LEGAL ETHICS IN WEST VIRGINIA

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PART I – INTRODUCTION

The subject of legal ethics does not have many black and white propositions, rather there are many difficult grey areas where choosing the wrong course of action could leave a lawyer open to ethics complaints or discipline. There is no absolute protection against ethics complaints – people can and often do file complaints which are frivolous. However, there are steps which lawyers can take to avoid receiving ethics complaints and, most importantly, avoid violating the Rules of Professional Conduct. Becoming familiar with the basic rules and understanding where to seek guidance when questions arise are important first steps.

This chapter provides an overview of the disciplinary process in West Virginia and some important rules to follow. It does not purport to be a comprehensive analysis, does not replace careful research and review of an issue, and does not bind the Office of Disciplinary Counsel, the Lawyer Disciplinary Board or the Supreme Court of Appeals of West Virginia on these matters.

PART II – THE LAWYER DISCIPLINARY PROCESS IN WEST VIRGINIA

THE RULES

A. **Rules of Professional Conduct.** The West Virginia Rules of Professional Conduct ["RPC"] are published annually in the Michie's West Virginia Code Annotated State Court Rules Volume. The RPC govern lawyer's conduct both in representing clients and, in some cases, their private lives [for example, a conviction of a crime which reflects adversely on a lawyers honesty can be a violation of the RPC, even if the crime had nothing to do with a case or a client]. Each rule in the RPC is followed

by a Comment section and, where applicable, an annotation to West Virginia cases. Although the Comment sections are not binding upon the Court, they should be carefully reviewed as they often provide helpful examples and analysis.

B. **Rules of Lawyer Disciplinary Procedure.** The Rules of Lawyer Disciplinary Procedure [RLDP] are also published in the Michie's West Virginia Code Annotated State Court Rules Volume. The RLDP are the procedural rules which govern disciplinary proceedings. The RLDP were significantly amended effective July 1, 1999. The primary change with the amendments was to allow for screening and easier dismissal of frivolous complaints.

C. **The Standards of Professional Conduct**. The Standards of Professional Conduct were adopted by the Supreme Court of Appeals of West Virginia effective January 1, 1997. They are aspirational in character and seek to encourage lawyers to behave in a civil and professional manner. All lawyers should read and abide by them. The Standards are not a basis for a cause of action and are not enforceable by the Lawyer Disciplinary Board.

THE LAWYER DISCIPLINARY BOARD

The Lawyer Disciplinary Board was created by the Supreme Court of Appeals of West Virginia and is considered an administrative arm of the Court. Its functions are set forth in the RLDP. Before the adoption of the RLDP in 1994, the Board was named the "Committee on Legal Ethics" and had a slightly different structure.

There are 19 members of the Board: 13 lawyers and 6 non-lawyers. Members are appointed by the President of the State Bar. The members volunteer their time. They

serve a three year term and may be reappointed once [for a total of six years]. Members reside all over West Virginia.

The Board is charged with investigating complaints of violations of the RPC and taking "appropriate action." When handling complaints, the Board divides into two bodies, the Investigative Panel and the Hearing Panel [discussed in complaint procedures section, below].

The Board as a whole considers policy matters and issues formal advisory opinions [called L.E.O.s, or "legal ethics opinions"[1]], discussed below.

THE OFFICE OF DISCIPLINARY COUNSEL

The Office of Disciplinary Counsel [ODC] is the full-time staff of the Lawyer Disciplinary Board. The staff, who are employees of the West Virginia State Bar, consists of four lawyers [called Disciplinary Counsel], three legal assistants, and a clerk/receptionist. Disciplinary Counsel serve as legal counsel to the Board.

The ODC reviews all complaints filed with the Lawyer Disciplinary Board and investigates where appropriate. The ODC may screen frivolous complaints, may dismiss complaints which after investigation are shown to lack merit, and prosecutes lawyers where complaints do have merit. Duties of the ODC are set forth in the RLDP.

The ODC in its discretion may initiate complaints on its own when it learns of a violation but no one has already filed a complaint. The ODC can also petition directly to the Supreme Court in cases in which a lawyer is impaired and unable to practice, has abandoned his / her practice, or appears to be a danger to the public.

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[1] These Opinions were called L.E.I.s, or "legal ethics inquiries" until 2006.

The ODC also attempts to informally resolve matters where appropriate. For example, if a client merely seeks assistance in obtaining a file or in getting a lawyer to return calls, an ODC employee will attempt to resolve the situation with a telephone call to the lawyer. This often avoids a formal sworn complaint and investigation.

Very importantly, Disciplinary Counsel give informal advice to lawyers on compliance with the Rules of Professional Conduct. There is no charge for this service, rather it is a benefit of State Bar membership. Lawyers or members of their legal staff may call and request this informal advice at (304) 558-7999, fax at (304) 558-4015, or send a letter to 2008 Kanawha Boulevard, East, Charleston, WV 25311. For routine questions, calling on the telephone is the quickest way to receive an answer. If the advice given is confirmed in writing by the requesting lawyer pursuant to RLDP 2.15, the Disciplinary Counsel who gave the advice will sign-off on the letter, and the letter is admissible should anyone file an ethics complaint about that matter. ODC staff makes informal advice a priority, and more than 700 of these opinions are given each year. Please call *before* you act!

