IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:16-cv-259C-KCD (Judge Davis)
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-KCD (Judge Davis)

OBJECTORS' MOTION FOR AN ORDER DIRECTING AN ACCOUNTING AND SAFEKEEPING OF THE DISPUTED FUNDS AND LIMITED DISCOVERY

The undersigned members of the *Health Republic* and *Common Ground* Non-Dispute Subclasses (the Objecting Class Members)[1] submit this motion seeking an accounting of the disputed portion of the common fund, an order directing the return of the funds to an interest-bearing client trust account for safekeeping pending final resolution of Quinn Emanuel Urquhart & Sullivan, LLP's fee award, and limited discovery related to the forthcoming fee petition.

[1] The class members submitting this motion are identified on the signature block.

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I. Introduction

As a result of the Federal Circuit's ruling, this Court will issue a new attorney's fee award that may require Quinn Emanuel to return to the Class a substantial portion of the initial $185 million fee award. But the Objecting Class Members believe—and Quinn Emanuel does not deny—that it has already distributed that $185 million to its partners, despite knowing that its entitlement to that sum was disputed by some of its Class member clients. Quinn Emanuel's premature distribution of the disputed funds was not only an ethical violation, but it creates a concrete, practical problem as well: how can the Court discharge its fiduciary duty to protect the Class and ensure that Quinn Emanuel can promptly return whatever funds the Court may order returned?

To address that problem, the Objecting Class Members request three things: (1) a full accounting; (2) an order to deposit the funds into an interest-bearing trust account; and (3) discovery into judgment preservation insurance Quinn Emanuel purchased before distributing the funds to its partnership.

A Full Accounting: This motion is necessary because, rather than voluntarily disclose what it has done with the funds and confirm that they are protected in an interest-bearing trust account, Quinn Emanuel has refused to answer any questions and has repeatedly told the Objecting Class Members' counsel to "go file a motion." The Court should order a full accounting of the $185 million from the time Quinn Emanuel took possession of it from the claims administrator to the time it improperly distributed the money to its partners. The Court is unquestionably empowered to order that accounting as part of its inherent equitable authority as well as its fiduciary duty to protect the Class. Further, Quinn Emanuel is ethically obligated to provide the accounting.

Quinn Emanuel's position—that is has no obligation to account for the funds because the Objecting Class Members aren't its clients—is legally false, contrary to Quinn Emanuel's prior statements to the Class and to this Court, and irrelevant in any event because the ethical duty to

account extends not just to clients but to third parties. *See* ABA Model Rules of Prof'l Conduct R. 1.15(d) (2023) (requiring counsel to, upon request, "promptly render a full accounting" of "funds . . . in which a client *or third person* has an interest") (italics added); D.C. Rules of Prof'l Conduct R. 1.15(c) (2018) (same); Cal. Rules of Prof'l Conduct R. 1.15(d)(4) (2018) (same); Ill. Rules of Prof'l Conduct R. 1.15(d) (2015) (same). Finally, a full accounting will reveal facts that the Court can and should consider in deciding the proper fee award on remand.

An Order to Deposit the Funds Into an Interest-Bearing Trust Account*:* When the accounting confirms that Quinn Emanuel has in fact already distributed the funds to its partners, the Court should order Quinn Emanuel to immediately deposit $185 million plus any interest that would have accrued in an interest-bearing client trust account, which should not be moved until further order of the Court. That is the best way to ensure that the Class is protected against possible non-payment or delay in payment. And it is what the ethical rules required in the first instance. *See* ABA Model Rules of Prof'l Conduct R. 1.15(e) (2023) ("When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved."); D.C. Rules of Prof'l Conduct R. 1.15(d) (2018) (same); Cal. Rules of Prof'l Conduct R. 1.15(c)(2) (2018) (same); Ill. Rules of Prof'l Conduct R. 1.15(e) (2015) (same).

Quinn Emanuel's consistent position has in effect been "trust us, we're good for the money." But this bald promise does not come close to meeting the Court's fiduciary obligation to ensure the Class will ultimately receive its portion of the common fund to which the Court deems it entitled. Nor does it satisfy Rule 1.15's strict safekeeping requirements.[2] The *only*

[2] All references to the "Rule" or "Rules" are to the above-mentioned Rules of Professional Conduct unless otherwise noted. Any citation to the "Rule" or "Rules" are to the Rules of Professional Conduct in effect at the time of the relevant conduct at issue. Note, though, the current versions of Rule or Rules in effect are not substantively different from the version of the Rule or Rules cited in this brief. The Rules, related comments, and related ethics opinions are attached to the Appendix at Exhibits 4-25. The Declarations of ethics experts Andrew I. Dilworth and George R. Clark discussing the applicable Rules are attached to the Appendix at

sure way to guarantee the Class will be paid back in full is an order directing Quinn Emanuel to maintain the money safely in an interest-bearing client trust account.

Quinn Emanuel has not denied that it purchased "judgment preservation" insurance against the possible reduction of its $185 million fee award to enable the distribution of the disputed fees to its partners. But this does not excuse Quinn Emanuel's conduct because Rule 1.15's safekeeping requirement is a non-delegable duty. Nor would such insurance adequately protect the Class: the Class's right to prompt repayment should not depend on the conduct of a stranger to this litigation; there is no assurance that the insurance is adequate in amount; and there is no assurance that the insurance company will not raise defenses based on representations Quinn Emanuel may have made to procure the insurance. In short, the existence of any insurance would neither safeguard the Class against the financial risk Quinn Emanuel created by distributing the funds to itself, nor would it absolve Quinn Emanuel of its ethical violation.

Discovery into Judgment Preservation Insurance*:* The Court should also permit discovery into the terms and circumstances of any such insurance for a variety of reasons. *First*, courts routinely order disclosure of "the terms of any agreement about fees for the services for which the claim is made" including "side agreements" between "class counsel and others about the fees claimed by the motion." RCFC 54(d)(2)(B)(iv) and Fed. R. Civ. P. 23(h), 2003 Advisory Committee Note.[3] *Second*, the Court is entitled to consider any ethical violations by Quinn Emanuel in deciding the amount of attorney's fees to award. *Third*, Quinn Emanuel will likely argue that the insurance obviates or reduces the need for it to deposit the disputed funds into a client trust account. This argument should be rejected out-of-hand because insurance is no substitute (even in the best of circumstances) for cash in a trust account. But if the Court is inclined to consider the insurance as any kind of substitute for cash, it must do so on a fully informed basis—including understanding the monetary limits of such insurance, what terms and conditions of coverage may excuse the insurance company from paying or delay payment, and

Exhibits 2-3.

[3] All references to "RCFC" are to the Rules of the United States Court of Federal Claims (2021).

whether the insurance company has already raised (or could raise) any coverage defenses.

These three actions will allow the Court to fully discharge its fiduciary duty to protect the Class and ensure that Quinn Emanuel can promptly return any amounts from the common fund to which it is not ultimately entitled. It also ensures Quinn Emanuel fulfills its "duty to be sure that the court, in passing on the fee application, has all the facts, as well as [Quinn Emanuel's] fiduciary duty to the class not to overreach." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987) (cleaned up).

II. Background

A. The risk corridors litigation

To induce health plans to participate in "Health Benefit Exchanges" to make health coverage more accessible, the Affordable Care Act established the risk corridors program, which provided for reimbursements to health plans that suffered losses in the exchanges. *See* 42 U.S.C. § 18062(b); 77 Fed. Reg. 17220, 17220 (Mar. 23, 2012); *see also Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1315-16, 1331 (2020). But after the program began, Congress included an appropriations rider forbidding the Department of Health and Human Services from adequately funding the program. *See* Maine Community, 140 S. Ct. at 1317 (citing Pub. L. 115–31, §223, 131 Stat. 543).

When the government failed to make the payments required by the statute, many health plans sued the United States in the Court of Federal Claims seeking damages under the Tucker Act, the statute that waives sovereign immunity for claims against the United States based on a federal statute, like the Affordable Care Act provisions here. *See id*. at 1328; 28 U.S.C. § 1491(a)(1).

In February 2016, Quinn Emanuel filed *Health Republic Insurance Company v. United States*, No. 1:16-cv-259 ("HR"), a putative class action challenging the government's failure to make risk corridors payments. Other law firms and health plans brought individual (non-class

action) lawsuits in early to mid-2016 challenging the government's nonpayment.[4] A year later, in June 2017, Quinn Emanuel filed a parallel class action complaint in *Common Ground Healthcare Coop. v. United States*, No. 1:17-cv-877 ("CG").

B. The class notice assurances

All class actions brought in the Claims Court are "opt-in." RCFC 23 2002 Rules Committee Notes. Unlike conventional opt-out class actions, an eligible class member must affirmatively choose to participate in these actions.

On January 3, 2017, the Claims Court certified the proposed opt-in class in *Health Republic* (which the government did not oppose) and appointed Quinn Emanuel as lead class counsel and Health Republic as class representative. (Order, HR Dkt. 30.) On February 24, 2017, the Claims Court approved Quinn Emanuel's proposal for notice to the potential class members. (Order, HR Dkt. 42.) On March 15, 2017, Quinn Emanuel sent a notice stating that if the lawsuit resulted in recovery to the Class, it would seek an attorney's fee award that would be deducted from any recovery by the Class. Importantly, that initial notice did not identify how much it would seek, whether by indicating a percentage of recovery or otherwise. (*Id.*; Amended Notice, HR Dkt. 41-1.)

Quinn Emanuel's Stephen A. Swedlow, prior lead Class Counsel, used this notice to actively solicit class members, including the Objecting Class Members who were considering filing "an individual claim both on an hourly basis and on contingency." (Suppl. Swedlow Decl. ¶¶ 6, 9, HR Dkt. 93-2.) Quinn Emanuel's original fee petition discusses these recruitment efforts as a "long and arduous process of providing notice to all of the putative class members and, because this is an opt-in class action, meeting with and discussing the case with potential class members and answering their questions about the claims (including, *inter alia*, the reasons to join

[4] *See, e.g.*, *First Priority Life Ins. Co. v. United States*, No. 1:16-cv-587; *Moda Health Plan, Inc. v. United States*, No. 1:16-cv-649; *Blue Cross & Blue Shield of N.C. v. United States*, No. 16-cv-651; *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-cv-744; *Me. Cmty. Health Options v. United States*, No. 16-cv-967.

the class)." (Mot. for Fees at 4, HR Dkt. 84.)

In March 2017, based on concerns that some potential Class members misunderstood the possible amount of requested fees, Quinn Emanuel obtained the Court's permission to distribute a supplemental Class notice which added the following limitation on fees that Class members would owe if they agreed to let Quinn Emanuel represent them:

> **9. Will joining the Class cost me any money?**
>
> Class Counsel represents that it will request no more than **5%** of any judgment or settlement obtained for the Class. The fee may be substantially less than 5% depending upon the level of class participation represented by the final membership of the Class. In any event, the exact percentage of Class Counsel's fees will be determined by the Court subject to, among other things, the amount at issue in the case and what is called a "lodestar cross-check" (i.e., a limitation on class counsel fees based on the number of hours actually worked on the case). *See, e.g.*, *Geneva Rock Products, Inc. v. United States*, 119 Fed. Cl. 581, 595-96 (2015); *Loving v. Sec'y of Health and Human Servs.*, 2016 WL 4098722, at *4 (Fed. Cl. Spec. Mstr. July 7, 2016).

(Mot. to Suppl. Class Notice at 2, HR Dkt. 50-1 (emphasis in original).)

"This supplemental notice was sent to every putative class member before the deadline to opt in, so all eventual class members joined the class with this information in hand." (Mot. for Fees at 5, HR Dkt. 84.) Mr. Swedlow details several communications he had with the Objecting Class Members wherein he, among other things, "personally informed each of them of the fee expectations" should they decide to opt in. (Suppl. Swedlow Decl. ¶¶ 6-9, HR Dkt. 93-2.)

The opt-in deadline was May 12, 2017. In total, 153 health plans opted into the *Health Republic* Class. Quinn Emanuel then sent a nearly identical notice to potential members in the *Common Ground* Class. (Mot. to App. Notice, CG Dkt. 32; Order, CG Dkt. 33.) 130 health plans opted into the *Common Ground* Class. All health plan issuers "who chose to opt in affirmatively selected Quinn Emanuel *as their counsel*." (Swedlow Decl ¶ 17, HR Dkt. 84-1, (emphasis added).)

C. The merits are decided while *Health Republic* and *Common Ground* are stayed

On July 22, 2017, the Court stayed the *Health Republic* and *Common Ground* cases pending resolution of appeals in other cases involving materially identical claims. During the

stay, on April 27, 2020, the Supreme Court ruled against the government on the central issue in the risk corridor cases, holding that health plan issuers were entitled to collect the ACA-promised payments under the Tucker Act. *See Maine Community*, 140 S. Ct. at 1331.

On July 13, 2020, the parties jointly moved to divide each *Health Republic* and *Common Ground* Class into several subclasses: one large subclass (in each action) that did not dispute the amounts of the proposed risk corridor payments (Non-Dispute Subclasses), and several smaller subclasses that disputed the amount of offsets to, or the total amount due for, the risk corridor payments. (Joint. Mot., HR Dkt. 80; CG Dkt. 103.)

In light of *Maine Community*, the Court entered megafund money judgments in favor of the *Health Republic* and *Common Ground* Non-Dispute Subclasses on July 23, 2020, in amounts totaling approximately $3.7 billion. (HR Dkt. 83; CG Dkt. 72.)

D. Quinn Emanuel moves for a 5% award

Quinn Emanuel moved for attorney's fees in both cases, requesting 5% of the $3.7 billion common fund recovery—or about $185 million. (HR Dkt. 84; CG Dkt. 107.) The Objecting Class Members filed an opposition and objection to Quinn Emanuel's fee motion. (Obj. to Fee Mot., HR Dkt. 89.) Several other Class Member filed joinders in the Objecting Class Members' opposition. (HR Dkt. 93-1.) The Objecting Class Members argued that Quinn Emanuel's requested 5% fee was based on a questionable lodestar, not supported by a lodestar cross-check, and resulted in an unjustified 18-19x lodestar multiplier (i.e., more than 18 times Quinn Emanuel's typical hourly rate). (Obj. to Fee Mot., HR Dkt. 89, CG Dkt. 114.)

E. Quinn Emanuel is awarded 5% and the Objecting Class Members appeal

On September 16, 2021, the Court granted Quinn Emanuel's motion for a $185 million fee. (Order, HR Dkt. 138, CG Dkt. 153.) The next day, the Clerk entered RCFC 54(b) judgments awarding Quinn Emanuel its requested $185 million fee. (Judgment, HR Dkt. 143; CG Dkt. 155.) RCFC 62(a) automatically stayed execution of the attorney's fee judgments for 30 days.

On October 1, 2021—two weeks after the RCFC 54(b) judgments were entered and while

the fee judgment was stayed—the Objecting Class Members filed their notice of appeal. (Notice, HR Dkt. 144, CG Dkt. 159.) Sixteen days later, on October 17, 2021, the automatic stay expired and the judgment went into effect.

At some point on or after October 17, 2021, Quinn Emanuel directed the claims administrator to disburse the $185 million to itself.[5] The exact date of this disbursement is unknown because Quinn Emanuel: (1) did not provide notice when it received the funds from the claims administrator and (2) has since refused to provide an accounting to the Objecting Class Members.[6] What is certain, however, is that Quinn Emanuel could not obtain the funds until after it knew both that the Objecting Class Members (i) had objected to the award, and (ii) filed a timely notice of appeal. In other words, Quinn Emanuel knew that its right to the $185 million was, and continued to be, "disputed" as contemplated by the Rules.

F. The Federal Circuit vacates the $185 million fee award

On January 31, 2023, the Federal Circuit vacated the fee awards and remanded for further proceedings. *Health Republic*, 58 F.4th at 1378. The Federal Circuit's findings emphasized that general attorney's fee case law and principles, as well as a fiduciary's scrutiny, apply to the determination of a proper fee in this case:

First, the Federal Circuit found that it was mandatory to perform a lodestar cross-check when the "court-approved notices sent to potential class members, for use by potential members in deciding to whether to opt into the classes, expressly guaranteed use of a lodestar cross-check." *Id.* at 1372-73. Contrary to Quinn Emanuel's contention, "the court-approved guarantee of a judicial lodestar cross-check was part of the 'deal' offered to potential class members and accepted by what we may assume to be all issuers that chose to join the classes." *Id.* at 1373. "And because each class-action notice referred simply to a 'lodestar crosscheck,' what was promised and therefore required was application of the scrutiny and accompanying standards generally bearing that name in attorney's-fee case law." *Id.* at 1374.

[5] (Keshavarzi Decl., ¶4, Ex. 27.)
[6] (Keshavarzi Decl., ¶¶2-7, Exs. 26-27.)

Second, the Federal Circuit found it was also mandatory to give "consideration or weight to [two] pertinent principles" articulated by the Supreme Court in the non-class-action context when fees are to be paid from a recovery—*even when there is an ex ante fixed contingency fee agreement for a set percentage* (and here, there is not): "If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is . . . in order"; and "[a] court should disallow windfalls for lawyers." *Id.* at 1374. Providing sufficient analysis and "consideration of multipliers used in comparable cases" to justify the award made is "consistent with the principles endorsed by the Supreme Court [a]nd it does not exclude *taking full account of the relevant attorney-fees considerations as they apply to a particular case*." *Id.* at 1375 (emphasis added).

Third, the Federal Circuit found that "[t]his is not a case in which a class notice stated that a fixed percentage of recovery would be awarded unless the court determines it to be unreasonable . . . The class notice in each case before us stated a maximum possible request and that *the court itself would determine the proper fee*. . . . At least in such a case, although a range of reasonableness undisputedly exists, . . . the court's task *is to make its own determination of what fee to award*, within the range of reasonable possibilities, considering the relevant principles and precedents addressing comparable facts." *Id.* at 1376-77 (emphasis added).

Finally, the Federal Circuit opined that all aspects of the fee analysis should be viewed through the lens of the Court's role as a fiduciary to the Class:

> We have concluded that the court must honor the class-notice commitments if, as here, they remain material to the court's task and that the court in this case may not treat the request as presumptively the proper award but must play a more neutral role, characterized as a fiduciary one, in deciding what fee is warranted. The Objectors argue that those conclusions may have a bearing on aspects of the fee analysis beyond the lodestar cross-check. Opening Br. at 48–53. On remand, the Claims Court should reconsider any parts of its analysis affected by the conclusions we have reached above.

Id. at 1378.

G. Objecting Class Members request an accounting, safekeeping of the disputed funds, and limited discovery related to the judgment preservation insurance

On March 14, 2023, counsel for the Objecting Class Members called Quinn Emanuel partner and current lead Class Counsel, Adam Wolfson, to discuss this matter. (Keshavarzi Decl., ¶2.) During that call, Objectors' Counsel: (i) inquired as to the status of the $185 million fee award; (ii) inquired as to the interest that had accrued to date on those disputed funds and whether any interest would be returned to the Class; and (iii) requested that Quinn Emanuel return the disputed funds. (*Id.*) Mr. Wolfson responded that the funds had already been "distributed"—but it was not clear in context whether he meant "distributed" by the claims administrator to Quinn Emanuel, or "distributed" by Quinn Emanuel to its partners. (*Id.*) When Objectors' Counsel pressed Mr. Wolfson to disclose where the disputed funds were, he responded that the fund are "safe" and that if the Objecting Class Members wanted the funds returned or any interest on them, they were going to "have to file a motion." (*Id.*) During that call Mr. Wolfson also stated that "the 5% is still at issue" as Quinn Emanuel would again seek 5% of the recovery on remand. (*Id.*)

On March 17, 2023, Objectors' Counsel sent a letter requesting a full accounting of the disputed funds—"including confirmation and evidence that the funds were being held in an interest-bearing trust account for the benefit of the clients"—as required by Rule 1.15 of the Rules of Professional Conduct. (*Id.*, ¶3, Ex. 26)

On March 20, 2023, Mr. Wolfson responded to that letter and refused to provide the requested accounting or return the disputed funds, claiming the Rules of Professional Conduct were inapplicable for two reasons: (1) the Objecting Class Members, as unnamed class members, were not Quinn Emanuel's clients, and (2) no party sought to stay or modify execution of the judgments. (*Id.*, ¶4, Ex. 27 at p. 2.)

H. The March 21, 2023 Status Conference

On March 21, 2023, the Court held the first status conference following the Federal Circuit's remand. (Order, HR Dkt. 185, CG Dkt. 177.) At the status conference, counsel for the Objecting Class Members raised concerns about Quinn Emanuel's distribution of the disputed funds to its partners and that Quinn Emanuel procured judgment preservation insurance (JPI) to

enable that distribution. (Transcript, CG Dkt. 180 at 24:6-13.) Quinn Emanuel did not deny either assertion. (*Id.* at 26:7-15.)

The Court directed the parties to meet and confer and file a joint status report by April 4, 2023. (Order, HR Dkt. 187, CG Dkt. 178.)

