2024 Employment Law Ethics Update

2024 Seminar
Written Materials

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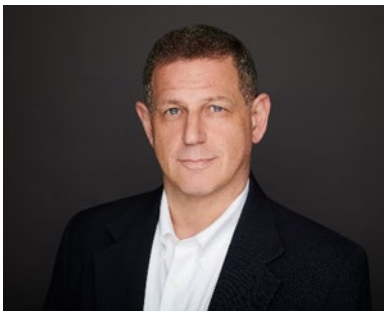
ABOUT THE SPEAKERS



Edward Lee Isler, Isler Dare, P.C. / *Tysons Corner*

Edward Lee Isler is a founding Partner of the law firm of ISLERDARE, P.C., with offices in Tysons Corner and Richmond, Virginia. The Firm's practice is dedicated solely to the representation of management in labor and employment matters. A native of McLean, Virginia, Eddie graduated in 1983 from the University of Virginia with a B.A. in Government and Economics. In 1987, Eddie graduated from the College of William & Mary, Marshall-Wythe School of Law, where he served as a member of the Board of Editors of the William & Mary Law Review and was inducted into the Order of the Coif. Upon graduation, Eddie served for a year as a judicial clerk to the Honorable James C. Turk, Chief Judge for the U.S. District Court, Western District of Virginia. Before establishing the firm in April 1997, Eddie spent seven years practicing labor and employment law in Washington, D.C. with the national firm, Gibson, Dunn & Crutcher, and two years with a regional employment firm. In 2010-2012, Eddie served a two year term as the Chair of the Virginia Bar Association (VBA), Labor and Employment Law Section. Since 1998, Eddie has served as a participant and/or Planning Chair for the VIRGINIA CLE Annual Employment Law Update. He is also an author of Virginia Employment Practices and Forms, a co-author and co-editor of Virginia Business Torts, both published by the Virginia Law Foundation, and a co-author of the Virginia Wage and Hour Handbook, published by the Virginia Chamber of Commerce Legal Reference Series. Eddie has been named repeatedly by Virginia Business Magazine as one of Virginia's Legal Elite for employment law, and has been recognized by CHAMBERS USA, SuperLawyers Magazine, and Washingtonian Magazine as one of the leading employment lawyers in Virginia. In 2013, 2015, 2017, and 2020, he was named by The Best Lawyers in America as one of the Top 10 attorneys (all practice areas) in the Washington, D.C. metropolitan area. Eddie is a member of the Virginia and District of Columbia Bars and is admitted to practice before numerous federal circuit and district courts as well as the U.S. Supreme Court. He has extensive experience representing employers before the EEOC and in federal and state court litigation. He resides with his wife, Kimberly, in Oakton, Virginia and is the proud father of Emily (UVA '17), Lindsay (UVA '19), Christy (UVA '21), and Michael (JMU '23). He is active in his church, McLean Presbyterian.

James McCauley, Law Office of James McCauley / *Richmond*

James ("Jim") M. McCauley represents lawyers and law firms on matters related to legal ethics, legal malpractice, lawyer discipline and professional responsibility. Jim is the former Ethics Counsel for the Virginia State Bar, retired as of November 2022. He served as staff liaison to the Virginia State Bar's Standing Committee on Legal Ethics and managed the staff in the Legal Ethics Department and the Legal Ethics Hotline. Jim served on the faculty of the Virginia State Bar's Mandatory Professionalism Course from 2004-2010. For 15 years Mr. McCauley taught Professional Responsibility at the T.C. Williams School of Law in Richmond, Virginia and served on the American Bar Association's Standing Committee on Legal Ethics and Professionalism from 2008-2011. In 2018, Mr. McCauley was elected "Leader of the Year" in the Virginia Lawyers Weekly "Leaders in the Law" awards program. He served as Chair of the Public Statements Committee for the Association of Professional Responsibility Lawyers. Mr. McCauley is a Fellow of the Virginia Law Foundation and American Bar Foundation. From 2014-2020, he served on the Board of Directors for the Virginia Judges and Lawyers Assistance Program (VJLAP), formerly Lawyers Helping Lawyers. Mr. McCauley is the 2021 recipient of the Travers Scholar Award given by the Real Property Section of the Virginia State Bar and Virginia Continuing Legal Education.

Ethics: Conflicts of Interest That May Arise in Employment Law

Part A: Hypotheticals

Part B: Answers to Hypotheticals

Part C: Virginia Rules of Professional Conduct, Rule 1.1-1.18

Part D: ABA Op. 512: Generative Artificial Intelligence Tools

October 2024

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Ethics: Conflicts of Interest That May Arise in Employment Law

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PART A
HYPOTHETICALS

HYPOTHETICAL NO. 1 (LUCY AND CHARLIE)

Charlie and his faithful associate, Lucy, have been representing Bredebear Enterprises in the defense of a public policy wrongful discharge case brought by the plaintiffs' firm of Sharp, Teeth, & Elbows, P.C. ("STE, PC"). About a month prior to trial, Lucy informs Charlie that she is leaving his firm to join STE, PC.

After Charlie expresses his sorrow over losing Lucy so close to trial, he says to her, "Wait a minute, you can't be switching sides in the middle of a fight."

Lucy responds, "Don't worry about it. I've already talked it over with them, and STE, PC will screen me out to avoid the conflict. And you know I would never disclose anything confidential that our client has shared with us."

Charlie is not convinced and contacts you, as his mentor, for advice.

1. Is the plan of Lucy and STE, PC, to set up a "screen" sufficient to avoid the imputation of a conflict for STE, PC?

2. Would it make a difference if Lucy plans to work remotely and not ever enter the office of STE, PC until after the trial is over?

3. What effect on the analysis, if any, does it have if Lucy's only connection to the case was to sit in and defend one deposition while Charlie was on vacation?

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[1] Jim McCauley was employed with the Virginia State Bar for more than 33 years, initially as the Assistant Bar Counsel and subsequently as the Ethics Counsel. From 2000 to 2019, he taught the course on Professional Responsibility at the University of Richmond TC Williams School of Law

[2] Eddie Isler has served as Planning Chair for the Virginia CLE Annual Employment Law Update for the last two decades and served as chair of the Virginia Bar Association Section on Labor Relations and Employment Law from 2010 to 2012.

HYPOTHETICAL 2 (PAUL, CRAIG, AND LISA)

Paul, a real estate attorney, is retained to represent Butler Industries, a wholly-owned subsidiary of Butler Holding Company, to review and negotiate a commercial lease on behalf of Butler Industries for its new manufacturing facility. During this representation, Paul deals entirely with the executives at Butler Industries and has no interactions with the parent, Butler Holding Company. This is the first work that Paul's firm has ever done for Butler Industries, and it has never performed any work for Butler Holding Company.

Craig, one of Paul's partners, has recently interviewed Lisa, the terminated controller of Butler Holding Company, about bringing a Title VII sex discrimination case against Butler Holding Company. After conducting an initial two-hour meeting with Lisa, Craig runs a conflict check through his firm's conflicts system, and although there is no conflict with Butler Holding Company, the name Butler Industries pops up. Craig reaches out to the responsible attorney for Butler Industries, Paul, but Paul is on vacation and does not respond to Craig's email inquiry about a potential conflict for several days. Craig decides to go ahead and launch a demand letter on Lisa's behalf to Butler Holding Company.

1. Should Craig have run a conflicts check prior to holding a two-hour introductory meeting with Lisa?

2. Would it make any difference whether Craig was charging Lisa his usual initial flat fee of $500 for the meeting or whether it was just a free consultation?

3. If Paul's lease negotiations on behalf of Butler Industries had ended a month prior to Lisa's consultation with Craig, would it be a conflict for Craig to pursue his claim?