THE COMPLAINT PROCESS

The disciplinary process is started when a sworn, notarized complaint is received by the ODC or when ODC initiates a complaint. For policy reasons [protection of the public], and because some of the Rules of Professional Conduct pertain to how a lawyer deals with opposing parties and unrepresented persons, there is no standing requirement as to who may file a complaint. Parties may, and often do, file against the opposing counsel.

A lawyer at ODC evaluates the complaint to determine whether it alleges a violation on its face. If not, a letter is sent declining to docket which closes the complaint. If the

complaint should be referred to a State Bar committee, such as the Voluntary Fee Dispute Mediation Program, it is. The complaint also can be referred to fee dispute mediation AND docketed as an ethics complaint.

If a violation is alleged on its face, the complaint is sent to the lawyer for a response. The lawyer has 20 days to respond, but may request an extension of time for good cause. ODC may perform any appropriate investigation.

If no violations are found, the case will be closed [dismissed] by either the Chief Lawyer Disciplinary Counsel or the Investigative Panel of the Lawyer Disciplinary Board. The closing order sets forth a brief explanation as to why the complaint is closed. A Chief Lawyer Disciplinary Counsel closing may be appealed by the Complainant to the Investigative Panel ["IP"].

The IP has a total of seven members: five lawyers and two non-lawyers. In addition to closing complaints, it can find probable cause that a violation occurred and issue a Statement of Charges to the Hearing Panel of the Board for a hearing. Alternatively, the IP can issue an "Investigative Panel admonishment" when a lawyer has committed a violation, but that violation does not warrant formal discipline. An IP admonishment is not considered to be formal discipline, and is not reported to other jurisdictions where the lawyer presently may be licensed. The IP also may close [dismiss] a complaint with a caution or warning to the lawyer to change bad practices, thus giving the lawyer a chance to correct the problem. A large majority of complaints are dismissed by the ODC or the IP, and do not go further in the process.

If the IP finds probable cause that a violation of the RPC occurred and that a hearing should be held, a formal statement of charges is drafted and filed with the Clerk

of the Supreme Court of Appeals of West Virginia. A Hearing Panel Subcommittee [consisting of Board members who are not on the IP] is appointed. The Subcommittee consists of two lawyers and one non-lawyer. The Subcommittee holds an evidentiary hearing, where an ODC lawyer serves as the "prosecutor" and the Respondent lawyer is usually represented by counsel. ODC has the burden of proving the case by clear and convincing evidence. The hearing is open to the public, testimony is taken and exhibits are offered. ODC and the Board do not have the authority to "settle" an ethics case. However, ODC and the Respondent lawyer can agree to submit stipulated findings of fact, conclusions of law, and a recommended sanction to the Subcommittee for consideration.

After holding the evidentiary hearing, the Hearing Panel Subcommittee can accept the stipulations or make recommended findings of fact, conclusions of law, and propose a recommended sanction to the Supreme Court of Appeals of West Virginia.

The Supreme Court reviews all cases in which the IP has found probable cause and issued a Statement of Charges. **The Supreme Court is the final arbiter of legal ethics cases.** The Supreme Court reviews the Hearing Panel Subcommittee's recommendations and may establish a briefing schedule and hold oral argument, particularly if either ODC or the Respondent object to the Hearing Panel Subcommittee's recommendations. The Court can conduct an independent review even if no one objects. The Court applies a *de novo* standard of review as to questions of law and to determining the appropriate sanction, but gives substantial deference to the Hearing Panel Subcommittee's findings of fact.

The Supreme Court then issues a decision, which can either be published or unpublished.

Some cases, such as emergency petitions, impairment petitions, or criminal convictions, go directly to the Supreme Court.

The Board and Court also hear "reciprocal cases" in which a lawyer who is also licensed in another state is sanctioned in that state for misconduct. Proceedings are then initiated in West Virginia based upon that out-of-state sanction.

PUBLIC RECORDS

A. **Your address.** Whatever address a lawyer lists with the West Virginia State Bar is a matter of public record. When ODC forwards a complaint to a lawyer, this address is used and will become known to the complainant. Accordingly, lawyers who do not wish for complainants or others to know their home addresses or phone numbers should list work information instead.

B. **"Informal complaints."** Where there has been no sworn complaint filed, but a client may call ODC seeking help in obtaining a file or a return call from a lawyer, these remain confidential. If a *sworn* complaint is filed, it is a public record after the complaint is resolved, as described in the next section.

C. **Confidentiality of open complaints.** The details of complaints filed or investigations conducted by ODC are confidential while the complaint is still open. However, ODC "may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the lawyer to a fair hearing. Prior to the release of information . . . reasonable notice shall be provided to the lawyer." RLDP Rule 2.6.

D. **Closed complaints and the "public file."** Once the complaint has been resolved – whether by the ODC, the IP, or decision of the Supreme Court – the initial complaint and the closing order or Supreme Court decision are matters of public record. Per the order of the Supreme Court of Appeals of West Virginia in Daily Gazette Co. v. Committee on Legal Ethics, 326 S.E.2d 705 (1994), closing orders and the initial complaints are matters of public record even if the complaint was determined to be frivolous.

E. **Hearings cases.** If a Statement of Charges is issued, it is filed with the Supreme Court Clerk, and thus is a matter of public record. All pleadings thereafter in a hearing case are filed with the Clerk. The hearing is open to the public. The Hearing Panel Subcommittee's recommendation, the briefs to the Supreme Court, and the Supreme Court's decision [even if unpublished] are filed with the Clerk and are public records. The ultimate decision of the Supreme Court is placed in ODC's public file.

