.

Incapacity or incompetence of attorney.

— Defense to misconduct.

— Reinstatement.

Law firms.

— Bookkeeping.

— Managing co-counsel.

— Managing partner.

— Office.

— Taxes.

Professional conduct.

— Candor toward the tribunal.

— Decorum of the tribunal.

— Illegal conduct.

— Obligations toward the tribunal.

Sanctions.

— Disbarment.

— Disciplinary proceedings.

— Dismissal of claim.

— Reprimand.

— Suspension.

Attorneys' fees.

— Fee splitting.

Attorney violated subsection (a) by attempting to divide a prospective fee in violation of Prof. Cond. R. 1.5(e). In re Maguire, 725 A.2d 417 (Del. 1999).

Client relations.

— Client funds.

— — Accounting.

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

— — Misappropriation.

Attorney violated subsection (c) through his misappropriation of client's funds, failure to pay off a judgment, and signing client's name to a check

without indicating he was signing for her. In re Maguire, 725 A.2d 417 (Del. 1999).

There was substantial evidence to support the factual findings and conclusions of law of the Board on Professional Responsibility regarding an attorney's violations of Law Prof. Conduct R. 1.5(f), 1.15(a) and (b), and 8.4(c), based on the attorney's misappropriation of clients' fees on various occasions, and the attorney's failure to include the typical refund provision regarding unearned fees in the retainer agreements for other clients; a 1-year suspension was warranted. In re Vanderslice, 55 A.3d 322 (Del. 2012).

There was substantial evidence to support the factual findings and conclusions of law of the Board on Professional Responsibility regarding an attorney's violation of Law Prof. Conduct R. 8.4(b), based on the attorney's theft by misappropriating firm funds; such conduct reflected adversely on the attorney's honesty, trustworthiness, or fitness as a lawyer. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Based on a report by the Board on Professional Responsibility, there was clear and convincing evidence that an attorney engaged in criminal conduct worthy of suspnsion by: (1) misappropriating funds from the attorney's employer over a 5-year period; (2) engaging in dishonest conduct by lying to the attorney's mortgage company; and (3) forging the employer's signature. In re Lankenau, 138 A.3d 1151 (Del. 2016).

— — Safeguarding.

When an attorney falsely represented that he had designated an estate account as an attorney trust or escrow account under Law. R. Prof. Conduct 1.15A, the attorney violated Law. R. Prof. Conduct 8.4(c) and (d). In re Wilson, 886 A.2d 1279 (Del. 2005).

Attorney was disbarred after having been found to have violated Law. R. Prof. Conduct 1.15 and Law. R. Prof. Conduct 8.4 by misappropriating clients funds and failing to identify a bank account as a law practice account; the attorney's conduct was found to have been intentional and no mitigating factors were present where it was shown that the attorney took a long time to provide a client with refinancing proceeds and, when the attorney did, the check was returned for insufficient funds, and the

attorney used a septic system escrow deposit to cover another check that the attorney had written. In re Garrett, 909 A.2d 103 (Del. 2006).

Attorney whose child stole funds from the attorney's escrow account was publicly reprimanded for violating Law. Prof. Conduct R. 8.4(c) and (d) by filing an annual registration statement that inaccurately reported that the attorney had a precertification review. In re Otlowski, 976 A.2d 172 (Del. 2009).

Board on Professional Responsibility correctly assigned a 6-month suspension with conditions for violation of Law. Prof. Conduct R. 1.15, 5.3 and 8.4 because: (1) the Board considered the attorney's state of mind and concluded the attorney, as managing partner, was at least negligent in overseeing 2 non-attorneys to ensure the books and records were maintained in compliance with the rules; (2) the attorney knew of rule violations due to the negative balances in the account; (3) the attorney filed an inaccurate 2015 Certificate of Compliance with the Delaware Supreme Court that misrepresented the law firm's compliance with the rule on safekeeping property; (4) the covering funds relied on by the Board on Professional Responsibility should not have been considered a substitute for negative balances in the client subsidiary ledger; (5) the law firm had a duty to safeguard the clients' property but failed to do so; and (6) as a managing partner who failed to supervise non-attorney employees, the attorney was responsible for those deficiencies. In re Beauregard, 189 A.3d 1236 (Del. 2018).

— Diligence.