4. What factors, if any, should be considered in determining whether Craig's attempted representation of a client adverse to Butler Holding Company is a conflict of interest with Paul's representation of Butler Industries?

5. Did Craig, by sending the letter without getting confirmation that there was no conflict, violate the Virginia Rules of Professional Conduct?

6. If Craig's transmission of the letter was a violation of the Virginia Rules of Professional Conduct, can Craig cure the violation by quickly sending a letter to Butler Holding Company informing them that he is withdrawing his representation of Lisa?

7. If Craig does act quickly to withdraw his letter of representation to Lisa, has he breached any duties to Lisa?

HYPOTHETICAL NO. 3 (WHIT AND TIM)

Tim, a plaintiff's attorney, has had so many cases against noted defense lawyer, Whit, that the two have become good friends and have golfed together on two or three occasions.

During their most recent golf outing, Tim asked Whit, "Hey, I've got this potential case I have been noodling over, and I wonder if I could run it by you?"

Whit responds, "Sure, glad to discuss – just don't tell me who the parties are or give me enough identifying information so I get conflicted if the employer ends up hiring me."

"You know I would never assert a conflict of interest in that sort of situation," Tim replies.

"I know," says Whit, "but just want to make sure we're on the same page."

Tim then starts to tell the facts of the potential case and, as often happens, ends up diving into some of the details of the alleged misconduct that led to his potential client resigning her job.

About six weeks later, Tim files his lawsuit against the company.

1. If Whit ends up getting retained by the company, does Whit have a conflict-of-interest issue by virtue of his conversation on the golf course with Tim?

2. If Whit ends up getting retained by the company, does Tim have a conflict-of-interest issue by virtue of his conversation on the golf course with Whit?

3. Does it make a difference if, at the time of the golf conversation, Tim had not yet actually been retained by the potential plaintiff?

4. Did Tim's assurance to Whit that he would not raise any conflict of interest if Whit ended up representing the employer cure the conflict (if one exists)?

HYPOTHETICAL NO. 4 (EMILY, LINDSAY, BRAD, AND ANGELINA)

Emily represents Brad, the former Director of Sales for Elliott Consulting Company, in his claims against the company that, over his last three years of employment, he was shorted his override commissions in the amount of approximately $500,000. After the parties have served written discovery, they embark upon settlement negotiations to see if both sides can avoid the cost and expense of the discovery process.

After going back and forth several times, the parties have narrowed the gap, with Emily's last offer being $425,000 and the company's last offer being $275,000. Counsel for Elliott Consulting Company, Lindsay, has mentioned to Emily that if Emily can get her client into the range of $350,000, Lindsay thinks that she can get the case settled.

Emily schedules a meeting in her office with Brad and his wife Angelina to discuss the settlement negotiations. When Brad and Angelina do not show up for the 11:00 AM meeting, Emily figures that they are just running late or forgot. She sends them both a text message but does not hear back.

In the late afternoon, Emily receives a startling text message from Angelina:

> "Emily, I don't know how to say this and I cannot believe I am having to write these words, but as we were driving to your office, we were in a terrible accident and Brad was killed. I broke both my legs and I am texting you from a hospital bed. I don't know how I am going to be able to go on without him, and I don't know how I'm even going to be able to afford to pay for his funeral. Please get the case settled for whatever you can as I will really need those funds."

Emily is devastated by the news, but becomes determined to help Angelina as much as she can. She sends Lindsay an email in which she writes: "if you can get your client to meet us in the middle at $350,000, I have authority to accept that number. Please let me know soon as possible."

1. Did Emily act ethically in trying to complete the settlement negotiations after she had learned of Brad's death without telling Lindsay that Brad was now deceased?

2. Would Emily be on better ethical footing if she disclosed to Lindsay that Brad had died in the accident but that Angelina, on behalf of the estate, still wanted to complete the settlement negotiations?

3. Would it make a difference if the parties had already agreed on principle to the settlement of $350,000, and the two attorneys were just in the process of writing up the agreement when the accident occurred?

4. Would it make any difference if Emily had asked both Brad and Angelina to sign her engagement letter because she was thinking of bringing a claim on behalf of Angelina for loss of consortium resulting from Brad's depression after he was laid off?

HYPOTHETICAL NO. 5 (TODD AND THE COO)

Todd is the long-time employment counsel to Gleason Consulting and over the years has become good friends with all of the senior executives. After meeting with the COO to go over a few corporate matters, the COO says to Todd, "Hey, can I share with you some really exciting news?"

Todd, assuming that it has something to do with one of the COO's grown kids, replies, "Sure, what's the good news?"

"Well, I'm setting up my own consulting company, and I've already gotten the Director of Sales and her top salesperson to go with me. And they've already reached out to a few clients who are anxious to make the move to our new company. Of course, once we get set up, we'll want you to represent us if we get any employment issues."

Todd, not sure what to say, simply nods his head, waves to the COO, and exits his office.

1. *Can* Todd tell the General Counsel of Gleason Consulting what the COO has just told him?

2. *Must* Todd, out of duty to his longtime client, tell the General Counsel of Gleason Consulting what the COO has just told him?

3. Would it change the situation if *all* the COO told Todd was that he was leaving to set up his own company?

HYPOTHETICAL 6 (RICHIE AND LINDA)

Noted defense lawyer, Richie Rigid, was checking his email on Saturday afternoon (like any good defense lawyer) when he opened an unsolicited and fairly detailed email from an employee, Linda Laidoff, who has recently been terminated. Linda does not mention the name of her employer, but provides a fair amount of detail about her situation. She writes:

> Mr. Rigid, it is nice to meet you by email. My neighbor Sally Sidewalk says you are the best employment lawyer in town. Here is my story and I am looking forward to working with you.
>
> I've been employed at my company for about 15 years and moved up in the finance department to the point where I became the Controller about three years ago. Everything was going fine until the company hired a new CFO, a guy who just seems to have it out for women. There was nothing I could do right in his eyes. He seemed to find fault with everything I did.
>
> We had a revenue recognition issue that came up, and I felt very strongly that the company was not handling it correctly. I tried to get them to reach out to our outside CPA firm, but the CFO said he knew how the accounting rules worked, and he didn't need help from an outside CPA. I let it drop, but only after sending him an email letting them know that I thought he was violating generally accepted accounting procedures.
>
> About four weeks after I sent that email, I was called into a meeting with the Director of Human Resources and told that they were restructuring and that my job was going away. They said they just did not need a Controller anymore. But I am fairly confident that they view me as a whistleblower and I think I have a really good claim. Please let me know when I can come in and meet with you for initial consultation.

Richie thinks about emailing Linda back to let her know that he works only with employers, but decides that he will just wait until Monday. The following day, Sunday, he receives a message from a long-time client, Holden Industrials, informing Richie that they are probably going to need him to help defend a whistleblower suit by their former Controller. They tell Richie that after they terminated the Controller, her final words to them were, "You haven't heard the last of me. I'll be seeing you in court."

1. Has Linda's unsolicited email created a conflict of interest that would preclude Richie from representing Holden Industries in her whistleblower case?

2. Now that he has received the email from Holden industries, what should Richie do with the unsolicited email from Linda? If there is a potential conflict of interest, can he cure the conflict by simply not responding and deleting the email?

3. Does Richie have a duty to inform Holden Industries before they formally retain him for the case that he received and read Linda's email?

4. If Richie does not have a duty to inform Holden Industries that he received and read Linda's email, is he at liberty to share with them what Linda put in her email to him?

