AMERICAN BANKRUPTCY INSTITUTE

2017 Hon. Eugene R. Wedoff Consumer Bankruptcy Conference

Kahoots: The 21st Century Ethics Game

Hon. Janet S. Baer, Moderator
U.S. Bankruptcy Court (N.D. Ill.); Chicago

David T. Erie
Kirkland & Ellis LLP; Chicago

Hon. Catherine J. Furay
U.S. Bankruptcy Court (W.D. Wis.); Eau Claire

Prof. Bruce A. Markell
Northwestern University School of Law; Chicago

2017

Hon. Eugene R. Wedoff
Seventh Circuit Consumer Bankruptcy Conference

Kahoots: The 21st Century Ethics Game

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Jenner & Block Conference Center
353 N. Clark Street
Chicago, IL 60654

Panel

Hon. Catherine J. Furay, Bankruptcy Judge, U.S. Bankruptcy Court, W.D. WI

Bruce A. Markell, Professor, Northwestern Pritzker School of Law

David T. Erie, Partner, Kirkland & Ellis LLP

Moderator

Hon. Janet S. Baer, Bankruptcy Judge, U.S. Bankruptcy Court, N.D. IL

Focus

This session will address ethical questions and cases on issues of current importance, especially matters that have arisen in the Seventh Circuit in the last year.

CLIENT CONFIDENTIALITY

Applicable Rules: MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.16 (1983).

Disclosure of Client Names in Marketing Materials:

A lawyer is obligated to maintain as confidential all information related to the representation of a client, absent consent of the client to disclosure. The obligation extends not only to information communicated in confidence to the lawyer, but also to all information relating to the representation of the client, whatever its source. This includes the identity of the client. Much information is not covered by the lawyer-client privilege but is protected by the confidentiality rule. Publicly disclosed (or available) information relating to the representation of a client is protected, as well as information which would be "harmless" to the client if disclosed.

Prof'l Ethics Comm. of the State Bar of Wis., *Formal Ethics Op. EF-17-02* (Apr. 4, 2017).

Disclosure of Client Information During Withdrawal:

An attorney moved to withdraw from his former client's divorce case. Along with his motion, the attorney submitted an affidavit recounting conversations he had with the client about the scope of his representation and legal advice he had given. The affidavit also implied that the client had taken potentially illegal actions against her ex-husband. The attorney argued that his disclosures were made to mitigate financial injury to the ex-husband and to establish a fee dispute with the former client. The court held that the attorney's affidavit did nothing to mitigate potential financial loss by the ex-husband and that the disclosures in the affidavit went well beyond what would be necessary to demonstrate a fee dispute. The court imposed a one-year suspension, stayed on the condition that the attorney commit no further misconduct.

ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op. 476* (2016); *Cleveland Metro. Bar Ass'n v. Heben*, 81 N.E.3d 469 (Ohio 2017).

IMPLICATIONS OF WITHDRAWAL

Applicable Rule: MODEL RULES OF PROF'L CONDUCT R. 1.16 (1983).

Withdrawal in Anticipation of Testifying Against a Client:

In a criminal proceeding, the defendant argued that he was denied the right to counsel of his choice after his original attorney withdrew. The defendant's original lawyer filed an appearance and then was informed by a government agent that he would be subpoenaed to testify against his client. The attorney withdrew, and the defendant found new counsel. In dicta, the court noted that it would be improper for the defendant's attorney to continue to defend his client when he knew that he would be called to testify against him.

Grady v. United States, 559 F. Supp. 30, 32 (E.D. Mo.), *aff'd*, 715 F.2d 402 (8th Cir. 1983).

Fraud and the Duty to Withdraw:

There is a difference between an attorney's duty to withdraw when her services have been used to perpetrate a fraud and an attorney's duty to withdraw when her services are being used or are about to be used for the same purpose. Withdrawal is mandatory if there is an ongoing scheme of fraud and the attorney work product is part of the scheme. In that case, the opinion says that the withdrawal may be "noisy," permitting the attorney to disavow her work product.

ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op. 92-366* (1992).

Withdrawal Based on a Client's Refusal to Settle:

An attorney withdrew on the eve of trial after his client refused to accept a settlement that he had negotiated. The court noted that the right of counsel to withdraw is not absolute. While the attorney may have been irked by the fact that his settlement was not accepted, that does not constitute proper grounds to withdraw when the withdrawal would prejudice the rights of the client.

Vann v. Shilleh, 54 Cal. App. 3d 192 (1975); *May v. Seibert*, 264 S.E.2d 643 (W.Va. 1980).

An attorney may nonetheless withdraw on the grounds that a client has refused to accept a settlement. To withdraw under such circumstances, the attorney has to prove that the client's failure to accept the settlement will lead to a total breakdown of the attorney-client relationship. In general, the court will refuse to allow an attorney to withdraw where: (1) the client's rights will be prejudiced, or (2) the withdrawal will affect the court's trial calendar, thereby impeding the interests of justice.

Goldsmith v. Pyramid Commc'ns, Inc., 362 F. Supp. 694 (S.D.N.Y. 1973).

Withdrawal Due to Non-Payment of Fees:

Attorneys sought to withdraw from the representation of a client who had paid less than half of the fees that the firm had incurred over the previous two years and who had made no arrangements for the payment of future fees. Although the client in the case attempted to block the attorneys' effort to withdraw by asserting that the withdrawal would prejudice the case, the attorneys succeeded in terminating their relationship with the client. The court noted that while "the legal profession may require many things of its practitioners it does not require that they take a vow of poverty."