I. Quinn Emanuel again refuses to provide an accounting

On March 28, 2023, Quinn Emanuel and Objectors' Counsel met and conferred as directed by the Court. (Keshavarzi Decl., ¶5.) During that conference, Objectors' Counsel renewed its request for an accounting and confirmation that the disputed funds were being held in an interest-bearing trust account. (*Id.*) Quinn Emanuel did not respond to the request on the grounds that the Objecting Class Members were not Quinn Emanuel's clients. (*Id.*) Objectors' Counsel then asked for information concerning any JPI Quinn Emanuel procured before distributing the fee award to its partners. (*Id.*) Objectors' Counsel told Mr. Wolfson the Objecting Class Members wanted to know what rights, if any, they have under the policies and what defenses the insures could or might assert. (*Id.*) Objectors' Counsel also explained that the Objecting Class Members do not want to be in a position where they would have to go to an insurance company that was not a party to the dispute to collect any disputed funds eventually ordered returned to the Class. (*Id.*) Objectors' Counsel also explained that the Objecting Class Members have a right to know whether the JPI affected Quinn Emanuel's position on remand with respect to the fee petition, meaning that Quinn Emanuel may be required to ask for 5% because the JPI requires it to do so. (*Id.*) Objectors' Counsel further explained that Objecting Class Members believe that the communications with the insurer(s) could be relevant to their evaluation of coverage under the JPI. (*Id.*) Mr. Wolfson did not deny Quinn Emanuel had procured JPI, but instead contended it was not relevant and that the parties need only discuss a briefing schedule. (*Id.*)

On April 3, 2023, the parties met and conferred again. (*Id.*, ¶6.) During that call, Objectors' Counsel told Mr. Wolfson that the Objecting Class Members believe that Quinn Emanuel distributed the $185 million to its partners and obtained JPI in order to do so. (*Id.*)

Objectors' Counsel told Mr. Wolfson that, if Quinn Emanuel's position is that this did not happen, he should say so. (*Id.*) Mr. Wolfson responded that he "was not going to get into Quinn Emanuel's inner workings" and that the Objecting Class Members would have to go "file a motion." (*Id.*) Objectors' Counsel pressed the issue explaining that under Rule of Professional Conduct 1.15 of any applicable jurisdiction, the Objecting Class Members were either clients or third parties with an interest in the disputed funds and thus were entitled to an accounting. (*Id.*) In short, the Objecting Class Members had a right to the accounting regardless of Quinn Emanuel's characterization of them as clients or otherwise. (*Id.*) Objectors' Counsel did not receive a response to those questions. (*Id.*)

As of the filing of this motion, Quinn Emanuel has failed to provide an accounting of the disputed funds, failed to confirm that the funds are in an interest-bearing client trust account, and failed to provide any information about the JPI. (Keshavarzi Decl., ¶7.)

III. Argument

A. The Court has authority to grant the relief requested here

The Court has the authority to grant the relief requested here—an accounting, safekeeping of the disputed funds in an interest-bearing client trust account, and discovery into the JPI—for four independent reasons.

First, the Court acts as a fiduciary to the Class. *See Health Republic*, 58 F.4th at 1377; *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) ("[T]he court is to act 'as a fiduciary who must serve as a guardian of the rights of absent class members.'"); *Skelton v. General Motors Corp*., 860 F.2d 250, 253 (7th Cir. 1988) ("The court becomes the fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications."); *In re Washington Public Power Supply Systems Securities Litigation*, 19 F.3d 1291, 1302 (9th Cir. 1994) ("[A]t the fee-setting stage, plaintiffs' counsel, otherwise a fiduciary for the class, has become a claimant against the fund created for the benefit of the class. It is obligatory, therefore, for the trial court judge to act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is.") (cleaned up).

Here, all the relief requested is important to protect the Class's interests in promptly receiving whatever share of the $185 million (plus interest) that the Court may determine must be returned to the Class, once the fee award is reconsidered.

Second, because Quinn Emanuel's fee application for a share of the common fund is grounded in equity, the Court possesses the full range of its inherent equitable authority to ensure that the result of the proceedings is fair. *See Fresh Kist Produce, L.L.C. v. Choi Corp*., 362 F. Supp. 2d 118, 128 (D.D.C. 2005) ("[T]he court must be sensitive to underlying equities when determining attorneys' fee awards in common fund cases."); *Haggart v. Woodley*, 809 F.3d 1336, 1352, 1359 (Fed. Cir. 2016) ("The common fund doctrine is rooted in the traditional practice of courts of equity and derives from the equitable power of the courts" and, "[a]t its heart, equity is about fairness.").

Third, courts have an "inherent power and duty" to enforce attorneys' moral and ethical responsibilities. *See, e.g.*, *Quantico Tactical Inc. v. United States*, 148 Fed. Cl. 440, 444-45 (2020) ("Courts have the inherent power and duty to 'supervise the conduct of the members of [their] bar[s]' to ensure that attorneys' moral and ethical responsibilities are not breached.") (alterations in original); 6 Newberg and Rubenstein on Class Actions ("Newberg") § 19:10 (6th ed. 2022) ("[T]here is no doubt that a court possesses the 'inherent authority' to enforce ethical codes of conduct for the lawyers appearing before them." (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)); *Kenosha Auto Transp. Corp*., 206 Ct. Cl. 888, 891 (U.S. 1975) ("We believe that the court, in an appropriate case, has a responsibility to examine an allegation of violation of professional ethics and to uphold the integrity of the legal process."); *General Motors Corp. v. City of New York*, 501 F.2d 639, 643 n. 11 (2d Cir.1974) ("[T]he court's inherent power to assure compliance with these prophylactic rules of ethical conduct has not been questioned at any stage of these proceedings.").

Here, there is reason to believe that Quinn Emanuel has prejudiced the Class through several ethical violations. These may include:

- Improperly commingling the disputed funds in Quinn Emanuel's operating account

after receiving the funds from the claims administrator, rather than sequestering the funds in an interest-bearing trust account;

- Misappropriating and dissipating the disputed funds by distributing them to the partnership, despite the ongoing dispute as to the appropriate amount of fees;
- Entering into an agreement(s) via the JPI that raise(s) conflict of interest concerns;
- Disclosing confidential client information to the JPI insurer(s) in the course of satisfying the insurer(s) underwriting inquiries; and
- Refusing to provide a full accounting upon request.

The Court can and should exercise its inherent power to protect the Class from the effects of this conduct.[7]

Finally, the Court can and should permit investigation of ethical violations not only for the protection of the Class, but also because such violations are one factor the Court is entitled to consider in "mak[ing] its own determination of what fee to award." *Health Republic*, 58 F.4th at 1377. As the Federal Circuit explained, the Court must determine the appropriate fee "considering the relevant principles and precedents addressing comparable facts," "taking full account of the relevant attorney-fees considerations as they apply to a particular case," and viewed through the lens of a "fiduciary." *Id*. at 1375-77.

Courts have routinely found that ethical violations are part of the "relevant principles and precedents" and "relevant attorney-fees considerations" that a court may consider in setting an

[7] This Court has already recognized that the ABA Model Rules, along with the D.C., California, and Illinois Rules of Professional Conduct "likely govern Class Counsel's representation in the instant cases." (CG Dkt. 153 at p.26.) *See also Quantico Tactical*, 148 Fed. Cl. at 445 ("In assessing a disqualification motion, this Court of Federal Claims is guided by the Model Rules of Professional Conduct of the American Bar Association, the Rules of Professional Conduct of the Bar to which the attorney at issue is admitted to practice, and relevant caselaw.") (citation omitted); *AEG Invs., LP v. United States*, 147 Fed. Cl. 537, 538 (2020) ("The Rules of the United States Court of Federal Claims do not explicitly incorporate the ABA Model Rules of Professional conduct. Nonetheless, the Court 'use[s] the ABA model rules to provide guidance regarding counsel's obligations to the [C]ourt.'") (alterations in original); Newberg, *supra*, § 19:10 ("Courts require lawyers to comply with the applicable rules of professional responsibility; for this purpose, federal courts typically utilize the professional responsibility rules of the state in which they are situated.").

attorney's fee award. *See, e.g.*, *Rodriguez v. City of N.Y.*, 721 F. Supp. 2d 148, 151-52 (E.D.N.Y. 2010) ("The Court is authorized to fulfill [its] obligation [to determine a reasonable attorney's fee in a class action] by governing and supervising the ethical conduct of attorneys as provided in the Code of Professional Responsibility." (citation omitted)); *Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 956 (7th Cir. 1997) ("Under Illinois law, unprofessional conduct can affect an attorney's right to recover fees and in some cases may be a complete bar to recovery."); *Hurstell v. Clement*, No. 99-3701, 2000 WL 1100387, at *3-4 (E.D. La. Aug. 4, 2000) (forfeiture of attorney's fees when counsel "intentionally commingled funds in direct contravention of his ethical duties" by "withdrawing $100,000 from the trust and paying his law firm after being informed that [his clients] contested his fee" and failed "to account for the whereabouts of the money"); *Idalski v. Crouse Cartage Co.*, 229 F. Supp. 2d 730, 742 (E.D. Mich. 2002) (finding counsel forfeited fee under referral fee agreement for misappropriating client funds); *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, 512 F. Supp. 3d 196, 258-66 (D. Mass. 2020) (reducing class counsel's fee award after finding that counsel: (i) secretly paid a finder's fee, (ii) misrepresented hourly rates in calculating the reported lodestar amount, and (iii) repeatedly violated duties of disclosure and candor contrary to FRCP 11 and the Mass. Rules of Professional Conduct).[8]

[8]*See also Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012) ("In determining what fees are reasonable, a district court may consider a lawyer's misconduct, which affects the value of the lawyer's services."); *Talley v. Alton Box Bd. Co.*, 37 Ill. App. 2d 137, 146 (1962) ("[T]he courts freely refer to the Code of Ethics as a reliable guide to what constitutes unprofessional conduct; also, that such conduct does have some effect on attorney fees, and in some cases, may be a complete bar to any recovery."); *Estakhrian v. Obenstine*, No. CV 11-3480 FMO (CWx), 2019 WL 3035119, at *17 (C.D. Cal. Mar. 26, 2019) ("Fraud or unfairness on the part of the attorney will prevent [the attorney] from recovering for services rendered; as will . . . acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties." (alterations in original) (citation and internal quotation marks omitted)); *In re "Agent Orange"*, 818 F.2d at 222 (opining that in fulfilling their role as protector of class members, "courts should look to various codes of ethics as guidelines for judging the conduct of counsel"); *Brooks v. Berryhill,* No. 1:15-cv-00436 (CKK/GMH), 2017 WL 10716887, at *7 (D.D.C. Oct. 26, 2017) ("[U]nder long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation.") (citation and internal quotation marks omitted); Restatement (Third) of the Law Governing Lawyers ("Law Governing

B. Quinn Emanuel must provide a full accounting of the disputed funds

Quinn Emanuel has refused to confirm or deny that it distributed the disputed $185 million to its partners. It is essential for the Court to ascertain whether Quinn Emanuel has in fact done so in order to protect the Class. If the funds have been maintained in an interest-bearing client trust account (which Quinn Emanuel also refuses to confirm or deny), then the Court will know that the Class is protected. But if the funds have been misappropriated, the Court needs to understand that so it can take appropriate steps—in particular, ordering the funds to be sequestered in an interest-bearing trust account—to ensure that Quinn Emanuel can and will promptly return any portion of the $185 million that exceeds the Court's fee award.

A full accounting will also reveal what Quinn Emanuel did with the money after receiving it from the claims administrator but before distributing the funds to its partners. If Quinn Emanuel commingled the funds in its general operating account, that in and of itself is an ethical violation. In contrast, if Quinn Emanuel deposited the funds into an interest-bearing trust account (as it should have done) before distributing the funds, that fact would be relevant for two reasons: (i) it demonstrates that Quinn Emanuel understood that the funds were "disputed" for purposes of the Rules, and (ii) because the Class is entitled to interest on any funds returned, a full accounting will establish what interest *would have accrued* in this particular interest-bearing account, which could impact how much additional interest the Class is ultimately due.

Further, an accounting is appropriate for a reason beyond the imperative of protecting the Class: Quinn Emanuel is also ethically obligated to provide the requested accounting. *See* ABA Model Rules of Prof'l Conduct R. 1.15(d) (2023) (requiring counsel to, upon request, "promptly render a full accounting" of "funds . . . in which a client or third person has an interest"); D.C.

Lawyers"), § 37, com. d (2000) ("Forfeiture should be proportionate to the seriousness of the offense. For example, a lawyer's failure to keep a client's funds segregated in a separate account (*see* § 44) should not result in forfeiture if the funds are preserved undiminished for the client. But forfeiture is justified for a flagrant violation even though no harm can be proved."); *id.*, Reporter's Note, com. c (collecting cases where attorney's breach of ethical obligation justified fee forfeiture).

Rules of Prof'l Conduct R. 1.15(c) (2018) (substantially same); Cal. Rules of Prof'l Conduct R. 1.15(d)(4) (2018) (substantially same); Ill. Rules of Prof'l Conduct R. 1.15(e) (2015) (substantially same); *see also* Law Governing Lawyers, *supra*, § 44, com. h (providing counsel must account for disputed funds "when requested").

During the meet and confer process, Quinn Emanuel has dismissed this ethical obligation, contending the Rule does not apply because the Objecting Class Members are not its clients.[9] This argument is meritless. Rule 1.15 applies to clients *and* third parties. So, even if Quinn Emanuel were right that the Objecting Class Members are not its clients (they *are* clients), that would not make a difference under any applicable version of the ethical Rules.

Quinn Emanuel is also wrong when it tries to deny an attorney-client relationship with the Objecting Class Members. Even in the context of an opt-out class, courts recognize an attorney-client relationship between class counsel and absent class members.[10] This relationship is even more clear in the context of an opt-in class, where Quinn Emanuel recruited the Class members to select its firm as counsel rather than retain other non-class counsel.

Indeed, Quinn Emanuel *told this Court* that the Class members are its clients. For example, in its Motion for Fees, Quinn Emanuel wrote:

> Unlike typical class actions—which bind thousands or potentially millions of individuals (who likely have never heard of the suit) unless they opt out—each of the class members here affirmatively chose to opt in to the Health Republic and Common Ground classes, which meant they *affirmatively selected Quinn Emanuel as their counsel* amid a competitive marketplace offering numerous other options of highly-qualified counsel, on both contingency and hourly bases.

(HR Dkt. 84 at p. 23) (emphasis added) (emphasis in original omitted); *see also id.* at p. 29

[9] (Keshavarzi Decl., ¶4, Ex. 27.)

[10] *See, e.g.*, Newberg, *supra*, § 19:2 ("[O]nce a class has been certified, the default presumption is that there is an attorney-client relationship between class counsel and the absent class members."); Newberg, *supra*, § 19:2 n.3 (collecting cases finding a "complete" attorney-client relationship between class counsel and unnamed class members after certification); *see also* ABA Formal Op. 07-448 (October 20, 2007) ("Additionally, unnamed class members in a class action lawsuit will be deemed after certification of the class to be represented by class counsel, absent their affirmative election to 'opt out' of the certified class.").

("[T]he percentage method is the clear preference '*when potential clients and lawyers bargain freely for representation*,' particularly, as here, for '*sophisticated individual clients* [with] high-stakes, complex claims worth hundreds of millions of dollars.") (emphasis added) (alteration in original).

Quinn Emanuel also admitted that Class members are its clients when it sent the Court-approved notice to putative class members. In it, Quinn Emanuel wrote: "If you become a Class Member, your interests will be represented by the Class Representative *and Class Counsel*." (Amended Notice, HR Dkt. 41-1 at pp. 5-6) (emphasis added).

In short, Quinn Emanuel has conceded that the class members are "clients" who selected Quinn Emanuel as their "counsel."

In meeting and conferring, Quinn Emanuel has also argued that, even if Rule 1.15 applied, it does not owe an accounting because the fee awards became "final and executable" when no party sought to stay or modify them.[11] This argument is irrelevant. All that is required to trigger the Rule 1.15 obligation to sequester disputed funds is that the attorney is aware of the dispute. Here, there is no doubt that Quinn Emanuel was aware of the dispute well before October 17, 2021—the earliest date that the claims administrator could have distributed the funds to Quinn Emanuel. (*See* RCFC 62(a); Judgment, HR Dkt. 143, CG Dkt. 155.) That is because the Objecting Class Members had filed a notice of appeal on October 1, 2021. (Notice, HR Dkt. 144, CG Dkt. 159.)

Consistent with the Court's fiduciary duty to the Class, its inherent equitable authority, and its authority to ensure ethical practice, the Court should direct Quinn Emanuel to provide a full accounting of the disputed funds as provided by the ABA Model Rules on Client Trust Account Records, Rule 1 (2023). *See also* D.C. Rules of Prof'l Conduct R. 1.15, com. 2 (2018); Cal. Rules of Prof'l Conduct R. 1.15, Standard 1 (2018); Ill. Rules of Prof'l Conduct R. 1.15(e) (2015).

[11] (Keshavarzi Decl., ¶4, Ex. 27.)

C. The disputed funds should be returned to an interest-bearing client trust account

Absent unexpected proof that Quinn Emanuel has already done so, the Court should also order Quinn Emanuel to deposit the disputed funds (or an equivalent sum, including appropriate interest) in an interest-bearing client trust account. The Court should do so, first, because that is the best way to ensure that the Class is promptly and fully paid all sums it is owed once the fee proceedings are concluded. Anything less—such as relying on Quinn Emanuel's assurances that it will be willing and able to promptly pay the money—puts the Class at risk.

Further, it was Quinn Emanuel's obligation in the first instance to sequester the funds, precisely to avoid the sort of misappropriation that threatens the Class here. *See* ABA Model Rules of Prof'l Conduct R. 1.15(e) (2023) ("When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved."); D.C. Rules of Prof'l Conduct R. 1.15(d) (2018) (substantially same); Cal. Rules of Prof'l Conduct R. 1.15(c)(2) (2018) (substantially same); Ill. Rules of Prof'l Conduct R. 1.15(f) (2015) (substantially same). As further explained in a District of Columbia ethics opinion:

> Because of the lawyer's duty of loyalty to the client, the client's mere assertion of a claim is enough to prevent the lawyer from withdrawing any disputed property: "There is no requirement that the dispute be genuine, serious, or bona fide, . . . The lawyer may not take possession of property the ownership of which is disputed by the client until it is absolutely clear that the dispute with the client has been finally resolved." *In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995).
>
> The lawyer's obligation is to safeguard the funds in a segregated account until the dispute is resolved.

D.C. Ethics Opinion 293 (Disposition of Property of Clients and Others Where Ownership Is in Dispute) (footnote omitted).[12]

The distribution of disputed client funds to its partners not only threatens the security of

[12] *See also* Law Governing Lawyers, *supra*, § 44, Reporter's Note, coms. d, f (collecting cases finding disputed funds should be held in a separate, interest-bearing account); *Most v. State Bar*, 67 Cal. 2d 589, 597 (1967) ("An attorney may not unilaterally determine his own fee and withdraw funds held in trust for his client in order to satisfy it, without the knowledge or consent of the client.").

the fund principal, but of interest as well. Especially where sums in dispute are large, the attorney's obligation is to sequester the funds in an interest-bearing account. That is because "[w]hen trust accounts may bear interest for the benefit of . . . client[s] and the amount and probable duration of the deposit justify the effort and expense involved, the lawyer should arrange for an interest-bearing account, with the interest to be transmitted to the clients." Law Governing Lawyers, *supra*, § 44, com. d; *see also* ABA Commission on Interest Lawyers' Trust Accounts Overview ("Lawyers often handle money that belongs to clients . . . . Sometimes the amount of money that an attorney handles for a single client is quite large. In such cases, lawyers deposit the funds into trust accounts, where the funds can earn interest for the client."); D.C. Rules of Prof'l Conduct R. 1.15(b) (2018) (substantially same); State Bar of Cal. Handbook on Client Trust Accounting, Section III, Key Concept 1 at p. 8[13] (2023) (substantially same); Ill. Rules of Prof'l Conduct R. 1.15(f) (2015) (substantially same).

In short, there is no doubt that sequestering the disputed funds in an interest-bearing trust account is the best way to protect the Class, and that it was Quinn Emanuel's ethical duty to do so in the first instance. Further, "there is no doubt that a court possesses the 'inherent authority' to enforce ethical codes of conduct for the lawyers appearing before them." Newberg, *supra*, § 19:10 (citing *Chambers*, 501 U.S. at 43). Additionally, "[a] court may order a lawyer to deposit property in court or in an interest-bearing account pending further court orders." Law Governing Lawyers, *supra*, § 45, com. e; *see also id*., Reporter's Note, com. e (collecting cases).[14]

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[13] *Available at*: https://www.calbar.ca.gov/Portals/0/documents/ethics/Publications/Portals0documentsethicsPublicationsCTA-Handbook.pdf

[14] *See also In re Villa Marina Yacht Harbor, Inc*., 984 F.2d 546, 548 (1st Cir. 1993) (The court's inherent power "to manage the litigation before it" is "not governed by rule or statute" and the court may "do what is necessary and proper to conduct judicial business in a satisfactory manner.") (citation omitted); *Rothe Dev. Corp. v. DOD*, 545 F.3d 1023, 1034 (Fed. Cir. 2008) (taking no issue with "the district court order[ing] DOD to deposit $10,000 with the court registry as a formal act of tender" in Little Tucker Act action); *Qwest Corp. v. City of Portland*, 204 F.R.D. 468, 470 (D. Or. 2001) (recognizing district court has inherent power to require party to deposit funds with the court); RCFC 1 ("These rules govern the procedure in the United States Court of Federal Claims in all suits. They should be construed, administered, and employed by

Finally, when balancing the equities, the harm to the Class by not protecting the disputed funds in an interest-bearing trust account is outweighed by any harm to Quinn Emanuel by forcing it to return those funds as required by the Rules. Any harm suffered by Quinn Emanuel would not have arisen but for its failure to honor its fiduciary and ethical obligations to the Class.

The Objecting Class Members respectfully request that the Court use its inherent authority to order Quinn Emanuel to return the disputed funds (or their monetary equivalent) and accrued interest to an interest-bearing trust account for the safekeeping and benefit of all Class members pending final resolution of the award.

