NEW YORK STATE BAR ASSOCIATION
Senior Lawyers Section

ETHICS FOR SENIOR LAWYERS

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I. Sale of a Law Practice

A. Rule 1.17 of the Rules of Professional Conduct ("RPC")

1. Rule provides that a lawyer who is retiring, or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice.

2. A suspended or disbarred attorney may not sell his/her law practice after suspension or disbarment.

3. Not permissible to sell a portion of a law practice and continue to practice in the same geographic area. See NYSBA Ethics Opinion #707.

4. For a thorough discussion of RPC 1.17, see Simon's New York Rules of Professional Conduct Annotated by Roy D. Simon, Distinguished Professor of Legal Ethics Emeritus, Hofstra University School of Law.

B. Protection of Client Confidences

1. Pursuant to RPC 1.17(b), a buyer or seller of a law practice must protect client confidences.

a. Seller may provide prospective buyers with any information not protected as confidential information under RPC 1.6.

b. Notwithstanding RPC 1.6, the seller may provide the prospective buyer with information as to individual clients:

- concerning the status and general nature of the

matter;

- available in public court files; and
- concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

c. If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information, the seller may not provide such information to prospective buyer without first advising client of prospective buyer's identity and obtaining client's consent to proposed disclosure.

2. Prior to making any disclosure of confidential information that may be permitted, the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists. If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client.

C. Notice Requirements

RPC 1.17(c) - Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

1. the client's right to retain other counsel or to take possession of the file;

2. the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

3. the fact that agreements between the seller and the seller's clients

as to fees will be honored by the buyer;

4. proposed fee increases, if any permitted; and

5. the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

D. Waiver

RPC 1.17(d) - When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

E. Fees

RPC 1.17(e) - The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

II. Termination of Law Practice by Disability or Death

A. Deceased or disabled lawyer's representative will be put in the position of having to close the practice.

B. RPC 1.15(g) establishes procedure for designation of successor signatory when deceased attorney was sole signatory on trust account.

C. 22 NYCRR §1240.21 - Appointment of Attorney to Protect Interests of Clients or Attorney.

D. Record-keeping requirements set forth in RPC 1.15(d) apply to representative of deceased or disabled lawyer.

E. Division of Fees

RPC 5.4(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 or another lawyer

associated in the firm 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; and

3. a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

III. General Obligations Upon Dissolution of Law Firm

A. Clients

1. Continue competent and diligent representation, and communication with clients during dissolution process.

2. Notify clients of the dissolution and provide clients with options; facilitate choice of new counsel by clients.

B. Client Files and Property

1. Proper transfer of client files, funds and other property that the client is entitled to receive.

2. Proper disposal of client files if appropriate.

3. RPC 1.15(h) provides that upon dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in RPC 1.15(d).

IV. Terminology

A. Retirement Pursuant to a Sale - retired only in the geographic area set forth in the terms of the sale agreement.

B. Certification of Retirement - a retired attorney can avoid the $375.00 bi-annual registration fee by certifying on the re-registration statement that he or she is retired. However, if you certify that you are retired from the

practice of law, you no longer can practice law for profit anywhere, whether it is in New York or any other state. You can practice law on a pro bono basis if you certify a retirement, but you can't receive any fees.

C. Non-Disciplinary Resignation - Resignation for non-disciplinary reasons is governed by 22 NYCRR 1240.22(a). This type of resignation allows the attorney to practice in another state where admitted, without having to pay the New York attorney registration fees. Attorney must apply by submitting affidavit in the form contained in Appendix E.

V. Common Ethical Problems

A. Dishonesty, Fraud, Deceit, and Misrepresentation

1. Improper notarization - Avoid shortcuts such as backdating documents, signing another individual's name to a document (even with that party's permission), or notarizing a signature that was not signed in your presence.

2. False Documents/Statements

a. False statements and/or creation of false documents to conceal neglect of legal matters.

b. False statements in attorney affirmations have resulted from attorneys failing to take necessary steps to verify information provided by clients.