HYPOTHETICAL NO. 7 (JOSH, SHIRLEY, BELLE, AND NICOLE)

Josh Sharpedge, an experienced plaintiff's attorney, brings a claim on behalf of two women, Shirley and Belle, against their former employer, Weaver Shirt Company (WSC), alleging discrimination based on sex and age arising from their recent terminations. WSC retains Nicole Sliceup to represent the company in the defense of the suit. Nicole reaches out to Josh and proposes that they attempt an early mediation of the case to see if they can it get resolved, and Josh and his clients agree to participate in the mediation.

At the mediation, the parties spend the better part of the day going back and forth through the mediator with proposals and counterproposals. Finally, the Company offers to settle the case for $100,000 as a last, best, and final offer for both plaintiffs and tells them that they can split it up however they want, but that the offer is good only if both Shirley and Belle agree to settle.

Sensing that this might put Josh in an uncomfortable position with his clients, the mediator pulls Josh and Nicole into the hallway so they can discuss Nicole's final proposal. Josh tells Nicole that she is putting him in an untenable position by not apportioning the settlement proposal between the two plaintiffs, and he would rather the defense lawyer apportion what the company is willing to pay to each plaintiff.

Nicole then than offers $60,000 to settle with Shirley and $40,000 to settle with Belle, but again says that they will not settle with only one of the plaintiffs since the main motivation for the settlement is to avoid the cost of litigation, which they would still be forced to bear if either Shirley or Belle decides to litigate.

Josh goes back to meet with his clients and explains the offer. Shirley wants to settle, but Belle says that it is not enough and she wants to litigate if she cannot get at least $50,000.

1. Was it ethical for Nicole to offer initially to settle for a lump sum of the $100,000, leaving it up to Josh and his clients as to how to split up the settlement amount?

2. Was it ethical for Josh, before communicating that offer to his clients, to ask Nicole to apportion the last, best, and final settlement offer between Shirley and Belle?

3. Can Josh continue to represent both Shirley and Belle in light of Shirley's desire to take the settlement offered and Belle's stated desire to litigate if she cannot get at least $50,000?

4. Would it be ethically appropriate for Josh to suggest to Shirley that if she really wants to get this done, then maybe she should agree to apportion the settlement evenly with Belle?

HYPOTHETICAL 8 (BONNIE, STEVE, AND MOLLY)

Bonnie Beauty, a former executive assistant at Davidson Bookbinding Company (DBC), filed a Complaint against DBC and her former boss, the company COO, Steve Straightlace, alleging sexual harassment and wrongful discharge. In the complaint, Bonnie alleges that Steve forced her to engage in sexual relations with him and when she refused to continue their affair, she was fired.

Molly is retained to represent DBC and potentially Steve. She conducts an initial interview with Steve, who denies all of the allegations entirely and explains that he has been happily married for more than 21 years, during which time he has never had an affair. Based upon this initial interview, Molly feels comfortable representing both the company and Steve.

Bonnie's attorney serves interrogatories on both DBC and Steve. Molly prepares answers to the interrogatories and explains to both of her clients that they will need to sign a verification under the penalty of perjury certifying that the answers are true and correct.

While meeting to go over the draft interrogatory answers and obtain Steve's signature on the verification, Steve says he has something to tell Molly that he hasn't told her in the past. Steve then explains that, after the last company holiday party, Steve and Bonnie had sex in his car, which Steve claims was completely consensual. Steve insists that it happened only that one time and that there is no way Bonnie could have felt coerced.

Steve then says that he wants to find a way to write the interrogatories answers to not reveal that fact, and he says to Molly, "You're my attorney, right? I don't want you saying anything to anyone about this."

1. *Can* Molly reveal what Steve has told her about the holiday party encounter to DBC, notwithstanding Steve's directive that she not do so?

2. *Must* Molly reveal what Steve has told her about the holiday party encounter to DBC given that she also owes a duty to them also as her client?

3. If the interrogatory only asked about *unwanted* advances and *nonconsensual* physical contact between Steve and Bonnie, can Molly answer the interrogatory and let Steve sign a verification that there was no nonconsensual or unwanted advances based upon Steve's description of the event, and then keep that information from the Company?

4. Can Molly inform Steve that she can no longer represent him based on the information he has shared, but that she intends to represent continue to represent DBC? Does Steve have the right to object to Molly continuing to represent DBC while no longer representing him?

5. Would it make a difference if, in the engagement letter that Molly had Steve sign, she had specifically obtained his permission in advance to continue representing the Company and requiring him to get his own counsel in the event that the interests of Steve and the Company diverged some point during the case?

HYPOTHETICAL NO. 9 (FRANK, JOHN, FLOYD, AND CAROLE)

Frank Bulldog is retained by three former African-American employees of Paltell Farm Mfg. (PFM) to bring a claim against PFM for a racially hostile work environment and retaliation. The three employees are John and Floyd, both Tractor Designers, and Carole, the Manager of Tractor Design. All three were recently separated from PFM due to an alleged reduction in force.

Among the allegations are that the Company allowed various managers to engage in racial stereotyping, including making comments about the hairstyle of various African-American employees and the types of food that African-American employees brought to eat in the breakroom. The plaintiffs allege that after they communicated their concerns to Human Resources, they were subjected to retaliation by being included in the RIF.

Frank meets with all three of the plaintiffs together to draft the lawsuit, and later to prepare answers to interrogatories.

Weeks later, however, while meeting with Floyd individually to prepare him for his deposition, Floyd tells Frank that one of the worst perpetrators of racially insensitive comments and jokes was actually Carole, his co-plaintiff. Floyd tells Frank for the first time that although he attempted to tell Carole that her comments were inappropriate, Carole would respond, "I am a black woman – if anyone can say these things, it's me."

1. Given this information, can Frank continue to represent all three plaintiffs in the lawsuit?

2. If Frank concludes that he has a conflict and cannot continue to represent all three, can he pick and choose which ones he wants to continue to represent?

3. If Frank decides that he wants to continue to represent John and Floyd, can Frank terminate his attorney-client relationship with Carole and continue to represent the other two without getting Carole's consent?

4. Even if Carole consents to Frank's continued representation of John and Floyd, is there an issue for Frank if Carole decides to stay in the lawsuit with a different attorney?

Virginia CLE®

Ethics: Conflicts of Interest That May Arise in Employment Law

PART B
ANSWERS TO HYPOTHETICALS

ANSWERS TO HYPOTHETICAL NO. 1 (LUCY AND CHARLIE)

1. Is the plan of Lucy and STE, PC, to set up a "screen" sufficient to avoid the imputation of a conflict for STE, PC?

   No, not if the Virginia Rules of Professional Conduct ("Virginia Rules")[3] are applied. Virginia did not adopt ABA Model Rule 1.10 which allows for non-consensual "screening" of lateral hires.

   "Side-switching" in the middle of litigation presents a conflict that can be cured only by informed consent of the affected clients (unlikely). Perhaps the affected clients would consider giving informed consent by agreeing to allow Lucy to be "screened."

2. Would it make a difference if Lucy plans to work remotely and not ever enter the office of STE, PC until after the trial is over?

   No, because even if Lucy works remotely, there remains the concern that she could still share information about the case with lawyers at her new firm, or that they could pressure her to discuss the case. Working remotely doesn't assure that Lucy will not communicate with lawyers in the new firm about the case.

   Although the Virginia Rules do not permit "screening" without the consent of the affected client, the Legal Ethics Committee has considered what effective screening might look like in the context of a staff member who has gone from one firm to another firm which is handling a matter adverse to that staff person's first firm. Specifically, Virginia Legal Ethics Opinion ("LEO") 1800 (October 8, 2004)[4] suggests what an effective "screen" should look like at least in that context:

   1) educate the new staff member both about the general concept of client confidentiality and should be specific that [the staff member] not discuss [the staff member's] work at the former firm on the matter in question;
   2) confirm that the newly hired staff member brought no files or documents with him regarding the matter in question;
   3) educate all of the attorneys and other staff members not to discuss the matter in question with that new staff member;
   4) preclude in some practical way access to and/or involvement with the pertinent file by the staff member;
   5) develop a written policy statement regarding confidentiality, which would include that the above steps are to be followed whenever staff members are hired from an opposing counsel's firm; and
   6) note, on the cover of the file in question, the key information regarding confidentiality.