D. The Court should permit discovery into the terms, limitations, and circumstances of any insurance concerning the fee award

Quinn Emanuel has not denied that it purchased "judgment preservation" insurance (JPI) against the possible reduction of its $185 million fee award before distributing the fee award to its partners. Insurance is no substitute for the cash that Quinn Emanuel should have kept in an interest-bearing trust account for the class. No amount or type of JPI could remedy Quinn Emanuel's ethical violation of distributing disputed client funds to its partners—Rule 1.15's safekeeping requirement imposes a non-delegable duty on lawyers. But the terms of each layer of the JPI are relevant and discoverable nonetheless for at least the following reasons [15]:

First, the Court may order disclosure of "the terms of any agreement about fees for the services for which the claim is made." RCFC 54(d)(2)(B)(iv). [16] Any JPI is discoverable under this rule because the insurance would constitute an agreement to repay a portion of the fees previously distributed to Quinn Emanuel. Courts give weight to agreements not only among the

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the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.")

[15] The JPI is presumed to be layered or in a tower, i.e., a program involving a series of insurers writing coverage, each one in excess of lower limits written by other insurers.

[16] Courts have wide discretion under FRCP 54(d)(2)—which is the functional equivalent of RCFC 54(d)(2)—to determine the appropriate procedure when evaluating a fee award, including ordering an evidentiary hearing, disclosure of additional information, and even discovery. Wright & Miller, 10 Federal Practice and Procedure § 2680 (4th ed. 2022).

parties regarding the fee motion, but also to agreements *between class counsel and others* about the fees claimed by the motion. Fed. R. Civ. P. 23(h), 2003 Advisory Committee Note. "'Side agreements' regarding fees provide at least perspective pertinent to an appropriate fee award." *Id.*

For example, as one Bloomberg Law Practical Guidance article on JPI explains: "There may be times when the insurer requires …[the] insured to vigorously prosecute all arguments that could result in an appellate win."[17] If any of the policies require Quinn Emanuel to seek the same 5% award on remand—especially when that agreement was made prior to the Federal Circuit's opinion vacating that award—then the JPI provides "at least some perspective" as to *why* Quinn Emanuel is seeking 5% on remand. An agreement between class counsel and a third party about the fees claimed by the motion "is worthy of consideration" as a side agreement to seek a sum certain regardless of any new law of the case. Fed. R. Civ. P. 23(h), 2003 Advisory Committee Note.

Second, Quinn Emanuel may argue that the insurance obviates or reduces the need to deposit the disputed funds into a client trust account. This argument should be rejected out-of-hand because insurance is no substitute for cash in a trust account, and it would not undo the ethical violation inherent in distributing the disputed funds to the partners—misappropriation. But if Quinn Emanuel points to the JPI as the means of paying a debt owed to the Class, then the JPI necessarily becomes a "mode of payment" of attorney fees that a court "must ensure . . . [is] fair and proper." Fed. R. Civ. P. 23(h), 2003 Advisory Committee Note.

Third, and relatedly, if the Court is willing to consider any contention that the JPI absolves the misappropriation, the Court's fiduciary obligation to protect the Class mandates that it do so on a fully informed basis—including understanding the monetary limits of such

[17] Ross Weiner, *Judgment Preservation Insurance: Protecting Plaintiffs' Award*, Bloomberg Law (Apr. 2022), https://www.bloomberglaw.com/external/document/XM3LAH4000000/litigation-professional-perspective-judgment-preservation-insura.

insurance, what terms and conditions of coverage may excuse the insurance company from paying or delay payment, and whether the insurer(s) have or may raise coverage defenses that could delay or prevent the distribution of any insurance proceeds. Whether any JPI claim will be covered at all depends on the terms and conditions of each policy. The insurance may be limited in amount, or there may be conditions and exclusions that cast doubt on any payment.[18]

One such coverage limitation is particularly pertinent: insurance policies commonly contain provisions that void coverage if the applicant concealed or misrepresented a material fact in applying for the insurance. Indeed, JPI "coverage will typically be excluded for losses resulting from material misrepresentations or omissions made during the underwriting process."[19] Because JPI "insurers are picking the 'safest, easiest-to-price' situations," it stands to reason that the insurers of the $185 million award believed there was little risk the award would be overturned on appeal.[20] That calls into question whether Quinn Emanuel fully and fairly disclosed to the JPI insurer(s) the risk of the vacatur that in fact ensued. To the extent the insurers came to this conclusion based on any misrepresentation or concealment of a material fact by Quinn Emanuel, that could jeopardize coverage to the detriment of the Class. Quinn Emanuel's communications with the insurers should therefore be disclosed along with the JPI policies so that the Court and the Class can determine the chance that a concealment or misrepresentation coverage defense might exist. For the same reason, any communications such as a notice of an actual or potential claim, and any responses or reservation of rights by insurers, would similarly be relevant to whether coverage might apply.

And even assuming coverage is ultimately found, the Court would also need to evaluate the financial stability of each insurer to confirm any claim could be timely paid. Permitting JPI

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[18] "Each Judgment Preservation Insurance Policy is Bespoke." Ross Weiner, *supra*.
[19] Matthew Grosack et al., *Emerging Trends in Litigation Risk Insurance*, Insurance Journal (Mar. 7, 2022), https://www.insurancejournal.com/magazines/mag-features/2022/03/07/656822.htm.
[20] Roy Strom, *Quinn Emanuel's Juicy Obamacare Fee Tests Litigation Insurers*, Bloomberg Law (Apr. 13, 2023), https://news.bloomberglaw.com/business-and-practice/quinn-emanuels-juicy-obamacare-fee-tests-litigation-insurers.

in the context of a disputed attorney's fee award arising out of a large common fund recovery not only harms the Class, it also tasks the Court with being the additional *financial* fiduciary of the Class.

Fourth, it is possible (indeed, likely) that any payment by a JPI insurer would not be due until all appeals are exhausted: "JPI is concerned only with final judgments . . . . [t]here can be no loss unless and until the judgment is final and there is no longer any chance of further appeal."[21] Therefore, if the Court orders Quinn Emanuel to repay some portion of the $185 million award, it will initially have to do so from its operating accounts. If Quinn Emanuel were unable to do so, the Class may not benefit from the JPI (if at all) until Quinn Emanuel exhausts all appeals. If this delay is inherent in the JPI, the Court and the Class are entitled to understand that fact.

Fifth, Quinn Emanuel has an ethical obligation to provide conflict-free representation and the ethical rules specifically prohibit lawyers from: (1) "acquir[ing] a[] . . . pecuniary interest adverse to a client" and (2) accepting "compensation for representing a client from one other than the client" unless certain criteria are met. ABA Model Rules of Prof'l Conduct R. 1.8(a), (f) (2023) (requiring, among other things, "informed consent" of the client); *id.* R. 1.7; *see also* D.C. Rules of Prof'l Conduct R. 1.7, 1.8(a), (e) (2018) (substantially same); Cal. Rules of Prof'l Conduct R. 1.7, 1.8.1, 1.8.6 (substantially same) (2018); Ill. Rules of Prof'l Conduct R. 1.7, 1.8(a), (f) (2015) (substantially same). The Objecting Class Members should be able to evaluate the terms of each JPI policy to determine whether they violate the Rules by interfering with counsel's independent judgment, as any such violation would again be relevant to Quinn Emanuel's fee award determination on remand. Fed. R. Civ. P. 23(h)(2), 2003 Advisory

[21] Weiner, *supra*; *see also* Grosack et al., *supra* ("[C]overage under litigation risk insurance is almost uniformly triggered on the ultimate and non-appealable final judgment or disposition of a litigation. Thus, while flexible in the sense that each coverage plan is customized and can provide other more immediate benefits, the insurance payout comes only if there is a judgment and after any applicable appeals are exhausted, such that the triggering adverse judgment or order is truly final and can no longer be challenged.")

Committee Note ("The court may allow an objector discovery relevant to the objections.").[22]

Finally, as detailed above, the Court is entitled to consider any ethical violations by Quinn Emanuel in deciding the amount of attorney's fees to award. In addition to the most obvious of Quinn Emanuel's ethical violations—misappropriating disputed client funds and failing to provide an accounting of those funds when requested—it is plausible that Quinn Emanuel may have violated others in the context of securing the JPI. In particular, it is likely that the JPI insurer(s) demanded a rigorous underwriting process before taking on such a large risk.[23] In that context, Quinn Emanuel may have disclosed client confidences to the JPI insurer(s) to satisfy the insurance underwriters' due diligence. If that occurred, the Court is entitled to consider that fact in deciding the appropriate fee award. Further, Quinn Emanuel would be obligated to account to the Class for any profits the firm made by using client confidential information to secure the insurance.[24]

IV. Conclusion

The Objecting Class Members respectfully request that the Court order Quinn Emanuel

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[22] *See also In re "Agent Orange"*, 818 F.2d at 221-22, 226 (considering "an issue of first impression: whether an undisclosed, consensual fee sharing agreement, which adjusts the distribution of court awarded fees in amounts which represent a multiple of the sums advanced by attorneys to a class for litigation expenses, satisfies the principles governing fee awards and is consistent with the interests of the class," and finding that "the fee sharing agreement violates the principles for awarding fees in an equitable fund action and places class counsel in a position potentially in conflict with the interests of the class which they represent"); *id.*at 225 ("Additionally, potential conflicts of interest in class contexts are not examined solely for the actual abuse they may cause, but also for potential public misunderstandings they may cultivate in regard to the interests of class counsel.").

[23] *See* Grosack et al., *supra* ("[D]ue diligence and underwriting of these [litigation risk] policies are fact-intensive and detailed. A prospective insured should be ready to provide feedback on the opposing party's litigation tactics and tone . . ."—and here, the "opposing party" would be Quinn Emanuel's clients, the Objecting Class Members.)

[24] *See* Law Governing Lawyers, *supra*, § 60(2) ("[A] lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made."); Cal. Civ. Prac. Business Litigation § 36:19 ("All benefits and advantages acquired by the agent as an outgrowth of the agency, exclusive of the agent's agreed compensation, are deemed to have been acquired for the benefit of the principal, and the principal is entitled to recover those benefits in an appropriate action.")

to: (1) provide a full accounting of the disputed portion of the common fund, (2) return the disputed funds to an interest-bearing client trust account for safekeeping pending final resolution of the fee petition, and (3) provide limited discovery related to the judgment preservation insurance for the fee award, including all such policies and communications with the insurer(s).

Dated: May 2, 2023

Respectfully submitted,

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UnitedHealthcare of Pennsylvania, Inc., UnitedHealthcare of the Mid-Atlantic, Inc., UnitedHealthcare of the Midlands, Inc., UnitedHealthcare of the Midwest, Inc., UnitedHealthcare of Utah, Inc., UnitedHealthcare of Washington, Inc., UnitedHealthcare of Ohio, Inc., Rocky Mountain HealthCare Options, Inc., All Savers Insurance Company, and CareConnect Insurance Company, Inc. fka North Shore-LIJ Insurance Company Inc.

APPENDIX

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:16-cv-259C-KCD (Judge Davis)
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-KCD (Judge Davis)

DECLARATION OF MOE KESHAVARZI IN SUPPORT OF OBJECTORS' MOTION FOR AN ORDER DIRECTING AN ACCOUNTING AND SAFEKEEPING OF THE DISPUTED FUNDS AND LIMITED DISCOVERY

I, Moe Keshavarzi, declare as follows:

1. I am an attorney with Sheppard, Mullin, Richter & Hampton LLP. I have personal firsthand knowledge of the facts set forth herein, except where the context indicates otherwise. I am counsel to the Objecting Class Members, which are identified in the

accompanying Motion for an Accounting, Safekeeping of the Disputed Funds, and Limited Discovery.

2. On March 14, 2023, I called Quinn Emanuel Urquhart & Sullivan, LLP partner and current lead Class Counsel Adam Wolfson to discuss this matter. My colleague Jenna Fasone joined me on the call. During that call, I: (i) inquired as to the status of the $185 million fee award; (ii) inquired as to the interest that had accrued to date on those disputed funds and whether any interest would be returned to the Class; and (iii) requested that Quinn Emanuel return the disputed funds. Mr. Wolfson responded that the funds had already been "distributed"—but it was not clear in context whether he meant "distributed" by the claims administrator to Quinn Emanuel, or "distributed" by Quinn Emanuel to its partners. When I pressed Mr. Wolfson to disclose where the disputed funds were, he responded that the fund are "safe" and that if the Objecting Class Members wanted the funds returned or any interest on them, they were going to "have to file a motion." During that call Mr. Wolfson also informed me that "the 5% is still at issue" as Quinn Emanuel would again seek 5% of the recovery on remand. He also stated that Quinn Emanuel's view was there was "no reason to have to change status quo." In addition to these issues, during the call we discussed other issues related to briefing on remand.

3. On March 17, 2023, I sent a letter to Mr. Wolfson. A true and correct copy of my March 17, 2023 letter is attached as **Exhibit 26** to the Appendix.

4. On March 20, 2023, Mr. Wolfson sent me a letter responding to my March 17 letter. A true and correct copy of Mr. Wolfson's March 20, 2023 letter is attached as **Exhibit 27** to the Appendix.

5. During the March 21 Status Conference the Court ordered the parties to meet and confer regarding various issues. On March 28, 2023, the parties met and conferred. I was joined by my colleagues Ms. Fasone and Katherine Rice. Mr. Wolfson was joined by his colleague Mr. Schapiro. During that call, I renewed the Objecting Class Members' request for an accounting

and confirmation that the disputed funds were being held in an interest-bearing trust account. Mr. Wolfson again did not respond to my request on the grounds that the Objecting Class Members were not Quinn Emanuel's clients. I then asked for information concerning any judgment preservation insurance (JPI) Quinn Emanuel procured before distributing the fee award to its partners. I told Mr. Wolfson I want to know what rights, if any, the Objecting Class Members have under the policies and what defenses the insures could or might assert. I also explained that the Objecting Class Members do not want to be in a position where they would have to go to an insurance company that was not a party to the dispute to collect any disputed funds eventually ordered returned to the Class. I also explained that the Objecting Class Members have a right to know whether the JPI affected Quinn Emanuel's position on remand with respect to the fee petition, meaning that Quinn Emanuel may be required to ask for 5% because the JPI requires it to do so. I also explained that Objecting Class Members believe that the communications with the insurer(s) could be relevant to their evaluation of coverage under the JPI. Mr. Wolfson did not deny Quinn Emanuel had procured JPI, but instead contended it was not relevant and that the parties need only discuss a briefing schedule. In that regard, Mr. Wolfson stated he believed there was a need for motion practice to better understand what relief the Objecting Class Members were seeking. He also stated that he believed Quinn Emanuel should file a new application after the parties resolved the pending disputes.

6. On April 3, 2023, the parties met and conferred again. I was again joined by Ms. Fasone and Ms. Rice, and Mr. Wolfson was joined by Mr. Schapiro. During that call, I told Mr. Wolfson that the Objecting Class Members believe that Quinn Emanuel distributed the $185 million to its partners and obtained JPI in order to do so. I told Mr. Wolfson that, if Quinn Emanuel's position is that this did not happen, he should say so. Mr. Wolfson responded that he "was not going to get into Quinn Emanuel's inner workings" and that the Objecting Class Members would have to go "file a motion." I pressed the issue explaining that under Rule of Professional Conduct 1.15 of any applicable jurisdiction, the Objecting Class Members were

either clients or third parties with an interest in the disputed funds and thus were entitled to an accounting. In short, the Objecting Class Members had a right to the accounting regardless of Quinn Emanuel's characterization of them as clients or otherwise. I did not receive a response to my questions. I then asked what Quinn Emanuel's position on interest was, i.e., what rate of interest Quinn Emanuel would use on any return of disputed funds. Mr. Wolfson responded that the rule was: if there is a lower amount awarded, the interest would be on the delta (between the initial $185 million and any lower subsequent award). Ms. Fasone then asked how Quinn Emanuel would calculate the interest rate on that delta, and Mr. Schapiro responded: "the lowest amount the law requires." I asked one final time why Quinn Emanuel would not just tell the Objecting Class Members were the funds were? Mr. Wolfson responded by asking "why [the Objecting Class Members] were making a big deal out of it?" I explained that the Objecting Class Members' position was that they cannot assume—and should not have to take Quinn Emanuel's word—that the firm was "good for it." I explained that the Objecting Class Members do not know the financial condition of Quinn Emanuel and cannot just trust and hope that when there is a final fee award down the line, the firm will be able to readily pay it back.

7. As of the filing of this motion, Quinn Emanuel has not provided an accounting of the disputed funds, failed to confirm that the funds are in an interest-bearing client trust account, and failed to provide any information about the JPI.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 2, 2023, at Los Angeles, California.

MOE KESHAVARZI

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:16-cv-259C-KCD (Judge Davis)
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-KCD (Judge Davis)

DECLARATION OF ANDREW I. DILWORTH IN SUPPORT OF OBJECTORS' MOTION FOR AN ORDER DIRECTING AN ACCOUNTING AND SAFEKEEPING OF THE DISPUTED FUNDS AND LIMITED DISCOVERY

I, Andrew I. Dilworth, declare as follows:

1. I am an attorney, licensed to practice law in California, and a partner with the law firm of O'Rielly & Roche LLP. My office address is 4 Embarcadero Center, Suite 1400, San Francisco, California 94111.

Expert Assignment

2. I have been retained by Sheppard, Mullin, Richter & Hampton LLP, counsel for objectors United Healthcare and Kaiser (Objectors)[1], as an expert in this matter, to evaluate issues of legal ethics, professional responsibility, and the standard of care, as well as the Rules of Professional Conduct that govern the conduct of lawyers, as they relate to the conduct of class counsel in these matters, Quinn Emanuel Urquhart & Sullivan LLP and its respective attorneys (Quinn Emanuel or Class Counsel).

Qualifications

3. I have been licensed to practice in California since 1995 and have been involved in litigation in state and federal courts since 1996. I received my J.D. degree with honors (*cum laude*) from the University of San Francisco School of Law in 1995.

4. I specialize in the field of professional responsibility of lawyers. My practice involves counseling and representing lawyers, law firms, and other clients on professional responsibility matters, which includes, among other things, the handling of funds in which clients or other persons have an interest, conflicts of interest, and issues of fiduciary duty. I serve as outside ethics counsel to lawyers and law firms on the law governing lawyers, which includes

[1] Objectors consist of the following health plans: Kaiser Foundation Health Plan, Inc., Kaiser Foundation Health Plan of Georgia, Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., Kaiser Foundation Health Plan Inc. of Colo., Harken Health Insurance Company, Health Plan of Nevada, Inc., Oxford Health Plans (NJ), Inc., Rocky Mountain Health Maintenance Organization, Incorporated, UnitedHealthcare Benefits Plan of California, UnitedHealthcare Community Plan, Inc., UnitedHealthcare Insurance Company, UnitedHealthcare Life Insurance Company UnitedHealthcare of Alabama, Inc., UnitedHealthcare of Colorado, Inc., UnitedHealthcare of Florida, Inc., UnitedHealthcare of Georgia, Inc., UnitedHealthcare of Kentucky, Ltd., UnitedHealthcare of Louisiana, Inc., UnitedHealthcare of Mississippi, Inc., UnitedHealthcare of New England, Inc., UnitedHealthcare of New York, Inc., UnitedHealthcare of North Carolina, Inc., UnitedHealthcare of Oklahoma, Inc., UnitedHealthcare of Pennsylvania, Inc., UnitedHealthcare of the Mid-Atlantic, Inc., UnitedHealthcare of the Midlands, Inc., UnitedHealthcare of the Midwest, Inc., UnitedHealthcare of Utah, Inc., UnitedHealthcare of Washington, Inc., UnitedHealthcare of Ohio, Inc., Rocky Mountain HealthCare Options, Inc., All Savers Insurance Company, and CareConnect Insurance Company, Inc. fka North Shore-LIJ Insurance Company Inc.

funds handling, conflicts of interest, and the fiduciary obligations of lawyers. For more than a decade, I also served as special counsel to my former firm, Cooper, White & Cooper LLP, on ethics issues. In my approximately twenty-eight years as a practitioner, I have analyzed numerous matters involving the handling of funds, attorney's fees, conflicts of interest, and/or breaches of fiduciary duty.

5. I have served as an expert on professional responsibility issues, fiduciary duties, and the standard of care. I have also been approved and testified as an expert in court on such matters.

6. I was an adjunct professor at the University of San Francisco School of Law for over a decade (approximately 2005 to 2017) where I taught Legal Ethics. I am a past Chair, Vice-Chair, and current member of the Bar Association of San Francisco Legal Ethics Committee. I am also a current member of the California Lawyers Association's (CLA) Legal Ethics Committee.

7. For the last three years (2020-2023), I have been a lecturer at Berkeley School of Law where I teach the Legal Profession, a course that focuses on the law governing lawyers, the rules of professional conduct, and the professional responsibilities and obligations of lawyers.

8. I am a past Chair and Adviser of the State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC). The Committee is responsible for issuing advisory ethics opinions on the rules and statutes regulating lawyer conduct in California, which have included opinions dealing with the handling of funds and property in which clients or other persons have an interest, conflicts of interest, and ethical obligations implicating the fiduciary obligations of lawyers, as well as assisting the State Bar Board of Trustees on such matters.

9. During my tenure on the Committee, the Committee reviewed virtually all (if not all) of the proposed revisions to California's Rules of Professional Conduct (CRPC) that were eventually adopted by the California Supreme Court and went into effect on November 1, 2018, including California's rules regarding the safekeeping of funds and property of clients and other

persons, and conflicts of interest. COPRAC's comments on the proposed rule revisions were shared with the State Bar's Commission for the Revision of the Rules of Professional Conduct (Rules Revision Commission), which made recommendations to the State Bar Board of Trustees as to the proposed revisions that should be presented to the Supreme Court.