B. Fiduciary Obligations to Third Persons

1. RPC 1.15(c)(4) requires lawyer to promptly pay or deliver to client or third person as requested by client or third person, funds or other property in possession of lawyer that client or third person is entitled to receive.

2. Many attorneys are not aware that their fiduciary duty to third persons may take precedence over the client's instructions regarding funds or property held in trust.

C. Trust Account Irregularities

1. Client funds must be maintained and preserved in an attorney trust account. Stashing cash in a file or a safe violates a lawyer's

fiduciary responsibility.

2. Failure to preserve client funds in trust account - conversion is complete when the account in which the client's funds are deposited is overdrawn or when the balance of the account is less than the client's interest in it.

   a. Reconcile your trust account monthly. Know your bank's procedures for making funds available. Do not issue checks for funds that are not yet on deposit and available.

   b. No excuse that the improper handling of the funds is due to mismanagement rather than misconduct.

3. All withdrawals from attorney trust account must be made by check made out to a named payee and <u>not</u> to cash. ATM cash withdrawals from trust accounts are prohibited. Bank transfers, electronic funds transfers, wire transactions, etc., are prohibited unless there is <u>prior written approval</u> from the person entitled to receive the proceeds.

4. Only an attorney can be a signatory on attorney trust account.

   a. Non-lawyer office staff may not be authorized signatories or be given "permission" to sign the attorney's name on trust account checks.

   b. A lawyer may allow paralegal to use a signature stamp in limited circumstances so long as attorney closely supervises the delegated work and maintains complete professional responsibility for acts of the paralegal. *NYSBA Ethics Opinion #693*

5. Commingling - attorney is strictly prohibited from commingling personal funds with funds of clients or third persons.

   a. Legal fees must be withdrawn promptly from trust account within a reasonable time after they have been earned, to avoid improper commingling of personal and client funds. Checks for withdrawal of fees should be clearly labeled as such and designate the client or transaction involved.

b. Lawyer may not deposit personal funds into trust account as protection against deposited items not clearing immediately.

c. Lawyer may not have a line of credit or other overdraft protection relating to attorney trust account due to prohibition against commingling.

6. Fees Paid in Advance By Client

a. Advance payments of legal fees are <u>not</u> client funds and should not be placed in attorney trust account. *NYSBA Ethics Opinion #570*

i. <u>Exception</u> **-** attorney and client may agree to treat the advance fee as the client's funds, to be withdrawn when the fees are actually earned by the attorney. Then it would be appropriate to maintain the advance fees in the attorney trust account, provided that such arrangement is contained in a written retainer agreement.

ii. Advance payment of legal fees must be distinguished from prepayment of expenses or disbursements by client, which do not belong to the attorney.

b. Regardless of whether the advance fee is to be treated as client funds, lawyer has obligation to promptly refund any unearned portion of fees upon completion of matter or withdrawal from representation.

7. "Advancing" Disbursements From Trust Account

a. It is improper to issue a disbursement check from the attorney trust account on behalf of a client before funds to cover the check have been <u>both deposited and cleared</u>.

b. Such an "advance" results in the check being paid out of funds belonging to other clients, which constitutes a conversion.

8. Technical Requirements

a. Trust account must contain "Attorney Trust Account", "Attorney Escrow Account", or "Attorney Special Account" in its title. RPC 1.15(b)(2).

b. Trust account must be opened/maintained at an approved banking institution. RPC 1.15(b)(1), 22 NYCRR §1300.1(a). Moreover, any "qualified funds" must be deposited into an IOLA account. Judiciary Law §497.4(a).

c. “Qualified funds” are those received by the attorney in a fiduciary capacity which, in the judgment of the attorney are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest to justify the expense of administering a segregated account. Judiciary Law §497.2

9. Required Bookkeeping Records - RPC 1.15(d)

a. Attorney must make accurate record entries at or near the time of the events recorded and maintain same for seven years.

b. No specific accounting system is prescribed under the Rules, but records must be kept as to the date, source, and description of each deposit item and the date, purpose and payee of each disbursement.