When an attorney handling 2 estates, inter alia, failed to probate the estates in a timely manner, the attorney violated Law. R. Prof. Conduct 8.4(d). In re Wilson, 886 A.2d 1279 (Del. 2005).

Lawyer violated Law. Prof. Conduct R. 8.4(c) because the lawyer falsely told a client: (1) a complaint was filed; (2) there was a tolling agreement; and (3) negotiations were ongoing. In re Wilks, 99 A.3d 228 (Del. 2014).

— Sexual.

Three-year suspension, along with other conditions, was the appropriate sanction for an attorney who admitted having had a sexual relationship with a client (who claimed to have felt pressured into it) that had not pre-

existed representation of the client, and where the attorney was also shown by clear and convincing evidence to have engaged in conduct with clients and employees of the firm that amounted to the Delaware misdemeanors of sexual harassment and offensive touching. In re Tenenbaum, 880 A.2d 1025 (Del. 2005).

In a professional disciplinary proceeding, an attorney was disbarred as a result of engaging in a pattern of sexual misconduct with clients for more than 2 decades. In re Tenenbaum, 918 A.2d 1109 (Del. 2007).

Incapacity or incompetence of attorney.

— Defense to misconduct.

A pattern of taking mortgage payoff funds is strong evidence of deliberate wrongdoing during an extended period of time, and was grounds for finding a violation of this section notwithstanding the attorney's mental illness. In re Dorsey, 683 A.2d 1046 (Del. 1996).

— Reinstatement.

State Supreme Court approved the Professional Responsibility Board's report and recommended sanction as the attorney admitted violations of Law R. Prof. Conduct 8.4(b), and the 18-month suspension was properly made retroactive to the date that the State Supreme Court entered its order that the disciplinary proceedings be held in abeyance because the attorney had been transferred to disability inactive status and was later granted transfer to active status after rehabilitation. In re Amalfitano, 931 A.2d 1006 (Del. 2007).

Law firms.

— Bookkeeping.

Attorney was publicly reprimanded and subject to a public two-year period of probation for her violations of Rule 1.15(b) and (d), former Interpretive Guideline No. 2, and subsection (d) of this Rule, for failing to pay various federal and state employee and employer payroll taxes in a timely manner, for failing to maintain her law practice books and records, by failing to file her 1998 and 1999 federal unemployment tax returns until October 2000, and by making consistently delinquent filings and payment in connection with other law practice payroll tax obligations, and

for certifying to the court that her law practice books and records were in compliance with the requirements of Rule 1.15 and that her tax obligations were paid in a timely manner. In re Benson, 774 A.2d 258 (Del. 2001).

Attorney was publicly reprimanded and was ordered to serve a public 2-year probation period for violating Law. R. Prof. Conduct 8.4(c) by filing certificates of compliance containing inaccurate representations as to compliance with Law. R. Prof. Conduct 1.15 with reference to the attorney's law practice bank accounts; the attorney's substantial experience, multiple offenses and attitude toward the offenses offset the attorney's lack of a prior disciplinary record, extensive remedial efforts, full cooperation and lack of injury to a client. In re Member of the Bar of the Supreme Court, 985 A.2d 391 (Del. 2009).

Attorney's failure to maintain law office books and records, filing certificates of compliance with annual registration statements that indicated maintenance of such documentation, and failure to file and pay taxes violated Law. R. Prof. Conduct 1.15(d) and Law. R. Prof. Conduct 8.4(c), (d); a public reprimand was imposed. In re Witherell, 998 A.2d 852 (Del. 2010).

Attorney was suspended for 1 year, with the suspension to run retroactively to the date the attorney was transferred to disability inactive status, for violating Law. Prof. Conduct R. 8.4(c) and (d), by filing certificates of compliance that contained misrepresentations relating to attorney's maintenance of the law practice's books and records. In re Nowak, 5 A.3d 631 (Del. 2010).

Following a self-reported embezzlement by a member of the attorney's staff, the attorney failed to obtain court-ordered precertification by a licensed certified public accountant for 2 years of certificates of compliance, reporting the status of recordkeeping with regard to requirements of Law Prof. Conduct R. 1.15 and Law Prof. Conduct R. 1.15A; because the absence of any injury to clients did not excuse the misconduct, the attorney's repeated violations of Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 8.4(d) supported an imposition of a public reprimand with conditions. In re Holfeld, 74 A.3d 605 (Del. 2013).