WHAT TO DO IF YOU RECEIVE A COMPLAINT

Remember that many complaints are based on a misunderstanding, or are filed because a client is unhappy with a fee or the outcome of a case, or the opposing party has focused his unhappiness on the opposing counsel.

If you want to have another lawyer represent you in the ethics complaint, you may do so. The general practice has been for the lawyer to respond to the initial complaint, but to hire counsel if a Statement of Charges is issued [*i.e.*, if the IP finds probable cause and refers the complaint to a Hearing Panel Subcommittee]. This is the decision of the lawyer

who receives the complaint, and the decision should be based upon how comfortable the lawyer is in responding on his/her own and how serious the allegations are.

The ODC will send the lawyer a copy of the complaint along with an explaining cover letter. Read the complaint and letter carefully, review any file on the underlying case, and prepare a written response to the ODC. There is no set format for the response. A letter with a verification is the usual format. *The response must be verified.*

Failure to respond to an ethics complaint or a request for information from ODC constitutes a separate and independent violation of Rule 8.1(b) of the RPC, even if the underlying complaint otherwise lacks merit.

Because of the number of complaints and other work ODC handles, the complaint process can sometimes take a long time. Lawyers may contact ODC and check on the status of the matter. All complaints which are pending review by the Chief Lawyer or the IP are considered "under investigation," regardless of the seriousness of the allegations. The length of time a complaint is under investigation is not necessarily synonymous with how serious ODC believes the complaint to be.

FORMAL OPINIONS OF THE BOARD

The Lawyer Disciplinary Board issues formal advisory opinions, called L.E.O.s [Legal Ethics Opinions]. These opinions are not binding upon the Supreme Court, but are binding upon the Board. The opinions are published in the *West Virginia Lawyer Magazine* upon issuance and are also available on the West Virginia State Bar's Internet homepage. All opinions can also be obtained by contacting ODC.

The State Bar's homepage also includes the West Virginia Code, cases, other research materials, and lots of helpful links. The Bar's page is www.wvbar.org. To find the

L.E.O.s (formerly L.E.I.s), choose the "Members" option, then choose the "Lawyer Disciplinary Board" option.

WHERE TO GO TO RESEARCH AN ETHICS QUESTION

A. Read the Rules of Professional Conduct [in the State Court Rules Volume of the Code], including the comment sections and any annotated cases pertaining to the applicable rule.

B. Many decisions of the WV Supreme Court on lawyer ethics and related matters are published cases and are available in printed reporters, computer research services, or the Supreme Court's homepage www.state.wv.us/wvsca/.

C. If you have a question about compliance with the Rules of Professional Conduct, you are invited to call the Office of Disciplinary Counsel and speak with one of the Disciplinary Counsel at no charge. Phone (304) 558-7999.

D. Check to see if there is an L.E.O. on your topic [see section above]. These can be found on the State Bar's homepage at www.wvbar.org or may be obtained by calling the ODC.

E. The *ABA/BNA Manual on Professional Conduct*, published by the American Bar Association and the Bureau of National Affairs, Inc., includes information and discussion on the model rules upon which WV's rules are based. There is information on the differences among the states, various state and ABA advisory opinions, the ABA model rules and model code, the model rules of lawyer disciplinary enforcement, current reports on cases across the nation, etc. The *Manual* is available in most law libraries.

F. Hazard and Hodes *The Law of Lawyering*, published by Prentice Hall Law & Business, has a discussion of each of the model rules with citations to select state cases. Sections on applying the rules are provided. This reference is available in most law libraries.

G. The American Bar Association has a call-in service called ETHICSearch which focuses on ABA advisory opinions and the model rules. ABA advisory opinions are not binding in WV, but are generally very persuasive. Make sure to compare the WV rule with the model rule – many are identical, but not all. There may be a charge for this service. Call 800-285-2221 (option B).

JUSTICES, JUDGES, MAGISTRATES, JUDICIAL CANDIDATES, AND FAMILY LAW MASTERS

A. Complaints against Supreme Court Justices, Circuit Court Judges, Family Law Judges, Magistrates, Mental Hygiene Commissioners and judicial candidates are handled by the Judicial Investigation Commission, the counterpart to the Office of Disciplinary Counsel. Contact Charles R. Garten, Counsel, or Nancy Black, Executive Secretary, at Post Office Box 1629, Charleston, West Virginia 25326, telephone number (304) 558-0169.

B. Judges must abide by a separate set of stringent rules, the Code of Judicial Conduct. These rules are published in the Michie's State Court Rules volume of the West Virginia Code.

PART III – STAYING OUT OF TROUBLE

DILIGENCE

Diligence is important: Diligence and lack of communication are by far the basis for most complaints filed with the ODC. Every day new complaints are filed where clients allege that the lawyer did not take timely, or any, action on a case. This includes not talking to potential witnesses, not performing discovery, not filing documents in a timely manner or at all, etc. Because of their busy practices, this can get to be a problem for some lawyers. Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness".

COMMUNICATING WITH THE CLIENT

Basic Considerations: Diligence and lack of communication are the main areas of complaints filed with the Office of Disciplinary Counsel. Thus, a friendly, responsive demeanor with clients is a necessity. Even the smallest matter may be very important to your client. Prompt attention to that matter and communication with your client are absolutely critical to avoid complaints.