i. As a practical matter, individual client ledger sheets are the only way to keep track of each client's transactions and to demonstrate, if necessary, that the funds were properly maintained.

ii. Merely keeping monthly bank statements, canceled checks, and check stubs does not satisfy these requirements.

c. Forms of record keeping and electronic storage

i. RPC 1.15(d)(3) - allows lawyer to maintain required "copies" by original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

ii. However, note that RPC 1.15(d)(viii) specifying records such as checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips makes no reference to "copies", and these must be maintained as original records. *NYSBA Ethics Opinion # 680.*

d. Failure to maintain the required bookkeeping records or to produce them upon demand of the Grievance Committee constitutes an independent basis for disciplinary action. RPC 1.15(I) and (j).

10. Interest on Lawyer Accounts Program (IOLA) alleviates the practical problem of attributing interest to numerous client deposits for relatively short periods of time. Judiciary Law §497.

a. IOLA accounts create no income tax consequences for the lawyer or client.

b. IOLA assumes the cost of bank service charges and fees relating to the account.

c. IOLA Fund is used for civil legal services for indigent and to improve administration of justice.

D. <u>Transactions Between Lawyer and Client</u>

1. RPC 1.8(a) - Transactions in which the attorney and client have differing interests and the client expects the lawyer to exercise professional judgment for the protection of the client.

a. Transaction must be fair and reasonable to the client, and the terms must be fully disclosed and transmitted <u>in writing</u> in a manner that can be reasonably understood by the client;

b. Client must be informed <u>in writing</u> of the desirability of seeking the advice of independent counsel in the transaction, and must be given a reasonable opportunity to do so; and

c. Client must give <u>informed consent, in a writing signed by the client</u>, 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.

2. Lawyer's duty may apply even if lawyer does not have an active legal matter pending with the client at the exact time of the transaction. If an attorney/client relationship existed prior to the transaction, the client may reasonably expect the lawyer to exercise professional judgment for the client's protection.
3. Business or financial sophistication of the client does not obviate the need for full disclosure.

E. Rules Governing Domestic Relations Matters

1. Rules apply to "divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions, or proceedings." 22 NYCRR §1400.1.

2. Attorney must provide and execute written retainer agreement and statement of client's rights and responsibilities containing the language prescribed in 22 NYCRR §§1400.2 and 1400.3. These documents must be executed prior to the commencement of any legal work.

3. Attorney must provide written, itemized billing statements to client at least every 60 days, regardless of whether retainer funds have been depleted.

F. Threatening Criminal Prosecution

1. RPC 3.4(e) - lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

2. Also improper for lawyer to threaten to file a disciplinary complaint, as that is contrary to lawyer's duty to report misconduct pursuant to RPC 8.3(a).

G. Lawyer's Responsibility for Conduct of Others

1. RPC 5.1 - Responsibilities of law firms, partners, managers and supervisory lawyers.

Lawyers with management authority in the firm or direct supervisory authority over other lawyers are required to make reasonable efforts to set up internal policies and procedures designed to provide reasonable assurance that all lawyers will conform to these Rules.

2. RPC 5.2 - Responsibilities of a subordinate lawyer.

Although lawyer not relieved of responsibility for a violation by fact that lawyer acted at direction of a supervisor, that may be relevant in determining whether lawyer had knowledge required to render conduct a violation of these Rules.

3. RPC 5.3 - Lawyer's responsibility for conduct of nonlawyers.

a. RPC 5.3(b) states that a lawyer shall be responsible for conduct of a nonlawyer employee that would be a Rule violation if engaged in by the lawyer, if the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it.

b. Rule requires firm to ensure that work of nonlawyers is appropriately supervised, and lawyer with direct supervisory authority over work must adequately supervise those nonlawyers.

c. Attorneys are obligated to oversee the trust account activities and bookkeeping practices of the law firm, and can be held responsible for the actions of other lawyers and non-lawyer employees of the firm.

