
PROFESSIONAL RESPONSIBILITY

I. General Matters

A. New York Code of Professional Responsibility (a modified version of the old ABA code)

Canons - Broad statements of norms

1. *Disciplinary Rules* (DR's) – *must* rules (subject to discipline for a violation).
2. *Ethical considerations* (EC's) – *should* rules (cannot be disciplined for a violation)

Complainants investigated by Departmental Disciplinary Committee. Filing a complaint against a lawyer is privileged.

Degree of penalties:

Letter of admonition

Public or Private Censure

Suspension

Disbarment

You can sit for the bar if you completed 1 yr law school and work in a law office so you aggregate 4 yrs experience. NY can refuse to admit you if you refuse to take oath to uphold NY and Federal Constitution.

Reciprocity

The other state allows reciprocity

You practiced law for at least 5 of the last 7 years

You must truthfully disclose

You have an affirmative duty to report on bad character of an applicant.

Unauthorized practice in another state:

1. You align with a local lawyer
2. Ask to be admitted pro hac vice (for this one time only)

Multistate firms

B. Misconduct – a lawyer or a law firm shall not:

1. *Violate a DR* (e.g. no contact rule – a lawyer cannot communicate with a represented party on the subject matter of representation)
2. *Circumvent a DR through actions of another* (e.g. hire a non-lawyer to circumvent the no contact rule)
3. Engage in *illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer* (e.g. assist in perjury)
4. Engage in conduct involving *dishonesty, fraud, deceit or misrepresentation* (need not be illegal)
5. Engage in conduct that is *prejudicial to the administration of justice* (e.g. this is what Clinton did)
6. *Unlawful discrimination in the practice of law* (e.g. discriminating in hiring/firing of lawyers)
7. Engage in any other conduct that *adversely reflects on the lawyer's fitness as a lawyer* (e.g. smoking pot)

C. Reporting Misconduct

1. *Duty to report* – a lawyer must report another lawyer's violations of DR (i.e. violation that raises substantial question as to the attorney's fitness as a lawyer). Must sign your name and be available to testify against the person. You cannot negotiate away your duty to report bad conduct (i.e. tell lawyer to pay client and you won't report him)
 - a. EXCEPT for *confidences & secrets* (i.e. learn about violation through context of the representation)
 - b. Lawyer fired for reporting – can bring a action for wrongful firing
2. *Duty of cooperation* – if called to testify by a grievance committee, a lawyer has a duty to cooperate & reveal information not protected as a confidence or secret

D. Responsibilities of Supervisory Lawyers and Subordinate Lawyers

1. *Law firm* – shall make efforts to ensure that all lawyers comply with DR's
2. *Supervisory lawyers* – have the same duty as subordinate lawyers
3. *Subordinate lawyers* – must obey DR's, even if acting at superiors' direction (no defense of following orders)

E. Disciplinary Authority and Choice of Law

1. *Disciplinary authority* – NY lawyer can be disciplined in NY for any conduct, *no matter where it occurred*

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2. *Choice of law*
 - a. *Conduct in connection with a proceeding* – apply rules of the state where court proceeding is conducted
 - b. *Any other conduct*
 - (i) *Lawyer admitted only in NY* – NY rules govern
 - (ii) *Lawyer admitted in NY and another jurisdiction* – apply the rules of the jurisdiction where the lawyer principally practices

II. Duty to Preserve Confidences and Secrets

A. Confidences & Secrets

1. *Confidences* – any information protected by the attorney-client privilege
2. *Secrets* – any information gained in the professional relationship that:
 - a. Client has *requested to be kept confidential*
 - b. Would be *embarrassing* to the client if revealed
 - c. Would be *detrimental* to the client if revealed

B. Duties – a lawyer shall NOT:

1. *Reveal* a confidence or secret
2. *Use* a confidence or secret to the disadvantage of client (client cannot consent to such use)
3. *Use* a confidence or secret to the advantage of the lawyer or 3rd person, UNLESS client consents