10. I have written articles for various publications and have lectured on the regulation of lawyers and legal ethics issues, including issues related to the handling of funds, conflicts of interest, and issues of fiduciary duty, for a variety of continuing legal education providers, including the California State Bar, the American Bar Association, various law schools, local bar associations, and national organizations.

11. I have been a member of the ABA Center on Professional Responsibility. I am also a member of the Association of Professional Responsibility Lawyers (APRL), a national organization of lawyers who practice in the field of legal ethics. The work of the ABA Center and APRL has involved issues relating to funds handling, conflicts of interest, and the fiduciary obligations of lawyers. A copy of my curriculum vitae is attached as Exhibit A to this declaration.

Summary of Opinions

12. **Opinion No. 1**: Consistent with the provisions of rule of professional conduct 1.15, Objectors should have been provided with notice of any common fund recovery monies Quinn Emanuel received from the Claims Administrator as attorney's fees that were in dispute, and any such funds should have been set aside in an interest-bearing trust account by Quinn Emanuel; any such monies were funds in which the Objectors had a financial interest, and of which interest Quinn Emanuel was on notice by virtue of the Objectors filing their objections and the Objectors filing their subsequent Notices of Appeal.

13. **Opinion No. 2**: Consistent with the provisions of rule of professional conduct 1.15, any distribution by Quinn Emanuel to itself, its attorneys, its staff, or others, of any funds

received from the Claims Administrator as attorney's fees, at least following the Objectors' filing of Notices of Appeal, while Quinn Emanuel's entitlement to such funds was "in dispute" and pending appellate resolution, would be ethically improper; once Quinn Emanuel had notice of the "dispute" created at least by the filing of the Notices of Appeal, its interest in any subsequent monies received from the Claims Administrator for attorney's fees was not "fixed."

14. **Opinion No. 3**: To the extent any funds were received by Quinn Emanuel from the Claims Administrator as attorney's fees, at least following the Objectors' filing of Notices of Appeal, and were not retained in a trust account, or were placed in a trust account and then subsequently distributed, such funds should be returned and held in an interest bearing trust account pending "final resolution" of the Objectors' and Quinn Emanuel's "dispute" over Quinn Emanuel's attorney's fees; Objectors have an interest in any such funds which remain subject to the requirements of rule of professional conduct 1.15.

15. **Opinion No. 4**: Consistent with rule of professional conduct 1.15 and related standards regarding trust account record keeping, the Objectors, as both clients and members of the classes at issue, are entitled to a written accounting from Quinn Emanuel regarding any funds it received from the Claims Administrator as attorney's fees at least following the Objectors' filing of Notices of Appeal; such accounting should include information consistent with what is required under the Standards to CRPC 1.15 and the ABA Model Rules on Client Trust Account Records.

16. **Opinion No. 5**: If funds were received by Quinn Emanuel from the Claims Administrator as attorney's fees, at least following the Objectors' filing of Notices of Appeal, the procurement of "judgment preservation insurance" by Quinn Emanuel, regarding such funds, would not dispense with Quinn Emanuel's and its attorneys' professional obligations regarding the safekeeping, management, accounting for, and distribution of the entrusted funds consistent with the requirements of rule of professional conduct 1.15; such duties are "non-delegable" and distribution of any such funds by Quinn Emanuel to itself, its attorneys, its staff, or others, prior

to the "final" resolution of the "dispute" between the Objectors and Quinn Emanuel regarding Quinn Emanuel's attorney's fees would be improper, regardless of whether judgment preservation insurance existed.

17. **Opinion No. 6**: Consistent with rule 1.7, Quinn Emanuel could not, in the absence of informed client consent, ethically permit its own interests to materially limit its professional obligations to the Objectors, including its compliance with the requirements of rule of professional conduct 1.15.

18. **Opinion No. 7**: It would be below the standard of care for class counsel to create a conflict of interest between their own financial interests, and class members (such as Objectors), with respect to common fund monies, by requesting and treating knowingly disputed funds as their own and then distributing such funds to themselves, despite knowledge of the dispute, and in contravention of their professional obligations to account for, maintain, and preserve disputed funds, and to try and "delegate" their maintenance, accounting, and preservation obligations regarding such funds to a third-party insurer.

Relevant Factual Background

19. My analysis and opinions are based on the following general background.

20. In February 2016, Quinn Emanuel filed the complaint in *Health Republic Insurance Company v. United States*, CFC Case No. 1:16-cv-259 (*Health Republic*), on behalf of a class of health plans challenging the federal government's failure to make required "risk corridor" payments under the Affordable Care Act.

21. Quin Emanuel was subsequently appointed Class Counsel and Health Republic was appointed as class representative. The class was certified as an "opt-in" class. The Supplemental Class Notice approved by the Court stated:

> "Class Counsel represents that it will request no more than **5%** of any judgment or settlement obtained for the QHP Issuer Class. The fee may be substantially less than 5% depending upon the level of class participation represented by the final

> membership of the QHP Issuer Class. In any event, the exact percentage of Class Counsel's fees will be determined by the Court subject to, among other things, the amount at issue in the case and what is called a 'lodestar cross-check' (i.e., a limitation on class counsel fees based on the number of hours actually worked on the case). *See*, *e.g.*, *Geneva Rock Products, Inc. v. United States*, 119 Fed. Cl. 581, 595-96 (2015); *Loving v. Sec'y of Health and Human Servs.*, 2016 WL 4098722, at *4 (Fed. Cl. Spec. Mstr. July 7, 2016)."
>
> Supplemental Class Notice, United States Court of Federal Claims, Case No. 1:16-cv-00259C-KCD (emphasis in original).

22. In June 2017, Class Counsel filed a parallel complaint in *Common Ground Healthcare Coop. v. United States*, CFC Case No. 1:17-cv-877 (*Common Ground*), to challenge nonpayment of risk corridor payments for the 2016 benefit year. The Class Notice approved by the Court in *Common Ground* also contained the assurances about the 5% maximum attorney fee recovery, the impact of class member participation and the amount at issue on the fee, and the lodestar cross-check. Ultimately 153 health plans opted into the *Health Republic* class and 130 opted into the *Common Ground* class.

23. Both the *Health Republic* and *Common Ground* actions were subsequently stayed, pending the outcome of other cases being pursued by different counsel challenging the government's nonpayment of risk-corridor payments. These cases included a case by Maine Community Health Options that made it to the Supreme Court in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020). The Supreme Court ultimately ruled in favor of the health plans in *Maine Community*, requiring the government to make risk corridor payments. Following the Supreme Court's decision in *Maine Community*, the class in *Health Republic* became entitled to a megafund recovery of approximately $1.9 billion, and the class in *Common Ground* became entitled to a megafund recovery of approximately $1.8 billion.

24. Quinn Emanuel subsequently moved for attorney's fees regarding each of the actions and requested 5% of the class funds, i.e., a total of $184,848,671. The Objectors filed an opposition and objection to Quinn Emanuel's fee motion. On September 16, 2021, the Claims Court granted Class Counsel's request for the 5% fee award it requested. On September 17,

2021, the Claims Court entered Rule 54(b) judgments in each of the actions. On October 1, 2021, a subset of the objecting class members – consisting of health plans in the Kaiser and United Healthcare families (Objectors) – filed Notices of Appeal. The Kaiser and United Objectors represented approximately one-third of the overall value of risk corridor claims.

25. On January 31, 2023, the United States Court of Appeals for the Federal Circuit issued a decision in the consolidated appeals vacating the Claims Court's fee awards and remanding the matters to the Claims Court for reconsideration of the fee awards. The Court of Appeal's decision noted that "In the opt-in notices sent to potential class members with court approval, Quinn Emanuel represented that it would seek attorney's fees to come out of any recovery, that it would seek no more than 5% of any judgment or settlement obtained, and that the Claims Court would determine the exact amount based on, among other things, how many issuers participated, the amount at issue in the case, and a so-called 'lodestar cross-check' (based on the hours actually worked)." *See* United States Court of Appeals for the Federal Circuit, *Health Republic Insurance Company v. U.S.*, Appeal No. 22-1018, Opinion, filed 1/31/2023, p. 5. In vacating the Claims Court's award, the Court of Appeals found that "the Claims Court's analysis was inconsistent with the terms of the class opt-in notices and did not adequately justify the extraordinarily high award …" *Id*. at p. 6.

26. It is my understanding based on information provided to me, that at some point following the Claims Court's award of fees in each of the actions, but prior to the Court of Appeals vacating the fee awards, Quinn Emanuel requested and received funds from the Claims Administrator for the actions totaling $184,848,671. Exactly when those funds were requested and received by Quinn Emanuel, and how they were managed, accounted for, and/or disbursed, is presently unknown to Objectors. I understand that Objectors have requested an accounting from Quinn Emanuel regarding any funds received by the firm from the Claims Administrator. However, to date, Quinn Emanuel has not complied with that request.

27. It is also my understanding based on information provided to me, that at some

point, Quinn Emanuel procured "judgment preservation insurance" related to funds it received from the Claims Administrator for attorney's fees. It is also my understanding that Quinn Emanuel has not denied procuring such insurance. I understand that Objectors have requested information regarding such insurance. However, to date, the policy and details of such insurance have not been shared with Objectors.

28. Both the *Health Republic* and *Common Ground* actions are presently before the Claims Court on remand, for reconsideration of the fee awards.

Analysis and Opinions

Applicable Rules and Standards

The Rules of the United States Court of Federal Claims

29. The Rules of the United States Court of Federal Claims contain rules regarding "Attorneys" (RCFC Rule 83.1) and "Attorney Discipline" (RCFC Rule 83.2). Although many District Courts in California adopt the California Rules of Professional Conduct by local rule (*see*, *e.g.*, C.D. Cal. Civ. Rule 83-3.1.2; E.D. Cal. Rule 180(e); N.D. Cal. Rule 11-4(a)(1); S.D. Cal. Rule 83.4.b), neither RCFC Rules 83.1 nor 83.2 expressly adopt the professional conduct rules of a specific jurisdiction. Nor do these rules contain a "choice of law" provision with respect to professional conduct rules.

30. RCFC Rule 83.2, among other things, lists as grounds for discipline "any conduct before the court that is unbecoming of a member of the bar of this court." RCFC Rule 83.2(c)(5). It is my general understanding that regarding disciplinary matters under the RCFC, the Standing Panel on Attorney Discipline, to whom disciplinary matters are referred (*see* RCFC 83.2(f)), typically considers "local disciplinary rules and/or ABA Model Rules to establish a consensus of ethical principles" in conjunction with evaluating the ethical conduct of attorneys appearing before the Claims Court.[2]

[2] Meg Beardsley, "Attorney Discipline Procedures in the Unites States Court of Federal Claims"

31. Thus, for purposes of my analysis and opinions, I consider the local disciplinary rules of California (and case law and opinions applying those rules) as well as the ABA Model Rules, to the extent such consideration may be helpful to the Court in evaluating the ethical issues discussed in this declaration.

The California Rules of Professional Conduct

32. California's Rules of Professional Conduct (CRPC) underwent significant revisions which were approved by the California Supreme Court and became effective in November 2018. The Claims Court's Order awarding Class Counsel attorney's fees was filed on September 16, 2021. In considering California's Rules of Professional Conduct I, therefore, consider the rules adopted and in place at the time of the conduct being evaluated in this declaration, the substantive portion of which post-dates November 2018.

33. California's Rules of Professional Conduct are Rules of Discipline. They are intended to regulate the professional conduct of lawyers through discipline and establish the standards for lawyers for purposes of discipline. *See* CRPC 1.0(a) ("Purpose and Function of the Rules of Professional Conduct"); and Comment [1] thereto.

California's Choice of Law Rule

34. A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. CRPC 8.5(a) ("Disciplinary Authority; Choice of Law"). In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied for conduct in connection with a matter pending before a

(2018) *available at*: https://www.uscfc.uscourts.gov/conferences/2018/materials/Ethics/Ethics%20Program%20-%20Attorney%20Discipline%20Procedures%20in%20the%20USCFC.pdf. I also note that in its September 16, 2021, Opinion and Order, awarding fees to Class Counsel, the Claims Court considered both the ABA Model Rules of Professional Conduct and similar rules in jurisdictions that the Claims Court found "likely govern Class Counsel's representation in the instant cases" – including California – in assessing whether to grant Class Counsel's request for incentive awards. September 16, 2021, Opinion and Order, pp. 26-27.

tribunal are the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise. CRPC 8.5(b)(1). For any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred are applied, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction are applied. CRPC 8.5(b)(2).

The ABA Model Rules of Professional Conduct

35. The ABA Model Rules contain a choice of law provision that is substantively identical to the choice of law provision in California, as outlined above. *See* Model Rule 8.5(b)(1)&(2). Moreover, California lawyers are encouraged to consider the ethical rules and standards promulgated by the American Bar Association where there is no direct California authority and where the Model Rules do not conflict with California policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852; CRPC 1.0, Comment [4] thereto. In such situations, the Model Rules serve as a "collateral source" for guidance on proper professional conduct in California. *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1210.

36. It is my understanding that the law firm of Quinn Emanuel Urquhart & Sullivan LLP is headquartered in Los Angeles. *See* https://www.linkedin.com/company/quinn-emanuel/about/. It is my further understanding that the Lead Attorney of record at Quinn Emanuel, regarding the *Health Republic* and *Common Ground* actions, Adam Wolfson, is a California-licensed attorney. The specific facts regarding Quinn Emanuel's receipt, management, accounting for, and/or disbursement of funds received from the Claims Administrator are not currently known to the Objectors, nor is the location in which the funds were received and/or maintained. However, Objectors have requested an accounting regarding any such funds. Should such an accounting be granted, it may shed light on these issues.

Quinn Emanuel and Its Lawyers Are Fiduciaries for the Objectors Who Are Clients and Class Members of the Actions at Issue

37. Attorneys and their clients stand in a fiduciary relationship of the very highest character, which binds the attorney to the most conscientious fidelity to the client. *Lee v. State Bar* (1970) 2 Cal.3d 927, 939. The fiduciary relationship between an attorney and a client includes a duty of loyalty to the client. The most fundamental quality of the attorney-client relationship is the absolute and complete fidelity that an attorney owes to his or her client. *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289. The duty of loyalty is broader than the scope of the CRPC requirements, it requires an attorney "to protect his [or her] client in every possible way, and it is a violation of that duty for him [or her] to assume a position adverse or antagonistic to his or her client without the latter's free and intelligent consent …" *Santa Clara County Counsel Attys. Ass'n v. Woodside* (1994) 7 Cal.4th 525, 548.

38. The violation of a rule can be evidence of a breach of fiduciary duty. CRPC 1.0(b)(3). The rules of professional conduct "together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which the attorney owes to his or her client." *See BGJ Assoc. v. Wilson* (2004) 113 Cal.App.4th 1217, 1227, *quoting David Welch Co. v. Erskin & Tulley* (1988) 203 Cal.App.3d 884, 890. Thus, the scope of an attorney's fiduciary duty "may be determined as a matter of law based on the Rules of Professional Conduct." *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086-1087, *quoting Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45; *see also* California Judicial Civil Jury Instruction (CACI) 4106 (Breach of Fiduciary Duty by Attorney – Essential Factual Elements).

39. As Class Counsel, Quinn Emanuel owed a fiduciary duty to its clients in the respective class actions. Here, there was an attorney-client relationship between Quinn Emanuel and the Objectors. *See* Mark Tuft, Ellen Peck, Kevin Mohr, *California Practice Guide: Professional Responsibility* (The Rutter Group) (2019), paragraph 3:131.20, p. 3-72 ("… where the *class is certified*, an attorney acting as class counsel represents *all class members (including*

unnamed members) (emphasis in original); *see also* ABA Formal Op. 07-448 (October 20, 2007) ("Additionally, unnamed class members in a class action lawsuit will be deemed after certification of the class to be represented by class counsel, absent their affirmative election to 'opt out' of the certified class."). The scope of the fiduciary duty Quinn Emanuel owed to Objectors included compliance with applicable rules of professional conduct, including rules related to the safekeeping of funds and property. Moreover, as explained below, even if Objectors were not considered to be clients of Quinn Emanuel, they would still be owed a fiduciary duty.

Quinn Emanuel and Its Lawyers Owe Fiduciary Duties to the Respective Class Members, Including Objectors

40. Class counsel owes fiduciary duties to all class members once a class has been certified, including unnamed members. *See, e.g.*, *In re Orange Prod. Liab. Litig.* (2nd Cir. 1986) 800 F2d. 14, 18 (the class attorney is the guardian of the class and owes a fiduciary duty to each member); *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 693 (class counsel has an obligation to represent all class members with "skill, prudence, and diligence"). These fiduciary duties include the class counsel's duty of undivided loyalty. *See, e.g.*, *Jaurigui v. Arizona Board of Regents* (Dist. Ariz. 1979) 82 FRD 64, 66 (a lawyer's duty of undivided loyalty directly relates to the "adequacy of representation" for class action purposes).

41. Here, Quinn Emanuel was Class Counsel for the class members in the actions at issue. The classes in those matters were certified on January 3, 2017 (*Health Republic*) and January 8, 2018 (*Common Ground*). As Class Counsel, Quinn Emanuel owed a fiduciary duty to the class members, even unnamed class members such as the Objectors. The scope of that duty included compliance with applicable rules of professional conduct, including rules related to the safekeeping of funds and property. That duty existed no later than January 3, 2017, and January

8, 2018, respectively. Those dates *predated* any request by Quinn Emanuel for an attorney's fee award in either of the respective class actions.

Quinn Emanuel Had an Obligation to Safekeep any Funds and Property of Its Clients or Third Persons (CRPC 1.15 and ABA Model Rule 1.15)

42. California's Rules of Professional Conduct and California Business & Professions Code section 6000 *et seq*. (the "State Bar Act") govern the handling and management of lawyer-entrusted funds and property. The rules regarding such handling and management trace their origins from common law and the statutory duties of trustees. *See San Francisco Bar Ass'n v. McClellan* (1919) 40 Cal.App.630, 632; *Blackmon v. Hale* (1970) 1 Cal.3d 548, 557-558. A trustee's duties regarding handling and management of funds typically include "accounting" for such funds, not just holding them in trust.

43. California's primary rule of professional conduct governing a lawyer's handling of entrusted funds and property of clients and third persons is CRPC 1.15 "Safekeeping Funds and Property of Clients and Other Persons". The parallel ABA rule is Model Rule 1.15.

Quinn Emanuel Had an Obligation to Hold in Trust Any Funds in Which Objectors Had a Financial Interest

44. Pursuant to CRPC 1.15 "[a]ll funds received or held by a lawyer or law firm*[3] for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty … shall be deposited in one or more identifiable accounts labeled 'Trust Account' or words of similar import ..." CRPC 1.15(a); *see also* Model Rule 1.15(a)-(c).

45. CRPC 1.0.1(g-1) defines the term "person" as having "the meaning stated in Evidence Code section 175." California Evidence Code section 175 states: "'Person' includes a

[3] Throughout this declaration quoted portions of the CRPC containing an asterisk (*) identify a word or phrase defined in CRPC Rule 1.0.1 ("Terminology").

natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." *See also* the 2023 California State Bar Handbook on Client Trust Accounting for California Lawyers, p. 6 ("Throughout rule 1.15, an attorney's duty is expressly stated as extending to a client or other person. As used in rule 1.15(a), this formulation of the rule language is intended to make clear that an attorney may have the same duties to a third-party as to his or her client.").

46. Accordingly, funds held by an attorney for the benefit of a client or person to whom the attorney has a fiduciary duty must be held in a trust account. In this case, Class Counsel owed a fiduciary duty to the class members in each of the respective actions. Thus, to the extent Class Counsel received or held any funds for the benefit of the class members, those funds had to be held in a trust account consistent with rule 1.15.

47. A client trust account is an "express trust," meaning it is a fiduciary relationship where the trustee holds the property for another's benefit. *See Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1123-1125; *see also* Model Rule 1.15, Comment [1] thereto ("A lawyer should hold property of others with the care required of a professional fiduciary.").

48. Funds held "for the benefit" of a client or a third person include funds in which the client or third person has a financial or pecuniary interest. CRPC 1.15(a). This would include funds awarded by a court or jury in which a client or third person has an interest. The awards in the class actions at issue were common fund awards to the respective classes.

49. As class members, Objectors had a financial and pecuniary interest in the common fund recovery monies awarded to the *Health Republic* and *Common Ground* classes. If Quinn Emanuel received any of those funds in which class members had a financial or pecuniary interest from the Claims Administrator, such funds needed to be deposited in an interest-bearing trust account. It is unclear whether Quinn Emanuel ever deposited any funds received from the Claims Administrator in a trust account. The accounting requested by Objectors may shed light

on this issue. Whether such funds were ever placed in a trust account might also inform Quinn Emanuel's view, at the time of receipt, as to whether it thought there were other prospective interests in those funds.

Quinn Emanuel Had an Obligation to Notify Clients and Third Persons, Including the Objectors, of the Receipt of Any Funds in Which the Clients or Third Persons Had an Interest

50. Both the California Rules of Professional Conduct and the Model Rules further recognize that a lawyer or law firm must "promptly notify" a client or third person of the receipt of any funds in which the client or third person has an interest. *See* CRPC 1.15(d)(1) (the lawyer must promptly notify a client or other person of the receipt of funds, securities, or other property in which the lawyer "knows* or reasonably should know* the client or other person* has an interest")[4]; Model Rule 1.15(d) (upon receiving funds or other property in which a client or third person has an interest "a lawyer shall promptly notify the client or third person").