[3] Available at https://vsb.org/Site/about/rules-regulations/rpc-part6-sec2.aspx.

[4] Virginia LEOs are available at the Virginia CLE website (https://www.vacle.org/leos-and-lawyer-resources/). In this instance, LEO 1800 can be found at https://www.vacle.org/opinions/1800.htm.

3. What effect on the analysis, if any, does it have if Lucy's only connection to the Bredebear Enterprises case was to sit in and defend one deposition while Charlie was on vacation?

This could be significant because Lucy and STE, PC can take the position that Lucy was not "personally and substantially involved" in the representation of the former client while she was employed at her old law firm. Comment [4a] to Rule 1.9 speaks to this:

> Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

Virginia Rule 1.9, comment 4a (emphasis added). This is especially true if Lucy did not learn any client confidential information in her limited role of defending a deposition. *See* LEO 1629 (February 7, 1995).[5]

[5] https://www.vacle.org/opinions/1629.htm.

ANSWERS TO HYPOTHETICAL 2 (PAUL, CRAIG, AND LISA)

1. Should Craig have run a conflicts check prior to holding a two-hour introductory meeting with Lisa?

Yes. Although the conflicts check turned up "Butler Industries" as a client, not Butler Holding, it would have raised a "red flag" and prompt further inquiry before meeting with Lisa, the prospective client. Virginia Rule 1.10, comment [2a] is relevant here:

> "A lawyer or firm should maintain and use an appropriate system for detecting conflicts of interest. The failure to maintain a system for identifying conflicts or to use that system when making a decision to undertake employment in a particular matter may be deemed a violation of Rule 1.10(a) if proper use of a system would have identified the conflict."

However, even if a conflict check had occurred before the meeting with Lisa, it remains unclear as to whether there is a conflict of interest if a law firm undertakes representation adverse to a parent of a client subsidiary the firm represents in an unrelated matter. The parent, Butler Holding, ostensibly is not a client of the firm. But a "corporate family" conflict analysis requires more because in some cases the interests of the parent and subsidiary may be so intertwined that both entities may be treated as a single client for purposes of the conflicts rules.

Comment [34] to ABA MR 1.7 provides some minimal guidance:

> 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).[3] 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.

Unfortunately, Virginia did not adopt Comment [34] to its version of Rule 1.7. Even so, the guidance is not very helpful. Courts struggle to establish principle guidelines for when an attorney may undertake representation adverse to a corporate affiliate their firm represents in an unrelated matter. The protection of client confidences concerning the represented affiliated entity is a key concern. In order to protect client confidences, some courts have adopted the "substantial relationship" test, borrowed from the former client conflicts rule, Rule 1.9. In *Pennwalt Corp. v. Plough, Inc*, 85 F.R.D. 264 (D. Del. 1980), the court observed that:

> The . . . rule for disqualification where there is concurrent dual representation of sister corporations cannot be accepted for the simple factual reason that [the law firm] has never represented [the sister] or [the parent corporation].... Similarly, [the law firm's] claim that the

> ethicality of its position is unassailable because it never represented [either affiliate] is overly broad. Representation under the Code has been prohibited in varied circumstances even though the attorney-client relationship never existed.

85 F.R.D. at 265. The court then applied the substantial relationship test because:

> [w]hile the case sub judice is not a 'prior representation' case, there would be no hesitation to find [the law firm] disqualified if that firm could not pass the widely adopted 'substantial relationship' test analogized to concurrent representation of sister corporations....
>
> [T]he determination of whether there is a substantial relationship ... involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other.

Id. at 270. The court then noted that the substantial relationship test is not the only guideline to apply:

In assessing whether this threat exists in circumstances such as those presented here, the court properly may [also] examine the relationship between the sister corporations. The object of this inquiry is not to determine whether [the affiliate] can be affixed with the label "client." Rather, it is to gauge the degree, if any, to which [the firm]'s representation [in either case] may be influenced by a regard for the alternate client's welfare. *Id.* at 271-72.

The court noted that until the corporations were organized into the same division, shared the same legal department, and reported to the same executive, there was not a conflict under Canon 5 of the New York Code of Professional Responsibility. *Id.* at 272. But the court added "It is difficult to perceive how there could be free, unfettered communications between [the firm] and [its client] after the merger of headquarters [when] a small staff of in-house attorneys located at the same physical site and under the active supervision of one attorney are handling both ... matters." *Id* at 273.

Ultimately, the court denied the motion to disqualify because

> the legal work done for defendant's subsidiary was of a highly specialized nature and had absolutely nothing in common with the subject matter of the present controversy. Moreover, . . . the work for the subsidiary was accomplished by a geographically isolated member of the firm.

Id. at 273. As lawyers should know, the creation of an attorney-client relationship may be implied by the way the lawyer deals and interacts with affiliated entities and the lawyer's conduct may justify a reasonable belief on the affiliate's part, that the lawyer is acting as their attorney. The affiliated entity may have imparted confidential information that is relevant to the lawyer's representation of an adverse affiliate.

Finally, there may be other criteria that point to treating the affiliate as a client: (1) whether the [client] and the [affiliate] share a common legal department and

management duties, (2) whether the lawyer's work for [the client] benefits [the affiliate], or (3) whether the lawyer's work for the [client] involves collecting confidential information." *Honeywell Int'l Inc. v. Philips Lumileds Lighting Co.*, 2009 U.S. Dist. LEXIS 12496 (E.D. Tex. Jan. 6, 2009) (granting motion to disqualify under Model Rule 1.7 cmt. 34).

California courts, which have not adopted the Model Rule, are directed to consider similar factors: "(1) whether the attorney received 'confidential information' from one entity 'substantially related to the present claim against' the other; (2) whether control of the two entities' legal affairs overlap; (3) whether the two entities have overlaps in other areas, such as operations, personnel, or insurance coverage." *iSmart Int'l Ltd. v. I-Docsecure, LLC*, 2006 U.S. Dist. LEXIS 77323, at *11 (N.D. Cal. 2006).

There could also be an understanding between the organizational client and the lawyer that the lawyer will avoid representation adverse to the client's affiliates. This is often accomplished by guidelines for outside counsel prepared by an organizational client's in-house legal department. Or it might be implicit or expressly stated in an engagement letter.

2. Would it make any difference whether Craig was charging Lisa his usual initial flat fee of $500 for the meeting or whether it was just a free consultation?

No. Whether retained or working pro bono, Craig created a conflict of interest by undertaking Lisa's matter, *i.e.*, by sending out the demand letter. This doesn't change the analysis. The overarching issue is what impact Lisa's action against Butler Holding will have on Butler Industries, the existing client and *vice versa*.

3. If Paul's lease negotiations on behalf of Butler Industries had ended a month prior to Lisa's consultation with Craig, would it be a conflict for Craig to pursue his claim?

No, not unless somehow Craig obtained information from representing Butler Industries that would be relevant to Lisa's case against Butler Holding. Since the matters are wholly unrelated, that is not likely.

4. What factors, if any, should be considered in determining whether Craig's attempted representation of a client adverse to Butler Holding Company is a conflict of interest with Paul's representation of Butler Industries?

If Butler Industries is a current, not former, client, a conflict exists if Butler Industries and Butler Holding should be regarded as a single client for purposes of the conflicts rules. Factors include common ownership, common control or management, common legal or human resources department(s) and most importantly whether one client would be adversely affected by the representation of the other client.