Attorney's admissions and the record established that the attorney violated Law. Prof. Conduct R. 1.5, 5.3, 8.4(c) and (d), resulting in 2 years'

probation, by: (1) misrepresenting to the court the attorney's maintenance of records; and (2) failing to properly maintain them, to safeguard client funds, to provide for reasonable safeguards to assure accurate accounting, to supervise nonlawyer staff, and to timely file and pay taxes. In re Gray, 152 A.3d 581 (Del. 2016).

— Managing co-counsel.

Lawyer engaged in knowing misconduct, for which suspension was the appropriate discipline, by: (1) assisting a suspended lawyer in the unauthorized practice of law when the lawyer engaged the suspended lawyer to work on cases without determining the applicable restrictions; (2) failing to supervise the suspended lawyer adequately; and (3) giving the suspended lawyer a percentage of a contingency fee that included work performed both before and after the suspension. In re Martin, 105 A.3d 967 (Del. 2014).

— Managing partner.

Where an attorney, the managing partner of a firm, admitted to violating Del. Law. R. Prof. Conduct 1.15(a) by keeping more than $1700 of the firm's funds in the client escrow account for almost a year, admitted to violating Del. Law. R. Prof. Conduct 1.15(d), by failing, for almost a year, to maintain the firm's books and records in compliance with the rule's requirements, admitted to violating Del. Law. R. Prof. Conduct 5.3 by failing to have reasonable safeguards in place to ensure an accurate accounting of the firm's financial books and records in compliance with the Rules, by failing to supervise employees' conduct in reconciling books and records and filing and paying payroll taxes, and by knowing that payroll, gross receipts, and corporate taxes were not being timely filed and paid, admitted to violating Del. Law. R. Prof. Conduct 8.4(c) by filing a Certificate of Compliance for the year 2000, which falsely stated that the law practice's books and records were maintained in compliance with Del. Law. R. Prof. Conduct 1.15 and by falsely stating on the Certificates of Compliance for 1998, 1999, and 2000 that the attorney was meeting tax filing and payment obligations, admitted to violating Del. Law. R. Prof. Conduct 8.4(d) by failing to file and pay various taxes and by filing false Certificates of Compliance for the years 1997, 1998, 1999, 2000, and 2001, and where a witness testified unequivocally that the attorney

instructed the witness to transfer escrow funds to the firm's operating account, and client trust funds had to be, and were, invaded, the Office of Disciplinary Counsel's recommended public reprimand was rejected, and the attorney was suspended from the practice of law for six months and one day; a managing partner of a law firm had enhanced duties to ensure that the law firm complied with its recordkeeping and tax obligations, and the managing partner had to discharge those responsibilities faithfully and with the utmost diligence. In re Bailey, 821 A.2d 851 (Del. 2003).

— Office.

Attorney who failed to maintain a bona fide office for the practice of law in Delaware violated various disciplinary rules because the attorney's assurance to disciplinary counsel that the bona fide office requirement was satisfied was knowingly false and dishonest; merely being reachable by phone was not sufficient. In re A Member of the Bar of the Supreme Court of Delaware: Fred Bar, 99 A.3d 639 (Del. 2013), cert. denied, 573 U.S. 916, 134 S. Ct. 2822, 189 L. Ed. 2d 785 (U.S. 2014).

— Taxes.

When an attorney failed to pay payroll taxes for five years and personal income taxes for six years, the attorney was suspended from the practice of law for 3 years for conduct prejudicial to the administration of justice, subject to the right to seek reinstatement after 6 months. In re Landis, 850 A.2d 291 (Del. 2004).

Attorney who was delinquent in the payment of the attorney's law practice's federal, state, and local payroll tax obligations violated Law. R. Prof. Conduct 1.15(b), 5.3, 8.4(c) and (d); due to the attorney's prior disciplinary history with delinquent taxes, a public reprimand, 18-month probation and implementation of internal accounting controls were warranted. In re Finestrauss, 32 A.3d 978 (Del. 2011).

Evidence supported the determination of an attorney's misconduct by the Board on Professional Responsibility because the attorney failed to file taxes in a timely manner for a period of years; the attorney also responded untruthfully that the taxes had in fact been filed on the annual attorney registration statement. In re Bria, 86 A.3d 1118 (Del. 2014).