C. EXCEPTIONS – a lawyer *may* reveal confidences or secrets in the following 5 situations:

1. After *informed consent* of the client
2. When *required by law* or court order (this is a *must* rule, not a *may* rule)
3. To reveal intention of client to commit a crime, & information necessary to prevent a crime (*any* crime, including nonviolent crimes like perjury)
4. Collect attorneys fees (when the lawyer sues to collect fees)
5. Defend self from accusation of wrongful conduct (i.e., malpractice, or a grievance)
6. To the extent *implicit in withdrawing a written or oral opinion or representation* previously given by the lawyer that the lawyer knows is false (e.g. withdrawing a statement of net worth in a domestic relations matter, or withdrawing answers to a set of interrogatories)

D. Duty of reasonable care

- Lawyer has a corresponding duty to ensure that his employees, associates, & others whose services he uses (i.e., accountants) do not reveal confidences or secrets – must use *reasonable care* to prevent them from revealing confidences

III. Advertising & Solicitation

A. Advertising

1. Definition – communication with the public at large (*A lawyer shall not use, disseminate, or participate in the preparation/dissemination of any publication or communication to a prospective client containing statements/claims that are false, deceptive, or misleading*)
2. Examples of *proper advertising*:
 - a. Education, degrees & other scholastic distinctions
 - b. Dates of admission to any bar
 - c. Areas of law in which lawyer or law firm practices
 - d. Public offices & teaching positions held
 - e. Memberships in bar associations or other professional societies or organizations
 - f. Foreign language fluency
 - g. Names of clients regularly represented, PROVIDED the client has consented *in writing*
 - h. Bank references
 - i. Credit arrangements accepted (you can accept credit cards)
 - j. Legal fees for initial consultation
 - k. Contingent fee rates in civil matters, when accompanied by the following:
 - (i) whether percentages are computed *before or after deduction of costs, disbursements, & other litigation expenses*
 - (ii) a statement that, in the event of no recovery, the client shall remain liable for the expenses of litigation, including ct costs & disbursements – example: an ad that says “if you lose, you pay nothing” is *improper* b/c the client will have to pay litigation expenses
 - l. Range of fees for services, provided that there be available to the public, free of charge, a written statement clearly describing the scope of each advertised service
 - m. Hourly rates
 - n. Fixed fees for specified legal services (e.g., 1K for divorce)

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- o. NOTE: (i) *business cards*, (ii) *firm letterheads* & (iii) *office signs* are all governed by these rules
 3. *Radio & television ads* are allowed – must be (i) prerecorded, (ii) taped, & (iii) approved for broadcast by the lawyer, who must (iv) *keep a copy of it for 1 year* following its last transmission
 4. *Direct mail* – permissible in NY, BUT:
 - a. *Must file a copy of the ad with the relevant app division* (can not references the filing in the direct mail)
 - b. *Must keep a mailing list for 1 year* following the last mailing
 5. *Changes in rates* – if you advertise fees, you cannot change the rate UNTIL after a *reasonable period of time*
 6. *Name, office address & phone number* – each ad must include this information for a lawyer or firm whose services are offered

B. Solicitation

1. Definition – lawyer’s individual contact with a layperson designed to entice the layperson into hiring the lawyer; applies to (i) *written*, (ii) *recorded*, AND (iii) *personal* communications
2. Rules
 - a. NO direct in-person or telephone contact,
 - EXCEPTION the client is a (i) *close friend*, (ii) *relative*, (iii) *former client*, or (iv) *current client*
 - b. NO direct written or recorded communications IF:
 - (i) Communication is false, misleading or deceptive
 - E.g. lawyer can’t promise a result in a case, either in an ad or in person
 - (ii) Recipient has communicated a desire not to be solicited by the lawyer
 - (iii) Solicitation involves coercion, duress or harassment
 - (iv) Age or physical, emotional or mental state of the recipient make it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney (e.g. recipient is an infant)
 - (v) Lawyer expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed by a lawyer not affiliated with the soliciting lawyer as a (i) partner, (ii) associate, or (iii) of counsel
 - c. Referral fees – lawyer can NOT give anything of value (including dinners) to a person or entity for recommending employment
 - d. Refusing employment – lawyer must refuse employment if the person who seeks to retain the lawyer does so because of a violation of the rules