In Max-um Fin. Holding Corp. v. Moya Overview, Inc., 1990 U.S. Dist. LEXIS 12324 (E.D. Pa. Sept. 19, 1990).

MAINTENANCE OF CLIENT FILES AND RECORDS

Applicable Rule: MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983).

Maintenance and Transfer of Electronic Files:

Lawyers may maintain client files in electronic form, except for documents that are intrinsically significant or are valuable original paper documents (e.g., securities, deeds, wills). To the extent that a lawyer has maintained an electronic copy of a file, that lawyer may provide a copy to the client in the same format in which the file has been maintained. A lawyer many charge the client the expense of providing records in an electronic format if the client asks the lawyer to: (1) convert the files from a format that is already widely available; (2) convert the files to a format that is not widely used; or (3) provide the files in a manner that is unduly expensive or burdensome.

Legal Ethics Comm. of the Or. State Bar, *Formal Op. 2016-191* (Sept. 2016); Legal Ethics Comm. of the Or. State Bar, *Formal Op. 2017-192* (Mar. 2017); Ethics Comm. of the N.C. State Bar, *2013 Formal Ethics Op. 15* (Jan. 24, 2014).

CONFLICTS OF INTEREST

Applicable Rules: MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8, 1.9 (1983).

Implications of Accepting Referral Fees:

A lawyer who refers a matter to another lawyer and divides a legal fee for that matter has undertaken representation of the client in the matter. Because the client is represented by the referring lawyer and the lawyer to whom the client has been referred, both lawyers are subject to the conflicts provisions of the rules. A lawyer cannot accept a referral fee in connection with a matter if the lawyer has a conflict that prohibits representation of the client in that matter unless the lawyer has obtained the required client consent.

ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op. 474* (2016).

Former Clients:

In taking on a representation of a client adverse to a former client, a lawyer needs the consent of the former client if the matter is substantially related to the lawyer's prior work for the former client. Two matters are substantially related if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information normally obtained in the prior representation would materially advance the client's position in the subsequent matter. The court held that the facts upon which the claim would turn were unique to the present case and there was no specific factual overlap with any prior case in which the lawyer represented the former client. General knowledge of a former client's policies and procedures is not the type of confidential information with which the rule is concerned, and confidential information may be rendered obsolete by the passage of time.

Watkins v. Trans Union, LLC, 869 F.3d 514 (7th Cir. 2017).

SOCIAL MEDIA

Applicable Rules: MODEL RULES OF PROF'L CONDUCT R. 3.4, 4.2, 8.4 (1983).

Accessing an Opposing Party's Website:

A lawyer may access the public portions of an opposing party's social media (e.g., Facebook) page (this is similar to a public statement made by that party) and may use the information in discovery. Absent consent of opposing counsel, a lawyer may not: (1) contact a represented opposing party through social media; (2) send a "friend request" to that party to gain access to non-public portions of the party's page; or (3) use a third person, on a pretextual basis or not, to do either (1) or (2).

Lawyer Disciplinary Bd., Office of Disciplinary Counsel, W.Va., *Op. 2015-02* (Sept. 22, 2015).

Advising Clients About "Cleaning Up" Social Media:

A lawyer may advise a client regarding the privacy settings of the client's social media page. A lawyer may not instruct a client to alter, destroy, or conceal any relevant information on the client's social media page. A lawyer may instruct a client to delete information from the client's page that may be damaging but must take appropriate action to preserve the information in the event that it proves to be relevant and discoverable. A lawyer must make reasonable efforts to obtain content of a client's page about which the lawyer is aware, if the lawyer knows or reasonably believes that such content has not been produced by the client.

The Phila. Bar Ass'n Prof'l Guidance Comm., *Op. 2014-5* (July 2014).

Responding to Online Reviews by Clients:

A lawyer is not allowed to disclose confidential client information in response to a negative online review by a client. In the subject case, the lawyer was reprimanded.

In re Tsamis, No. 2013PR00095, Ill. ARDC Hr'g Bd. (Jan. 15, 2014).

TECHNOLOGY

Applicable Rules: MODEL RULES OF PROF'L CONDUCT R. 1.1, 3.4, 4.1, 8.4 (1983).

Lawyer's Necessary Competence Regarding Technology:

A lawyer's duty of competence extends to technology issues and requires lawyers to keep abreast of changes in the law and its practice, including the benefits and risks associated with technology, and to engage in continuing study and education on the topic. Lawyers need to learn the basic features of technology involved in legal practice and should understand and use electronic security measures to safeguard client communications and information. A lawyer can associate with another lawyer or expert to evaluate and employ such safeguards.

ABA Comm. on Ethics and Prof'l Responsibility, *Formal Op. 477R* (May 22, 2017).

Use of Cloud-Based Services in Delivery of Legal Services:

A lawyer who uses cloud-based services must have a sufficient understanding of the technology to assess the risks of unauthorized access or disclosures of confidential information. A lawyer may use an outside provider for cloud-based services but must employ, supervise, and oversee that provider. A lawyer must ensure that the provider reasonably safeguards client information, but also, at the same time, allows the lawyer access to the data. A lawyer must conduct a due diligence investigation of the provider. A lawyer's oversight obligations do not end when the lawyer selects a provider. A lawyer must conduct periodic reviews and regularly monitor existing practices to determine whether client information is adequately protected.