51. An attorney has a general duty to communicate with a client. *See* CRPC 1.4; Model Rule 1.4. In part, CRPC 1.4 requires an attorney to "keep the client reasonably* informed about significant developments relating to the client's representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed." CRPC 1.4(a)(3)); *see also* Model Rule 1.4 (a)(4) (a lawyer shall "promptly comply with reasonable requests for information").

52. Comment [1] to CRPC 1.4, in part, provides that: "Whether a particular development is significant will generally depend on the surrounding facts and circumstances. For example, a lawyer's receipt of funds on behalf of a client requires communication with the client

[4] Effective January 1, 2023, CRPC 1.15(d)(1) was amended to read that the lawyer must "absent good cause, notify a client or other person* no later than 14 days of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest."

pursuant to rule 1.15, paragraphs (d)(1) and (d)(4) and ordinarily is also a significant development requiring communication with the client pursuant to this rule." *See also* the 2023 California State Bar Handbook on Trust Accounting for California Lawyers, p. 6.[5]

53. Here, if Quinn Emanuel received funds in which it knew or reasonably should have known the Objectors had an interest, it was obligated to provide "prompt notice" to them of the receipt of such funds consistent with rules 1.15 and 1.4. Quinn Emanuel knew or should have reasonably known that Objectors had an interest in any funds Quinn Emanuel received for attorney's fees once the Objectors filed their objections and subsequent Notices of Appeal.

Quinn Emanuel Had an Obligation to Maintain Records and Account for the Entrusted Funds Consistent with Rule 1.15

54. A lawyer holding funds in which a client or third person has an interest must not only hold such funds in a trust account, but the lawyer also has an affirmative obligation to maintain written records and account for the maintenance of those funds. *See, e.g.*, CRPC 1.15(d)(4) (a lawyer shall "promptly account in writing* to the client or other person* for whom the lawyer holds funds or property"); *see also* CRPC 1.15(d)(5) (a lawyer must "preserve records of all funds and property held by a lawyer or law firm* under this rule for a period of no less than five years after final appropriate distribution of such funds or property"); Model Rule 1.15(a) ("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").

55. The "Standards" adopted pursuant to Rule 1.15, by the Board of Trustees of the California State Bar (CRPC 1.15(e)), and the ABA's Model Rules on Client Trust Account Records, recognize the specific record-keeping requirements imposed on lawyers and law firms

[5] "An amendment to Comment [1] to rule 1.4 was approved effective January 1, 2023. This amendment was developed as a companion initiative to the proactive regulation of client trust accounting under CTAPP; see Reporting Required by the Client Trust Account Protection Program (CTAPP). See also, California Rule of Court 9.8.5 and State Bar Rule 2.5, Appendix 2."

regarding maintenance of, and accounting for, funds held in which a client or third person has an interest. *See* CRPC 1.15, Standards (1)-(2); ABA Model Rules on Client Trust Account Records.

56. The detailed requirements of California's Standards and the Model Rules on Client Trust Account Records underscore the fact that an attorney's ethical obligation to maintain and account for funds goes *far beyond* simply having funds "available" or accounting for the "current balance" of funds being held. *See*, *e.g.*, CPRC 1.15, Standard (1) (requiring *a written ledger* for each client or person on whose behalf funds are held that identifies: the name of such client or other person, the date, amount and source of funds received on behalf of such client or other person, the date, amount, payee and purpose of each disbursement made on behalf of such client or other person; *a written journal* for each bank account that sets forth the name of the account, the date, amount and client or other person affected by each debit and credit, and the current balance in the account; *all bank statements and canceled checks* for each account; and *each monthly reconciliation* (balancing) of these documents and accounts); *see also* The Model Rules on Client Trust Account Records (containing similar requirements).

57. These obligations and detailed record-keeping requirements ensure that a client or third person whose funds are being held in trust not only has notice of the funds, but that the maintenance, handling, and disbursement of such funds can be tracked and accounted for during the period in which the funds are entrusted. *See*, *e.g.*, the 2023 California State Bar Handbook on Client Trust Accounting for California Lawyers, p. 3 ("Keeping track of exactly what's happening with a client's money is your personal, nondelegable ethical responsibility. The minute you don't keep track, you are in violation of the client trust accounting rules").

58. Although Quinn Emanuel has not provided Objectors with an accounting, any funds it held in which Objectors had a financial or pecuniary interest needed to be maintained and accounted for through written records, consistent with the provisions of rule 1.15 and related standards regarding trust account record keeping. Given that the Claims Court did not issue a fee award to Quinn Emanuel until September 2021, any records and accounting of such funds

presumably should still reside with the firm given the requirements under both CRPC 1.15 and Model Rule 1.15 that records be maintained for five years after final appropriate distribution of the funds (CRPC 1.15(d)(5)) or termination of the representation (Model Rule 1.15(a)). Regardless, any funds held by Quinn Emanuel need to be properly accounted for consistent with rule 1.15 and related standards regarding trust account record keeping.

Quinn Emanuel Was Prohibited from Withdrawing, and Distributing to Itself or its Attorneys, Funds in which Quinn Emanuel and Objectors Each Had Potential Interests, Prior to Quinn Emanuel's Interest Becoming "Fixed"

59. Both CRPC 1.15 and Model Rule 1.15 recognize the principle that a lawyer's funds should not be "commingled" with those of a client or third person. *See* CRPC 1.15(c); Model Rule 1.15(a)&(b) and Comment [2]. Accordingly, CRPC 1.15(c)(2) provides, in part:

> "Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except …
>
> (2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time *after a lawyer or law firm's interest in that portion becomes fixed*." (Emphasis added).

60. Thus, a lawyer or law firm that receives funds in which a client or other person has an interest, and in which the lawyer or firm has a present or potential interest, is ethically obligated to place such funds in a trust account and should withdraw the portion belonging to the lawyer or law firm once the lawyer or law firm's interest in the funds is "fixed."

61. Here, if Quinn Emanuel received common funds in which both Quinn Emanuel and the Objectors or other class members had respective pecuniary interests (presently or potentially), those funds needed to be placed in a trust account until Quinn's Emanuel's interest in any portion of those funds became fixed, at which point the "fixed portion" could be

withdrawn. *See, e.g.*, COPRAC Formal Opinion No. 2006-171, *3 (funds misappropriated or withdrawn before an attorney's fee becomes "fixed" are funds in which the client has a whole or part ownership interest).

Quinn Emanuel Had an Ethical Obligation to Hold Any "Disputed" Funds it Received for Attorney's Fees in Trust Pending a Final Resolution of the Dispute

62. The obligation not to commingle funds which, in part, presently or potentially, belong to the lawyer or law firm, with funds in which a client or other person has an interest, contains an important caveat for situations in which there is a "dispute" regarding the lawyer's or law firm's right to receive a portion of the funds. In that regard, CRPC 1.15 expressly provides "… if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall *not* be withdrawn *until the dispute is finally resolved*." CRPC 1.15(c)(2) (emphasis added).[6] Model Rule 1.15(e) also embodies this concept:

> "When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

[6] Effective November 1, 2018, California's former rule regarding safekeeping of funds and property (Rule 4-100) was amended to extend the duties owed to a client to other persons, and Comment [1] was also adopted. These revisions were a result of the recommendation of the Commission for the Revision of the Rules of Professional Conduct. In making such recommendation, the Commission expressed concern "that [then] current rule 4-100 is deficient to the extent it fails to address the issue of funds and property entrusted by non-clients." New Rule of Professional Conduct 1.15 (Former Rule 4-100) Safekeeping Funds and Property of Clients and Other Persons, Executive Summary, Commission for the Revision of the Rules of Professional Conduct, https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.15-Exec_Summary-Redline.pdf, p. 1. The Commission also noted that "the change is comparable to the standard in Model Rule 1.15" and "[most] significantly, California case law has held that a lawyer owes such duties to third persons." *Id* at p. 3.

63. The California State Bar's Handbook on Client Trust Accounting for California Lawyers explains these obligations succinctly:

> "You should [] remember [] you can't pay yourself legal fees that your client is disputing, whether or not you feel you've earned them. The moment a client disputes your fees, the disputed amount is frozen in your client trust bank account until the dispute is settled. When the amount of your fees is no longer in dispute, you have an ethical obligation to take those fees out of the client trust bank account as soon as you reasonably can."
>
> The 2023 California State Bar Handbook on Client Trust Accounting for California Lawyers, p. 24.

64. Thus, where a lawyer or law firm claims a portion of client funds held in trust for unpaid fees, costs, or expenses, and the client disputes the fee claim, the disputed amount must be retained in a trust account until the matter is finally resolved. CRPC 1.15(c)(2); *see also* Model Rule 1.15, Comment [3]. This obligation is not predicated on the ultimate merits of the client or other person's position in the dispute, or the ultimate outcome of the dispute.

65. Both the California Rules of Professional Conduct and the Model Rules recognize that a lawyer or law firm has no right to "unilaterally" withdraw disputed fees from a trust account. Where a client disputes, for example, an attorney's invoice, the entire amount of the invoice must remain in the trust account until the matter is resolved – unless the client *consents* to the withdrawal of some undisputed portion of the funds. *See, e.g.*, Los Angeles Bar Ass'n Form. Opn. 438 (1985); *In re Song* (Rev.Dept. 2013) 5 Cal. State Bar Ct.Rptr 273, 277-278.

66. A lawyer who retains disputed fees in trust must also seek prompt resolution of the dispute. *Garlow v. State Bar* (1988) 44 Cal.3d 689, 701. A "mistaken belief" that a client has authorized the application of client funds to pay outstanding fees is not a defense to a violation of the rule. *See Dudugian v. State Bar* (1991) 52 Cal.3d 1092, 1097, 1100-1101. Similarly, funds wrongfully acquired by a lawyer or law firm which belong to the client must be held in trust, as a "constructive trustee," for the benefit of the client. *Silver v. State Bar* (1974) 13 Cal.3d 134, 142.

Objectors' Notices of Appeal Unequivocally Put Quinn Emanuel's Right to Receive $184,848,671 of the Common Fund Recovery for Attorney's Fees in "Dispute"

67. The Claims Court's Order awarding attorneys' fees was filed on September 16, 2021. On October 1, 2021, Objectors filed and served Notices of Appeal. Accordingly, Quinn Emanuel knew or should reasonably have known no later than October 1, 2021, that Objectors "disputed" Quinn Emanuel's right to receive $184,848,671 of the common fund recovery being held by the Claims Administrator for "attorney's fees." Not only was there notice of such dispute as of that date, but Objectors were ultimately successful on appeal.

68. Because of Quinn Emanuel's refusal to provide an accounting, Objectors do not know exactly when the firm requested and received funds from the Claims Administrator. Given that RCFC 62(a) imposes an automatic 30-day stay on the execution of a judgment and proceedings to enforce it unless the court orders otherwise, it is reasonable to assume that any such request for and receipt of funds by Quinn Emanuel would not have occurred prior to the expiration of the 30-day stay, lest such request and receipt of funds violate the automatic stay. RCFC 62(a). Notably, none of the materials I reviewed indicated that the trial court "ordered otherwise."

69. If this assumption is correct, the request by Quinn Emanuel for and receipt of funds from the Claims Administrator would have occurred *after* Quinn Emanuel was on express notice that its right to $184,848,671 of the common fund recovery, for attorney's fees, was continuing to be disputed by the Objectors by being appealed to the United States Court of Appeals for the Federal Circuit.

70. In my opinion, the fact that RCFC 62(b) provides a further "procedural mechanism" for a party to obtain a stay, by providing a bond or security, does not dispense with the professional obligations of Quinn Emanuel and its attorneys with respect to being on notice of a dispute regarding their entitlement to $184,848,671 of the common fund recovery in the

class actions, and the handling, maintenance, accounting for, and disbursement of any such funds in their possession *after* they received such notice. RCFC 62(b). A lawyer's professional obligations are not erased by procedural mechanisms that permit parties to challenge or contest judgments.

71. Not only did Quinn Emanuel have notice no later than October 1, 2021, that its right to $184,848,671 was in dispute, it knew prior to that date that the Objectors had disputed that amount of attorney's fees and it knew that Objectors could maintain that dispute by timely filing a notice of appeal. The nature and amount of the fees Quinn Emanuel would receive from any judgment were inherently "unfixed" and expressly dependent on a final and binding determination by the Claims Court. Accordingly, even assuming that Quinn Emanuel received the funds from the Claims Administrator before the Objectors filed Notices of Appeal, Quinn Emanuel knew that the Objectors had disputed the amount of the award and that the Objectors retained the right to continue that dispute by filing Notices of Appeal.

72. Unlike many class actions in which class counsel contracts to receive a specific "contingency fee" or where the matter is settled or resolved pursuant to a stipulated or fixed amount of fees being designated as attorney's fees, the Class Notices in the actions at issue expressly provided that Quinn Emanuel would seek *no more* than 5% of any judgment or settlement obtained and that the *Claims Court* would determine the exact amount based on, among other things, how many issuers participated, the amount at issue in the case, and a so-called "lodestar cross-check" (based on the hours actually worked). *See* United States Court of Appeals for the Federal Circuit, *Health Republic Insurance Company v. U.S.*, Appeal No. 22-1018, Opinion, filed 1/31/2023, p. 5.

73. Accordingly, the calculation of the appropriate amount of attorney's fees to which Quinn Emanuel might be entitled was, from the outset of the representation, uncertain and dependent on a specific and binding evaluation by the Claims Court. Although the Claims Court issued an Order granting a fee award, the award was timely appealed and subsequently vacated

by the Court of Appeal. To this day, Quinn Emanuel's right to receive an attorney's fee award in the respective matters is not "fixed" and is subject to the further determination of the Claims Court and any other appellate proceedings that may occur.

74. Thus, Quinn Emanuel knew or reasonably should have known no later than October 1, 2021, that (1) its right to $184,848,671 of the common fund recovery held by the Claim Administrator for attorney's fees was in "dispute," (2) the Claims Court's Order regarding such fees had been appealed, and (3) if the appeal was successful, the attorney's fees to which Quinn Emanuel was entitled, were dependent on an appropriate determination by the Claims Court – consistent with the requirements of the Class Notices and the Court of Appeals' decision.

75. It is my opinion that Quinn Emanuel had a professional and ethical obligation to hold any disputed attorney's fees it requested and received from the Claims Administrator in an interest-bearing trust account (CRPC 1.15(a) & (c); Model Rule 1.15(a) & (e)), and not to distribute those funds until Objectors' "dispute" regarding Quinn Emanuel's right to such funds was "finally resolved" through the appellate process and any related proceedings. *See* CRPC 1.15(c); Model Rule 1.15(e). Quinn Emanuel's right to such funds would not have been "fixed" once it was on notice of the dispute with the Objectors. *Cf. Miller v. Rau* (1963) (lawyer liable for paying funds to client during pendency of suit of which lawyer had notice, that ultimately held funds due to another); *see also* COPRAC Formal Opinion No. 2006-171, *3 (funds misappropriated from a CTA, or withdrawn before an attorney's fee becomes "fixed" are funds in which the client has a whole or part ownership interest). Nor is Quinn Emanuel's right to such funds currently "fixed." As noted above, the order regarding such funds was vacated on January 31, 2023.

To the Extent Any Disputed Funds in Which Objectors and Other Class Members Had a Financial Interest Were Not Held in a Trust Account or Were Subsequently Distributed by Quinn Emanuel, Such Funds Should be Returned to a Trust Account Pending "Final Resolution" of the "Dispute" Over Quinn Emanuel's Attorney's Fees

76. Where an attorney distributes disputed funds to him or herself *before* the attorney's fee is "fixed" such funds retain their status as funds in which the client has a whole or part ownership interest which must be held in a trust account. It is therefore incumbent that any such distributed funds be put into a trust account pending the final resolution of the dispute. This principle was acknowledged in COPRAC Formal Opinion No. 2006-171:

> "… funds misappropriated from a CTA, or withdrawn *before* an attorney's fee becomes 'fixed' within the scope of rule 4-100(B)(2), *are funds in which the client has a whole or part ownership interest* (citation omitted). As such, misappropriated funds are *ones that have never lost their trust account status and remain subject to rule 4-100 in all respects*."
>
> COPRAC Formal Opinion No. 2006-171, *3 (decided under formal rule 4-100, now rule 1.15) (emphasis added).

77. Here, if Quinn Emanuel distributed any funds received from the Claims Administrator as attorney's fees after it was on notice of the Objectors' dispute, such funds remain funds in which Objectors have an interest and must be placed in an interest-bearing trust account pending final resolution of the dispute over the amount of Quinn Emanuel's attorney's fees.

The Potential Existence of "Judgment Preservation Insurance" Would Not Supplant the Ethical Obligations of Quinn Emanuel and Its Attorneys

78. I understand based on information provided to me that, at some point, Quinn Emanuel likely procured "judgment preservation insurance" related to funds it received from the Claims Administrator. I also understand based on information provided to me that Quinn

Emanuel has not denied procuring such insurance. The specific details of such insurance, when it was procured, what it covers, and the provisions and potential restrictions and/or exclusions that may be associated thereto, are unknown to Objectors at this time. I understand that Objectors have requested such information but, to date, Quinn Emanuel has refused to provide it.

79. It is my opinion that even assuming Quinn Emanuel timely procured judgment preservation insurance regarding any monies it received from the Claims Administrator, such procurement does not dispense with Quinn Emanuel and its attorneys' ethical obligations to safeguard, maintain, and account for related disputed funds consistent with their professional obligations and the rules of professional conduct, including rule 1.15.

Quinn Emanuel's and Its Attorney's Duties Under Rule 1.15 are "Non-Delegable"

80. Neither the CRPC nor the Model Rules provide for deviance from the requirements and Standards of rule 1.15 if "judgment preservation insurance" (or any other kind of insurance) is procured. Moreover, it is well-established that a lawyer's responsibilities for the safety of entrusted funds in client trust accounts are "non-delegable". *See, e.g.*, Mark Tuft, Ellen Peck, Kevin Mohr, *California Practice Guide: Professional Responsibility* (The Rutter Group) (2019), paragraph 9:33, p. 9-5; *Matter of Malek-Yonan* (Rev.Dept. 2003) 4 Cal. State Bar Ct.Rptr. 627, 634-635; *Matter of Robins* (Rev.Dept. 1991) 1 Cal. State Bar Ct.Rptr. 708, 712-714.[7]

[7] The California State Bar's recent enactment of the Client Trust Account Protection Program (CTAPP) underscores the "non-delegable" nature of the safekeeping and accounting obligations of an attorney who handles funds governed by rule 1.15. The CTAPP program, implemented on December 1, 2022, requires all California lawyers, with very few exceptions, to complete an annual self-assessment of client trust account management practices and to certify with the State Bar that they understand and comply with requirements and prohibitions applicable to the safekeeping of funds and property of clients and other persons in rule 1.15 of the Rules of Professional Conduct. The program is designed to protect the public by ensuring proper accounting and safeguards for client funds entrusted to attorneys and educate, support, and assist attorneys in complying with the ethical and accounting requirements of managing client trust accounts. The self-assessment and certification are required from any licensee who at any point during the reporting period, (1) acted

81. In my opinion, taking out judgment preservation insurance does not entitle a lawyer to forego his or her professional obligations regarding the safekeeping, management, accounting for, and distribution of entrusted funds. If that were true, lawyers could distribute disputed funds to themselves in violation of the rules simply by establishing or proving that they had other funds or resources sufficient to replace the disputed funds should they lose the dispute. Allowing such conduct would be contrary to traditional notions of the duties accompanying fiduciaries and trustees, and their respective obligations to maintain entrusted funds.

Taking a Client's or Other Person's Funds to Which Counsel Is Not Entitled Can Constitute Misappropriation and Subject a Lawyer to Discipline

82. Misappropriation is the unauthorized use or withholding by an attorney of entrusted funds. *See* Mark Tuft, Ellen Peck, Kevin Mohr, *California Practice Guide: Professional Responsibility* (The Rutter Group) (2019), paragraph 9:375, p. 9-76. "Misappropriation of client funds has long been viewed as a particularly serious ethical violation … It breaches the high duty of loyalty owed to the client, violates basic notions of

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as a signatory or exercise managerial or administrative oversight for a trust account, or (2) represented a client in a matter in which funds have been received and were responsible for complying with any of the requirements or prohibitions in rule 1.15 of the Rules of Professional Conduct. State Bar of California, Frequently Asked Questions: Client Trust Account Protection Program, https://www.calbar.ca.gov/Portals/0/documents/ctapp/CTAPP-FAQ.pdf, pp. 1, 3.

This includes lawyers who don't do the accounting. "If a lawyer is representing a client and they or their office has received funds from or for that client, the lawyer is responsible for those funds. The lawyer remains ultimately responsible even if nonlawyers are assigned certain accounting tasks for those funds; for example, bookkeeping and banking related to client trust accounts. In addition, recordkeeping activities are only one part of a lawyer's duties to properly handle entrusted funds. Other duties include, for example, identifying and resolving disputes about entitlement to trust funds, and these duties ordinarily are not the job of a firm's bookkeeper. *All of these responsibilities are considered nondelegable duties*. The proactive regulation, reporting, and monitoring of the CTAPP are intended to promote a lawyer's compliance and prevent avoidable financial harm to clients. The only aspect of CTAPP reporting that can be fulfilled by the lawyer's firm is the annual registration of client trust accounts by a firm or organization that is registered with the State Bar's Agency Billing platform." *Id*. at 5 (emphasis added).

honesty, and endangers public confidence in the legal profession." *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656; *see also* COPRAC Formal Opinion No. 2006-171, *3 (misappropriated funds are funds in which the client has a whole or part ownership interest).

83. Willful misappropriation of a client's funds can involve "moral turpitude" within the meaning of Cal. Bus. & Prof.C. section 6106, and thus be cause for disbarment or suspension. *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1035. A willful violation of a rule of professional conduct does not require that the lawyer intend to violate the rule. *See* CRPC 1.0, Comment [3].