C. Internet Issues

1. **Webpage – advertisement rule apply**
2. Chatroom – solicitation rule apply

IV. Fees

A. NO excessive fees

1. Lawyer can NOT (i) enter into an agreement, (ii) charge, or (iii) collect an excessive fee
2. Factors for determining excessive fees include:
 - a. *Time & labor required* – double-billing prohibited
 - b. *Likelihood* (if apparent or made known to the client) *that acceptance of the particular employment will preclude other employment by the lawyer*
 - c. *Locality* – lawyers fees must bear some relationship to the customary fees in the locality
 - d. *Amount involved & results obtained*
 - e. *Time limitations imposed by the client or circumstances*
 - f. *Nature & length of the professional relationship* – the longer the relationship, the more you can charge
 - g. *Experience, reputation & ability* of the lawyer
 - h. Whether fee is *fixed or contingent* – contingency fee can result in a very high hourly-rate; but certain contingency fees are capped by statute (e.g. personal injury. Medical malpractice)

B. Written letter of engagement (as of March 4, 2002)

1. Contents – must include:
 - a. Explanation of the *scope of services* to be provided
 - b. Explanation of *fees to be charged, expenses & billing practices*
 - c. Notice of *client’s right to arbitration of fee disputes*
2. EXCEPTIONS:
 - a. If use a ***signed retainer agreement*** that includes the 3 above items
 - b. Fee is expected to be ***less than 3K***
 - c. Where the attorney’s services are ***of the same general kind as previously rendered*** & paid
 - d. ***Domestic relations matters*** – must be a *retainer agreement* that conforms with court rules
3. NOTE: if an insurer is paying, letter must be sent to both insurer & insured

C. Contingent fees

1. MUST be in **writing** (& satisfy the *written letter of engagement rule*) – which sets forth:
 - a. *Fee determination method* – including percentage that shall accrue to the lawyer in the event of settlement, trial or appeal
 - b. *Litigation & other expenses* – which will be deducted from the recovery
 - c. Whether such expenses are to be *deducted before, or, if not prohibited* by state or court rule, after the contingent fee is calculated
2. *Written closing statement* – after the representation is over, a lawyer must provide the client with a closing statement computing the fee (*must be filed with the courts*)
3. Contingent fees are PROHIBITED in (i) *criminal matters* & (ii) *domestic relations matters*
 - NOTE: in criminal cases, a DR violation may provide a basis for reversing conviction but not automatic reversal (must show effect on conviction)

D. Domestic relations matters

1. Definition – when a lawyer represents a client in any claim/action/proceeding, or preliminary to the filing of a claim/action/proceeding in any court (including app courts) for:
 - (i) *divorce*, (ii) *separation*, (iii) *annulment*, (iv) *custody*, (v) *visitation*, (vi) *maintenance*, (vii) *child support*, (viii) *alimony* or (ix) *proceedings to enforce or modify a judgment/order* in connection with any of the above claims/actions or proceedings
2. Fee arrangement – must be in **writing**, as prescribed by court rule
 - a. Writing must be signed by the lawyer & client
 - b. Lawyer shall provide a prospective client with a statement of the client's rights & responsibilities at the initial conference & prior to the signing of a written retainer agreement
3. Must send out *periodic bills & return any unused portion of retainer fee*
4. *NO contingent fee* in domestic relations matter – not even to collect an unpaid support judgment
5. *NO nonrefundable fees* in domestic relations matters
6. Must resolve fee disputes by *arbitration at the election of the client*
7. Can NOT secure a fee in a domestic relations matter with a mortgage on the client's property

E. Division of Fees among Lawyers

- NO division of fee for legal services with another lawyer (who is not a partner/associate of the lawyer's firm), UNLESS:
 - a. Client *consents after full disclosure* that a division of fees will be made; AND
 - b. Division is in *proportion to the services* performed by each lawyer, OR made in a manner that each lawyer assumes *joint responsibilities* for the representation in a writing given to the client, AND
 - c. Total fees do *not exceed reasonable compensation* for all legal services rendered to the client

F. Fee Dispute Resolution Program

1. Where representation has commenced, on or after January 1, 2002, in a civil matter, fee disputes between lawyer & client are subject to arbitration **at the client's option**
2. Notice must be given in: (i) *written letter of engagement*; or (ii) where there is dispute with client
3. EXCEPTIONS: (i) criminal matters, (ii) amounts less than 1K or more than 50K, & (iii) claims involving malpractice