Standing Comm. on Prof'l Conduct of the Ill. State Bar Ass'n, *Op. 16-06* (Oct. 2016).

LITIGATION FUNDING

Applicable Rules: MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.4, 1.6, 2.1, 2.3 (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000).

General Ethical Implications of Litigation Funding Arrangements:

It is not unethical *per se* for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third-party lender. Nevertheless, when clients contemplate or enter into such arrangements, lawyers must be cognizant of the various ethical issues that may arise and should advise clients accordingly. The issues may include the compromise of confidentiality, the waiver of attorney-client privilege, and the potential impact on a lawyer's exercise of independent judgment.

Providing financing companies access to client information not only raises concerns regarding a lawyer's ethical obligation to preserve client confidences, but may also interfere with the unfettered discharge of the duty to avoid third-party interference with the exercise of independent professional judgment. While litigation financing companies typically represent that they will not attempt to interfere with a lawyer's conduct in connection with the litigation, their financial interest in the outcome of the case may, as a practical matter, make it difficult for them to refrain from seeking to influence how the case will be handled by litigation counsel.

Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of N.Y., *Op. 2011-2* (2011).

Lawyers may inform clients of the non-recourse civil litigation advances that are offered by alternative litigation finance providers. If a client pursues such an advance, the lawyer must recognize the ethical obligations that the transaction creates:

1. Professional Conduct Rules 1.1, 1.4, and 2.1 require the lawyer to communicate with the client and provide competent, candid advice about the nature of the transaction and its terms.

2. Under Rule 1.4, the lawyer must ensure that the funding provider does not interfere with the lawyer's duty to exercise independent professional judgment.

3. Due to the confidentiality provisions of Rule 1.6, the lawyer shall not reveal information about the representation to the funder without securing the client's informed consent. The lawyer may obtain informed consent only after explaining to the client the risks of sharing information with the funder, including the potential waiver of attorney-client privilege.

4. The lawyer must also obtain the client's informed consent before providing a case evaluation to a funder pursuant to Rule 2.3 as the evaluation may materially and adversely affect the client's interests.

Non-recourse Civil Litig. Advance Contracts: Guidance for Ohio Lawyers, The Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline, Op. 2012-3 (Dec. 7, 2012).

Litigation Funding and Control:

A chapter 11 litigation trustee sought approval of a funding arrangement to prosecute lawsuits against the debtor's former officer and directors. The trustee proposed to sell a portion of the litigation recoveries to the funder. In denying the request, the court held that the litigation funding arrangement which provided the funder with significant control over the actions being funded constituted "champerty" under North Carolina law. The funding agreement at issue required an ongoing relationship between the trustee and the funder for the duration of the litigation. For instance, the litigation would not be funded at once; instead, the trustee and her attorneys were required to go back to the funder on a quarterly basis to request funding. Also, if law firms withdrew from the case, the trustee was required to consult with the litigation funder regarding substitute counsel. Increases to the litigation budget were also required to be approved by the funder. The court found that this "power of the purse" provided the funder with too much control of the litigation.

In re DesignLine Corp., 565 B.R. 341, 343 (Bankr. W.D.N.C. 2017).

In another case, a commission stated: "While a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit, *absent client consent*, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation, including the decisions of whether to settle or the amount to accept in any settlement."

Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of N.Y., *Op. 2011-2* at 7 (2011) (emphasis added).

Privilege Issues:

A court found that communications between a judgment creditor and a litigation funder were protected by the common interest exception to waiver of the attorney-client privilege. Under Florida law, and applicable federal law, the common interest privilege requires only that the third party and the privilege holder are engaged in some type of common enterprise and that the legal advice relates to the goal of that enterprise.

Likewise, the agency exception to waiver of the attorney-client privilege protects communication between a third-party funder and the privilege holder as communication with those to whom disclosure is in furtherance of the rendition of legal services to the client (i.e., any party who assists the client in obtaining legal services). The communications were also found to be protected as work product as the litigation funder was a link in the chain of parties with whom counsel had to communicate "in furtherance of rendition of legal services" and thus had a "primary purpose" of facilitating rendition of legal services.

In re Int'l Oil Trading Co., LLC, 548 B.R. 825 (Bankr. S.D. Fla. 2016).

The common interest privilege typically protects communications when two or more clients consult with an attorney on matters of common interest – generally a nearly identical interest. A client's interest and a lender's interest are not identical. The relationship that exists between two clients that triggers the common interest privilege is legal. But the relationship between a client and a lender is commercial. Thus, the privilege may not protect documents shared with a litigation funder.

Miller UK Ltd., v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014); *see also Leader Techs., Inc. v. Facebook, Inc.,* 719 F. Supp. 2d 373 (D. Del. 2010).

APPEARANCE COUNSEL

Applicable Rules: MODEL RULES OF PROF'L CONDUCT R. 1.0(e), 1.2(c), 1.5(b) (1983); Local Rule 2091-1(A), Bankr. N.D. Ill. (Apr. 1, 2016).

Consent and Communication of Limited-Scope Representation:

A lawyer is required by Model Rule 1.2(c) to secure the informed consent of a client when providing limited-scope services. Informed consent is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e). A lawyer providing limited-scope services should clearly explain the limitations of the representation, including the types of services which are *not* being provided and the probable effect of the limited representation of the client's rights and interests.

ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op.* 472 (2015).

Although not required by Rule 1.2(c), it is recommended that when lawyers provide limited-scope representation to a client, the lawyer confirm with the client the scope of the representation, including the tasks that the lawyer will perform and not perform, in a *written agreement* which the client can read, understand, and refer to later.