I. Lawyer censured for failure to adequately supervise conduct of two secretaries who commingled client and non-client funds, failed to promptly remit client funds, and made unauthorized withdrawals of client funds. *In re Collins, 196 AD2D 69 (4th Dept. 1994).*

ii. Lawyers suspended for failure to supervise paralegal who converted client funds. *In re Bushorr, 274 AD2d 107 (4th Dept. 2000); In re Gaesser, 290 AD2d 58 (4th Dept 2001).*

d. Confidentiality

RPC 1.6(c) requires a lawyer to exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client.

H. Legal Fees

1. Written Letter of Engagement or Written Retainer Agreement required when fee is expected to be over $3,000.00. [22 NYCRR Part 1215].

2. Fee Dispute Resolution Program - Part 137 of the Rules of the Chief Administrator.

   a. Fee arbitration is mandatory for the attorney if it is requested by the client in a civil matter.

   b. Exceptions include criminal matters, disputes involving sums of less than $1,000 or more than $50,000, claims involving substantial legal questions including professional malpractice or misconduct, and others.

3. Contingent fee agreements.

   a. In all personal injury matters involving contingent fees, attorney is required to have written contingent retainer agreement. RPC 1.5(c). 22 NYCRR §1015.15.

   b. In every contingent fee matter, attorney must promptly provide client with a writing stating how the fee is to be determined and a written closing statement upon conclusion of the matter. RPC 1.5(c).

   c. Contingent fees are prohibited for representing a defendant in a criminal matter RPC 1.5(d)(1).

4. Non-Refundable Retainer Fees

   a. "Nonrefundable" fee agreements or special retainers wherein an attorney keeps an advance payment irrespective of whether the legal services contemplated are actually rendered have been ruled to be unethical. Matter of Cooperman, 83 NY2d 465, 611 NYS2d 465. Reasoning is

that such agreements improperly impair client's right to discharge lawyer for any reason or no reason.

b. The Appellate Division in Cooperman distinguished "minimum fee" arrangements, which it defined as a forecast by the attorney of the minimum amount the client can expect to pay in order for the attorney to complete the matter and held these to be proper. Matter of Cooperman, 187 AD2d 56, 591 NYS2d 855 (2nd Dept. 1993).

5. Fee Splitting

a. Attorney may not divide a legal fee with another attorney who is not a partner or associate in the attorney's law firm pursuant to RPC 1.5(g) unless the total fee is reasonable and:

i. The client consents to employment of the other lawyer after full disclosure that a division of fees will be made;

ii. The division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; and

iii. The total fee is not excessive.

I. Advertising and Solicitation

1. RPC 7.1(a) - A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that contains statements or claims that are false, deceptive or misleading, or violates a Rule.

2. RPC 7.1 forbids specific types of advertisements, including paid endorsements or testimonials absent disclosure that the portrayal is by a paid actor, or the use of a fictitious law firm.

3. RPC 7.1 permits certain types of advertising, including basic biographical information, legal fees charged and, with written consent, the names of clients regularly represented.

4. Advertising must be labeled "Attorney Advertising" and be retained by the law firm for a period of not less than three years for hard copies and one year for computer accessible communications.

5. RPC 7.3 - A lawyer shall not solicit professional employment from a prospective client by in-person or telephone contact unless the recipient is a close friend, relative, former client, or existing client.

6. Targeted direct mailings, written and recorded communications are permitted under RPC 7.3(a)(2) unless:

    a. They are misleading pursuant to RPC 8.4(c);

    b. Recipient has made it known to the lawyer a desire not to be solicited by the lawyer;

    c. The solicitation involves coercion, duress, or harassment;

    d. The lawyer knows or reasonably should know that the age or the physical, emotional, or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney; or

    e. The lawyer intends or expects, but does not disclose, that the case will be handled primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

7. RPC 7.4(c) defines conditions under which the word "specialist" may be used in advertising, with mandated disclaimers. Distinction is made between certification by a private organization approved by the American Bar Association and certification under authority of laws of another jurisdiction.

