New York State Bar Association
Committee on Professional Ethics
Opinions 1056-1090 (June 2015 – April 2016)
Digests

1056. Subject to any overriding law or regulation governing the office, a county clerk may engage in the private practice of law provided the clerk does not participate in any way in any matter before the clerk's office in which the clerk is personally and substantially involved in private practice, and avoids use of the public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees to influence official conduct.

1057. The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider (1) whether withdrawal is mandatory or permissive; (2) whether withdrawal may be accomplished without significant disclosure to the court; (3) whether disclosure is ordered by the court; (4) the circumstances under which the information is to be disclosed (e.g., in open court or in camera); and (5) whether the client consents to the disclosure. The lawyer may test on appeal the validity of a court's order to disclose. Client documents filed with another court in other proceedings will be deemed confidential unless their existence is generally known in the community or in the legal profession.

1058. If a lawyer is admitted solely in New York but is authorized by Federal law to practice immigration law in another state, and if the lawyer practices only immigration law and practices only in another state, then the lawyer is not required to maintain an attorney trust account in a New York banking institution unless the other state's Rules of Professional Conduct require the lawyer to do so.

1059. Lawyers for minor clients in immigration proceedings may disclose the names and certain procedural information regarding the clients' cases to granting organizations where (1) the information is not privileged and the disclosure would not be embarrassing or detrimental to the clients or (2) the clients or their legal representatives (e.g., parents or guardians) give voluntary, informed consent to the disclosure.

1060. Law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts, and to transfer funds from a sub-account to the master escrow account, in name of a lawyer admitted in New York State and under that lawyer's direction, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

1061. Subject to certain conditions, a lawyer may report a client's payment history on a database system that allows lawyers to report on the timeliness of payment of legal bills and gives access to such information to subscribing law firms and their staff members. Such reporting does not violate the Rules of Professional Conduct provided that (i) the lawyer has obtained the client's informed consent, and (ii) the client's consent is not coerced. To obtain the client's uncoerced informed consent, the lawyer should fully explain the material risks of consenting, including the uses to which the information may be put, and the lawyer should take into consideration the sophistication of the client. The lawyer should also inform the client of his/her right to have independent counsel advise on whether the client should consent. A client who has given informed consent to disclose confidential information may later revoke the consent at any time.

1062. A law firm may engage in certain types of crowdfunding but not others. Any form of fundraising that gives the investor an interest in a law firm or a share of its revenue would be prohibited. However, in some circumstances a law firm may give the funding source some kind of reward. For example, a law firm may send a funder non-confidential memoranda discussing legal issues (provided the law firm complies with any applicable advertising rules), or may agree that the law firm will provide pro bono legal services to certain charitable organizations, provided that the lawyer complies with Rule 1.1 regarding competence and the representation does not involve conflicts in violation of Rule 1.7 or Rule 1.9.

1063. When a lawyer accepts payment of legal fees from a third party, the third-party payor is not a client merely by virtue of paying the lawyer's fee. Where the lawyer's fee for representing a son was paid by the client's father and mother, and the lawyer did not give father reason to believe he was a client, the lawyer's representation of mother would not constitute a conflict of interest unless a reasonable lawyer would conclude that the lawyer's interest in continuing to receive fees from the father for representing the son would create a significant risk of adversely affecting the lawyer's professional judgment on behalf of the mother. But even if such a conflict exists, the lawyer could cure the conflict by obtaining the mother's informed consent to the conflict as long as the lawyer satisfies the terms of Rule 1.7(b).

1064. A lawyer who is a former family court judge is prohibited by Rule 1.12(a) from privately representing a client in a permanent neglect action when the same client appeared before the judge in a previous neglect action and the judge issued an order "upon the merits" to put the subject child in foster care. For the same reason, the former judge is prohibited by Rule 1.12(a) from privately representing a client in a proceeding to modify child support when, as a judge, he or she issued orders upon the merits related to custody and visitation in the same matter and custody and visitation issues will be revisited as part of the application to amend child support. A conflict arising under Rule 1.12(a) cannot be waived even with consent of all parties. However, the Rule 1.12(a) conflict is not imputed to other members of the lawyer's firm if the firm acts promptly and reasonably to implement certain screening measures and no other circumstances in the particular representation create an appearance of impropriety.

1065. The law firm of a part-time prosecutor for Town may represent a client in an Article 78 proceeding against Village, involving actions of Village zoning board or Village planning board, where (i) the Town and Village are separate legal entities and have separate legal departments, (ii) the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning and planning laws, and (iii) the proceeding would not involve Village law enforcement personnel, even though the Town and Village courts have been merged and the Village provides police protection services to both the Village and Town.