Attorney's failure to file taxes in a timely manner for a period of years, and the attorney's false response on that issue on the annual attorney registration statement, warranted a suspension of 6 months and 1 day in order to avoid the automatic reinstatement of a lesser suspension period. In re Bria, 86 A.3d 1118 (Del. 2014).

Professional conduct.

— Candor toward the tribunal.

"Negligent misrepresentation" may form the basis for a charge of misconduct under the literal terms of Law R. Prof. Conduct 8.4(c). In re Wilson, 886 A.2d 1279 (Del. 2005).

Attorney's misrepresentation to a Family Court that a client was not in arrears with regard to alimony and had paid the debt in full was determined to have been an act of dishonesty, fraud, deceit, or misrepresentation in violation of Law. Prof. Conduct R. 8.4(c) and (d), a failure to provide competent representation to the client, in violation of Law. Prof. Conduct R. 1.1, and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of Law. Prof. Conduct R. 1.4(b); the misrepresentation was found to have been knowingly made, but the recommended suspension of 2 years was reduced to 6 months, because mitigating circumstances were found in the nature of the attorney providing the Family Court with correspondence, which would have permitted the Family Court and the adverse party an opportunity to verify the debt. In re Chasanov, 869 A.2d 327 (Del. 2005).

Attorney violated Law. R. Prof. Conduct 8.4(c) by filing with a Family Court a petitioner's answer to a respondent's counterclaim, on which the attorney had signed the client's name and had falsely notarized the signature. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Based on an attorney's false statements to a Virginia court regarding delivery of legal documents to a party-opponent, and misleading statements in a Virginia disciplinary proceeding constituting violations of Law. Prof. Conduct R. 3.3(a)(1), 4.1, and 8.4(c), a 30-day suspension was imposed; rather than imposing an "admonishment with terms," as Virginia

did, a "substantially different discipline" was warranted pursuant to Bd. Prof. Resp. 18(4). In re Amberly, 996 A.2d 793 (Del. 2010).

Attorney admittedly committed disciplinary violations by failing to comply with continuing legal education (CLE) requirements, and by failing to respond to communications with the CLE Commission about that deficiency. In re Poverman, 80 A.3d 960 (Del. 2013).

Attorney admittedly committed disciplinary violations by falsely certifying in the annual registration that there were no disciplinary charges pending because the attorney knew of a continuing legal education deficiency issue and the investigation thereof. In re Poverman, 80 A.3d 960 (Del. 2013).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

— Decorum of the tribunal.

Revocation of an attorney's admission pro hac vice was authorized for his failure to control his client's behavior during a deposition. State v. Mumford, 731 A.2d 831 (Del. Super. Ct. 1999).

In an appeal taken to the trial court from a licensing board, attorney's written arguments suggesting that the trial court would not rule on the

merits, an unfounded accusation, violated Law R. Prof. Conduct 3.5(d), conduct degrading to a tribunal, and Law R. Prof. Conduct 8.4(d), conduct prejudicial to the administration of justice; the trial court had to waste judicial resources striking the offending arguments sua sponte and writing an opinion explaining its actions, and warranted a public reprimand of the attorney. In re Abbott, 925 A.2d 482 (Del.), cert. denied, 552 U.S. 950, 128 S. Ct. 381, 169 L. Ed. 2d 263 (U.S. 2007).

Attorney's communications sent to 4 different Deputy Attorneys Generals did not violate this rule because the evidence did not clearly show that the letters, as offensive and inappropriate as they were, had an actual impact on the administration of justice; the emails, which included crude and sexualized comments, were private and did not directly burden the trial court or affect the outcome of pending litigation. In re Memebr of the Bar of the Supreme Court: Hurley, 183 A.3d 703 (Del. 2018).

— Illegal conduct.

Attorney's conviction for felony possession of a firearm was conclusive of a violation of subsection (b). In re Funk, 742 A.2d 851 (Del. 1999).

Where an attorney was convicted of possession of child pornography and unlawful dealing in material depicting a child engaging in a prohibited sexual act, the serious crimes reflected on the attorney's fitness as a lawyer in violation of Del. Law. R. Prof. Conduct 8.4(b), and attorney's misconduct warranted disbarment without further proceedings. In re Fink, 825 A.2d 238 (Del. 2003).