Id. at 4.

Some state rules of civil procedure require that a limited-scope appearance be filed with the court, identifying each aspect of the proceeding to which the limited-scope appearance pertains.

See, e.g., Ill. Sup. Ct. Rules, Art. I., Rule 13(c)(6) (1982).

Inquiry into the Opposing Party's Limited Scope Representation:

While Model Rule 4.2 does not require a lawyer to ask whether a person is represented by counsel, a lawyer cannot evade the requirement of Rule 4.2 to obtain consent of counsel before speaking with a represented person. Thus, where it appears

from circumstances that a person or the opposing side has received limited-scope legal services, the lawyer should begin the communication by asking whether the person is represented by counsel for any portion of the matter so that the lawyer will know whether to proceed under Rule 4.2 or 4.3.

ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op.* 472 at 6.

Attorney-of-Record's Use of Appearance Counsel:

If a lawyer knows from the outset of a representation that he will be using appearance (or stand-in) counsel, the lawyer should give the client that information immediately so that the client can make an informed decision about representation. In recommending to his client the use of appearance counsel, the lawyer has to reasonably believe that appearance counsel's services will contribute to the competent and ethical representation of the client. The lawyer must adequately prepare appearance counsel for the representation and supervise such counsel.

Lawyer's Disciplinary Bd. of W.Va., *L.E.O. 2015-01* (Sept. 18, 2015).

If an attorney chooses to arrange for another attorney to represent a client at a 341 meeting, no matter how brief, uneventful, and of little consequence the meeting may generally be, the attorney must still provide competent representation requiring legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Further, in addition to the ethical rules regarding informed consent, section 329 of the Bankruptcy Code and Rule 2016(b) regarding disclosure of compensation must be complied with.

In re Olsen, 2016WL3453341 (Bankr. D. Idaho 2016).

Disclosure of and Consent to Appearance Counsel's Fees:

Any fee or expense that the client will be responsible for must be in writing before or soon after the start of the representation. Thus, any expenses for hiring appearance counsel that will be charged to a client must be in writing. Further, a division of fees when the case is referred to another attorney or law firm is permitted only if the client consents to the referral.

Lawyer's Disciplinary Bd. of W.Va., *L.E.O. 2015-01* at 4 (Sept. 18, 2015).

Permissible Use of Appearance Counsel:

Use of appearance counsel is permissible as long as counsel ensures that he or she can do the following: (1) provide competent representation; (2) define the scope of the representation; (3) provide proper communication, including communicating to the client about the hiring of appearance counsel; (4) charge a reasonable fee; (5) have a written fee agreement; (6) maintain client confidentiality; (7) ensure that there are no conflicts; (8) ensure fairness to the other side; and (9) ensure proper legal advertising.

Id. at 7.

As stated by the ABI National Ethics Task Force: "Even in the context of providing limited services representation, a lawyer representing a chapter 7 debtor must comply with all of the relevant governing Rules of Professional Conduct. These rules include the requirements of (i) competency; (ii) diligence; (iii) communication; (iv) confidentiality; and (v) conflicts of interest.

FINAL REPORT OF THE ABI NAT'L ETHICS TASK FORCE 56 (Apr. 2013) (citations omitted).

UNBUNDLING OF LEGAL SERVICES

Applicable Rules: MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.2 (1983).

Unbundling Legal Services:

Most states, including Illinois, have adopted some form of Model Rule 1.2(c) which permits limited scope arrangements so long as the limitation is reasonable under the circumstances and the client gives informed consent. In determining what is reasonable, bankruptcy courts are generally concerned that debtors not be left vulnerable and unrepresented at the exact moment that they need professional legal advice, especially for routine and fully anticipated matters, such as providing advice regarding negotiation of a reaffirmation agreement. The decision to reaffirm a debt plays a critical role in the bankruptcy process. So critical that assistance with the decision must be counted among the necessary services that make up competent representation of a chapter 7 debtor.

See, e.g., *In re Minardi*, 399 B.R. 847 (Bankr. N.D. Okla. 2009).

A one size fits all rule regarding carve-outs of services is problematic. What constitutes an "informed decision" by a client to limited scope representation when a client may have no clear idea of what future problems may arise for which he will have waived help from his lawyer? If counsel, for example, does not do a good job of asking the right questions before the unbundling agreement is signed, it may well be that a nondischargeablity suit was hiding in plain sight. If the client is not accurate in the listing of claims and contingent claims, the landscape quickly changes with dire consequences.

See Zach Mosner, *Unbundling and Ghostwriting: Who Ya Gonna Call?*, ABI JOURNAL, Sept. 14, 2016.

Attorneys have ethical obligations to their clients regardless of the economic pressures which might exist. The balance cannot be tipped toward the interest in collecting fees to the detriment of the client's right to thorough and competent representation. Thus, to comply with the fundamental and core obligation imposed upon an attorney representing a debtor in bankruptcy, it would be exceedingly difficult to contract away the core package of ordinary services such as attendance of the 341 meeting.

In re Johnson, 291 B.R. 462 (Bankr. D. Minn. 2003); *see also*, Carrie A. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, ABI JOURNAL, Oct. 14, 2013; FINAL REPORT OF THE ABI NAT'L ETHICS TASK FORCE (Apr. 2013).

MISCELLANEOUS

Applicable Rule: MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983).