5. Did Craig, by sending the letter without getting confirmation that there was no conflict, violate the Virginia Rules of Professional Conduct?

The failure to do conflicts check before sending the demand letter may be deemed a violation of Rule 1.10 if proper use of a system would have identified the conflict. *See* Cmt. [2a] to Rule 1.10.

6. If Craig's transmission of the letter was a violation of the Virginia Rules of Professional Conduct, can Craig cure the violation by quickly sending a letter to Butler Holding Company informing them that he is withdrawing his representation of Lisa?

   This would not cure the conflict because Rule 1.7(a)(1) was violated when Craig sent the letter. However, prompt withdrawal upon discovery of the conflict would be a mitigating factor in terms of deciding what sanction should be imposed.

7. If Craig does act quickly to withdraw his letter of representation to Lisa, has he breached any duties to Lisa?

   Yes, Craig's concurrent representation of Lisa while his partner, Paul, represents Butler Industries is a conflict of interest and a breach of loyalty.

ANSWERS TO HYPOTHETICAL NO. 3 (WHIT AND TIM)

1. If Whit ends up getting retained by the company, does Whit have a conflict-of-interest issue by virtue of his conversation on the golf course with Tim?

   Yes, there would be a material limitation conflict under Rule 1.7(a)(2) due to the fact that Tim confided with Whitt and presumably has a reasonable expectation that Whitt would keep Tim's confidences and not use the confidential information against Tim's client

2. If Whit ends up getting retained by the company, does Tim have a conflict-of-interest issue by virtue of his conversation on the golf course with Whit?

   Yes, Tim would have a conflict if he imparted information to Whitt which could be used against Tim's client.

3. Does it make a difference if, at the time of the golf conversation, Tim had not yet actually been retained by the potential plaintiff?

   No, not really. If Tim imparted confidential information to Whitt, even in a social setting, confidentiality has been breached. Even if Tim was not retained by the prospective client, Rule 1.18 would require Tim to protect the confidentiality of information the prospective client may have imparted to Tim. If Tim's conversation in the golf course was not authorized by the prospective client, there has been a breach of confidentiality.

4. Did Tim's assurance to Whit that he would not raise any conflict of interest if Whit ended up representing the employer cure the conflict (if one exists)?

   No, if Tim's disclosure of confidential information to Whitt creates a conflict, the decision to not raise the conflict is not Tim's to make. The prospective client gets to make that call, not Tim.

ANSWERS TO HYPOTHETICAL NO. 4 (EMILY, LINDSAY, BRAD, AND ANGELINA)

1. Did Emily act ethically in trying to complete the settlement negotiations after she had learned of Brad's death without telling Lindsay that Brad was now deceased?

   No. Emily violated Rule 4.1 of the Virgnia Rules of Professional Conduct by withholding and not revealing to Lindsay that Brad had died. *See* Va. LEO 1900 (App'd by Supreme Court of Virginia, January 4, 2024). After Brad's death, Emily has no client and no authority to make or accept a settlement offer, unless and until Brad's widow, or other representative, retains Emily to pursue any remaining claims on behalf of Brad's estate.

2. Would Emily be on better ethical footing if she disclosed to Lindsay that Brad had died in the accident but that Angelina, on behalf of the estate, still wanted to complete the settlement negotiations?

   No. Emily would still need to be retained by the administrator of Brad's estate to pursue the settlement negotiations with Lindsay.

3. Would it make a difference if the parties had already agreed on principle to the settlement of $350,000, and the two attorneys were just in the process of writing up the agreement when the accident occurred?

   No, this still doesn't change the analysis.

4. Would it make any difference if Emily had asked both Brad and Angelina to sign her engagement letter because she was thinking of bringing a claim on behalf of Angelina for loss of consortium resulting from Brad's depression after he was laid off?

   No. The current representation of Brad and/or Angelina was effectively terminated as a matter of law upon Brad's death. Angelina's loss of consortium claim would be derivative of a wrongful death or survival claim that would still require an administrator or personal representative to pursue it.

ANSWERS TO HYPOTHETICAL NO. 5 (TODD AND THE COO)

1. *Can* Todd tell the General Counsel of Gleason Consulting what the COO has just told him?

   Yes, probably, although a premature disclosure will almost certainly destroy Todd's relationship with the COO and likely jeopardize any forthcoming opportunities to represent the COO's new company. But the COO is not Todd's client—the organization, Gleason Consulting is Todd's client. Thus, Todd has no ethical duty to keep the COO's plans confidential and would likely be breaching his duty of loyalty to Gleason Consulting were Todd to withhold this information.

2. *Must* Todd, out of duty to his longtime client, tell the General Counsel of Gleason Consulting what the COO has just told him?

   Maybe. The information Todd has learned from the COO about the COO's plans to leave and set up his own business seems unrelated to any legal work Todd is performing for Gleason Consulting. A lawyer's duty to communicate with a client does not necessarily extend to personal information unrelated to any legal representation of a client.

   On the other hand, the COO's disclosure has created a bit of a dilemma for Todd. The COO's intent to lure key employees and clients away from Gleason Consulting sounds like a serious breach of fiduciary duty an officer owes to his company. Rule 1.13(b) states:

   > 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 . . . . 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.

   One approach might be for Todd to advise the COO of the potential legal consequences of his intended actions. But this would create an attorney client relationship between Todd and the COO, and a conflict of interest for Todd since Todd is counsel for Gleason Consulting. Todd should wisely counsel the COO to discuss his plans with independent counsel. Todd should warn the COO that as counsel for Gleason Consulting, Todd may be obligated to inform Gleason Consulting of the COO's plans.

3. Would it change the situation if *all* the COO told Todd was that he was leaving to set up his own company?

   Yes, because the COO has not revealed any plans or wrongdoing that Todd could be obligated to report to the client.

ANSWERS TO HYPOTHETICAL 6 (RICHIE AND LINDA)

1. Has Linda's unsolicited email created a conflict of interest that would preclude Richie from representing Holden Industries in her whistleblower case?

Probably not. In LEO 1842 (September 30, 2008),[6] the Virginia State Bar's Standing Committee on Legal Ethics opined that a lawyer generally owes no duty of confidentiality if the lawyer receives an unsolicited communication from a *potential* (as opposed to *prospective*) client. LEO 1842 was decided before the Supreme Court of Virginia adopted Rule 1.18, but even Rule 1.18 does not apply in this instance because the rule applies only after a person has discussed with a lawyer the possibility of hiring the lawyer for legal services. An unsolicited email is not protected under the rule. Comment [2] to Rule 1.18 explains:

> Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who 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, is not a "prospective client" within the meaning of paragraph (a).

The question becomes whether Linda has a "reasonable expectation" that her email to Richie would be kept confidential. The Committee observed in LEO 1842 that

> The Committee believes the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information via e-mail to the firm using the lawyer's e-mail address posted on the firm's website. The person is using mere contact information provided by the law firm on its website and does not, in the Committee's view, have a reasonable expectation that the information contained in the email will be kept confidential.

The Committee then discussed, in the context of a lawyer's use of an Internet website, whether the lawyer has invited discussion about the possibility of hiring the lawyer. In the broadest sense, all advertising material "invites" a person to contact a lawyer about hiring them.

> In reaching this conclusion, the Committee looks to two factors: (1) whether the law firm, by merely publishing contact information on its website that includes an e-mail address, creates a reasonable belief that the law firm is specifically inviting or soliciting the communication of confidential information; and (2) whether it is reasonable for the person providing the information to expect that it will be maintained as confidential.
>
> Standing alone, publication of a telephone number in a yellow pages advertisement cannot reasonably be construed as an invitation by the lawyer or firm to an individual to submit confidential information. Thus, it

[6] https://www.vacle.org/opinions/1842.htm

> would be unreasonable for a person leaving a voicemail to have an expectation that the information will be maintained as confidential. . . .
>
> Whether or not it is reasonable for a person to expect that information transmitted by email or left on a voicemail will be maintained as confidential depends in part on whether the lawyer said or did anything to create the impression that he was inviting information or simply publishing his contact information.