V. Withdrawal

A. Duties before Termination

1. **Permission of tribunal** – if matter is before a tribunal, must obtain the court's permission before withdrawing
2. **Delivery of property** – must return all client property, including the unused portion of a retainer, & the entire contents of the file (including document drafts)

B. Mandatory withdrawal – lawyer representing a client before a tribunal MUST make a motion to withdraw from represent the client where:

1. Lawyer knows, or it is obvious, that the client is asserting a position in litigation merely for the purposes of harassing any person (i.e., frivolous lawsuit);
2. Continued employment will result in the violation of a DR (e.g., continued representation will require you to assist a client in committing perjury);
3. Lawyer's mental/physical condition make it unreasonably difficult to carry out employment effectively; OR
4. Lawyer is discharged by the client

C. Permissive withdrawal – lawyer MAY withdraw from representing a client, or makes a motion to withdraw IF:

1. Withdrawal can be accomplished without material adverse effect on the interests of the client;
2. Client insists on presenting a frivolous claim or defense;
3. Client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* (certainty not required) is criminal or fraudulent;
4. Client insists that the lawyer pursue a course of conduct that is illegal or prohibited by the DR's;

5. Client, by other conduct, renders it *unreasonably difficult* for the lawyer to carry out employment effectively;
6. Client insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment & advice of the lawyer, even though it is not prohibited by the DR's;
7. Client deliberately disregards an agreement or obligation to the lawyer as to *expenses* or *fees*;
 - BUT, failure of client to pay, standing alone, is NOT enough – you have to show that he has the money but isn't paying it
8. Client has used the lawyers services to perpetrate a crime or fraud;
9. Lawyer's continued employment is likely to result in violation of a DR;
10. Lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;
11. Client knowingly & freely agrees to termination of the employment; OR
12. Lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of *other good cause* for withdrawal
 - NOTE: lawyer may not agree to alter with the client to alter these rules (lawyer is bound by these rules)

VI. Conflicts – *is there a conflict / can the client consent to the conflict & allow for representation*

- A. Lawyer's own personal interests** – lawyer shall not accept or continue employment if exercise of professional judgment *reasonably may be affected* by the lawyer's own financial, business, property or personal interests
1. **Consent possible – IF:**
 - a. *A disinterested lawyer would believe that representation of client will not be adversely affected, &*
 - b. *Client consents to representation after a full disclosure*
 2. *Wills* – lawyers should NOT suggest that the client give them a gift/bequest, other than in “exceptional circumstances;” lawyer should NOT prepare any instrument, like a will, which gives the lawyer a gift/bequest
 3. *Mortgages* – lawyer can NOT take mortgage on client property to secure a fee
- B. Business transactions between lawyer & client** – lawyer shall not enter into a business transaction with a client if they have differing interests therein, & the client expects the lawyer to protect the client's interests in the transaction (e.g. representing a client in buying land, & taking joint ownership of the land with the client)
1. **Consent possible - IF**
 - a. Transaction is *fair & reasonable to the client*;
 - b. Transaction is *fully disclosed & transmitted in writing to the client* in reasonably understandable terms; &
 - c. Client *consents in writing*
 2. Example: attorney receives stock in a corporation in exchange for services performed in the incorporation
- C. Simultaneous representation** – lawyer shall decline to represent a prospective client if exercise of independent judgment on behalf of prospective party is likely to be affected by lawyer's representation of other current client
1. **Consent possible - IF**
 - a. *A disinterested lawyer would believe that the lawyer can competently represent the interest of each, &*
 - b. *Each consents to the representation after full disclosure of the implications of the simultaneous representation & the advantages/risks involved*
 2. Example: draft a will for both husband & wife
- D. Former clients** – lawyer who has represented a former client in a matter shall NOT thereafter represent another person in the *same or a substantially related matter* in which the current client's *interests are materially adverse* to the interests of the former client (rationale – because a lawyer cannot use/reveal confidences/secrets of a former client in representing a current client)
1. **Consent possible – IF former client consents after full disclosure**
 2. NOTE: no need for client's consent if matters unrelated
- E. Imputed disqualification** – while lawyers are associated in a law firm, none of them can accept or continue employment if any one of them, practicing alone, would be prohibited from doing so because of a conflict based on: (i) *the lawyer's own personal interests*, (ii) *simultaneous representation conflict*, OR (iii) *former client conflict*
1. *Check for conflicts* – law firms are required to have a *conflicts checking system* in place
 2. NO *simultaneous representation conflict* – consent not available
- F. Organizational clients** – lawyer representing a corporation is the *lawyer for the entity*, & does NOT represent the officers, directors, or shareholders
1. Must advise constituents that lawyer represents the organization
 2. If lawyer for an organization knows that a constituent intends an unlawful act that might result in organization's substantial injury – lawyer must (i) ask the person to reconsider, (ii) seek for separate legal opinion, (iii) refer the matter to higher authority, or (iv) withdraw
- G. Representing the insured** – lawyer represents *the insured*, NOT *the insurance company paying the bill*, meaning:
1. *Duty of confidence runs to the insured*