Failure to Disclose Material Information:

In an action by a creditor to set aside confirmation of a chapter 13 plan on the ground of fraud, the attorney filed a complaint and certification asserting that the creditor had a claim but that the plan was confirmed "behind the back" of the creditor's attorney. The attorney failed to disclose that he had filed a proof of claim and responded that he did not know if notices had been received regarding motions to discharge his client's mortgage. The attorney violated the Rule 3.3 Duty of Candor Toward the Tribunal.

In re Kouterick, 161 B.R. 755 (Bankr. D.N.J. 1993).

The Duty of Candor v. Zealous Advocacy:

The U.S. Trustee became suspicious of the accuracy and completeness of the debtor's petition, schedules, and statement of financial affairs. Among other things, the U.S. Trustee believed that the debtor had not disclosed personal property. The court granted the trustee's motion to authorize discovery. The debtor hired two new attorneys to replace the one who had originally helped create the various bankruptcy documents. The debtor's new attorneys represented him in both the general bankruptcy case and the U.S. Trustee's adversary proceeding. If they accurately filed amended schedules, they argued, doing so would essentially prove the U.S. Trustee's theory about an earlier omission. The new attorneys argued that their duty of zealous advocacy prevented them from making accurate amendments. The court rejected these arguments, holding that the duty of candor always trumps the duty of zealous advocacy.

In re Varan, 2014 Bankr. LEXIS 2807 (Bankr. N.D. Ill. 2014).

Creating the Appearance of a Pro Se Filing:

Two chapter 7 debtors filed pro se. The debtors alone signed their petitions and personally delivered them and their schedules to the Clerk of Court. The petitions included a "Disclosure of Compensation of Attorney For Debtor" signed by an attorney. The disclosure stated that the attorney had prepared the petitions and schedules in both cases. The court noted that "where an attorney has a client sign a pleading that the attorney has, in fact, prepared, an impression is created that the client, in fact, drafted the pleading." The court found that submitting a document that could be mistaken as being prepared pro se violated Rule 9011(b)(1) and the duty of candor to the court.

In re Johnson, 317 B.R. 347 (Bankr. C.D. Ill. 2004).

SUPPLEMENT

Unless otherwise designated, all rules below refer to the ABA Model Rules of Professional Conduct.

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2 Scope of Representation

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

For more resources on this topic, see: https://www.isba.org/practiceresourcecenter/limitedscope

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Rule 1.5 Fees

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; or
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(h) A lawyer shall not:

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

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

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

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Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 Communication with Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 5.4 Professional Independence of A Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer . . .

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Ill. Sup. Ct. Rules Art. I. General Rules (1982).

Rule 13. Appearances—Time to Plead—Withdrawal

(6) Limited Scope Appearance. An attorney may make a limited scope appearance on behalf of a party in a civil proceeding pursuant to Rule of Professional Conduct 1.2(c) when the attorney has entered into a written agreement with that party to provide limited scope representation. The attorney shall file a Notice of Limited Scope Appearance, prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article I Forms Appendix in the form attached to this rule, identifying each aspect of the proceeding to which the limited scope appearance pertains.

An attorney may file a Notice of Limited Scope Appearance more than once in a case. An attorney must file a new Notice of Limited Scope Appearance before any additional aspect of the proceeding in which the attorney intends to appear. A party shall not be required to pay more than one appearance fee in a case.

Bankr. N.D. Ill. Local Rules (Apr. 1, 2016)

Rule 2091-1(A) WITHDRAWAL, ADDITION, AND SUBSTITUTION OF COUNSEL

A. General Rule: An attorney of record may not withdraw, nor may other attorneys appear on behalf of the same party or as a substitute for the attorney of record, without first obtaining leave of court by motion, except that substitutions or additions may be made without motion where both counsel are of the same firm. Where the appearance indicates that pursuant to these Rules a member of the trial bar is acting as a supervisor or is accompanying a member of the bar, the member of the trial bar included in the appearance may not withdraw, nor may another member be added or substituted, without first obtaining leave of court. Any motion to withdraw must be served on the client as well as all parties of record.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

§ 76 The Privilege in Common-Interest Arrangements

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68- 72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.

Kahoots: The 21st Century Ethics Game

Question 1: Withdrawal

- **FACTS**: A client and an attorney are having a fee dispute. The attorney says that the pending matter was excluded from the services that the attorney agreed to provide. The attorney has sent seven letters to the client discussing trial strategy and requesting information. The client is not responding, paying fees, showing up for appointments, or cooperating in trial preparation. The attorney wants to withdraw.

- **QUESTION**: In the application to withdraw, what may the attorney do?

MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.16 (1983);

ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op. 476* (2016); *Cleveland Metro. Bar Ass'n v. Heben*, 81 N.E.3d 469 (Ohio 2017).

Question 1: Withdrawal

A. State that the cheapskate client hasn't paid or cooperated.
B. Attach the letters.
C. The attorney may not withdraw.
D. Allege a break-down of the attorney-client relationship.

Question 2: Withdrawal

- **FACTS**: An attorney prepares schedules and then learns that the client has lied and is hiding funds and assets. The attorney files a motion to withdraw and states that professional considerations require withdrawal because the client wants the attorney to violate the Rules, but the duty of confidentiality prohibits revealing further information. The attorney attaches copies of letters to the client detailing the failure to cooperate and possible false representations. The attorney also prepares an affidavit detailing the information that the client is concealing and submits it to a judge not on the case.

- **QUESTION**: Did the attorney properly withdraw?