The best answer to this question is that Richie should not be foreclosed from defending Holden Industries in the whistle blower case filed by Linda.

2. Now that he has received the email from Holden industries, what should Richie do with the unsolicited email from Linda? If there is a potential conflict of interest, can he cure the conflict by simply not responding and deleting the email?

Richie should not have conflict solely for having received Linda's email. Since Holden Industries is Richie's client, Rule 1.4 would require Richie to inform his client about the email and its contents. Richie should not destroy the email if it contains information about which the client should be informed. Since Linda does not have a reasonable expectation of confidentiality in the contents of the email, there is nothing improper about Richie sharing it with his client.

3. Does Richie have a duty to inform Holden Industries before they formally retain him for the case that he received and read Linda's email?

Yes, Richie does have duty to inform the client about any communications that would be material to the representation.

4. If Richie does not have a duty to inform Holden Industries that he received and read Linda's email, is he at liberty to share with them what Linda put in her email to him?

Yes. *See* Answers to Questions 2 and 3 *supra*.

ANSWERS TO HYPOTHETICAL NO. 7 (JOSH, SHIRLEY, BELLE, AND NICOLE)

1. Was it ethical for Nicole to offer initially to settle for a lump sum of the $100,000, leaving it up to Josh and his clients as to how to split up the settlement amount?

   No. By doing so, Nicole has created a conflict of interest for herself and also a conflict of interest for Josh. The VSB's Standing Committee on Legal Ethics addressed this type of conflicts scenario in LEO 1894 (App'd by the Supreme Court of Virginia, April 20, 2022).[7] Nicole's initial offer to settle both cases with a lump sum settlement of $100,000 creates a conflict of interest between Josh and his two clients. This is called an "aggregate settlement" and at least two conflicts rules are violated by this approach—Rule 1.7(a) and Rule 1.8(g).

   An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client. An aggregate settlement may be offered to multiple claimants in a single case or where the claimants have separate claims against the same tortfeasor. The aggregate settlement rule does not apply, for example, if the lawyer negotiates an individual settlement with the defendant for each represented client. However, the lawyer must still manage the concurrent representation conflict pursuant to the requirements of Rule 1.7. This would require that the lawyer exercise independent professional judgment in the best interests of each client and that the representation of each client is not materially limited by the lawyer's ethical duties to the other clients.

   The aggregate settlement rule, Rule 1.8(g), presents obstacles that the lawyer must surmount. First, each client's case may be different in value, strengths, and weaknesses. Second, it is possible that the clients may have to accept less than what their case is worth. Third, the lawyer cannot advocate in favor of one client against the interests of another client. Fourth, the representation must be transparent with each client's case, with information being shared with the other concurrently represented clients. Finally, all the affected clients must agree to the amount of the settlement and its division.

2. Was it ethical for Josh, before communicating that offer to his clients, to ask Nicole to apportion the last, best, and final settlement offer between Shirley and Belle?

   No, because even if Nicole apportions the settlement funds for each client's case, Josh is abdicating his obligation to exercise his independent professional judgment by having Nicole serve as his proxy. In addition, even if Nicole apportions the settlement, the settlement of each client's case is "interdependent," meaning that both cases must settle or neither case will settle. Again, the problem is that the value of each client's claim is not based on case-by-case facts and negotiations. The acceptance of an amount for one client impacts the other client's settlement.

[7] https://www.vacle.org/opinions/1894.htm

3. Can Josh continue to represent both Shirley and Belle in light of Shirley's desire to take the settlement offered and Belle's stated desire to litigate if she cannot get at least $50,000?

   No. Belle's settlement position of not accepting anything less than $50,000 brings the settlement negotiations to an impasse. Shirley and Belle's goals and objectives are irreconcilably conflicted and Josh must withdraw from representing them both.

4. Would be ethically appropriate for Josh to suggest to Shirley that if she really wants to get this done, then maybe she should agree to apportion the settlement evenly with Belle?

   Perhaps, but only if Josh is fully transparent with Shirley and Belle, provides full disclosure and evaluation of the strengths and weaknesses of their claims and each accept the even split if it is in their respective legal interests to do so.

ANSWERS TO HYPOTHETICAL 8 (BONNIE, STEVE, AND MOLLY)

1. *Can* Molly reveal what Steve has told her about the holiday party encounter to DBC, notwithstanding Steve's directive that she not do so?

   No. Steve is Molly's client and has bound her to secrecy about his relationship with Bonnie. Rule 1.6(a) and attorney-client privilege apply here. What Molly can, should or must do also depends upon the scope of the interrogatories and what the interrogatories ask. Also, it depends upon what Molly has disclosed in her Answer to the Complaint. For example, if the Answer denies that Steve had any sexual relations with Bonnie, an amendment to the Answer may be required.

   A bigger problem is that Molly has a potential conflict in representing both Steve and DBC jointly. Steve was not honest with Molly when he denied having any affair or extramarital relations. Now, Molly must consider whether she can continue to represent both clients. It may be, as Steve claims, that his extramarital hookup with Bonnie was consensual, but there are problems even if that is true. First, DBC may have company policies and human resource issues when employees of the company have consensual sexual relations with other employees. Second, Steve's insistence that this information is not revealed creates a conflict, as that direction collides with her duty of candor to the court and to opposing counsel. See Rules 3.3(a), 4.1(a)-(b)

2. *Must* Molly reveal what Steve has told her about the holiday party encounter to DBC given that she also owes a duty to them also as her client?

   Arguably, Molly is obligated by Rule 1.4 to communicate Steve's information to DBC, but in so doing, she would be violating her duty to Steve under Rule 1.6.

3. If the interrogatory only asked about *unwanted* advances and *nonconsensual* physical contact between Steve and Bonnie, can Molly answer the interrogatory and let Steve sign a verification that there was no nonconsensual or unwanted advances based upon Steve's description of the event, and then keep that information from the Company?

   Maybe, perhaps in the short term, but ultimately the discovery and further proceedings would reveal Steve's allegedly consensual sexual activity with Bonnie.

4. Can Molly inform Steve that she can no longer represent him based on the information he has shared, but that she intends to represent continue to represent DBC? Does Steve have the right to object to Molly continuing to represent DBC while no longer representing him?

   Maybe. It depends on the facts and circumstances. Taken as true, Bonnie's allegations present a situation in which joint representation of both Steve and DBC presents a conflict because their defenses and litigation strategy are not mutually compatible. If Steve's conduct creates a possible defense for DBC, Molly cannot discharge Steve and continue to represent DBC because she cannot use Steve's admission to Molly to Steve's disadvantage. Rule 1.9(c). Steve would have the right to object and seeks Molly's disqualification from representing DBC.

5. Would it make a difference if, in the engagement letter that Molly had Steve sign, she had specifically obtained his permission in advance to continue representing the Company and requiring him to get his own counsel in the event that the interests of Steve and the Company diverged some point during the case?

Maybe, but highly unlikely.

Unlike the ABA Model Rules, Virginia's version of Rule 1.7(b) and the comments thereto do not offer any guidance regarding a lawyer's use of advance conflict waivers to cure conflicts in a matter in which the lawyer wishes to continue representing one co-client after terminating the representation of the other jointly represented client. Comment [22] to ABA Model Rule 1.7 does provide some guidance on this issue:

> 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).