8. Use of terms such as “concentrating in” or “practice limited to” is permissible.

9. Social Media

    a. LinkedIn profile does not constitute attorney advertising unless the profile’s primary purpose is the retention of the lawyer for pecuniary gain. *See generally* N.Y. Cty. Formal Op. 748 (2013); NY City Formal Op. 2015-7

    b. Profiles containing lawyers’ background information is not considered advertising, but a profile including subjective statements about the attorney’s skills, area of practice, endorsements and testimonials from clients or colleagues is likely to be considered advertising.

    c. If content is reasonably likely to create an expectation of

results, or where it compares the lawyer's services with those of other lawyers, the attorney should label the page as "Attorney Advertising" and include the disclaimer "Prior results do not guarantee a similar outcome."

d. Attorneys should periodically review the endorsements on their social media pages to ensure that statements posted by third parties are truthful and not misleading.

VI. Best Practices to Avoid Problems

A. Communication with Clients

1. RPC 1.4 states that a lawyer shall promptly inform the client of material developments in the matter, including settlement or plea offers; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; and promptly comply with a client's reasonable requests for information.

2. Explanation at the outset. Client should be fully educated as to the relative merits of the case, the length of time it will take to complete the matter, and what it will cost in terms of the fee arrangement and expenses. Avoid creating unrealistic expectations by client.

3. Client should be kept advised of the status of the case, and client's inquiries/phone calls should be answered promptly.

   a. Provide clients with copies of correspondence, documents, pleadings, etc., to keep them informed of the progress of their matters.

   b. If nothing is happening in the matter, let the client know of that fact and the reasons for the delay and what next step will be.

   c. Document non-written communications with clients and

unsuccessful attempts to respond to their phone calls.

d. Avoid even the appearance of procrastination.

4. Fee arrangements and billing procedures should be crystal clear to the client. Consider having a written fee agreement in all cases, even where not required by rules, to minimize potential fee complaints.

5. Regular billing - this will keep clients advised as to what you are doing and help prevent disputes over fees.

B. Client Selection

1. Exercise discretion in accepting employment that is likely to produce dissatisfaction based upon the nature of the client or the matter.

2. For example, the following types of prospective clients are more likely to be dissatisfied with you regardless of the quality of your services or the outcome - and are thus more likely to file a grievance:

* those who persist in unrealistic expectations despite your advice;
* those who are adamant about quick results;
* those who are not truthful with you;
* those who do not want you to talk with their previous counsel.

C. Conclusion of Representation

1. Consider a closing letter to client summarizing services completed and results achieved; thanking them for being your client; and making clear that the attorney-client relationship is concluded for that matter.

2. After matter is completed, client's inquiries should still be answered as a preventative measure. If the former client does not hear from you, they will turn to the Bar Association or Attorney Grievance Committee.

D. Law Office Procedures

1. Management of telephone and written communications (including return of calls by staff when attorney is not immediately available), calendaring, case review (tickler) systems, and conflicts checks systems.

2. Training of office staff to deal with clients in a professional manner and to enhance the attorney/client relationship.

3. Be fair to office staff - do not expect them to do dirty work of giving client bad news or to tell "white lies" (or worse) so you can avoid handling unpleasant situations yourself.

VII. Rules Governing Professional Conduct and Where to Find Them

A. Professional Misconduct is defined as a violation of any of the Rules of Professional Conduct, as set forth in 22 NYCRR Part 1200, including the violation of any rule or announced standard of the Appellate Division governing the personal or professional conduct of attorneys. 22 NYCRR §1240.2(a).

B. The New York Rules of Professional Conduct - formally promulgated as joint rules of all four Appellate Divisions. 22 NYCRR §1200.

C. Resources

1. New York State Bar Association Committee on Professional Ethics provides advice, informal opinions, and published formal opinions. (518) 463-3200 or e-mail: ethics @nysba.org
2. Publications

   a. New York Law Journal - frequent articles on ethics and professionalism; publishes disciplinary decisions and ethics opinions in full.

   b. Simon's New York Rules of Professional Conduct Annotated by Roy D. Simon, Distinguished Professor of Legal Ethics Emeritus, Hofstra University School of Law.