84. A lawyer's "restitution" of funds that he or she was unauthorized to use or withhold is *not a defense* against a violation of the rules of professional conduct regarding the safekeeping of funds. *See, e.g.*, *In the Matter of Elliott* (Review Dept. 1996) 3 Cal. State Bar Crt. Rptr. 541, 544 (restitution is not a defense to misappropriation, but it can be a mitigating factor in determining the amount of discipline). Nor does an alleged "lack of harm" to the person who has an interest in the entrusted and misappropriated funds excuse a lawyer's improper handling of such funds. *See, e.g.*, *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 (clients entrusted funds to counsel and depended on counsel to administer the funds from an interest-bearing account; counsel deprived the clients of interest the funds would have earned had they remained in the trust accounts; and "[counsel] abused the trust and confidence placed in him to gain a monetary advantage for himself. *His misconduct is not excused in any way merely because his client ultimately suffered no loss*") (emphasis added); *see also Bernstein v. State Bar* (1990) 50 Cal.3d 221, 232.

85. Additionally, "restitution" of misappropriated funds or the alleged "absence" of financial harm to a person who has an interest in entrusted funds does not answer the question of whether ethical obligations were violated in connection with the handling and safekeeping of the funds, regardless of whether other funds may be available to cover the misappropriated funds. As discussed in more detail below, the existence of ethical violations by class counsel is something a

court can consider in determining an appropriate fee award.

86. In my opinion, it would be ethically improper for an attorney or law firm to ignore compliance with the requirements of rule 1.15 simply because he or she has obtained insurance with respect to entrusted funds. Not only is the notion of preservation insurance as a "substitute" for holding actual disputed funds in trust contrary to the rules of professional conduct, but it also unnecessarily injects a third person (i.e., the insurer(s)) and their respective interests into the maintenance, control, and disbursement of such funds.[8]

87. The extent to which such third-person interests might control or dictate how Quinn Emanuel will go about seeking attorney's fees on remand or on further appeal, or the timing and distribution of any funds the Claims Court may subsequently determine belong to the classes, is presently unknown. The details of such an insurance policy, however, could illuminate whether, and the extent to which, the interests of the insurer(s) might impact the control, management, accounting, and/or distribution of such funds, and the position Quinn Emanuel takes with respect to such funds in its renewed request for attorney's fees.

Quinn Emanuel Had an Ethical Obligation Not to Allow Its Own Interests to "Materially Limit" Its Professional Obligations to the Objectors, Including Compliance With Duties Regarding the Safekeeping of Funds

88. Lawyers representing a class must provide conflict-free representation. *See* Mark Tuft, Ellen Peck, Kevin Mohr, *California Practice Guide: Professional Responsibility* (The

[8] It is generally recognized that lawyers should exercise "independent professional judgment" with respect to their representation of clients, and not permit the financial interests of third persons to dictate decisions regarding such representation or the lawyers' compliance with rules of professional conduct. *See*, *e.g.*, CRPC 2.1 ("in representing a client, a lawyer shall exercise independent professional judgment and render candid advice"); Model Rule 2.1 (same); CRPC 1.8.6 (a lawyer shall not accept compensation from one other than the client unless there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship and the client provides informed written consent); Model Rule 1.8(f) (same). It would be ethically improper for a lawyer to let their independent professional judgment regarding compliance with ethical rules regarding the safekeeping, accounting and/or distribution of funds to be dictated or influenced by the third-party interests of a judgment preservation insurer.

Rutter Group) (2019), paragraph 4:157.23, p. 4-102; *see also Jaurigui*, *supra*, 82 F.R.D. at 66. All class actions, however, present a potential conflict between the class counsel's interest in maximizing his or her fees and the class members' interest in maximizing their recovery. *See Zucker v. Occidental Petroleum Corp.* (9th Cir. 1999) 192 F.3d 1323, 1326-1327.

Rule of Professional Conduct 1.7 Requires Consent for a Current Client "Material Limitation" Conflict Under CRPC 1.7(b) and Model Rule 1.7(a)(2)

89. Objectors' "dispute" with Quinn Emanuel regarding the firm's asserted entitlement to $184,848,671 for attorney's fees from the common fund recovery was and is adversarial in nature. Both California's Rules of Professional Conduct and the Model Rules recognize that a conflict exists where there is a "significant risk the lawyer's representation of the client will be *materially limited by … the lawyer's own interests*." CRPC 1.7 (b) (emphasis added); Model Rule 1.7(a)(2).

90. Material limitation conflicts based on a lawyer's own financial interests risk impairment of the lawyer's duty of loyalty to the client. *Flatt*, *supra*, 9 Cal.4th at 288, *citing Anderson v. Eaton* (1930) 211 Cal. 113, 116. A breach of the duty of loyalty may also support a claim for breach of fiduciary. *See, e.g.*, *Growth Centre City, Ltd. v. Sildorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1151. Such conflicts are improper – absent the informed consent of each affected client. *See* CRPC 1.7(b) (lawyer must obtain "informed written consent*"[9]; Model Rule 1.7(b)(4) (informed consent must be "confirmed in writing").[10]

[9] Pursuant to CRPC 1.0.1(e) "Informed Consent" means "a person's* agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct." "Informed Written Consent" means that "the disclosures and the consent required by paragraph (e) must be in writing." CRPC 1.0.1(e-1).

[10] Comment [25] to Model Rule 1.7 states "When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer *for purposes of applying paragraph (a)(1) of this Rule*. Thus, the lawyer does not typically need to get the consent of such a person before representing a

None of the materials I reviewed indicate that the Objectors ever provided informed consent to any personal interest (or other) conflict of Class Counsel, or to the distribution by Quinn Emanuel of any funds from the common fund recovery to itself for attorney's fees.

Quinn Emanuel and Its Attorneys Cannot Ethically Permit a "Material Limitation" Conflict Based on Their Financial Interests to Impair Their Compliance with the RPC

91. A "material limitation' conflict exists "if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other … interests." CRPC 1.7, Comment [4]; *see* also Model Rule 1.7, Comment [8] (same). The "[c]ritical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with a lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of each client." *Id*.

92. In my opinion, if Quinn Emanuel requested and received monies from the common fund recovery from the Claims Administrator for attorney's fees following the Objectors' filing of the Notices of Appeal from the Claims Court's Order awarding fees, and

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client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter." (Emphasis added). Model Rule 1.7(a)(1), however, refers specifically to "direct adversity" conflicts between two or more current clients of the lawyer. Model Rule 1.7(a)(1) does not state that unnamed members of the class are treated as "non-clients" for purposes of "material limitation" conflicts under Model Rule 1.7(a)(2). Even as to "direct adversity" conflicts under Model Rule 1.7(a)(1), the ABA Comment does not state that unnamed class members are *never* clients of class counsel; the Comment just says that their "consent" is typically not required for a "direct adversity" conflict. Notably, CRPC 1.7 does not contain any Comment equivalent to Model Rule 1.7's Comment [25]. *See also* Mark Tuft, Ellen Peck, Kevin Mohr, *California Practice Guide: Professional Responsibility* (The Rutter Group) (2019), paragraph 3:131.20, p. 3-72 ("… where the *class is certified*, an attorney acting as class counsel represents *all class members (including unnamed members)*" (emphasis in original), *citing In re Agent Orange Prod. Liab. Litig.* (2nd Cir. 1986) 800 F.2d 14, 18 (class attorney is guardian of the class and owes fiduciary duty to each member) and *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 693.

then distributed those funds to itself or others while a known appeal was pending, without its clients' informed consent, Quinn Emanuel promoted its own financial interests and failed to comply with the requirements of CRPC 1.7(b) and Model Rule 1.7(a)(2).

93. Regardless of whether Quinn Emanuel agreed with the Objectors' position, CRPC 1.7 and Model Rule 1.7 (and CRPC 1.15 and Model Rule 1.15) would require any disputed funds held by the firm to be placed in a trust account and would preclude the distribution of such funds pending final resolution of the dispute. No later than the filing of Objectors' Notices of Appeal, Quinn Emanuel knew or reasonably should have known that its entitlement to $184,848,671 of the common fund recovery for attorney's fees was "disputed". This dispute constituted an actual difference in interests between Class Counsel and the Objectors.

94. To the extent Quinn Emanuel proceeded to receive disputed funds and did not place those funds in a trust account, and/or distributed the disputed funds to itself or its attorneys or others while the dispute remained pending, its actions failed to comply with the principles set forth in CRPC 1.15 and Model Rule 1.15 to safekeep disputed funds. Regardless of the disagreement over the amount of a fee award, Quinn Emanuel continued to owe fiduciary obligations to the Objectors and all class members.

95. In my opinion, the "reasonable" course of action to be pursued by Quinn Emanuel (CRPC 1.7, Comment [4]; Model Rule 1.7, Comment [8]) was to hold, safeguard, and account for, any disputed funds received, consistent with the requirements of rule 1.15. Failing to do so – and instead distributing disputed funds to itself or its attorneys or others because of Quinn Emanuel's own interest in receiving a $184,848,671 attorney's fee award – would be placing the Class Counsel's own personal interests above those of the Objectors who were clients and members of the class. Such "self-help" conduct would enable Class Counsel's own financial interests to "materially limit" compliance with their professional obligations – obligations owed to the client as part of the representation (i.e., it would be treating the disputed funds as the attorney's property when the attorney knows that his or her entitlement to such funds is disputed

and should, under the rules of professional conduct, be held in a trust account pending resolution of the dispute).

96. It is my further opinion that such self-help conduct would also be a breach of Class Counsel's duty of loyalty and the fiduciary obligations owed to the Objectors.

The Standard of Care

97. In performing legal services for a client "an attorney has the duty to have that degree of learning and skill ordinarily possessed by attorneys of good standing, practicing in the same or similar locality and under similar circumstances". *Smith v. Lewis* (1975) 13 Cal.3d 349, 35, fns. 3 and 14 (approving jury instructions to that effect) (disapproved on other grounds by *Marriage of Brown* (1976) 16 Cal.3d 838, 851). A lawyer must also "use the care and skill ordinarily exercised in like cases by reputable members of his [or her] profession practicing in the same or a similar locality under similar circumstances …." *Id.*; *see also* CACI 600 (Standard of Care).

98. It is my opinion that for class counsel to create a conflict of interest between their own financial interests, and class members (such as Objectors), with respect to common fund monies, by requesting and treating knowingly disputed funds as their own and then distributing such funds to themselves, despite knowledge of the dispute, and in contravention of their professional obligations to account for, maintain, and preserve disputed funds, and to try and delegate their maintenance, accounting, and preservation obligations regarding such funds to a third-party insurer, would be below the standard of care. *See, e.g., Mirabito*, *supra*, at p. 45 ("[A]n attorney's duties to his clients are conclusively established by the rules of professional conduct …"); *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1147 ("An attorney's duty, the breach of which amounts to negligence, is not limited to his failure to use the skill required of lawyers … it is a wider obligation to exercise the care to protect a client's best interests in all

ethical ways ... The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct.").

The Impact of Ethical Obligations on Potential Fee Recovery

99. While it is beyond the scope of my engagement to render an opinion on what consequences, if any, should result from my analysis and opinions, I do note that there is authority recognizing that courts have broad equitable powers to deny an award of fees, in whole or in part, when class counsel commits an ethical violation. *See, e.g.*, Mark Tuft, Ellen Peck, Kevin Mohr, *California Practice Guide: Professional Responsibility* (The Rutter Group) (2019), paragraph 5:1026.4, pp. 5-221-222; *Rodriguez v. Disner* (9th Cir. 2012) 688 F.3d 645, 653-655; *Lofton v. Wells Fargo Home Mortg.* (2014) 230 Cal.App.4th 1050, 1065.

100. Similarly, outside of the class counsel context, it is generally recognized that where conflict rules are violated, such violations may affect an attorney's right to recover fees. *See, e.g.*, *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1151 ("California courts have often held that when the ethical violation in question is a conflict of interest between the attorney and the client … the appropriate fee for the attorney is zero"); *see also United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.* (9th Cir. 1996) 89 F.3d 574, 579.

101. Given these principles, the facts regarding Quinn Emanuel's receipt, management, accounting for, and/or disbursement of funds received from the Claims Administrator bear materiality beyond simply ensuring that the "disputed funds" are protected and maintained for purposes of the final resolution of the dispute; such facts fall within the scope of information the Claims Court may consider in assessing whether there have been any ethical violations and determining any appropriate fee award on remand.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the facts in my declaration are true and correct, the opinions and

conclusions in my declaration are based on my analysis, research, and support as set forth, and that I executed this declaration on May 2, 2023, in San Leandro, California.

DocuSigned by:

2D1D6D224DC24B6...

Andrew I. Dilworth

EXHIBIT A

Andrew I. Dilworth

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San Francisco, California 94111
(415) 952-3002
drew@oriellyroche.com

LEGAL PRACTICE

Partner with the firm of O'Rielly & Roche LLP; principally engaged in counseling and representing lawyers and law firms on matters of legal ethics and professional responsibility, including legal malpractice actions and other litigation or claims brought by, against, or between lawyers. Experience includes conflicts of interest, fee issues, and other matters of professional responsibility; representing lawyers in malpractice actions, State Bar proceedings, disqualification matters, contempt proceedings, and other court-initiated matters; counseling and litigation regarding lawyer departures and law firm dissolutions; advisement on compliance with the rules of professional conduct, risk management, and law practice management issues; and serving as an expert on issues of professional responsibility.

LEGAL EDUCATION

J.D., University of San Francisco School of Law, June 1995. Graduated *cum laude*.

- Academic Honors

PROFESSIONAL ASSOCIATIONS AND AWARDS

- Member, California Lawyer's Association Ethics Committee (2022 to present)
- Board Member, Pilot Legis (2018 – 2021)
- Chair, Risk Management Committee, Pilot Legis (2018 – 2021)
- Advisor, State Bar of California's Committee on Professional Responsibility and Conduct (2018-2019)
- Chair, State Bar of California's Committee on Professional Responsibility and Conduct (2017-2018)
- Vice-Chair, State Bar of California's Committee on Professional Responsibility and Conduct (2016-2017)
- Chair, Bar Association of San Francisco Legal Ethics Committee (2012-2013)
- Vice-Chair, Bar Association of San Francisco Legal Ethics Committee (2010-2011)
- Member, Association of Professional Responsibility Lawyers (APRL)
- Member, Association of Discipline Defense Counsel (ADDC)

PUBLICATIONS AND TEACHING

- Author of several articles in the area of professional responsibility, appearing in publications such as the California Bar Journal, The Bar Association of San Francisco's Bulletin; the Media Law Resource Center Ethics Column; and Los Angeles Lawyer. Recent articles include Daily Journal, February 24, 2017 "The 'Self Defense' Exception to Confidentiality."

- Panelist in continuing legal education and other programs. Recent presentations include: Pilot Legis RPG Mid-Year Program, May 6, 2022, "Changing Culture of Law Firm Practice"; State Bar of California Twenty-Third Annual Ethics Symposium, April 12, 2019, "Ethics Update – What You Need to Know"; USC Gould School of Law 60th Annual Institute on Entertainment Law and Business, October 20, 2018, "Ethics Update – What You Need to Know"; State Bar of California Twenty-Second Annual Ethics Symposium, April 6, 2018, "Ethics Update – What You Need to Know"; Pilot Legis 10th Annual Mid-Year Program, June 9, 2017, "The Perpetual Problem of UPL"; State Bar of California Annual Meeting, September 30, 2016, "Huffing, Puffing and Bluffing: The Bounds of Legal Ethics In Negotiations"; State Bar of California Annual Meeting, September 30, 2016, "My Lips Are Sealed: Client Secrets, Confidences and the Attorney-Client Privilege"; Lake County Bar Association, June 14, 2016, "Recent Developments In Legal Ethics"; State Bar of California Annual Meeting, October 9, 2015, "Ethics For the Solo and Small Firm Lawyer"; Bar Association of San Francisco, September 22, 2015, "The Frontier of Ethics, Social Media and Advertising"; ABA Fall 2015 National Legal Malpractice Conference, September 17, 2015, "Location, Location, Location: The Decisions Involved in Venue Selection"; San Francisco Trial Lawyers Association, January 9, 2015, "How to Ethically and Effectively Use Social Media In Today's Online World"; Contra Costa Bar Association MCLE Spectacular, November 21, 2014, "Ethics in Social Media and Information Technology"; Pilot Legis Annual Conference, November 8, 2014, "Recognizing the Near, Faux and Wannabe Client"; State Bar of California Annual Meeting, September 12, 2014, "Starting Off on the Right Foot: Addressing Ethics Issues at the Outset"; Bar Association of San Francisco, January 28, 2014, "Navigating the Internet Highway and Legal Ethics;" Bar Association of San Francisco, January 24, 2013, "Ethical Considerations In Joint Representation"; ABA Fall 2012 National Malpractice Conference, September 5-7, 2012, "Tightrope Walking When Managing Disciplinary Proceedings and Legal Malpractice Actions"; Lawyers Associated Worldwide, March 30, 2012, "Cross-Border Legal Ethics"; Pilot Legis, November 6, 2011, "Risk Management Roundtable"; Strafford Publications, February 11, 2009, "Law Firm Internal Ethics Counsel: Meeting the Ethical Obligations"; Strafford Publications, December 18, 2007, "Ethical Risks of Outsourcing Legal Services"; Berkeley/Albany Bar Association , September 17, 2007, "Professional Responsibility Update:

Recent Developments"; USF School of Law 2006 Reunion Weekend, October 21, 2006, "Legal Ethics and the Internet."

- Lecturer, UC Berkeley School of Law, Legal Profession (Fall 2020 to present)
- Adjunct Professor, University of San Francisco School of Law, Legal Ethics (2005-2017)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:16-cv-259C-KCD (Judge Davis)
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-KCD (Judge Davis)

DECLARATION OF GEORGE R. CLARK IN SUPPORT OF OBJECTORS' MOTION FOR AN ORDER DIRECTING AN ACCOUNTING AND SAFEKEEPING OF THE DISPUTED FUNDS AND LIMITED DISCOVERY

I, George R. Clark, declare as follows:

1. My name is George R. Clark. I have been designated as an expert witness by the United and Kaiser Objectors ("Objectors").[1] My CV is attached to this Report as Exhibit A. My

[1] Objectors include Kaiser Foundation Health Plan, Inc., Kaiser Foundation Health Plan of Georgia, Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., Kaiser Foundation Health Plan Inc. of Colo., Harken Health Insurance Company, Health Plan of Nevada, Inc., Oxford Health Plans (NJ), Inc., Rocky Mountain Health Maintenance Organization, Incorporated,

opinions are based on information provided to me by Objectors' counsel. I am informed that discovery will be requested by the Objectors and the Court will rule on that request. In the event discovery is granted or other information is disclosed in this matter bearing on my opinions, my opinions are subject to revision and addition as the circumstances are appropriate.

QUALIFICATIONS

2. I am a member of the Bars of the District of Columbia (1973) and Illinois (1972, inactive as of 2021). I am Chair of the D.C. Bar's Ethics Committee, serving as Chair from July 1, 2022, until my two three-year terms end on June 30, 2023. I was Vice-Chair from 2021 to 2022. I also served six years on the D.C. Bar's Rules of Professional Conduct Review Committee (the last three as Chair) (2006-2012). That Committee is responsible in the first instance for suggesting changes to the Rules of Professional Conduct.

3. I was President of the Association of Professional Responsibility Lawyers (APRL) from 2017 to 2018. APRL has approximately 450 members in more than 40 States and in other countries. Its membership includes lawyers who represent other lawyers (and sometimes other lawyers' clients) in all aspects of legal ethics and professional responsibility. In addition to representing respondents in disciplinary matters, APRL lawyers also advise lawyers and law firms on risk management, legal malpractice, lateral transitions, and other aspects of the law of lawyering. APRL also numbers academics and judges among its members. It is the largest organization of private practitioners devoted exclusively to this area of the law. As APRL

UnitedHealthcare Benefits Plan of California, UnitedHealthcare Community Plan, Inc., UnitedHealthcare Insurance Company, UnitedHealthcare Life Insurance Company UnitedHealthcare of Alabama, Inc., UnitedHealthcare of Colorado, Inc., UnitedHealthcare of Florida, Inc., UnitedHealthcare of Georgia, Inc., UnitedHealthcare of Kentucky, Ltd., UnitedHealthcare of Louisiana, Inc., UnitedHealthcare of Mississippi, Inc., UnitedHealthcare of New England, Inc., UnitedHealthcare of New York, Inc., UnitedHealthcare of North Carolina, Inc., UnitedHealthcare of Oklahoma, Inc., UnitedHealthcare of Pennsylvania, Inc., UnitedHealthcare of the Mid-Atlantic, Inc., UnitedHealthcare of the Midlands, Inc., UnitedHealthcare of the Midwest, Inc., UnitedHealthcare of Utah, Inc., UnitedHealthcare of Washington, Inc., UnitedHealthcare of Ohio, Inc., Rocky Mountain HealthCare Options, Inc., All Savers Insurance Company, and CareConnect Insurance Company, Inc. fka North Shore-LIJ Insurance Company Inc.

President, I also served on the Coordinating Council of the ABA Center for Professional Responsibility.

4. From January 2004 through the present, I have engaged in the practice of law in my own solo practice firm, practicing exclusively in ethics, professional responsibility, risk management, and the law of lawyering, including malpractice, breach of fiduciary duty, conflicts of interest, and other professional liability claims. I represent lawyers, law firms, and their clients with respect to these subject matters. In my current practice I deal daily with ethical rules, opinions, and related issues in individual states across the country. I frequently advise lawyers on their obligations and rights concerning fee issues, their obligations of disclosure to clients and third parties, and their fiduciary duties.