Returning Calls and Responding to Letters: Rule 1.4(a) of the RPC requires a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." You should make it a priority to return the client's calls and answer letters, or have a member of your staff do it for you. Often the client just wants to know the status of a matter, which can be communicated by your secretary or legal assistant – just do not permit support staff to give legal advice. Even if you have nothing new to report, return the call or have someone in your office return the call or respond by letter. If a client calls your office numerous times a day every day, of

course you do not have to take/return every single call – it is a reasonableness test – but you should return some of these calls, and it is important that you personally speak with the client from time to time.

Explaining the matter to the client: Pursuant to Rule 1.2(a) of the Rules of Professional Conduct, settling a case or accepting a plea bargain are decisions to be made by the client, with the lawyer's advice. Rule 1.4(b) requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The ODC gets numerous complaints every year from clients who say their lawyer did not explain something to them and/or coerced them into settling or pleading. What kind of explanation you give often depends on the client – a client who is unsophisticated in the ways of litigation may need more time with you than a business CEO would, but you must spend the time. Written documentation of your advice is important. If the client is not following your advice, a written letter to the client confirming the situation is a good step.

ADVERTISING

Basic Considerations: You may advertise by newspaper, radio, television or in magazines. You must keep a copy of the advertisement or communication, and records of where and when the ad or communication took place, for two years after its last dissemination. [Rule 7.2]. You should avoid mentioning the dollar amounts of past verdicts, to avoid creating an unjustified expectation of results you can achieve. [Rule 7.1(b)]. Do not compare your services with other lawyers' services unless the comparison can be factually substantiated. [Rule 7.1(c)]. You may include statements of fact, such as the fact that you are a C.P.A., a civil trial specialist certified by the National Board of Trial

Advocacy, or a nurse. Your ad must include the name of the "responsible attorney." [Rule 7.2(d)]. If your ad copy includes "no recovery–no fee" or similar phrases, you must disclose in the ad the client's responsibility for fees, costs and expenses. [L.E.I. 96-01]. The same rules apply to Internet advertising. [L.E.I. 98-03].

Targeted Solicitation: You are permitted to write directly to someone known to be in need of legal services, such as an accident victim, as long as the solicitation does not include coercion, duress or harassment, and complies with the other advertising rules. [Rule 7.3(b)]. You MUST include the words "Advertising Material" on the outside of the envelope.

Telephone or in-person contact with someone with whom you have had no prior professional relationship is forbidden. Use of investigators, paralegals, police officers, hospital employees, or others to do that which the lawyer may not do is equally unethical. Committee on Legal Ethics v. McCorkle, 452 S.E.2d 377 (W. Va. 1994); Lawyer Disciplinary Board v. Allen, 479 S.E.2d 317 (W. Va. 1996). Moreover, you are not justified in contacting a potential client by telephone or in person when someone other than the client calls and leaves a message that the client wants you to call. The caller should be told that the potential client must call you himself.

Collective National or Regional Advertising: Some advertisers want lawyers to join in regional or national advertising which entitles you to a referral on a geographic basis. For example, there may be a television advertisement. Those people calling in from the geographic area you "paid for" are given your name.

A lawyer is prohibited from paying for a referral. However, a lawyer may pay the reasonable costs of advertising or the usual charges of a not-for-profit lawyer referral

service. [Rule 7.2(c)]. The line between advertising and paid referrals is sometimes blurred. Also, some of these advertisements do not comport with this state's Rules of Professional Conduct, and you are responsible for any ad in which you participate. Please review L.E.I. 90-3 and 97-03 before entering into these types of agreements.

Firm Name: If you do not operate as a partnership, you cannot use a firm name which sounds like a partnership. [Rule 7.5(d)]. You may include the names of deceased partners or retired partners. You cannot use the name of those individuals who have left the firm and are still practicing.

If you are simply sharing space with another lawyer, do not put the other lawyer's name on your letterhead, and both attorneys should advise every client in writing that he/she is only sharing space [otherwise, the clients of the other attorney might think you are their lawyer and may sue you or file an ethics complaint against you if they are dissatisfied].

You may use a trade name if it does not imply a connection with a government or charitable entity or is not otherwise misleading. [Rule 7.5(b)]. It is misleading to advertise under a trade name which conceals the true identity of your firm. [L.E.I. 97-01]. If you wish to practice as an entity other than a partnership or sole proprietorship, you may incorporate under W. Va. Code § 30-2-5a. Prior to filing your Articles of Incorporation, you must submit them to the West Virginia State Bar for review. Please include language in the Articles of Incorporation which reflects that the legal corporation is governed by the obligations and restrictions contained in W. Va. Code §30-2-5a and the current ethical standards. Remember that only members of this Bar on active status may be shareholders. Recently-enacted statutes permit lawyers to practice as a limited liability

partnership or a limited liability company if they maintain a certain amount of malpractice insurance or self-insurance and meet other requirements. W.Va. Code §31-1B-1, *et seq.* and W.Va. Code §47B-10-1, *et seq.* If you practice as a legal corporation or a limited liability partnership or company, your letterhead must disclose this fact.

LEGAL FEES

General Considerations: Rule 1.5(a) of the Rules of Professional Conduct requires every fee to be "reasonable", taking into account the eight factors set forth in the Rule. Contingent fee agreements must be in writing. [Rule 1.5(c)]. L.E.I. 99-03 requires written fee agreements for non-refundable retainers. Even if a written agreement is not required, you must disclose the basis of your fee at the beginning of the representation or within a reasonable time thereafter. [Rule 1.5(b)]. *You are strongly encouraged to use written fee agreements at all times for the protection of yourself and your client.* The absence of a written fee agreement has fueled many misunderstandings and ethics complaints.