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- a. NOT give confidential information to the insurance company
 - b. NOT allow insurance company to direct the lawyer
 2. Must send a *letter of engagement* to the insurance company AND to the insured

VII. Communicating with Represented and Unrepresented Parties

A. Represented Party

1. Lawyer can NOT communicate with a party, the lawyer knows to be represented in the matter
2. EXCEPTION: (i) consent of party's lawyer; (ii) communication not relate to representation; or (iii) authorized by law

B. Unrepresented Party

- Lawyer can NOT give advice to an unrepresented party other than advice to secure counsel

C. Causing a client to communicate with a Represented Person

- May be allowed, IF lawyer gives *reasonable advance notice* to the represented person's counsel

VIII. Client who commits Perjury

A. Criminal Defendant – has Constitutional right to testify

1. Counsel must attempt to persuade client not to commit perjury (if already conducted, advise client to recant)
2. If client insists on presenting perjured testimony – seek motion to withdraw
3. Revealing to the court client's perjury is acceptable – should be done in camera
4. Attorney can NOT knowingly use perjured testimony or false evidence

B. Party in Civil Litigation

1. NO Constitutional right to testify – lawyer should not put client on
2. Permissive redraw

PROFESSIONAL RESPONSIBILITY – ESSAY QUESTIONS

I. QUESTION – R-2 (& WILLS)

- A. Whether a bequest made in a testamentary instrument to an *attorney draftsman* is valid
1. Lawyer should not suggest to client that a gift made to the lawyer for the lawyer's benefit – peculiarly susceptible to charge that he unduly influenced or overreached the client
 2. Beneficiary must show that he was a natural object of the decedent's bounty, such as relative or close friend
 3. *Gift must be freely and willingly made*

II. QUESTION – R-3 (& WILLS)

- A. Whether an attorney may accept employment by a prospective client whose interest present conflict of interest with a current client or with the attorney himself
1. Lawyer must not accept or continue employment if the exercise of his professional judgment on behalf of a client would be adversely affected by the employment or if it would be likely to involve the lawyer in representing differing interests
 2. Lawyer must refuse employment when his professional judgment will reasonably be affected by his own financial, business, property, or personal interests
 3. BUT – may accept employment if
 - a. A disinterested lawyer would believe that the lawyer can competently represent the clients' interests &
 - b. Client consent after full disclosure of the potential conflict
- B. Whether an attorney who drafts a will where he is named executor may receive both attorney's fees and an executor's commission
1. If a will nominates the drafting attorney as a fiduciary – a disclosure statement must have been signed by testator acknowledging
 - a. any person, not just attorney, can be named executor
 - b. executors are entitled to statutory commissions
 - c. the attorney also will be entitled to attorney's fees for any legal services rendered to the estate
 2. IF NOT – only entitled to attorney's fees & only ½ of the statutory executor's commission

III. QUESTION – R-1 (& DOMESTIC RELATIONS)

- A. Whether an oral retainer agreement in matrimonial actions is valid
1. In matrimonial actions – must obtain a (i) *signed, written retainer agreement*, &
 2. In domestic relations matters – must provide (ii) *a statement of the client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement*
 3. Failure to abide by these rules results in an attorney's preclusion from collecting and recovering a legal fee for services rendered and not paid
- B. Whether an attorney is entitled to retain the full amount of a paid retainer fee
1. However, where a retainer fee has already been paid, an attorney may deduct reasonable fees for services rendered and must return the balance