State Supreme Court approved the state Professional Responsibility Board's report and found that the attorney's conduct in getting together with a friend, selling paintings to each other, making claims against a corporation that accepted payments for transactions, and then pursuing a legal action to recover not only a money back guarantee, but also treble damages and attorney fees, violated Law Prof. Conduct R. 8.4(b), 8.4(c), and 8.4(d), and warranted a public reprimand (especially in light of the attorney's lack of prior discipline and remorse). In re Gielata, 933 A.2d 1249 (Del. 2007).

In an attorney disciplinary matter, an attorney was disbarred as a result of committing various felonies (violently physically attacking that

attorney's spouse in front of their children, destruction of evidence and continual violation of a protective order) in the State of Maine which violated Law. R. Prof. Conduct 3.4(a) and (c) and 8.4(b), (c), and (d); the Supreme Court of Delaware rejected the attorney's defense that the conduct was the result of 2 brain injuries, as the medical evidence did not address mental state at the time of the crimes and there was nothing in the record to suggest that the attorney raised any defense to those crimes based on the claimed infirmity. In re Enna, 971 A.2d 110 (Del. 2009).

Attorney's conduct in connection with a motor vehicle accident was a violation of Law. Prof. Conduct R. 8.4, where the attorney: (1) reported false information (i.e. that the attorney did not drink prior to the accident) to a law-enforcement officer relating to an actual offense or incident in violation of 11 Del C. § 1245; and (2) ingested alcohol after the incident with the intent to circumvent the police investigation. In re Davis, 43 A.3d 856 (Del. 2012).

Sanction of a public reprimand of attorney was the appropriate where the attorney violated Law Prof. Conduct R. 8.4(b), (c) and (d); the attorney had made a false report to the police in a 9-1-1 call that a hostage situation was taking place, in violation of 11 Del. C. § 1245, in order to obtain an expedited police response. In re Schaeffer, 45 A.3d 149 (Del. 2012).

Attorney was suspended for 2 years under Law. Prof. Conduct R. 8.4(d) where the attorney pled guilty to possession of controlled substances and drug paraphernalia (both misdemeanors) with no aggravating factors; there were, however, a number of mitigating factors including political involvement and substantial pro bono work. In re Nixon, 49 A.3d 1193 (Del. 2012).

Denial of a petition for discipline against an attorney was proper because Law Prof. Conduct R. 8.4(b) implicated only criminal conduct that reflected adversely on an attorney's fitness to practice law; there was no such case where the offensive touching was committed by the attorney in an attempt to prevent that attorney's child from running away from home. In re Michaels, 67 A.3d 1023 (Del. 2013).

Because an attorney knowingly executed Department of Housing and Urban Development settlement statements containing false information which ensured loan funding by lenders, such constituted a criminal act that

reflected adversely on the attorney's honesty, trustworthiness, or fitness as a lawyer in other respects in violation of the rules of professional conduct. In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Attorney who violated the Delaware Rules of Professional Conduct, as well as 18 U.S.C. § 1010, by making false certifications in Department of Housing and Urban Development settlement statements (HUD-1 statements) was disbarred; the attorney acted with the intent of facilitating 22 real estate closings that defrauded those who relied on the accuracy of the HUD-1 statements. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney's misappropriation of legal fees constituted theft under the criminal code, which was an ethical violation. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

Lawyer was properly suspended for 15 months because: (1) the lawyer knowingly carried a concealed weapon, drove under the influence of alcohol and illegally possessed a controlled substance, reflecting adversely on honesty, trustworthiness, and fitness, causing potential injury to the public and actual injury due to resources expended to prosecute the lawyer; (2) the presumptive sanction was suspension; and (3) mitigating factors of lack of prior discipline or selfish motive, personal problems, effort to rectify misconduct, cooperation, inexperience, character, other sanctions and remorse outweighed aggravating factors of a pattern of misconduct and illegal conduct. In re Vavala, 207 A.3d 564 (Del. 2019).

— Obligations toward the tribunal.

Where attorney who had practiced for over 20 years and was found to be a good lawyer committed professional misconduct by failing to appear at a scheduled family court hearing and by failing to reschedule two other teleconferences in family court, which constituted violations of Del. Law. R. Prof. Conduct 3.4(c) and 8.4(d), the public probation period that attorney was already serving for prior misconduct was extended for an additional year. In re Solomon, 847 A.2d 1122 (Del. 2004).