MODEL RULES OF PROF'L CONDUCT R. 1.16 (1983);
ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op. 92-366* (1992).

Question 2: Withdrawal

A. Yes, because the client committed fraud.
B. Yes, because the client is committing or is about to commit fraud.
C. No, because the attorney didn't obtain the client's consent.
D. No, because the attorney submitted the affidavit with details.

Question 3: Unbundling

- **QUESTION**: Can you represent a debtor in filing the bankruptcy case, but exclude any representation for any adversary proceedings commenced by creditors?

MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.2 (1983);

In re Seare, 493 B.R. 158 (Bankr. D. Nev. 2013), *aff'd,* 515 B.R. 599 (B.A.P. 9th Cir. 2014).

Question 3: Unbundling

A. Yes, absolutely.
B. Yes, generally, unless the purpose of the representation would be futile if the creditor prevailed.
C. No, unless the debtor fails to pay a new retainer.
D. No, absolutely.

Question 4: Unbundling

- **QUESTION**: Can you represent a debtor in filing the bankruptcy case, but exclude any appearances in the case (including at the § 341(a) meeting)?

MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.2 (1983);

In re Johnson, 291 B.R. 462 (Bankr. D. Minn. 2003).

Question 4: Unbundling

A. Yes, absolutely.

B. Yes, generally, unless the purpose of the representation would be futile if the creditor prevailed.

C. No, unless the debtor fails to pay a new retainer.

D. No, absolutely.

Question 5: Litigation Funding

- **FACTS**: You are the chapter 7 trustee of an estate that has a potential $5 million fraudulent conveyance action against a wealthy former partner of the debtor. The litigation is likely to be successful and collection should be no problem. However, the defendant is a stubborn sort who is not likely to settle. Litigating the matter could cost the estate as much as $1 million, which it does not have. And, while your firm is very slow right now and can devote essentially all of its time and manpower, as a small law firm, you cannot afford to front the $1 million in costs and fees. You do, however, have contacts with a small private equity firm who is willing to front the costs of this litigation in exchange for a 50% stake in the outcome. This would be huge for your firm as it may not survive if it does not find more work, fast.

- **QUESTION**: In recommending to the debtor that he should contract with the equity firm for this litigation funding, do you need to disclose that the $1 million in fees will all be paid to your firm and that it is the difference between your firm continuing in business and potentially having to liquidate?

MODEL RULES OF PROF'L CONDUCT R. 1.8, 2.1 (1983);

Non-recourse Civil Litig. Advance Contracts: Guidance for Ohio Lawyers, The Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline, Op. 2012-3 (Dec. 7, 2012);

Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of N.Y., *Op. 2011-2* (2011).

Question 5: Litigation Funding

A. No, who the fees go to is irrelevant.
B. No, unless your firm has already defaulted on its line of credit.
C. Yes, disclose everything.
D. Yes, but only if you are more than a 50% owner of the firm.

Question 6: Litigation Funding

- **FACTS**: You are the chapter 7 trustee of an estate that is about to enter into a litigation funding arrangement with a private investor. Prior to closing the deal, the private investor wants to see your internal research memorandum on the strengths and weaknesses of the case.

- **QUESTION**: Given your duty to protect the estate's confidentiality, can you provide the private investor with the memo?

MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983);

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000);

Non-recourse Civil Litig. Advance Contracts: Guidance for Ohio Lawyers, The Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline, Op. 2012-3 (Dec. 7, 2012);

Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of N.Y., *Op. 2011-2* (2011);

In re Int'l Oil Trading Co., LLC, 548 B.R. 825 (Bankr. S.D. Fla. 2016);

Miller UK Ltd., v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014);

Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373 (D. Del. 2010).

Question 6: Litigation Funding

A. Yes, without qualification.
B. Yes, but it may then be discoverable in subsequent litigation.
C. Yes, so long as the memo is attorney work product.
D. No, production violates your confidentiality obligations to the estate.

Question 7: Client Confidentiality

- **FACTS:** It's 2017. Joe has decided to leap into the 21st Century and have a website. Joe wonders, "What should I put on it?" As he ponders that question while watching VHS tapes of old Get Smart episodes, he exclaims, "I know what will be the centerpiece of the site – a list of relevant debtor representations I have had in different market categories. My cell phone console will be ringing non-stop!"

- **QUESTION**: Can Joe present a list of clients on his new website?

MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983);
Prof'l Ethics Comm. of the State Bar of Wis., *Formal Ethics Op. EF-17-02* (Apr. 4, 2017).

Question 7: Client Confidentiality

A. Yes.
B. Yes, if in open court.
C. Yes, if public.
D. Yes, with consent.

Question 8: Social Media - Accessing Opposing Party's Website

- **FACTS:** Jim represents Purple Company in a pending personal injury lawsuit arising out of a car accident between one of its drivers and the plaintiff, Art. Jim would like to review the public portions of Art's Facebook page to see if he can find any information helpful to the case, particularly with respect to the injuries alleged by Art.

- **QUESTION**: Can Jim access the public portions of Art's Facebook page?

MODEL RULES OF PROF'L CONDUCT R. 4.2, 8.4 (1983);
Lawyer Disciplinary Bd., Office of Disciplinary Counsel, W.Va., *Op. 2015-02* (Sept. 22, 2015).