5. From 1980 through 2003, I was a partner at the law firm of Pierson, Ball & Dowd, and then at Reed Smith when my former firm merged into Reed Smith in 1989. From approximately 1982 through the end of 2003, I was the partner who dealt with all questions in Washington, D.C. and other locations for those firms concerning ethics, professional responsibility, risk management, and related issues. My responsibilities also required that I stay current with respect to ethical issues in the legal profession. I regularly dealt with the ethics rules and opinions in individual states around the country in the course of my in-house representation of Reed Smith. At the time I left Reed Smith to open my own practice at the start of 2004, there were approximately 1,000 lawyers in the firm with offices across the United States and in England.

6. As a result of my background, experience, and training in the practice of law, and in ethics-related questions pertaining to that practice, including the applicable ethics rules, opinions, and case law, I am familiar with the obligations and fiduciary duties owed to clients when engaged in the practice of law, the rules and practices relating to conflicts of interest, and the standard of care that an attorney, having the skill and knowledge ordinarily possessed by a reasonably prudent attorney acting under the same or similar circumstances, should exercise.

7. There may be a number of factual disputes in this matter, where the record to date is either contradictory or ambiguous. Some of these disputed factual issues are material to my opinions. It is not my province to weigh the evidence and reach conclusions on disputed issues of fact. Where certain facts are necessary to an opinion I express in this Report, I have made assumptions of those facts and have so indicated. But I am not offering a professional opinion as to the accuracy of those factual assumptions.

FACTUAL BACKGROUND

8. My opinions are based on the following assumed facts.

9. Quinn Emanuel Urquhart & Sullivan, LLP ("Class Counsel") filed *Health Republic Insurance Company v. United States*, No. 1:16-cv-259 in February 2016, and *Common Ground Healthcare Coop. v. United States*, No. 1:17-cv-877 in June 2017, as putative class actions against the United States on behalf of health plans participating in the Affordable Care Act's risk corridors program.

10. The Opt-in Notice to potential class members, drafted by Class Counsel and approved by the Court, provided the following statements telling potential class members that Class Counsel would be their lawyer if they opted in to the class:

> **IV. The Lawyers Representing You**
>
> **11. Do I have a lawyer in this case to represent me?**
>
> The Court has decided that attorneys at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, led by partners Stephen Swedlow, J.D. Horton, and Adam Wolfson, are qualified to represent you and all Class Members. Quinn Emanuel Urquhart & Sullivan, LLP is called "Class Counsel." Class Counsel has experience handling this type of lawsuit. More information about Class Counsel is available at: www.quinnemanuel.com.
>
> **12. Should I get my own lawyer?**
>
> You do not need to hire your own lawyer because Class Counsel will work on your behalf and represent your interests if you join the Class. You have the right to have your own lawyer. Your own lawyer can appear in court for you if you

> want someone other than Class Counsel to speak on your behalf. If you choose to hire your own lawyer, you will have to pay that lawyer.

11. Class Counsel further stated that all Class Members who join the lawsuit would be considered "Plaintiffs" on page 3 of the Notices drafted by Class Counsel and approved by the Court, creating at least fiduciary duties towards the class for both Class Counsel and the Court:

> **4. What is a class action and who is involved?**
>
> In a class action lawsuit, one or more people or entities called "Class Representatives" (in this case Common Ground Healthcare Cooperative [or Health Republic Insurance Company]) sue on behalf of other people or entities who have similar claims. These people or entities together are a "Class" or "Class members." The people or entities who sued—and all the Class Members who join the lawsuit—are called "Plaintiffs."

12. The Court certified the proposed opt-in classes in *Health Republic* and *Common Ground* and appointed Quinn Emanuel as Class Counsel.

13. Both cases were stayed pending appeals in other related cases which were eventually resolved in the health plans' favor by the Supreme Court in April 2020. *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020). In light of *Maine Community*, the Court entered megafund judgments in favor of the health plans in amounts totaling approximately $3.7 billion.

14. In July 2020, Class Counsel moved for attorney's fees of 5% of the $3.7 billion common fund (or approximately $185 million). In August 2020, the Objectors (joined by several other class members) filed objections to the $185 million fee request.

15. The Court granted Class Counsel's fee petition for $185 million on September 16, 2021 and entered RCFC 54(b) judgment on September 17, 2021. The Objectors filed notices of appeal on October 1, 2021. RCFC 62(a) automatically stayed execution of the September 17, 2021 judgment for 30 days, or until October 17, 2021.

16. Based on information provided to me, my understanding is that Class Counsel then requested the claims administrator to disburse the fee award to the firm. It is also my understanding that Class Counsel, unbeknownst to the Objectors, did or may have purchased

some form of "judgment preservation insurance" ("JPI") in connection with distributing the $185 million fee award to its partners following the Objectors' filing of the appeal.

17. In January 2023, the United States Court of Appeals for the Federal Circuit vacated the fee award and remanded both cases for further evaluation of the fee petition.

18. I am also informed that Objectors have requested, but Class Counsel has not provided, an accounting of the $185 million fee award. It is also my understanding that the Objectors have requested that Class Counsel return the disputed funds to an interest-bearing client trust account and that Class Counsel disclose information relating to any JPI procured in relation to the distribution of the funds to the partners. I am informed that Class Counsel has done neither.

EXPERT OPINIONS

19. The ABA Model Rules and the D.C. Rules of Professional Conduct both obligate lawyers to do several things when lawyers hold disputed property on behalf of clients or third parties. Whether Objectors were clients or third parties, the lawyer's accounting and safekeeping obligations remain the same.

20. The following opinions are based upon my qualifications and the assumed facts discussed above.

OPINION ONE

21. It is my opinion that the Objectors were clients of Class Counsel for purposes of the ethical rules. The basis for my opinion is that: (i) the classes were certified by the Court; (ii) the Opt-in Notice to potential class members told them that Class Counsel would be their lawyer if they opted in to the class; and (iii) the class members had to opt-in to join the class, which included affirmatively selecting Class Counsel as their lawyers. *See* ABA Formal Op. 07-448 (October 20, 2007) ("Additionally, unnamed class members in a class action lawsuit will be deemed after certification of the class to be represented by class counsel, absent their affirmative election to 'opt out' of the certified class.") Each of the Objectors are identified Class Members

who opted-in to join the cases as plaintiffs. Thus, contrary to Class Counsel's assertion, Objectors are not "unnamed members of the class" as contemplated and discussed in Comment 25 to ABA Rule 1.7 (assuming, for argument's sake, that Comment had any application outside of Rule 1.7). Moreover, the Federal Circuit held that the Notice controls, so the funds relate to a "representation" under Rule 1.15.

22. The duties discussed below, however, exist whether Objectors were clients or third parties. Even if the Objectors were not clients, they are third parties with a "just claim." *See* D.C. Ethics LEO 293 (Disposition of Property of Clients and Others Where Ownership Is in Dispute). Therefore, Rule 1.15's accounting and safekeeping requirements discussed below apply either way.

OPINION TWO

23. It is my opinion that Class Counsel has an ethical obligation to render a complete accounting of all information concerning the location, treatment, disposition and current status of all the attorneys' fees awarded by the Court and dealt with in any way by Class Counsel. The basis for my opinion is ABA Model Rule of Professional Conduct Rule 1.15(a)&(d) as well as D.C. Rule of Professional Conduct 1.15(a)-(d), which provide that Class Counsel was and is obligated to provide "upon request by the client or third person… promptly … a full accounting regarding such property."

24. Hazard, Hodes & Jarvis, The Law of Lawyering § 20.05 (2022) explains that Rule 1.15(d)'s requirements concerning disputed funds are analogous to a lawyer's duties under Rule 1.15(a) when holding a client's property, which mirror the obligations under the Restatement of the Law Governing Lawyers:

> "Rule 1.15(d) simply imposes the same fiduciary duties as in situations where the lawyer is holding a client's money or property—the interested party must be notified of the availability of the property, and prompt delivery must be made of whatever that party is "entitled to receive." These requirements, and the further requirement of an accounting whenever requested, are mirrored in Restatement of the Law Governing Lawyers §§44(2) and 45(1)."

25. So whether the Objectors were clients or "interested part[ies]," Class Counsel was and is obligated to give notice of distribution from the Claims Administrator to itself and full and complete detailed accounting of how the funds have been handled and moved. Here, Class Counsel made this distribution without any of the required accounting for the funds or trace of notice where they might end up.

26. The accounting extends to full details of the attorney's handling of the funds because the Objectors have made a non-frivolous claim for the disputed amounts. As Comment 2 to D.C. Rule 1.15 states (quoting in part from *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003)):

> "The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. *The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Disciplinary Counsel can be completed even if the attorney or the client, or both, are not available." Rule 1.15 requires that lawyers maintain records such that ownership or any other question about client funds can be answered without assistance from the lawyer or the lawyer's clients.* (Emphasis added.)

27. The Rule requires that the accounting be one that can be audited for compliance without any assistance from Class Counsel. In the circumstances here, it is my opinion that the "complete records" contemplated by the rule includes the terms of the JPI and what the insurers were told in the underwriting, assuming Class Counsel asserts that the JPI "demonstrate[s] an attorney's compliance with his ethical duties." That is because, if Class Counsel contends that the JPI is relevant to determining whether the funds were handled appropriately, then the full details of that JPI must be disclosed so that any questions about the client funds can be answered "without assistance" from Class Counsel.

28. Nothing relieves Class Counsel from their obligation under Rule 1.15 to provide a complete accounting for five years after the representation ends. Rather, the obligation continues as long as the funds remain in dispute as further discussed below.

OPINION THREE

29. It is my opinion that Class Counsel has an ethical obligation to segregate disputed funds (whether claimed by the client or any other party) in an interest-bearing trust account until the dispute is resolved. The basis for my opinion is that ABA Model Rule 1.15(a)&(e) and Comment 1 thereto (along with D.C. Rule 1.15(a)&(d)) require funds disputed by a client or third party to be held separate from the lawyer's and identified as such. *See* ABA Model Rule 1.15(e) ("When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved.").

30. Class Counsel was on notice, at least by the time the notices of appeal were filed on October 1, 2021, that the $185 million fee award was "disputed" as contemplated by Rule 1.15. As such the terms of Rule 1.15 required Class Counsel to follow the Rule's safekeeping requirements by segregating the disputed funds and holding them in trust pending final resolution of the fee award.

31. Moreover, where sums in dispute are large, the attorney's obligation is to sequester the funds in an interest-bearing account. *See* ABA Commission on Interest Lawyers' Trust Accounts Overview ("Lawyers often handle money that belongs to clients . . . . Sometimes the amount of money that an attorney handles for a single client is quite large. In such cases, lawyers deposit the funds into trust accounts, where the funds can earn interest for the client."); D.C. Rules of Prof'l Conduct R. 1.15(b) (materially same).

32. Nothing relieves Class Counsel from their obligation under Rule 1.15 to safeguard disputed funds in an interest-bearing trust account. In particular, procuring JPI does not relieve Class Counsel of this obligation. Nothing in the ethical rules recognizes such an exception. Further, the purpose of the rule is to ensure the utmost protection of the client funds and make those funds immediately available to the client, without risk of diminution, upon resolution of a dispute over the funds. A financial product such as JPI, which relies on performance by a third

party and is subject to terms and conditions that may delay or limit payment, cannot plausibly provide the same assurance of immediate and full payment as does keeping the funds in an interest-bearing account.

OPINION FOUR

33. It is my opinion that the obligations to safeguard disputed funds and provide a complete accounting are non-delegable (such as via insurance) and continue through final disposition of the fee award. Model Rule 1.15(e) and D.C. Rule 1.15(d) both require the disputed funds to be kept in trust until the dispute is resolved. D.C. Ethics LEO 293 (2000) makes clear this is final resolution after all appeals are exhausted. *See also In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995). Class Counsel knew the dispute was not resolved because, at a minimum, it knew Objectors had appealed the fee award before Class Counsel could have distributed the funds to itself. Court procedural rules with respect to judgments do not override the ethical obligations of a lawyer.

34. Class Counsel may say "don't worry" we have judgment preservation insurance, but the terms and conditions of that insurance, including the basic fact of who it is payable to, are again not revealed by Class Counsel despite the provisions of Rule 1.15. The failure to abide by the requirement of Rule 1.15 to place disputed funds (of a non-nominal amount) in an interest-bearing trust account violates the Rule even if the client suffers no direct financial harm or the funds are not dissipated. *See In re Gray*, 224 A.3d 1222, 1233-34 (D.C. 2020); Bennett et al., ABA Annotated Model Rules of Professional Conduct p.300 (10th ed. 2023). This duty is non-delegable. Insurance does not substitute for placing the funds in a trust account, for the reasons explained in paragraph 32.

OPINION FIVE

35. It is my opinion that Class Counsel's distribution of the funds to itself and procurement of the JPI, depending on its terms, violate Model Rule 1.7 and its D.C. equivalent, which require a lawyer to provide conflict-free representation. Model Rule 1.8 and its D.C.

equivalent also specifically preclude a lawyer from "knowingly acquir[ing] an ownership, possessory, security, or other pecuniary interest adverse to a client" unless certain conditions are complied with. Here, based upon information provided to me, it appears Class Counsel has substituted "judgment insurance" for the placing of the disputed funds in an interest-bearing trust account as required by Rule 1.15. Despite several requests, Class Counsel has not disclosed the terms of this insurance, including even who may make a claim on it and under what conditions. Likewise, my understanding is that Objectors were not informed about the insurance or asked to agree to it even though it may adversely affect their rights. Class Counsel was not permitted to unilaterally take possession of disputed client funds or enter into an agreement adverse to Objectors in order to facilitate any distribution of those funds to its partners.

36. In addition, this substitution of an unknown insurance agreement for $185 million in cash may also be inconsistent with Class Counsel's obligations under ABA Model Rule 1.8(a) (and D.C.'s analogous Rule 1.8(a)), depending on its terms:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> > (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> >
> > (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> >
> > (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

37. Here, Class Counsel knowingly acquired an interest in the disputed funds adverse to their clients, the Objectors, as well as all of the Class members, if they distributed the disputed client funds to its partnership. Not only did Class Counsel acquire an interest adverse to its clients, it apparently substituted an unknown insurance agreement for those disputed funds with

no notice or guarantee to the Objectors and the Class that they could enforce its terms or that the terms were sufficient to provide coverage assuming Class Counsel's fee award is ultimately reduced. Rule 1.8 says that lawyers cannot enter into an agreement or transaction adverse to their clients without their informed consent after a full disclosure in writing and the opportunity to consult counsel. Here there was no disclosure, no opportunity to consult, and no consent—much less informed consent.

38. Class Counsel is a fiduciary to the Objectors and the Class, and any claim by Class Counsel that unknown insurance will mitigate the risk of non-payment by Class Counsel after distribution of the disputed funds to its partners constitutes a transaction and/or agreement adverse to the Class. Class Counsel has put the Class at risk by taking possession of disputed funds and, without notice or a chance to object, substituting unknown insurers as payors of any funds that may be ordered returned to the Class. This is prohibited by both Rule 1.8 and Rule 1.15.

39. Rules 1.15 and 1.8 are designed to protect clients from the failings of their lawyers. The funds are to be held in trust so that other Class Counsel creditors or the IRS cannot seize them.

40. Comment 2 to Model Rule 1.8 explains the lawyer's obligation further:

> [2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

41. ABA Model Rule 1.7(a)(2) (and D.C.'s analogous Rule 1.7(b)(4)) require that lawyers provide conflict-free representation. Class Counsel may have purposely put themselves

at odds with the interests of their clients, potentially creating a Rule 1.7 and/or 1.8 conflict of interest.

42. Rule 1.15 puts the burden on the lawyer to resolve any dispute over funds with the clients. Class Counsel has taken the opposite approach here, "solving" the problem without waiting for final disposition of the matter.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: May 2, 2023

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EXHIBIT A

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EXPERIENCE

Over thirty-five years' experience in ethics/professional responsibility/risk management advising senior law firm management and partners. Over thirty years' experience preparing and trying complex cases before federal and state courts and administrative agencies throughout the United States.

George R. Clark **Jan. 2004-present**
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Solo practice representing law firms, lawyers, and their clients in all aspects of professional responsibility, ethics, and risk management. Act as expert witness on professional responsibility and standard of care issues.

Render advice and opinions and consult regularly with law firms and individual lawyers on all issues related to professional responsibility and ethics including, e.g., business intake decisions, conflicts of interest, lateral hiring, attorney-client privilege, disqualification, fee disputes, Rule 11, dissatisfied clients, bar complaints and admissions, lawyers changing firms, insurance coverage, attorney discipline, attorney client privilege, advertising, risk management policies and procedures, engagement letters, subpoenas, mergers, and business subsidiaries**.**

Reed Smith LLP, Partner **1989 – Dec. 2003**
Washington, D.C.

- Ethics/professional responsibility/risk management partner for Reed Smith D.C. with extensive firmwide duties for 1000 lawyer firm with 18 U.S. offices and U.K. (ALAS Loss Prevention partner until firm withdrew from ALAS).
- Claims investigation and management, including selecting, supervising and actively working with outside counsel and insurers, in claims and suits nationwide.
- Insurer audits and annual and loss prevention meetings with insurers.
- Design, develop, and implement law firm ethics training and counseling program.
- Prosecute and defend as first-chair, trials (up to 10 weeks and 100 or more depositions) of numerous complex and protracted civil cases, with recoveries ranging up to $200 million. Appeals argued in several U.S. Courts of Appeal and various state Supreme Courts.
- Extensive experience mentoring/training lawyers during 10 years as Assistant Litigation Group Head; developed and implemented a 2 year long trial training program.

GEORGE R. CLARK

Pierson, Ball & Dowd, Partner 1980-89, Associate 1973-80 **1973-1989**
Washington, D.C.
(Merged into Reed Smith 1989)

- ALAS Loss Prevention partner for malpractice insurance and in-house counsel on ethics/conflict of interest and related issues.
- Prepared and tried complex cases in federal and state courts across U.S., on health care, communications, libel and invasion of privacy, antitrust, and business tort issues.
- Served on Executive Committee during Reed Smith merger negotiations; negotiated final agreement.
- Head of Litigation Practice Group (5 years).

Law Clerk for the Honorable William B. Jones **1972-1973**
United States District Court for the District of Columbia

EDUCATION

- University of Illinois College of Law, J.D., 1972 -- Order of the Coif; Articles Editor -- Law Review
- University of Notre Dame, B.S. (Physics), 1969

BAR ADMISSIONS

- District of Columbia; Illinois (inactive eff. 1-1-2021)
- United States Courts of Appeal for the District of Columbia, Second, Third, Fourth, Fifth and Seventh Circuits
- United States District Courts for the District of Columbia and for the District of Maryland
- Supreme Court of the United States

PROFESSIONAL ACTIVITIES

- District of Columbia Bar Legal Ethics Committee (Chair 2022-23; 2017- ; Vice Chair 2021-22)
- Association of Professional Responsibility Lawyers: President 2017 -18 ; President Elect 2016 – 2017; Board of Directors (2012 -19); Treasurer 2014-15, Secretary 2015-16
- ABA Center for Professional Responsibility Coordinating Council (2017-18); liaison to the CPR's CPR/SOC Professional Responsibility Council (2016-18).
- District of Columbia Bar Rules of Professional Conduct Review Committee (2006 - 2012; Chairman 2009 - 2012);
- Liaison to ABA Center on Professional Responsibility Policy Implementation Committee 2012 – 2016
- Selected for inclusion in *2012 through 2022 Washington DC Super Lawyers*
- District of Columbia Bar Nominations Committee 2013
- American Bar Association, Center for Professional Responsibility; Section of Business Law (Firm Counsel Project -- Washington, D.C. coordinator 2006-2012)
- International Bar Association (Chairman, Media Law Committee 1996 -2000; Vice Chair 1992-96); Chairperson/Featured Speaker on Media Law issues in Amsterdam, Berlin, Buenos Aires, Vancouver, New Delhi, France, Switzerland, Melbourne, Montreal, New York, Boston, New Orleans, Chicago

GEORGE R. CLARK

RECENT PROGRAMS

- "Developments in Legal Professional Privilege," Joint Program of the Law Society of England and Wales and the Association of Professional Liability Lawyers, November 2018, Washington, DC
- "Social Media Policies for Law Firms," ABA Section of Taxation Midyear Meeting, May 2018, Washington, D.C.
- "'Tis all one as if they should make the standard for measure the chancellor's foot" -- Should Standard Setters Judge Compliance with Them?, Association of Professional Responsibility Lawyers, August 2016, San Francisco
- "Attorney-Client Privilege and Confidentiality – EU Developments for Corporate Representation and In-House Lawyers," Association of Professional Responsibility Lawyers, April 2016, Paris
- "Money Matters: Ethics in Fees and Billing," Federal Communications Bar Association, April 2016, Washington, D.C.
- "Joint APRL & NOBC Presentation On Changes to the Advertising Rules: A Reality Check," joint program of the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers, July 2015, Chicago
- "UPL and MJP: The Times, They Are A Changin' - Does It Really Matter Where a Lawyer Sits?" Association of Professional Responsibility Lawyers, February 2015, Houston
- "Remorse in Disciplinary Proceedings," National Organization of Bar Counsel, August 2014, Boston
- "Conflicts of Interest in Buy/Sell Transactions: How to Spot Them and Avoid Them," Federal Communications Bar Association, May 2014, Washington, D.C.
- "The Evolving Practice of Law: Foreign Lawyers, Domestic Regulation," Association of Professional Responsibility Lawyers, March 2014, Las Vegas
- "How to Avoid Potentially Catastrophic Ethical Traps," ALI Continuing CLE/ABA Section of Taxation, Tax Exempt Organizations: An Advanced Course, Arlington, VA, November 2013
- "Changing Law Firm Structures – US and International Trends," Association of Professional Responsibility Lawyers, February 2013, Dallas
- "The Zen of Discipline: What Every Lawyer Needs To Know about the Professional Disciplinary System," National Asian Pacific American Bar Association, November 2012, Washington, D.C.
- **"**Changing Law Firm Structures – US and International Trends," Association of Professional Responsibility Lawyers, May 2012, Istanbul
- **"**COUNSELING THE GOVERNMENT LAWYER: Revolving Doors and More," Association of Professional Responsibility Lawyers, February 2011, Atlanta
- " Ethics for Litigators," ALI-ABA Continuing Professional Education teleconference, November 2010
- ABA Firm Counsel Project Roundtable, "This is Privileged, Right" The Scope of the Privilege for Internal Firm Communications, October 2009
- ABA Firm Counsel Project Roundtable, "Law Firms are Businesses Too" - The Role of Firm Counsel in Management Decisions and Internal Employment Practices, April 2009
- "Ethical, Effective Fee Agreements," ABA Center for Continuing Legal Education teleconference, March 2009
- **"**Ethical Issues in Documenting Lawyer-Client Relationships," ABA Center for Continuing Legal Education teleconference, December 2008
- ABA Firm Counsel Project Roundtable, How to Take Advantage of the Teachable Moment Presented by the *Qualcomm* Proceedings, October 2008