Office of Disciplinary Counsel established by clear and convincing evidence that an attorney engaged in conduct prejudicial to the administration of justice, in violation of Law Prof. Conduct R. 8.4(d)

where: (1) the attorney wasted judicial resources in continuing to request to withdraw from appointments as attorney of record; (2) asked the court to put "on the record" and disclose to clients the fact that the attorney should not be appointed, but that the court was making the appointment anyway; (3) caused clients to believe that the attorney could not represent them and that they needed other counsel; and (4) failed to obtain substitute counsel or to even contact the 2 attorneys whose names were provided by the court for just that purpose. In re Murray, 47 A.3d 972 (Del. 2012).

While it was true that an attorney's language did not amount to the inflammatory language of other cases where public reprimand was ordered, the attorney did send discourteous letters to the court in 3 different cases and violated Law Prof. Conduct R. 3.5 and 6.2 in each of those cases; because the Law Prof. Conduct R. 8.4(d) violation for the wasting of judicial resources in attempting to avoid court appointment was not de minimus, public reprimand was appropriate. In re Murray, 47 A.3d 972 (Del. 2012).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Based on the Supreme Court's interpretation of Law. Prof. Conduct R. 8.4(d) to mean that although not all crimes are "prejudicial to the administration of justice," crimes involving "violence, dishonesty, breach of trust, or serious interference with the administration of justice" are categorically Rule 8.4(d) violations; an attorney's theft constituted a violation thereof. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information

and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, did not involve dishonesty, fraud, deceit or misrepresentation; despite the attorney's mere "knowing" conduct, the attorney was trying to zealously defend the client and had no intent to engage in dishonest behavior. In re Lyle, 74 A.3d 654 (Del. 2013).

Where an attorney, in order to benefit a client, knowingly violated the Chancery Court's seizure order enjoining persons from bringing claims relating to an insurer except in that Court, thereby causing injury to the insurer and the Insurance Commissioner and prejudice to the judicial system, the presumptive sanction of suspension was nevertheless reduced to public reprimand; mitigating factors outweighed the aggravating factors in the case. In re Brown, 103 A.3d 515 (Del. 2014).

Office of Disciplinary Counsel proved by clear and convincing evidence that an attorney committed professional conduct violations by knowingly causing images from a sexual abuse victim's cell phone to be shown to both the victim's parent and defendant in violation of a protective order. In re Koyste, 111 A.3d 581 (Del. 2015).

Thirty-day suspension of a deputy attorney general was appropriate because the attorney's conduct, cajoling a bailiff to enter a room in a courthouse brandishing a firearm as an ill-conceived prank, involved breaches of duties owed to the legal system and to the legal profession. In re Gelof, 142 A.3d 506 (Del. 2016).

Board on Professional Responsibility erred in finding that the attorney's admitted violation of the terms of private probation did not also constitute a violation of the rule of professional misconduct with respect to obligations to the tribunal; there was clear and convincing evidence that the attorney's violation thereof was prejudicial to the administration of justice. In re Woods, 143 A.3d 1223 (Del. 2016).

Sanctions.

— Disbarment.

Lawyer was disbarred for the misappropriation of client funds for the lawyer's personal use, and the failure to establish a separate account for the proceeds of the sale of a client's house, despite evidence of the lawyer's personal and emotional problems. In re Carey, 809 A.2d 563 (Del. 2002).

Attorney was disbarred for knowingly violating the terms of a prior suspension by failing to turn all files over to an active member of the bar, by failing to notify all parties of attorney's suspension, and by paying attorney's fees from estates during the suspension; that misconduct caused potential injury to the estate beneficiaries. In re McCann, 894 A.2d 1087 (Del. 2005).

Attorney was disbarred in part because of failure to: (1) maintain proper books and records relating to client funds, but falsely certified compliance for 3 years; (2) timely file and pay federal and state payroll taxes, but falsely certified compliance for 6 years; and (3) pay personal state and federal income taxes. In re McCann, 894 A.2d 1087 (Del. 2005).