Contingent Fee Agreements: Contingent fees must be reflected in a written agreement. You may not accept a contingent fee for criminal cases or domestic relations cases. A contingent fee agreement is not appropriate for matters in which there is no real risk of recovery involved, such as recovering life insurance proceeds for the named beneficiary in an uncontested setting. Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107 (W. Va. 1986). Your agreement should specify whether your percentage is calculated from the gross amount recovered or from the net amount after expenses are deducted. You should prepare a settlement statement at the conclusion of the case showing the remittance to the client and the method of its determination. [Rule 1.5(c)].

Although you have a signed contingent fee agreement, you may still be required to justify a fee charged in light of the eight factors set forth in Rule 1.5(a). Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (W. Va. 1988).

When you are terminated by your client prior to the conclusion of the case, you are entitled to a *quantum meruit* recovery, assuming that you can sufficiently document your work, or in some cases you can assert a contract theory. Hardman v. Snyder, 393 S.E.2d 672 (W. Va. 1990); Shaffer v. CAMC, 485 S.E.2d 12 (W.Va. 1997). Depending upon the circumstances, you may file an attorney's lien to protect your rights to any recovery. See Rule 1.16(d) and L.E.I. 89-02 and 92-02 for other obligations to clients upon termination or withdraw.

Non-refundable Retainers: Some attorneys wish to charge a certain fee at the initiation of the representation and deem this a "minimum" fee or a non-refundable retainer no matter how much or little time is spent on the case. Some states ban this practice. It is not *per se* unethical in West Virginia, although the Board has issued an opinion, L.E.I. 99-03, which encourages lawyers to avoid minimum retainers in cases where a specific work product is expected [like a divorce case]. The Board suggests in L.E.I. 99-03 that minimum retainers are allowed in types of cases where lawyers are paid for availability [like ongoing business consulting, or to prevent the lawyer from representing the opposing side]. Non-refundable or minimum retainers must be set forth in a **written** representation agreement which clearly explains the terms to the client. Furthermore, even if the client agrees, the overall fee charged must still meet the reasonableness test set forth in RPC Rule 1.5(a).

Workers' Compensation and Other Benefits Claims: W. Va. Code §23-5-16 (previously §23-5-5) permits an attorney to charge no more than 20% of benefits to be received in a 208 week period. Disputes concerning the interpretation of this statute are common. Here are a few guiding principles: A permanent total disability award, whether a standard life award or a second-injury life award, cannot be broken down into more than one award. The first check, for back benefits, is part of a single award. Do not take 20% of that check and then take 20% of 208 weeks. Committee on Legal Ethics v. Coleman, 377 S.E.2d 485 (W. Va. 1988). This statutory limitation cannot be waived by the client for reasons of public policy. Committee on Legal Ethics v. Burdette, 445 S.E.2d 733 (W. Va. 1994). Do not take a percentage of an award which was awarded before you were retained, unless you are defending against a protest and actually perform legal work.

The fees you charge in Social Security and Black Lung cases are governed by federal regulations. Please check these carefully. There may be specific requirements which your fee agreement and rate must meet, including, but not limited to, advance disclosure to the agency. If the Social Security Administration directs you to refund a portion of your fee, do so promptly.

Fee Splitting: You may divide your fee with another attorney not in the same firm if the client is advised of and does not object to the participation of the other lawyer and the fee split is proportional to the work done. [Rule 1.5(e)]. Fee splitting in contingent fee cases is treated somewhat differently. Remember that you cannot pay a referral fee to someone who simply recommends your services. However, if the referring lawyer assumes joint responsibility for the case and the client agrees to the arrangement in writing, the referring lawyer may share the fee. A fee split is unethical if there is some

ethical or legal impediment to the referring lawyer representing the client at all, such as having a conflict of interest.

Letters of Protection or Acknowledgment of Assignments: Rule 1.15(b) requires you to pay a client or a third person promptly when you are holding trust money. If you have issued a letter of protection or acknowledged in writing an assignment to a medical provider or other creditor, you must follow through when you receive a judgment or settlement. Scyoc v. Holmes, 450 S.E.2d 784 (W.Va. 1994). *Otherwise, you may be personally liable for payment and may face disciplinary charges.* If you guaranteed payment, do not trust your client to handle it. You are still free to negotiate with the creditor on your client's behalf, but you cannot ignore your earlier promise.

Finally, if your representation is terminated before the conclusion of the case, you should notify anyone to whom you have sent a letter of protection and advise them, as well as your successor counsel.

Repayment of Subrogated Funds: When your client's insurance company makes medical payments for bills incurred due to an accident, it usually has a subrogation clause requiring repayment if the client collects damages from the tortfeasor. Workers' Compensation and Medicaid have similar provisions for medical payments. Medicaid has a statutory requirement that the lawyer must advise WVDHHR of any possible subrogation right. There are certain circumstances in which the client is not obligated to repay these subrogated funds, depending upon the amount of recovery. When there is a sufficient recovery to justify the client repaying the funds, Federal Kemper v. Arnold, 393 S.E.2d 669 (1990), holds that the insurance company must pay its pro rata share of attorney's fees.