Question 8: Social Media - Accessing Opposing Party's Website

A. Yes.

B. Yes, if Art consents.

C. Yes, if Art's lawyer consents.

D. No.

Question 9: Social Media - Advising Client About "Cleaning Up" Social Media

- **FACTS**: Helen represents Art in Art's personal injury lawsuit against Purple Company. Shortly after Purple filed its answer in the case, Helen decided it would be a good idea to review the public portions of Art's Facebook page to see if it contained any information that might be relevant to the case. Much to Helen's surprise, there were a number of apparently current pictures of Art snowboarding, water skiing and sky diving, none of which seemed terribly helpful to Art's damages claim in the case.

- **QUESTION**: Can Helen discuss with Art making those photos "private" on his Facebook page?

MODEL RULES OF PROF'L CONDUCT R. 3.4, 8.4 (1983);
The Phila. Bar Ass'n Prof'l Guidance Comm., *Op. 2014-5* (July 2014).

Question 9: Social Media - Advising Client About "Cleaning Up" Social Media

A. Yes, you can delete 'em – no D/R.

B. Yes.

C. Yes, but no instruction or permission to destroy.

D. No.

Question 10: Social Media - Responding to Online Reviews by Clients

- **FACTS**: Art's personal injury lawsuit against Purple Company did not go well for a variety of reasons, including evidence developed about Art's activities earlier in the evening before the accident, and the disclosure of Art's daredevil photos during discovery. Art, dissatisfied with his settlement, took to various websites that collect reviews of lawyers and viciously attacked Helen's handling of the case. When this was brought to Helen's attention, she was furious. Helen said, "This is lunacy. I am going to get on those sites, set the record straight, and describe his conduct that night and show how deplorable it was and describe how the photos showed his damages claim was a joke."

- **QUESTION**: Can Helen go to the websites and make those disclosures?

MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.9, 8.4 (1983);
In re Tsamis, No. 2013PR00095, Ill. ARDC Hr'g Bd. (Jan. 15, 2014).

Question 10: Social Media - Responding to Online Reviews by Clients

A. Yes.

B. Yes, if Art consents.

C. Yes, if Art is not harmed by the response.

D. No.

Question 11: Withdrawal

- **FACTS**: Trial is approaching and you need information from the client but the client is nowhere to be found. You want to withdraw. You file a motion to withdraw stating that the client is a psycho who hasn't paid, refuses to cooperate, and is nowhere to be found, and that continued representation under the circumstances is impossible.

- **QUESTION**: Which of the statements was proper grounds for withdrawal?

MODEL RULES OF PROF'L CONDUCT R. 1.16 (1983);

In Max-um Fin. Holding Corp. v. Moya Overview, Inc., 1990 U.S. Dist. LEXIS 12324 (E.D. Pa. Sept. 19, 1990).

Question 11: Withdrawal

A. The statement about nonpayment.
B. The statement about refusal to cooperate.
C. The statement about your client being a psycho.
D. The statement about representation being impossible.

Question 12: Withdrawal

- **FACTS**: A creditor has filed both a motion for relief from stay and a motion to dismiss against your client. You have been unable to reach the client after 1 or 2 calls and the client hasn't paid. The deadline for responses to the motions is approaching. The retainer agreement does not explicitly cover these types of motions. You think about filing the best responses you can and then falling on your sword at the hearing, but then decide to ignore them and file a motion to withdraw.

- **QUESTION**: Did you act properly?

MODEL RULES OF PROF'L CONDUCT R. 1.16 (1983);
In Max-um Fin. Holding Corp. v. Moya Overview, Inc., 1990 U.S. Dist. LEXIS 12324 (E.D. Pa. Sept. 19, 1990).

Question 12: Withdrawal

A. Yes, the motions were not covered in the agreement.
B. Yes, you filed a motion to withdraw.
C. No, you were required to file a response.
D. No, you should have borrowed money from your escrow account to pay the creditor.

Question 13: Appearance Counsel

- **QUESTION**: Can you have an attorney friend stand in for you at a status check calendar call?

MODEL RULES OF PROF'L CONDUCT R. 1.0(e), 1.2(c), 1.5(b) (1983);
Local Rule 2091-1(A), Bankr. N.D. Ill. (Apr. 1, 2016);
ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op.* 472 (2015);
Lawyer's Disciplinary Bd. of W.Va., *L.E.O. 2015-01* (Sept. 18, 2015).

Question 13: Appearance Counsel

A. Yes.
B. No, unless they do a client conflict check.
C. No, unless they do a client conflict check and are able to give the court a continued date when you'll be available.
D. No, unless they are fully able to represent the client before the court.

Question 14: Appearance Counsel

- **QUESTION**: Can a court sanction you for standing in for a friend at a status check calendar call?

MODEL RULES OF PROF'L CONDUCT R. 1.0(e), 1.2(c), 1.5(b) (1983);
Local Rule 2091-1(A), Bankr. N.D. Ill. (Apr. 1, 2016).

Question 14: Appearance Counsel

A. Yes, without qualifications.
B. No, if you had done a conflict check.
C. No, if you had done a conflict check and if you were able to give the court a continued date when your friend would be available.
D. No, if you were fully able to represent the client before the court.

Question 15: Electronic Files - Maintenance & Transfer

- **FACTS**: It's 2017. Sally is sick and tired of her paper client files. Sally wonders, "What should I do? I am running out of space in this office." She has an idea, "I know what I will do. I am going totally paperless. No more hard copy files – just electronic. I will actually have room to move around in here!"

- **QUESTION**: Can Sally go to electronic client files exclusively?

MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983);

Legal Ethics Comm. of the Or. State Bar, *Formal Op. 2016-191* (Sept. 2016); Legal Ethics Comm. of the Or. State Bar, *Formal Op. 2017-192* (Mar. 2017); Ethics Comm. of the N.C. State Bar, *2013 Formal Ethics Op. 15* (Jan. 24, 2014).

Question 15: Electronic Files - Maintenance & Transfer

A. Yes.

B. Yes, if no significant/valuable paper docs.

C. Yes, if common format.

D. No.

Question 16: Technology - Lawyer's Necessary Competence Regarding Technology

- **FACTS**: Frank has a long-standing local neighborhood litigation practice. While he utilizes e-mail in his representation of clients, particularly because those clients communicate with him through it, e-discovery and data protection issues are a bridge-too-far for Frank. "I've heard of it, but I don't understand the stuff, and don't need to because of the nature of my practice," he says.

- **QUESTION**: Does Frank need to understand the basic features of technology involved in his legal practice?

MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983);

ABA Comm. on Ethics and Prof'l Responsibility, *Formal Op. 477R* (May 22, 2017).

Question 16: Technology - Lawyer's Necessary Competence Regarding Technology

A. No.

B. No, if he hires IT pro.

C. No, if he hires IT pro and IT-savvy associate.

D. Yes.

Question 17: Technology - Use of Cloud-Based Services in Delivery of Legal Services

- **FACTS**: Sally is happy in her now paperless office, but she is always looking for ways to make the office more streamlined. "I have all of this data I am keeping. It would sure make things run more efficiently if I could at least store some of it with one of those cloud-based services I read about in the law & technology blogs," she said, "I wonder how much work it would be to start using a service like that in my practice."

- **QUESTION**: What does Sally have to do if she wants to use a cloud-based service in her practice?

MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983);

Standing Comm. on Prof'l Conduct of the Ill. State Bar Ass'n, *Op. 16-06* (Oct. 2016).

Question 17: Technology - Use of Cloud-Based Services in Delivery of Legal Services

A. Learn the technology to assess the risks.
B. Conduct due diligence of provider.
C. Monitor work.
D. A, B, & C.

Question 18: Conflicts of Interest - Referral Fees

- **FACTS**: Jane is talking with her older brother Bob about Thanksgiving dinner at their parents' house. During the call, Bob says to Jane, "Oh, I almost forgot. I have a friend, Pete, in town who has a big wrongful termination dispute with Green Company. I knew you were a lawyer, so I gave Pete your name and number. Don't say I never do anything nice for you. By the way, don't make that pumpkin pie this year – it's horrible." Jane, who happens to be a tax lawyer, says to herself, "I can't handle this, but my undergrad roommate Sarah works for a plaintiffs' labor law firm in town. Maybe I can refer the matter to her and at least get a referral fee out of this. Funny, even if I was able to handle this, I might have a problem because my law firm represents Green Company on tax matters."

- **QUESTION**: If Sarah agrees to represent Pete, can Jane get a referral fee in connection with the matter?

MODEL RULES OF PROF'L CONDUCT R. 1.5(e), 1.7 (1983);
ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op. 474* (2016).

Question 18: Conflicts of Interest - Referral Fees

A. Yes.

B. Yes, if Pete consents.

C. Yes, if Pete and Green Company consent.

D. No.

Question 19: Conflicts of Interest - Former Clients

- **FACTS**: Mary represents Jack in connection with his bankruptcy filing. As part of that representation, Mary wants to file a preference action against Blue Company. Mary recalls that about three years earlier, her firm represented Blue in connection with a fraudulent conveyance action brought against Blue.

- **QUESTION**: Under the ethical rules, does Mary need Blue's consent to represent Jack in the preference action?

MODEL RULES OF PROF'L CONDUCT R. 1.9 (1983);

Watkins v. Trans Union, LLC, 869 F.3d 514 (7th Cir. 2017).

Question 19: Conflicts of Interest - Former Clients

A. No.

B. No, if prior attorneys are screened.

C. Yes.

D. Yes, if substantially related.

Question 20: Litigation Funding

- **FACTS**: You represent a chapter 7 debtor as plaintiff in 21 separate preference cases against many of his very significant former customers. The estate is receiving litigation funding from a private equity firm to pursue the cases. The funding is made on a monthly basis upon request, which request must contain a breakdown of what the funds are to be used for that month and an assessment of the merits of the cases for which the funds are being used that month. In the course of the litigation with a Fortune 500 defendant, defendant requests the monthly reports you have provided the litigation funder regarding the case against that defendant.

- **QUESTION**: In response to a formal discovery request, you turnover, unredacted, the May, June and August monthly reports that contain information on 14 of the pending cases. Is the turnover of these 3 monthly reports a violation of your duty to the debtor and his estate?

MODEL RULES OF PROF'L CONDUCT R. 1.6, 5.4 (1983);

Non-recourse Civil Litig. Advance Contracts: Guidance for Ohio Lawyers, The Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline, Op. 2012-3 (Dec. 7, 2012);

Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of N.Y., *Op. 2011-2* at 7 (2011);

In re DesignLine Corp., 565 B.R. 341, 343 (Bankr. W.D.N.C. 2017).

Question 20: Litigation Funding

A. No, you have to comply with formal discovery requests.
B. No, there is no privilege because the reports first went to a third party.
C. Yes, you should never willingly turnover any relevant documents in discovery.
D. Yes, get ready to be sued for malpractice!