Because there was evidence to support the finding that a suspended attorney knowingly practiced law multiple times over more than 1 year during a disciplinary suspension, the lawyer violated multiple disciplinary rules; the appropriate sanction in the circumstances was disbarment. In re Member of the Bar of the Supreme Court of Del. Feuerhake, 89 A.3d 1058 (Del. 2014).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney committed multiple ethical violations by misappropriating fees received for legal services to clients while the attorney was engaged in the private practice of law and failing to disclose the fees during prior disciplinary proceedings; disbarment was warranted. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

— Disciplinary proceedings.

No statute of limitation applies to a professional disciplinary proceeding and, therefore, no basis exists in such proceedings to assert the affirmative defense of laches. In re Tenenbaum, 918 A.2d 1109 (Del. 2007).

— Dismissal of claim.

Because the integrity of the proceedings and the court's truth-finding function involving company management disputes between the parties was threatened by plaintiffs' actions, based on their payments to witnesses in exchange for certain testimony, threats against witnesses and threats of civil litigation on baseless claims, their conspiracy claims were dismissed against all defendants; certain adverse inferences were also drawn as to other claims. OptimisCorp v. Waite, 2015 Del. Ch. LEXIS 222 (Del. Ch. Aug. 26, 2015), aff'd on other grounds, 137 A.3d 970 (Del. 2016).

— Reprimand.

When an attorney handling 2 estates violated Law. R. Prof. Conduct 8.4(d), because the attorney had aggravating factors of a prior private admonition, multiple counts, and substantial legal experience, and mitigating factors of remorse and lack of dishonest motive, the attorney was publicly reprimanded, prevented from representing a personal representative or serving as 1, and required to cooperate and pay costs. In re Wilson, 886 A.2d 1279 (Del. 2005).

The appropriate sanction was a public reprimand and 1 year probation period where: (1) an attorney violated the conditions of a previously imposed private admonition by failing to provide a required precertification and not promptly paying various payroll taxes; (2) the attorney admitted to violating Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 1.15(b), 1.15(d), 5.3, 8.4(c), and 8.4(d); (3) the attorney's violations were not isolated incidents but were repeat violations; (4) the attorney failed to adequately supervise a nonlawyer assistant to assure an accurate accounting of the firm's books and records; and (5) the attorney disregarded the conditions imposed on the private admonition. In re Martin, 35 A.3d 419 (Del. 2011).

Attorney who committed various disciplinary violations with respect to the failure to complete continuing legal education requirements and reporting obligations relating thereto was publicly reprimanded with conditions, because: (1) the attorney acted knowingly and had no remorse; (2) the attorney did not cause injury to a client; and (3) the aggravating factors outweighed the mitigating ones. In re Poverman, 80 A.3d 960 (Del. 2013).

Attorney who had knowingly violated a protective order was properly sanctioned to public reprimand because the misconduct was serious, caused potential injury to the vulnerable teenage victim and caused actual injury to the legal system. In re Koyste, 111 A.3d 581 (Del. 2015).

Attorney committed professional misconduct by failing to comply with the conditions of private probation, by failing to maintain the firm's books and records properly, and by filing false certifications with respect to compliance with that obligation; public reprimand and probation for 3 years with conditions were imposed upon the attorney's immediate reinstatement to the practice of law. In re Woods, 143 A.3d 1223 (Del. 2016).

When respondent violated Law. Prof. Conduct R. 1.5(f), 1.15(a) and (d), 8.4(c) and (d) by failing to properly maintain law firm's books and records for 3 consecutive years, filing inaccurate certificates of compliance for 3 consecutive years, and failing to give flat fee clients proper notice that the fee was refundable if not earned, a public reprimand with a 2-year period of probation was appropriate; this was true, even considering the mitigating factors, given a lawyer's obligation to maintain orderly books and records. In re Castro, 160 A.3d 1134 (Del. 2017).

The Delaware Supreme Court accepted the Board on Professional Responsibility's findings and recommendation for discipline, publicly reprimanding and placing the attorney on a 2-year period of probation with the imposition of specific conditions, because the attorney failed to provide the client with a fee agreement and/or statement of earned fees withdrawn from the trust account, to identify and safeguard client fund, to maintain financial books and records or to supervise nonlawyer assistants; the attorney had engaged in conduct involving misrepresentation, prejudicial to the administration of justice. In re Malik, 167 A.3d 1189 (Del. 2017).