Nonpayment Problems: If you are owed a fee, you cannot delay preparing a final order or the Family Law Master's recommended decision until you receive payment. [L.E.I. 84-04]. You may only charge a finance charge on unpaid balances if the client has agreed to such charges in writing at the beginning of the representation [L.E.I. 93-02] and the finance charge is reasonable. You may only forward an overdue account to a collection agency under limited circumstances – see the nine conditions set forth in L.E.I. 94-01. You cannot hold a client's file hostage to obtain a fee from a client who fired you. [L.E.I. 89-02 and 92-02]. Not all conflicts can be waived by the client. If an independent lawyer examining the situation would not seek a waiver from the client, then neither may you. [Comment, Rule 1.7].

LEGAL FUNDING PLANS

The Board has stated that a lawyer may not refer the client to any legal funding plan in which the lawyer, his/her law firm, or the lawyer's family member has an ownership interest. Additionally, the lawyer shall not receive any compensation or other value from the funding plan in exchange for referring clients as this would violate Rules 1.8(c) and 1.7(b).

However, the lawyer may, at the client's request, honor the funding plan's letter of protection signed by the client. The lawyer is prohibited from providing a letter of protection to the funding plan signed by the lawyer because this makes the lawyer a part of the loan process, a violation of Rules 1.8(e) and 1.7(b).

Ultimately, you should not recommend the client's matter to the legal funding plan nor contact the plan on a client's behalf. While you may provide information to the funding

plan upon the client's written request, the West Virginia Lawyer Disciplinary Board strongly cautions attorneys against involvdment with these plans. [L.E.I. 2005-02].

CONFLICTS OF INTEREST

General Considerations: You should have a system in place for checking conflicts even if you practice by yourself. Above all, clients expect loyalty from their lawyer. Keep in mind that in non-governmental practice, conflicts of other lawyers in your firm are imputed to you and vice versa. [Rule 1.10]. Screening or "Chinese Walls" are not always permitted. Also watch for staff conflicts -- if you hire the paralegal away from a law firm who is opposing you on a case, and the paralegal knows all about the opponent's case, you may have a problem and you risk getting thrown off the case.

Current Client: Do not accept a new case if the representation will be directly adverse to a current client, even if it concerns an unrelated matter. [Rule 1.7(b)]. You cannot withdraw from representing the first client to cure the problem. Direct adversity extends beyond naming the client as a party. It includes suing a closely-held corporation of the client and cross-examining the client as an adverse witness. Committee on Legal Ethics v. Frame, 433 S.E.2d 579 (W.Va. 1993). Cross-examining a current client, even in a totally unrelated case, creates an adversity and is a conflict.

Former Client: You should not represent a client whose interests are "materially adverse" to a former client in the "same or substantially related matter", unless the former client consents. [Rule 1.9(a)]. The law presumes that the former client imparted confidential information. State ex rel. McClanahan v. Hamilton, 430 S.E.2d 569 (W. Va. 1993). Interpret the phrase "same or substantially similar matter" broadly to avoid disqualification motions, possible sanctions, or ethics complaints.

If the current matter is unrelated to the earlier matter, you still may not use information relating to the earlier representation to the disadvantage of the former client. [Rule 1.9(b); Rule 1.6]. For an overview of client confidentiality obligations and Rule 1.6, see Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (W.Va. 1995).

Not all conflicts can be waived by the client. If an independent lawyer examining the situation would not seek a waiver from the client, then neither may you. [Comment, Rule 1.7].

Initial Client Consultation: A consultation with a prospective client can disqualify you from representing the opposing party, even though you were not hired or paid by the first individual. It depends upon the amount and type of information conveyed by the potential client. State ex rel. DeFrances v. Bedell, 446 S.E.2d 906 (W. Va. 1994); State ex re. Taylor Associates v. Nuzum, 330 S.E.2d 677 (W. Va. 1985). Even if you no longer have your notes and cannot remember the conversation, if the conversation occurred and confidential information as defined by Rule 1.6 was passed, then you have a conflict. You may wish to limit the extent of the initial consultation to avoid this problem, particularly in domestic relations cases. Letters of engagement and non-engagement are highly recommended, as are accurate client intake information and accurate record-keeping. Add information regarding initial consultations to your conflicts check system.

Moving to a New Firm: If you represented a client in Firm No. 1 and you learned information protected by Rule 1.6 which is material, your new firm, Firm No. 2, will be disqualified from representing the opposing party unless both parties waive the conflict. In this circumstance, no screening is allowed.

Remember that Rule 1.6 "Confidentiality of information" is broader than the attorney-client evidentiary privilege. Rule 1.6 protects "information relating to representation". However, if your representation of the client while in Firm No. 1 was limited to non-confidential information, your firm will not necessarily be disqualified and you may be screened from participation. The Comment to Rule 1.10 suggests if you had no involvement in the representation of the client while in Firm No. 1, you are not prohibited from representing the opposing party in the same litigation when you join Firm No. 2. However, you may wish to think carefully before doing this. Clients expect loyalty from an entire firm, not just those lawyers working on the matter.

Government Employment: Under Rule 1.11, a government lawyer entering or leaving private practice has a different standard. The lawyer is conflicted out if he/she "participated personally and substantially" during the prior employment. A government lawyer leaving for private practice should not represent a private client in a matter in which the lawyer had participated "personally and substantially" while serving as a government attorney, regardless of whether or not the lawyer is switching sides.