1066. A lawyer may not guarantee repayment of a loan made to a client for the purpose of paying legal fees.

1067. When a person consults with a lawyer in good faith about possible representation in a matter, the lawyer owes a duty of confidentiality pursuant to Rule 1.18(b) with respect to information the lawyer learns in the consultation, absent the prospective client's consent to disclosure or use. Whether the prospective client's identity, the fact of the consultation, and the subject matter of the consultation constitute confidential information turns on whether the information is protected by the attorney-client privilege, on whether disclosure likely would be embarrassing or detrimental to the prospective client, and on whether the prospective client has asked the lawyer not to disclose the information. Whether the consultation precludes or restricts the lawyer from undertaking representation of another client or continuing to represent another client depends on whether the matters are the same or substantially related and on whether the information the lawyer learned from the prospective client could be "significantly harmful" to the prospective client in the matter.

1068. Lawyer may not join with a claims recovery firm in an agreement to offer legal services to the public to be performed by the lawyer and nonlegal services by the claims recovery firm if cross-referrals are to be provided on a systematic and continuing basis, because claims recovery firms are not on the Appellate Division list of approved nonlegal professionals within the meaning of Rule 5.8. Even if the relationship is a "non-exclusive reciprocal referral agreement" within the meaning of Rule 5.8(c), the lawyer must ensure that the relationship does not interfere with the lawyer's independent professional judgment, does not involve improper solicitation of clients, does not involve aiding in the unauthorized practice of law, and does not involve the improper sharing of legal fees. Lawyer may share in contingent fee paid by client to lawyer and nonlawyer but only if (i) the nonlawyer provides substantial assistance in the proceedings (i.e. does not merely sign up clients and pass them on to the lawyer), (ii) the nonlawyer's compensation is commensurate with the nonlawyer's services, and (iii) the lawyer's fee is also commensurate with the lawyer's services (i.e. is not reduced so that the reduction is in effect a referral fee to the nonlawyer).

1069. Despite the potential for conflict, a lawyer who represents an immigrant child in federal administrative removal proceedings may simultaneously represent the proposed guardian in a state family court proceeding provided that the lawyer reasonably believes he can competently and diligently represent both clients simultaneously, and the lawyer obtains informed consent from each client, confirmed in writing. The lawyer may accept the consent of the child if the lawyer believes (i) the child has the capacity to understand the conflict and to make a reasoned decision to consent, and (ii) the consent is voluntary. While there is no particular age when a child may be said to have such capacity, verbal children aged 12 and older will generally be capable of making such reasoned decisions after the lawyer makes full disclosure of the material risks and reasonably available alternatives.

1070. In a joint representation, there is a presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients. But there are exceptions to this presumption, including where disclosure would violate an obligation to a third party or where the lawyer has promised confidentiality with respect to a disclosure. Normally, a client is entitled to full access to the attorney's file on the matter, with narrow exceptions. However, if the co-client requesting the file asks the lawyer not to disclose the request to the co-clients, and the lawyer believes the request for the file is material to the other co-clients, then the lawyer may not comply and should counsel the requesting client that the lawyer may not honor the request for the file unless the requester authorizes disclosure to the co-clients. Keeping the request confidential is inconsistent with the expectation of joint clients that the lawyer will keep all of them informed of material developments in the case and with the lawyer's duty of loyalty to the other joint clients.

1071. A municipal attorney may not engage in partisan political activity while employed by an agency that is charged by law to investigate police misconduct, is given the power to compel attendance of witnesses and the production of documents, and is authorized to refer misconduct to the Police Department for administrative prosecution or referral to criminal prosecutors.

1072. Before entering into a partnership with a foreign lawyer, a New York lawyer must engage in an independent inquiry to confirm that the educational requirements for the foreign lawyer are equivalent to those for a New York lawyer and that such a partnership would not compromise the New York lawyer's ability to uphold the ethical requirements of this State, including those governing attorney-client confidentiality. Both determinations are beyond the jurisdiction of this Committee.

1073. A defense attorney serving on a District Attorney's conviction integrity committee is not prohibited from continuing to engage in the practice of criminal law since that defense attorney is not a member of the District Attorney's firm and is not assuming a prosecutorial role.

1074. A part-time lawyer for a county Department of Social Services may not accept appointments as assigned counsel for indigent persons in which the Department of Social Services is involved.

1075. A business formed by a retired judge to help lawyers prepare arguments for court may not use a trade name.

1076. A lawyer may blind copy a client on e-mail correspondence with opposing counsel, despite the objection of opposing counsel. Because a lawyer is the agent of the client, sending such a blind copy is not deceptive. However, there are practical reasons why the lawyer should consider forwarding the e-mail correspondence to the client rather than using "bcc".