The drafters of the Virginia Rules of Professional Conduct did *not* adopt this comment. This does not mean that they categorically rejected the possibility that a lawyer might use an advanced waiver of a conflict of interest. Comment [19] to Va. Rule 1.7 addresses consent and waiver of a conflict:

> A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is 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. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

The lawyer must also have a written memorialization or confirmation that the client has given an informed consent to waive the conflict. As Comment [20] to Va. Rule 1.7 explains:

> Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

Aside from addressing the direct adversity conflict between jointly represented clients, the lawyer must also address confidentiality. As a matter of law, there is no privilege between jointly represented clients and the lawyer must be sure that both clients understand that any information obtained from one co-client may be shared with the other co-client. Thus, whatever Steve has shared with Molly ***must*** be shared with DBC. Steve may be unwilling to agree to that and that creates a big problem for Molly. As Comment [30] to Va. Rule 1.7 explains:

> 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.

To address this problem, Comment [31] to Va. Rule 1.7 explains:

> 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 the 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.

Lawyers may obviously jointly represent multiple clients on the same matter, and routinely do so in certain circumstances. However, such multiple joint representations involve special duties and risks.

The first issue an attorney should raise with multiple jointly represented clients involves confidentiality rather than conflicts. A lawyer jointly representing clients normally may not keep secret from one client what another client tells the lawyer. Virginia Rule 1.7 Comment [30] explains that "[w]ith regard to the attorney client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach." *Accord* Restatement (Third) of Law Governing Lawyers § 75, cmt. d ("Rules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients. Fairness and candor between the co-clients and with the lawyer generally precludes [sic] the lawyer from keeping information secret from any one of them, unless they have agreed otherwise."); *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 439 (Bankr. S.D.N.Y. 1997) ("In a joint client situation, there is no secrecy between the two parties at the time of communication.").

Lawyers should remember that not only does the law (and the ethics rules) normally require the sharing of information among jointly represented clients, but that the lawyers must explain this to the jointly represented clients. For instance, Virginia Rule 1.7 Comment [31] explains that 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.

Lawyers and their clients can take a different approach in certain limited circumstances.

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. Accord Restatement (Third) of Law Governing Lawyers § 75 cmt. d, illus. ("Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients."). In addition to this confidentiality issue, lawyers jointly representing multiple clients on the same matter must also look down the road to determine the possibility of adversity among them. If adversity already exists, it would be improper for a lawyer to represent all of the clients (absent very unusual circumstances and explicit consent). If future adversity is possible but not likely, lawyers generally may proceed with the representation.

Molly probably cannot have Steve and DBC enter into an agreement to waive confidentiality because the potential adversity is too great and Steve's admitted sexual activity with Bonnie is too critical and relevant to the litigation to ethically withhold from DBC. In this hypothetical it would seem to be inappropriate to conclude that Steve's admission to Molly is a secret that can be withheld from DBC.

If Molly does not have Steve's consent to share this information with DBC then Molly cannot continue to represent DBC, as her representation of DBC would be "materially limited" by her duty of confidentiality to Steve and her inability to use that information to defend DBC or use it to Steve's disadvantage. Va. Rule 1.9(c). Without a waiver of both confidentiality and conflicts from Steve, Molly would have to withdraw from representing both Steve and DBC. This is why it is often wise for a lawyer to do an intake interview with only one co-client first rather than meeting jointly with them.

In theory, an advance waiver *might* work in very limited circumstances. For example if Steve's admitted sexual activity was consensual, it may be that Molly can achieve an enforceable advance waiver, in which she can drop Steve as a client and continue representing DBC. Even then, however, Steve's sexual activity with Bonnie is a critical issue. We are not talking about a waiver of potential conflicts that might arise in the future if Molly were to undertake an unrelated matter or case adverse to Steve or DBC Almost all authorities agree that such an arrangement is not *per se* unethical, at least as to private entities (as to public entities see the paragraph entitled "Governments" below). The problem is that, depending upon the facts and the tribunal, any number of things can result in such a waiver not being enforceable.

The key issues will be (1) whether the future "unrelated" matter is adequately identified, (2) whether the party giving the waiver is adequately sophisticated, (3) whether the waiver is recent enough, and (4), in some cases, whether the waiving party had an opportunity to seek independent counsel's advice on giving the waiver. So far, no two courts have treated these issues the same.

The Painter Article. Richard W. Painter, *Advance Waiver of Conflicts*, 13 Geo. J. of Legal Ethics 289 (2000) is an excellent and timely review of the entire subject of advance waivers. It discusses the leading cases on the subject that preceded the article. These include *Kennecott Copper Corp. v. Curtiss-Wright Corp*., (S.D.N.Y.) (MacMahon, J) (Memorandum and Order, April 10, 1978); *Unified Sewerage Agency of Washington County v. Jelco Corp*., 646 F.2d 1339 (9th Cir. 1981); *Elliott v. McFarland Unified School Dist*., 165 Cal. App. 3d 562 (Cal. App. 1985); *Interstate Properties v. Pyramid Co*., 547 F. Supp. 178 (S.D.N.Y. 1982); *Fisons Corp. v. Atochem N.A., Inc*., 1990 U.S. Dist. LEXIS 15284 (S.D. Cal. 1990); and *Worldspan L.P. v. The Sabre Group Holdings, Inc*., 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

In each of the cited cases, except one, the court enforced some sort of advance waiver. In *Worldspan*, the court found that the waiver was not effective because it was too remote in time and because it did not specify that the "adverse matter" could be actual litigation. The court also expressed hostility to any such waiver, 5 F. Supp. 2d at 1358; thus, the court might not have approved the waiver under any circumstances.

Not mentioned by Professor Painter is *City of Cleveland v. Cleveland Elec. Illuminating Co*., 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd mem*., 573 F.2d 1310 (6th Cir. 1977). There, the court held that an advance waiver could be inferred from the fact that the client's in-house lawyer knew all that was going on.

Other cases also not mentioned by Professor Painter in which courts found advance waivers wanting are *Hasco, Inc. v. Roche*, 700 N.E.2d 768 (Ill. App. 1998); *Florida Ins. Guaranty Ass'n. Inc. v. Carey Canada, Inc*., 749 F. Supp. 255 (S.D. Fla. 1990); *Marketti v. Fitzsimmons*, 373 F. Supp. 637 (W.D. Wisc. 1974) (mere knowledge by client of second representation not a waiver); and *In re Boone*, 83 F. 944 (N.D. Cal. 1897)

ABA Op. 93-372 (1993). The ABA opinion recognizes the validity of such arrangements, although it is firm on the need to identify the type of matters being waived with specificity. It states, in part, as follows:

> [I]f the waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when it was given.

D.C. Op. 309 (2001) and N.Y. County Op. 724 (1998) follow the approach of ABA Op. 93-372 (1993). See, too, Cal. Op. 1989-115 (1989),.and L.A. Co. Op. 471 (1994).

Restatement. See §§ 122, Comment d. It says that normally to be effective the client must be sophisticated and have an opportunity to get the advice of another lawyer.

Treatises. HAZARD & HODES §§ 10.9; ROTUNDA §§ 8-4.2.

Other articles. *Note, Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 Mich. L. Rev. 1074 (1981).

Governments. The author (McCauley) is aware of a few jurisdictions where a waiver from a state or local government simply would not be enforced. New Jersey Rules of Professional Conduct 1.7(a)(2) & 1.7(b)(2); *State of West Virginia v. MacQueen*, 416 S.E.2d 55 (W. Va. 1992); and *City of Little Rock v. Cash*, 644 S.W.2d 229 (Ark. 1982). This may be true in other states, as well.