Attorney was publicly reprimanded with a 2-year probation, subject to conditions; the attorney acted with "wilfulness" and did not comply with 3 conditions of a prior disciplinary sanction by failing to inform the firm's supervising attorney of the conditions of the attorney's reinstatement, including the need for a practice monitor. In re Grandell, 189 A.3d 1288 (Del. 2018).

Attorney was publicly reprimanded, subject to specific conditions, because: (1) the attorney failed to maintain the firm's books and records, resulting in the firm's trust accounts being exposed to fraud; (2) the attorney's certificates of compliance contained misrepresentations concerning the status of the firm's books and records; and (3) the attorney was already the subject of discipline for similar conduct to the conduct at issue. In re A Mbr. of the Bar of the Supreme Court of Delaware Glancy, 246 A.3d 1140 (Del. 2021).

— Suspension.

Where a lawyer engaged in a pattern of knowing misconduct over a period of several years by commingling client funds, failing to maintain the lawyer's law practice accounts, failing to pay taxes, falsely representing on certificates of compliance that the lawyer complied with the record-keeping requirements and paid taxes, the lawyer violated Del. Law. R. Prof. Conduct 1.5(f), 1.15(a), (b), (d), 8.4(b), (c), (d); as a result, the lawyer was suspended for 3 years. In re Garrett, 835 A.2d 514 (Del. 2003).

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Attorney whose misconduct involved false notarizations, failure to safeguard fiduciary funds, failure to pay taxes on real estate transactions, and other misrepresentations committed violations Law. R. Prof. Conduct 1.15(a), (b), and 8.4(a), (c), and (d); based on knowing, rather than negligent, conduct in committing the violations, a 1-year suspension as well as a public reprimand and permanent practice restrictions were

deemed appropriate sanctions to impose. In re Member of the Bar of the Supreme Court, 974 A.2d 170 (Del. 2009).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Based on an experienced attorney's misappropriation on multiple occasions of clients' funds and the attorney's use of a deficient retainer agreement, which constituted a violation of Law. Prof. Conduct R. 8.4(b) and (d) as well as violations of other disciplinary rules, a suspension of 1 year was deemed appropriate; in the circumstances, a public reprimand was too lenient. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Lawyer was suspended for 21 months, retroactive to the date of the attorney's transfer to disability inactive status, for violating this rule after the attorney injured another driver as a result of DUI; the attorney demonstrated aggressive and consistent rehabilitation since the accident, implementing the appropriate and necessary life changes and counseling to maintain sobriety for over 1 year. In re Cairns, 132 A.3d 1160 (Del. 2016).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court

and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Attorney was suspended for an additional 6 months where: (1) the attorney filed 2 complaints in Superior Court without maintaining a Delaware office, conduct prejudicial to the administration of justice; (2) the attorney created a false impression by testifying in a prior disciplinary matter that the attorney did not currently have any suits pending in Delaware; (3) the violations were knowing and caused potential harm to the legal system; (4) suspension was the presumptive sanction; and (5) the aggravating factors did not sufficiently outweigh the mitigating factors to warrant disbarment. In re Lankenau, 158 A.3d 451 (Del. 2017).

Rule 8.5. Disciplinary authority; choice of law.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENT

[1] *Disciplinary Authority.* — It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this

jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[2] *Choice of Law.* — A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction is within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

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In-state practice.

Safe harbor provision.

In-state practice.

Attorney's regular representation of Delaware clients constituted the practice of law "in Delaware" under Law. R. Prof. Conduct 8.5 as, for several years, the attorney: (1) accepted new clients who were Delaware residents, involved in Delaware car accidents, and seeking recovery under Delaware insurance policies; (2) did everything short of appearing in Delaware courts; (3) engaged Delaware attorneys as co-counsel only if the attorney could not resolve the matter without litigation; and (4) was

physically present in Delaware, representing the attorney's Delaware clients, on 3 occasions. In re Tonwe, 929 A.2d 774 (Del. 2007).

Safe harbor provision.

Where attorney's regular representation of Delaware clients constituted the practice of law "in Delaware," the safe harbor provision of Law. R. Prof. Conduct 8.5(b) was unavailable as even if the attorney harbored a belief that the representation was in Pennsylvania, the attorney knowingly violated a cease and consent order prohibiting such conduct; the attorney was disbarred. In re Tonwe, 929 A.2d 774 (Del. 2007).

FORMS

For court forms associated with this rule set, see: http://courts.delaware.gov/forms/.

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