1077. A law firm may scan original signed retainer agreements into the firm computer system and then destroy the original agreements, provided that the firm maintains the scanned copies for seven years after the events they record.

1078. A lawyer does not violate the duty of confidentiality by advising the son of a former client that the lawyer did not draft a will for his deceased father or refer the father to another law firm for will services, and that the lawyer does not possess an original will for the father.

1079. Because New York State does not require paralegals to be certified, the term "paralegal" does not imply certification. Consequently, it is not deceptive for a lawyer to use the title "paralegal" to describe a layperson who assists the lawyer with substantive legal work for which bar admission is not necessary but who is not a graduate of a paralegal program or certified by any certifying body. Nor is it improper to charge for the time of such paralegal in accordance with the lawyer's engagement letter.

1080. A lawyer who has been communicating with counsel for a municipality on a matter may not thereafter communicate with a public official with respect to the matter, even if the public official requests such communication, unless the lawyer obtains the prior consent of the municipality's counsel.

1081. Lawyers employed by a debt management company may not provide legal services to the company's customers. Whether services are legal services is a question of law that we cannot answer, but if the services *are* legal services, then the inquirers may be aiding a nonlawyer in the practice of law, allowing a nonlawyer to interfere with their independent professional judgment, sharing legal fees with a nonlawyer, and providing incompetent representation to clients, and they may have a personal conflict of interest. If the services *are not* legal services and the clients do not believe they are legal services, then the only applicable ethical rules would be those that apply even where the lawyer does not have an attorney-client relationship, such as the prohibition against conduct involving dishonesty.

1082. A lawyer may not provide legal services to individuals through a for-profit company in which a nonlawyer has an ownership or controlling interest.

1083. A lawyer whose firm represents nursing homes may form a nonprofit corporation for the purpose of accepting judicial guardianship appointments for low-asset nursing home residents who lack the capacity to document their eligibility for Medicaid. But representing the nonprofit in certain matters might present conflicts of interest. Consent to a conflict of interest by both the nonprofit and the nursing home may be possible, but if the matter involved a claim (*e.g*. regarding quality of care issues) by the guardian against a nursing home that is represented by the inquirer's firm in the matter, the firm could not represent both the guardian and the nursing home, because the conflict would be non-consentable.

1084. Where a defense attorney obtained information from a deceased client that appears to exonerate a co-defendant, that information is protected as confidential, notwithstanding that the client was convicted and there are no pending proceedings against the client or in which the attorney has appeared. Authorization to disclose confidential information may have been expressed by the client, or may be implied when the disclosure is consistent with the client's best interests and is reasonable under the circumstances.

1085. When a firm is aware of parties adverse to a prospective client but has only incomplete identifying information for those parties, such as street names, it may be necessary for the firm's conflict check to go beyond checking its written records of engagements, by consulting its lawyers who may have represented those adverse parties. A lawyer's duty to avoid conflicts is not limited to the requirement of an adequate conflict-checking system. Thus when a lawyer acquires new information about adverse parties during the course of a representation, it may be advisable, even though not required by the rule on conflict-checking systems, for the lawyer to perform a new conflict check based on that new information.

1086. An attorney may not accept a fee or commission from an investment firm for referring the client to such firm where the money to be invested arises from an engagement in which the lawyer represented the client because the fee creates a non-consentable conflict.

1087. A lawyer may ethically charge a nominal amount to a person who cancels an appointment for an initial consultation without reasonable notice, provided the lawyer informs the person (orally or in writing) what will trigger the cancellation charge and the charge either represents the cost incurred by the lawyer as a result of the late cancellation or the client has given advance consent to the amount of the charge.

1088. A lawyer may include in advertising the names of clients regularly represented by the attorney provided each client has given prior written consent. Absent prior consent after full disclosure to the client, a lawyer may not disclose the identity of a client or the fact of representation, if this information constitutes "confidential information" under Rule 1.6(a). If the client has not requested that the lawyer keep the client's name and the fact of representation confidential, then the lawyer must determine whether such information is publicly known and, if not, whether disclosing the information is likely to be embarrassing or detrimental to the client. This will depend on the client and the specific facts and circumstances of the representation, and, if the lawyer is not reasonably confident of the client's views, it may require the lawyer to consult with the client.

1089. A lawyer who is retired from the practice of law under Section 118.1(g) of the Rules of the Chief Administrative Judge and who therefore may render legal services only without compensation may use the title "Esq.", but must indicate the retired status or the limitations on his or her right to practice if there is a risk of confusion regarding his or her role.

1090. A law firm may bill a client for work performed by a student-intern despite the fact that the law firm does not pay the intern, because the intern receives academic credit for the work, as long as (i) the internship program complies with applicable law, (ii) the educational institution does not object to the client charges, and (iii) the charge is not excessive.