Contact with Unrepresented Party: You must not state or imply you are uninterested. [Rule 4.3]. One lawyer cannot represent opposing parties. This is of particular concern in domestic relations cases. A lawyer representing one spouse must not prepare an answer for the unrepresented spouse to sign, and must not even present a form answer for the unrepresented spouse's use. *See* Walden v. Hoke, 429 S.E.2d 504 (W. Va. 1993), Committee on Legal Ethics v. Frame, 433 S.E.2d 579 (W. Va. 1993). The lawyer may draft a property settlement agreement, since that is a document to be signed by both parties – but it is a good idea to put in the document that the unrepresented party

recognizes that the lawyer only represents the one client. When negotiating or discussing the agreement with the unrepresented party, the lawyer should make clear -- preferably in writing -- that he/she is not safeguarding the unrepresented party's interests. [Rule 4.3].

Transacting Business with a Client: You should not enter into a business transaction with a client unless the terms are very fair to the client, there is a written agreement, and the client is given an opportunity to seek the advice of independent counsel. [Rule 1.8(a)]. You should inform the client in writing about the desirability of seeking legal advice. A business transaction includes borrowing money from and loaning money to a client. Committee on Legal Ethics v. Cometti, 430 S.E.2d 320 (W.Va. 1993), Committee on Legal Ethics v. Battistelli, 457 S.E.2d 652 (W. Va. 1993). This is an area where several lawyers have been the subject of formal charges in recent years. Lawyer Disciplinary Board v. King, 650 S.E.2d 165 (W. Va. 2007).

Limiting Your Liability for Malpractice: You should not make an agreement with a client to prospectively limit your liability for malpractice unless the client is independently represented. [Rule 1.8(h)]. This general prohibition does not restrict your right to practice as a limited liability entity or a legal corporation. If you commit malpractice and wish to settle the claim, you must first advise the client in writing to consult another lawyer. [Rule 1.8(h)]. As a practical matter, do not settle a claim on terms that you cannot realistically meet, or there will be an ethics complaint in your future.

Real Estate Transactions: L.E.I. 89-01 discusses providing notification of whom you represent when you are the closing attorney in a real estate transaction. Please review this opinion carefully. The opinion contains a helpful notification form for your use.

OFFICE PRACTICE

Malpractice Insurance: Much to the surprise of non-lawyers throughout the state, West Virginia lawyers are not required to maintain legal malpractice insurance unless they practice under a limited liability form of business. However, the West Virginia State Bar now requires you to disclose, among other things, whether you maintain malpractice insurance. [Article III(A) of the West Virginia State Bar By-Laws]. Lawyers who do not have malpractice coverage run an incredibly high risk. Moreover, if you are in a partnership and your partner commits malpractice, your personal liability is eminent and you could lose your savings, your house, etc.

Trust Accounts: The most basic rule is not to commingle client money with your firm money. A check in which you and your client have an interest should be deposited into a trust account. If the sum of money will not justify maintaining a separate account, you should place the check in an IOLTA general trust account. [Rule 1.15(d)]. You cannot personally benefit from interest earned from client funds. You must also send a Notice of Compliance with Rule 1.15 for your IOLTA account to the West Virginia Bar Foundation, Inc. This form may be obtained by contacting the West Virginia State Bar.

When a check has been deposited into a trust account, any fee or reimbursement for expenses owed to you should be promptly paid to you in the form of a check from the trust account. Do not leave the money in your trust account or write checks for rent or general business expenses on the trust account. When you have money deposited in the trust account for litigation expenses, write expense checks directly on the trust account. Do not transfer a lump sum into your business account and then write the checks. Do not run a check owed in part to your client through your business account. Do not cash

settlement checks without depositing them first into the trust account. It is also a bad idea to pay your client in cash.

Your trust account records should always show whose money is in the account without having to review all of your individual client files. [Rule 1.15(a)]. The records should also reflect on whose behalf withdrawals are made or checks are written.

It should go without saying that you cannot "borrow" or use client funds for uses other than their intended use. Misappropriation is complete when you use client money for personal purposes or for purposes of other clients' cases, even temporarily. Lawyer Disciplinary Board v. Kupec, 505 S.E.2d 619 (W. Va. 1998); Lawyer Disciplinary Board v. Wheaton, 610 S.E.2d 8 (W. Va. 2004). Misappropriation is an offense which generally results in disbarment.

Advancing Client Expenses: You may advance the costs of litigation and make repayment contingent upon recovery. You may also pay such costs outright for indigent clients. [Rule 1.8(e)(1) & (2)].

You cannot advance or loan money for living expenses, even if it is in the client's best interest to avoid early settlement or even if the client begs you for money because he cannot make the rent, etc. Do not advance money pending receipt of a settlement or benefits check.

Travel expenses associated with a client who is examined by an expert can be considered costs of litigation. Payment for medical treatment cannot.

Supervision of Nonlegal Personnel: Lawyers have an obligation to make sure nonlegal personnel follow the same ethical practices which lawyers must follow. [Rule 5.3 and L.E.I. 76-07]. Moreover, lawyers must insure that their nonlegal personnel do not

practice law. [Rule 5.5(b)]. For guidance on what constitutes the unauthorized practice of law, contact the Committee on Unlawful Practice at the West Virginia State Bar.

Communicating with Employees of an Organizational Party: You may not talk with those current employees, officers and directors of a party "whose acts or omissions in the matter under inquiry are binding on the corporation or imputed to the corporation for purposes of its liability, employees implementing the advice of counsel, those officials who have the legal power to bind the corporation . . . or any member . . . whose own interests are directly at stake." Dent v. Kaufman, 406 S.E.2d 68 (W. Va. 1991). Also read Rule 4.2 and State ex rel. CAMC v. Zakaib, 437 S.E.2d 759 (W. Va. 1993).