Items post-dating *The Painter Article*:

In re Rite Aid Corp. Securities Litigation v. Grass, 2001 U.S. Dist. LEXIS 4669 (E.D. Pa. April 17, 2001). This is a securities class action against Rite Aid and several of its executives. Early in the case the General Counsel of Rite Aid retained Ballard Spahr to represent Rite Aid and one of the executives, Alex Grass. Ballard Spahr sent Grass an engagement letter saying that if a conflict developed between the Rite Aid and Grass, Ballard Spahr would withdraw from representing Grass and would continue on behalf of Rite Aid. A conflict did develop, Ballard Spahr dropped Grass, and it continued on behalf of Rite Aid. Grass moved to disqualify Ballard Spahr, and the court, relying in part upon the engagement letter, denied the motion.

Goss Graphics Systems, Inc. v. Man Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 MJM (N.D. Iowa, May 25, 2000). A law firm had two advance waiver agreements with a client, one signed in 1997, relating to one matter, and the other signed in 1999, relating to a later matter. Arguably, the earlier letter was broad enough to allow the law firm to oppose the client in an unrelated litigation matter. However, the later letter was not that broad. The parties could not agree on whether the later letter superseded the earlier. The court resolved matters by disqualifying the law firm.

"*Sidebar*" National Law Journal, May 22, 2000. According to this publication, a prominent Philadelphia law firm recently tried to rely on an advance waiver that was signed in 1990. Evidently, it did not work, and a state administrative tribunal removed the firm from the matter in question. The brief article does not say whether the age of the waiver was a factor.

ANSWERS TO HYPOTHETICAL NO. 9 (FRANK, JOHN, FLOYD, AND CAROLE)

1. Given this information, can Frank continue to represent all three plaintiffs in the lawsuit?

   No. Carole has imparted valuable information to Floyd that could be used to prove John's and Floyd's claims. But Carole's statements to Floyd could prove that Carole was a perpetrator of racially offensive remarks and hostile environment in the workplace. Thus, John and Floyd's cases are at least partially and directly adverse to Carole's, or would at least put Floyd in a position of testifying adversely against Carole. This presents a direct adversity conflict under Rule 1.7(a)(1). The conflict is not curable if John or Floyd have a claim in the same litigation to pursue against Carole for her contribution to the hostile work environment. See Rule 1.7(b)(representation cannot 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).

2. If Frank concludes that he has a conflict and cannot continue to represent all three, can he pick and choose which ones he wants to continue to represent?

   Well, maybe, but not likely. Frank has initially chosen to represent all three co-plaintiffs and his ability to pick and choose who he represents going forward may be limited by his duty of confidentiality to Carole as well as needing her consent to represent clients directly adverse in the same or substantially related matter. Rule 1.9(a). *See* discussion under Question 3.

3. If Frank decides that he wants to continue to represent John and Floyd, can Frank terminate his attorney-client relationship with Carole and continue to represent the other two without getting Carole's consent?

   Maybe, but not likely. Frank would need Carole's informed consent to continue representing John and Floyd since the case is the same or substantially related matter. Rule 1.9(a). Frank may not be able to cure the conflict with a waiver from Carole if Frank has to tell Carole what Floyd told Frank about Carole's conduct. Floyd and/or Frank may not want to prematurely tip their hand by revealing what Floyd said about Carole's offensive remarks. If so, Frank will not be able to make sufficient disclosure to Carole reasonably necessary to get her informed consent to waive the conflict. Further, if Carole imparted information to Frank that Frank should use to help John's and Floyd's case, Frank may be hamstrung and materially limited by his duty of confidentiality to Carole. Rule 1.9(c). This could compel withdrawal from both John's and Floyd's cases as well.

4. Even if Carole consents to Frank's continued representation of John and Floyd, is there an issue for Frank if Carole decides to stay in the lawsuit with a different attorney?

   Yes, *see* discussion under Hypothetical 3.

Ethics: Conflicts of Interest That May
Arise in Employment Law

PART C
VIRGINIA RULES OF PROFESSIONAL CONDUCT

Rules 1.1 – 1.18
Client-Lawyer Relationship

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.

1.2 Scope of Representation

a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of 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 may limit the objectives of the representation if the client consents after consultation.

c) 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.

    1) discuss the legal consequences of any proposed course of conduct with a client;

    2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law; and

    3) counsel or assist a client regarding conduct expressly permitted by state or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law

d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

1.3 Diligence

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

b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

1.4 Communication

a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

1.5 Fees

[Omitted]

1.6 Confidentiality of Information

a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

1. such information to comply with law or a court order;

2. such information 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;

3. such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

4. such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

5. such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

6. information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;

7. such information to prevent reasonably certain death or substantial bodily harm.

c) A lawyer shall promptly reveal:

1. the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or

2. information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

1.7 Conflict of Interest: General Rule

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 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 each affected client consents after consultation, and:

   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. the consent from the client is memorialized in writing.

1.8 Conflict of Interest: Prohibited Transactions

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 which can be reasonably understood by the client;
   2. the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
   3. the client consents in writing thereto.

b) A lawyer shall not use information protected under Rule 1.6 for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not

accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

d) Prior to the conclusion of all aspects of a matter giving rise to the 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 litigation, the repayment of which may be contingent on the outcome of the matter; and
   2. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

   1. the client consents after consultation;
   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 consents after consultation, including disclosure of 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 make an agreement prospectively limiting the lawyer’s liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

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

1. acquire a lien granted by law to secure the lawyer's fee or expenses; and
2. contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

k) While lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when one of them practicing alone would be prohibited from doing so by paragraphs (a), (b), (c), (d), (e), (f), (g), (h), or (j) of this Rule.

1.9 Conflict of Interest: Former Client

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 both the present and former client consent after consultation.

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 both the present and former client consent after consultation.

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 or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would

permit or require with respect to a client, or when the information has become generally known; or

d) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

1.10 Imputed Disqualification: General Rule

a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

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

d) The imputed prohibition of improper transactions is governed by Rule 1.8(k).

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

1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

[Omitted]

1.12 Former Judge Or Arbitrator

[Omitted]

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;
    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 in 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 or may decline to represent the client in that matter 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 it is apparent 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.

1.14 Client With Impairment

[Omitted]

1.15 Safekeeping Property

[Omitted]

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 withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

   1. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;
   2. the client has used the lawyer's services to perpetrate a crime or fraud;
   3. a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
   4. 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;
   5. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
   6. other good cause for withdrawal exists.

c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

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, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

1.17 Sale Of Law Practice

[Omitted]

1.18 Duties to Prospective Client

a) A person who discusses with a lawyer 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 had discussions with a prospective client shall not use or reveal information learned in the consultation, 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; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client; and

        ii. written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.

Virginia CLE

Ethics: Conflicts of Interest That May Arise in Employment Law

PART D

ABA FORMAL OP. 512 GENERATIVE ARTIFICIAL INTELLIGENCE RULES

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512 **July 29, 2024**

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

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[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] What level of competency should lawyers acquire regarding a GAI tool? How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a GAI tool to clients? What level of review of a GAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II. Discussion

A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

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[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

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[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.[15] While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

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[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

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[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

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[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].
[27] MODEL RULES R. 1.6(c).
[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").
[29] MODEL RULES R. 1.6, cmt. [18].
[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.
[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).
[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.
[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

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[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "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." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

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[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

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lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "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

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

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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."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

F. Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

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[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.
[54] *See* ABA Formal Op. 08-451, *supra* note 15.
[55] Fla. Bar Advisory Op. 12-3 (2013).
[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].
[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.
[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

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[59] The listed considerations are (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.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

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[66] ABA Formal Op. 93-379 at 7.
[67] *Id.* at 8.
[68] *Id.* at 7.
[69] *Id.*
[70] *Id.* at 8.
[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

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[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.