Communicating with Treating Physician / Testifying Expert Physician: Counsel may not have *ex parte* contact with the opposing party's treating physician. State ex rel. Kitzmiller v. Henning, 437 S.E.2d 452 (W. Va. 1993). For expert physicians, see Rule 26(b)(4)(A) of the WV Rules of Civil Procedure, but basically you can only get to a testifying expert's opinion by means of deposition or interrogatories -- do not contact him yourself. For non-testifying experts, see Rule 26(b)(4)(B).

Keeping your Law License Current: You must pay your Bar dues annually regardless of whether you receive a dues notice. You must also meet the Continuing Legal Education requirements and fill out the requisite forms to establish that you have fulfilled those requirements. You must also submit a Financial Responsibility Disclosure form which indicates, among other things, whether you have malpractice insurance. If your law license is suspended for failing to pay dues, failing to fulfill CLE requirements or failing to submit your Financial Responsibility Disclosure form, you must not continue to practice law. To continue to practice would be an ethics violation. [Rule 5.5(a)].

WITHDRAWAL

Motion to Withdraw: When you wish to withdraw or your representation has been terminated, you must file a motion to withdraw if you have made an appearance before a forum, either in person or by pleading. Godbey v. Lanham, 445 S.E.2d 174 (W. Va. 1994); Trial Court Rule 4.03(b). Review Trial Court Rule 4.03 before filing a motion to withdraw, which sets forth eight specific things of which the client must be notified. Since you are still under an obligation to protect your client's interests, keep the motion as general and bland as possible. Revealing client confidences or trial strategy in the motion to withdraw may violate Rule 1.6. Lawyer Disciplinary Board v. Farber, 488 S.E.2d 460 (W.Va. 1997).

You should not withdraw at a time when the client will lose a valuable procedural right and will not realistically have time to obtain other counsel. Examples of this situation are the 10-day period in which to file objections to the Family Law Judge's recommended decision and the period in which to file objections to a recommendation in a Social Security case, unless you receive a continuance for the client.

Returning the File: When you cease representing a client, whether you have been fired or you voluntarily withdraw, the client is entitled to the file, regardless of whether you are owed money for fees or expenses. This includes all material provided by the client; all correspondence; all pleadings; motions and other material filed; discovery, including depositions, and all documents which have evidentiary value and are discoverable under the Rules of Civil Procedure, such as business records. If the client has not paid fees or expenses clearly owed, the attorney may withhold work product as defined by WV Rules of Civil Procedure. [L.E.I. 92-02 and Rule 1.16(d)]. However, if the client is current on his/her bill, you must turn over work product as the work has been paid for.

The client should be given the original documents. If the lawyer wishes to retain a copy, he/she may not charge the client copying charges unless specifically agreed to by the client at the beginning of the representation. [L.E.I. 89-02]. The attorney cannot condition the return of the file upon the client signing a general release of liability. The attorney may have the client sign a receipt indicating that the file has been released.

Refunding Unused Portions of Retainer: This issue generates many ethics complaints. Rule 1.16(d) requires you to return unused portions of a retainer. What is to be considered "unused" is the crux of the problem. If an attorney has charged a flat fee to represent someone, the client generally believes he/she is entitled to some type of refund if the attorney does not complete the matter. Often the attorney believes he/she has devoted a sufficient amount of time to justify keeping the entire fee. The final determination as to whether the fee is unethical must be made based upon the reasonableness test of Rule 1.5. There may also be civil contract theories involved. The client is also entitled to an accounting or itemization from the attorney. [Rule 1.15(b)].

Retention and Destruction of Closed Client Files: When you destroy a file from a concluded representation, you are destroying someone else's property. [L.E.O. 89-02 and 92-02]. The best practice is for you to obtain explicit client consent prior to destroying files. The easiest way to obtain consent is to include language in every representation agreement or retainer letter which sets forth your file retention policy.

At some point in time, even absent explicit consent to destroy, it is no longer reasonable for a client to expect that the lawyer will still maintain the client's property. Consistent with Rule 1.15(a), the Lawyer Disciplinary Board advises that closed client files either be provided to the individual client or be maintained for a minimum of five years if

the client has not requested the file. However, some files must be maintained well beyond five years, such as files pertaining to the claims of minor children and certain tax matters. There are undoubtedly other examples. In addition, you should also check with your malpractice insurance carrier to determine the minimum time period it recommends as you may be exposed to a malpractice claim beyond five years.

Before destroying files, the lawyer or some capable firm employee must look through every file to ensure that no original documents are forever lost. These documents must be removed and properly handled before disposing of the file. You must also continue to protect client confidentiality during this process pursuant to Rule 1.6. Finally, any destruction of client files must be done in such a way as to protect this confidentiality. The Lawyer Disciplinary Board recommends that any destruction be accomplished by burning, shredding, or some similar manner which results in complete destruction. [L.E.I. 2002-01].

Succession Plans: A lawyer should also have in place a plan to protect the legal interests of his/her clients in the event the lawyer is unable to continue practicing due to death, disability, impairment, or incapacity. The West Virginia State Bar has directed that such "Succession Plans" be made available. A copy of "Succession Plans" can be obtained by contacting the West Virginia State Bar or the ODC. You may also obtain "Succession Plans" by accessing the West Virginia State Bar's website, www.wvbar.org, then choose "Members" and then "Succession Plans".