GEORGE R. CLARK

- "At the Intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulation," Association of Professional Responsibility Lawyers, May 2008, Amsterdam
- ABA Firm Counsel Project Roundtable, "Not *Every*" Lawyer Dreams of Being a Novelist." (Lawyers Acting as Directors and Lawyers Acting as Expert Witnesses), May 2008
- "Third-Party Equity Holdings in Law Firms: An Inevitable Response to Globalization or an Infeasible Ethical Morass?" ABA International Law Section Mid-Year Meeting April 2008, New York City
- ABA Firm Counsel Project Roundtable, "CH- CH- CH- CH- Changing Firms" Lateral Hires and Lateral Hiring Issues, January 2008
- "Ethics Application in the Legal Environment," ARMA International, Oct. 4 & 5, 2007, Baltimore
- "'Will You Still Love Me Tomorrow?' Advance Waivers, Hot Potatoes, Predatory Terms and Other Engagement Letter Issues in Today's Corporate Family Context," Association Of Professional Responsibility Lawyers, Aug. 2007, San Francisco
- ABA Firm Counsel Project Roundtable, "Should They Stay or Should They Go?" Law Firm Document Retention Policies in Light of the New E-Discovery Rules, April 2007
- ABA Firm Counsel Project Roundtable, "E Unum Pluribus?" Corporate Family Conflicts and Advance Conflict Waivers, Jan. 2007
- ABA Firm Counsel Project Roundtable, "'This is Privileged, Right?' – The Scope of the Privilege for Internal Firm Communications," Oct. 2006
- "Avoiding Pitfalls and Minimizing Risk: The Ethics of Negotiation," DC Bar Law Practice Management Section, March 2006
- "Truth and Consequences – The Ethics of Negotiation**,"** Association of Professional Responsibility Lawyers, Feb. 2006 , Chicago
- **"**Ethical Crises Facing Young Lawyers," May 2005, Bar Association of D.C.
- "Predicting the Future and Other Mysteries: Dealing with Advance Conflict Waivers," Feb. 2005, Association of Professional Responsibility Lawyers, Salt Lake City

PUBLICATIONS/MEDIA

- Media Defense Resource Center, Annual Fifty State Survey of Media Libel Law, District of Columbia section, 1982-2003 (book on U.S. libel law published annually)
- Appearances on CNN (including Burden of Proof), the BBC and the Financial Times, 1998-present

CIVIC WORK

- Committee of 100 on the Federal City, Chairman (2010 - 2012) and Trustee (2006 – 2013, 2015-19) Treasurer (2020-)
- Federation of Citizens Associations of the District of Columbia, President 2005-2008
- District of Columbia Zoning Review Task Force 2007 – 2013

Rule 1.7: Conflict of Interest: Current Clients

Client-Lawyer Relationship

(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.

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ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients

Rule 1.7 Conflict of Interest: Current Clients - Comment

Client-Lawyer Relationship

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical

questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the

lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

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Rule 1.8: Current Clients: Specific Rules

Client-Lawyer Relationship

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(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.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

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

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(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.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(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.

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American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules - Comment

Client-Lawyer Relationship

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition

on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Person Paying for a Lawyer's Services

[14] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[15] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a

conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[16] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[17] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of

the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[18] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[19] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[20] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of

harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[21] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[22] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[23] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

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Rule 1.15: Safekeeping Property

Client-Lawyer Relationship

(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.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

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ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_15_safekeeping_property

Rule 1.15 Safekeeping Property - Comment

Client-Lawyer Relationship

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., Model Rules for Client Trust Account Records.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

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ABA Model Rules on Client Trust Account Records - Rule 1 Recordingkeeping Generally

Rule 1: Recordingkeeping Generally

A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these Rules and required by [Rule 1.15 of the Model Rules of Professional Conduct], and shall retain the following records for a period of [five years] after termination of the representation:

(a) receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

(b) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(c) copies of retainer and compensation agreements with clients [as required by Rule 1.5 of the Model Rules of Professional Conduct];

(d) copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(e) copies of bills for legal fees and expenses rendered to clients;

(f) copies of records showing disbursements on behalf of clients;

(g) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(h) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

(i) copies of [monthly] trial balances and [quarterly] reconciliations of the client trust accounts maintained by the lawyer; and

(j) copies of those portions of client files that are reasonably related to client trust account transactions.

Comment

Next - RULE 2: CLIENT TRUST ACCOUNT SAFEGUARDS

IOLTA

Overview

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What Is IOLTA?

IOLTA – Interest on Lawyers' Trust Accounts – is a method of raising money for charitable purposes, primarily the provision of civil legal services to indigent persons. The establishment of IOLTA in the United States followed changes to federal banking laws passed by Congress in 1980, which allowed some checking accounts to bear interest. IOLTA programs currently operate in 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

How Does IOLTA Work?

Lawyers often handle money that belongs to clients, such as settlement checks, fees advanced for services not yet performed, or money to pay various court fees. Sometimes the amount of money that an attorney handles for a single client is quite large. In such cases, lawyers deposit the funds into trust accounts, where the funds can earn interest for the client.

Often, however, the amount of money that a lawyer handles for a single client is quite small or held for only a short period of time, and cannot earn interest for the client in excess of the costs incurred to collect that interest. Traditionally, lawyers have placed these deposits into combined, or pooled, trust accounts that contained other nominal or short-term client funds.

Before state laws and Supreme Court rules created IOLTA programs, trust funds pooled in this manner earned no interest. This is because trust accounts typically are checking accounts (to allow easy access to the funds) and, until the early 1980s, checking accounts did not earn interest. In addition, these trust funds earned no interest because it is unethical for attorneys to derive any financial benefit from funds that belong to their clients.

Since the inception of IOLTA, however, attorneys who handle nominal or short-term client funds that cannot earn net income for the client place these funds in a single, pooled, interest-bearing trust account. Banks in turn forward the interest earned on these accounts to the state IOLTA

program, which uses the money to fund a variety of charitable causes.

Although IOLTA creates income, nothing else is changed: lawyers satisfy their ethical and fiduciary duty to place client funds in a secure account; there is on-demand access to the client's money; and, as in the past, the client realizes no interest income because the nominal or short-term client funds that are pooled in IOLTA accounts are funds that cannot earn net interest for the client.

Most banks treat IOLTA accounts as Negotiable Order of Withdrawal ("NOW") or other Business Interest Checking accounts. Banking regulations hold that attorneys can set up the accounts as NOW accounts even though the attorney-depositor may be a for-profit corporation, because the interest goes to a not-for-profit charitable entity.

The Impact of IOLTA

Since 1981, IOLTA has generated over $4 billion in revenue throughout the United States. In 2020, IOLTA grants nationwide totaled over $175 million. IOLTA is a significant source of funding for programs that provide civil legal services to those living in poverty, with over 90 percent of grants awarded by IOLTA programs (~$168 million in 2020) supporting legal aid offices and pro bono programs.

IOLTA programs have taken a leading role in funding a number of innovative programs that have had a positive impact on the delivery of legal services to those living in poverty. These include loan repayment assistance programs, state-based legal information websites, and legal assistance hotlines. IOLTA programs also fund a variety of other activities including alternative dispute resolution programs, young lawyer special public service projects, victim services programs, court-appointed special advocate (CASA) programs, pro se assistance resources, and law school scholarship programs.

History of the Commission on IOLTA

To support the initiation and operation of IOLTA programs, the ABA created the Commission on IOLTA in 1986. The ABA Commission on IOLTA, consisting of nine members: (1) collects, maintains, analyzes and disseminates information on programs involving the use of interest on lawyers' trust accounts for the support of law-related public service activities; (2) makes recommendations for ABA policy on the creation and operation of IOLTA programs; (3) maintains liaisons with state IOLTA programs; and (4) oversees the IOLTA Clearinghouse, which provides information,

materials and technical assistance on IOLTA program design and operation.

The ABA Commission on IOLTA monitors developments in areas that may affect IOLTA operations such as banking, grantmaking, tax law and constitutional law.

The ABA has supported IOLTA for 30 years. Beginning in 1978, it provided information on the development of American and foreign IOLTA programs to interested bar associations, legal services providers and states. In 1981, the ABA formed the Advisory Board and Task Force on Interest on Lawyer Trust Accounts, which reported to the ABA Board of Governors in 1982. The report resulted in the Board of Governors' 1983 adoption of a resolution in support of IOLTA. The ABA House of Delegates also has adopted two resolutions in support of IOLTA.

In 1982, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that examined the ethical implications of a lawyer's participation in an IOLTA program. The opinion concluded that it is ethically permissible for a lawyer to participate in an IOLTA program authorized by a state. See ABA Formal Opinion 348 (July 23, 1982).

The ABA supported IOLTA programs against several constitutional challenges. At the ABA Commission on IOLTA's request, the association has filed five amicus curiae briefs in support of the Texas IOLTA program:

- On appeal twice before the Fifth Circuit Court of Appeals
- On rehearing en banc before the Fifth Circuit Court of Appeals
- On petition for writ of certiorari before the U.S. Supreme Court
- On the merits before the U.S. Supreme Court

Also at the ABA Commission on IOLTA's request, the ABA filed two amicus curiae briefs in support of the Washington state IOLTA program, one before the Ninth Circuit Court of Appeals and one before the U.S. Supreme Court, as well as one in support of the Massachusetts IOLTA program before the First Circuit Court of Appeals.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 07-448 **October 20, 2007**

Appointed Counsel's Relationship to a Person Who Declines to be Represented

The client-lawyer relationship is a consensual one. Situations arise, however, in which a lawyer is appointed to represent someone who declines the representation. Whatever purposes may be served by requiring lawyers to provide services relating to such a person, the person refusing representation is not entitled to expect of the lawyer the duties arising out of the client-lawyer relationship. The lawyer's legal duties – if any – are defined in such circumstances by the order of the assigning tribunal, and the lawyer's ethical duties are limited to those obligations a lawyer owes under the Rules to tribunals or to persons other than a client.[1]

The Committee here addresses the circumstance in which a lawyer is appointed or directed by a tribunal to represent a competent individual who refuses the representation. Most commonly, although not always, such an individual is a defendant in a criminal proceeding.[2] Defense lawyers in criminal matters, once accepted as counsel by an accused, are sometimes not permitted to withdraw by the court, despite a client's subsequent demand to exercise the right to self-representation.[3] Similarly, death penalty statutes in some

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1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. Although there may be unusual circumstances in which such a person is not a criminal defendant, because that is the usual context, a person who refuses representation from the moment counsel is appointed for them will in this opinion be termed the "defendant."

3. In Faretta v. California, 422 U.S. 806, 819 (1975), the Supreme Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when that choice is voluntary and intelligent. That right is not absolute, however, and it may properly be denied when a request that counsel be removed from the case is not clear, knowing, or timely. *See also* Daniels v. Lee, 316 F.3d 477, 489 (4th Cir. 2003), *cert. denied*, 540 U.S. 851 (2003) ("a fundamental part of the *Faretta* doctrine is that the defendant must clearly and unequivocally assert his right to self-representation").

states require an appeal to the state's highest court, regardless of whether the convicted person wishes to appeal.[4] The questions facing a lawyer in such situations arise from the tension between the defendant's wish not to be represented and the lawyer's duties to the tribunal that appointed the lawyer.

The ethical quandary a lawyer may face where representation is refused from the onset is whether, in fact, the lawyer has a client to whom he owes duties, or whether any duties the lawyer has flow from the tribunal's order assigning him to undertake the representation. Resolving that difficulty requires considering the source of obligations imposed on the lawyer for the benefit of the defendant. Those obligations do not create a conflict between the responsibilities the lawyer owes to the tribunal and those the lawyer owes to the defendant, at least until such time as the defendant accepts the representation,[5] when all the requirements of the Rules apply (including those that limit the terms under which the lawyer may withdraw from the representation).[6]

Examination of the dilemma faced by appointed counsel when the defendant refuses representation begins with Rule 1.2(a), which states that a lawyer "shall abide by a client's decisions concerning the objectives of representation and … shall consult with the client as to the means by which they are to be pursued." Thus a lawyer is required, for example, to abide by his client's decisions with respect to civil settlements, criminal pleas, waiver of criminal jury trials, and testifying in a criminal trial. As a further example, under Rule 1.2(c), a lawyer may limit the scope of the representation only if he obtains his client's informed consent. In the situation considered here, however, the defendant's desire to proceed without a lawyer's assistance makes it impossible for the lawyer to provide, or to participate in, a true "representation."

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4. *See, e.g.*, 11 DEL. CODE ANN. tit. 11, § 4209(g)(1) (2007) (automatic appeal of death penalty cases, with counsel appointed "to respond to the State's positions"); MO. ANN. MO. STAT. § 565.035(6) (West 1999) (mandated attorney considered an "assistant to supreme court" appointed in all cases). *See also* GA. CODE ANN. § 17-10-35(a) (2006) (whenever death penalty is imposed, upon judgment becoming final in trial court, sentence shall be reviewed on the record by state supreme court); S.C. CODE ANN. § 16-3-25(A) (Law. Co-op. 1976) (same).

5. Paragraph [17] of the Rules' Scope section provides that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." The precise meaning of this comment is unclear, and no explanation exists in the history of its adoption by the ABA. Substantive law in a given jurisdiction may place additional requirements on the creation of a client-lawyer relationship or define who may provide consent; the rules describing the client-lawyer relationship may only be understood, however, to presume some expression of assent on behalf of a client to determine whether the relationship has been created.

6. Viewed in one light, the relationship to which a client consents when creating the "client-lawyer relationship" carries with it limitations, including limitations on the circumstances under which it may be terminated.

Other Rules defining the lawyer's obligations to a client similarly make sense only after a client has accepted the client-lawyer relationship. Rule 1.1 obligates a lawyer to act competently; Rule 1.3 requires a lawyer to be prompt and diligent; and Rule 1.4 requires a lawyer to inform the client as necessary to permit informed decisions regarding the representation. If a defendant has not accepted the client-lawyer relationship, he has no basis upon which to hold the lawyer accountable to such standards.

This principle applies equally to duties imposed by several other Rules. Among these is Rule 1.6, which obligates a lawyer not to reveal information relating to the representation of a client absent informed consent. Rules 1.7, 1.8, and 1.9 define the obligations of a lawyer to avoid conflicts of interest, and Rule 2.1 approaches that subject from a different vantage point by requiring "independent professional judgment" in representing a client. More specifically, Rule 1.8(f) prohibits a lawyer from accepting compensation for representing the client from a person other than a client unless (a) the client consents, (b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and (c) information related to the representation is kept confidential.[7] If the defendant never accepts the client-lawyer relationship, and thus never becomes a client or (eventually) a former client, he has no basis upon which to contend that the lawyer is or was ever obliged to avoid conflicts of interest.

Underlying these and other Rules describing the client-lawyer relationship are the premises that a lawyer's role in the client-lawyer relationship is to further the goals and interests of a client, and that a competent client has the ultimate authority to determine what the client's goals and interests may be. In short, the client-lawyer relationship, at its inception, can only be understood under these Rules as a relationship in which a lawyer and client agree that the lawyer will follow the client's instructions unless to do so would be unlawful. A competent client properly advised is, and should be, able to make all important decisions about the representation.[8] The notion that the client-lawyer relationship can be created absent consent by or on behalf of a client – or acquiescence amounting to consent – is foreign to the concepts in the Rules.[9]

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7. *See also* Rule 5.4(c) (prohibiting a lawyer from permitting 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"); *cf.* Rule 1.18 & cmt. 2 (protecting information communicated to a lawyer by a prospective client who demonstrates a reasonable expectation that the lawyer is willing to discuss forming a client-lawyer relationship, whether or not the client-lawyer relationship ultimately is formed).

8. *See* Rule 1.14 cmt. 1 ("The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.")

9. *Cf.* Faretta v. California, 422 U.S. at 821 ("An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction.")

When a tribunal requires a lawyer to act on behalf of a person against that person's will, there are two potential sources for the lawyer's obligations: (a) the express or implied terms of the order under which the obligation to act is imposed,[10] and (b) the lawyer's obligations under the Rules to persons other than clients.[11] Because the defendant never has accepted the representation, he has no basis to require or even to expect the lawyer to satisfy any of the obligations defined by those Rules that apply to the client-lawyer relationship.

Courts may appoint "standby counsel" for a criminal defendant who elects to represent himself to avoid disruption if the defendant later demands a lawyer.[12] There is no client-lawyer relationship unless and until the defendant accepts representation. Such defendants sometimes turn to "standby counsel" and seek advice or assistance without intending to waive their self-representation right.[13] The substantive Sixth Amendment principles defining when a defendant has waived that right differ from those addressed in this opinion. Whenever such a defendant turns to appointed counsel and seeks advice or representation, the defendant may be found to have consented to and thereby to have created a client-lawyer relationship under the Rules.[14]

There are a number of situations in which a routine client-lawyer relationship arises because the law allows someone other than the client to consent to the relationship, or the client's acquiescence may be implied by contract or by some action or failure to act. For example, parents or courts are routinely authorized by state law to engage counsel or a guardian ad litem to represent a child, or other person under legal disability, even when the person may not

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10. This opinion assumes that a court or other tribunal has the power to enter such an order under applicable law, a question beyond the purview of the Rules and beyond the scope of this opinion. Whether a party is deemed to be represented under the rules of a tribunal is different from the question of whether the party has representation as that term is used in the Rules. The former turns on the law of criminal or civil procedure, the latter on legal ethics.

11. *See, e.g.*, Rule 7.1 (prohibiting false or misleading communications about the lawyer's services); Rule 8.4(c) & (d) (prohibiting conduct that is dishonest or prejudicial to the administration of justice).

12. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.9, "Hybrid and Standby Counsel," available at http://www.abanet.org/crimjust/standards/ prosecutionfunction.pdf; McKaskle v. Wiggins, 465 U.S. 168, 178 (1984) ("standby counsel" must not interfere with self-representing defendant's control or appearance of control over defense); *see also* United States v. Salerno, 81 F.3d 1453, 1460 (9th Cir.), *cert. denied,* 519 U.S. 982 (1996) ("standby" or "advisory" counsel do not represent pro se defendants).

13. *Cf.* United States v. Swinney, 970 F.2d 494, 498 (8th Cir.), *cert. denied*, 506 U.S. 1011 (1992) (defendant found to have accepted "standby counsel" as his defense counsel by authorizing counsel to conduct voir dire and make opening statement).

14. *Cf.* McKaskle v. Wiggins, 465 U.S. at 182 (under Sixth Amendment "[a] defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense").

wish to be represented.[15] Additionally, unnamed class members in a class action lawsuit will be deemed after certification of the class to be represented by class counsel, absent their affirmative election to "opt out" of the certified class.[16]

The principles concerning withdrawal from a client-lawyer relationship once it has been established, moreover, are also distinguishable from those applicable to the forming of a relationship. When ordered to do so by a tribunal, Rule 1.16(c) requires a lawyer to continue representation notwithstanding good cause for terminating the representation. Clients, particularly criminal defendants, are not permitted to throw the judicial system into disarray by firing their counsel at a time when doing so would prejudice the administration of justice.[17] The authority of the court to order that a representation be continued does not undermine the principle that initial client consent is essential to the creation of a client-lawyer relationship.

It has been suggested[18] that lawyers may be compelled by a tribunal to represent a defendant regardless of client consent based on the notion that lawyers are "officers of the court."[19] That notion has roots in the English legal system, where some lawyers were subject to the court's discipline, including members of its clerical staff who did not represent clients but primarily performed ministerial tasks. In contrast, English barristers never were considered officers of the court, owing their duties to the crown not to the court.[20] In the United States, however, lawyers have never been considered court "officers"

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15. Rule 1.14 addresses a client with diminished capacity. The law of minority and guardianship provides a substitute for what would be the consent of a competent client, a topic beyond the scope of this opinion.

16. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 & cmt. g (2000) (client-lawyer relationship is consensual and arises when a person manifests to a lawyer an intent that the lawyer provide legal services and the lawyer accepts, and even when a lawyer is appointed by a court without the lawyer's consent, that appointment may be rejected by the prospective client unless the client lacks capacity to choose); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:101 (2004) ("the client's consent is generally necessary" to formation of client-lawyer relationship).

17. *See, e.g.*, United States v. Frazier-El, 204 F.3d 553, 560 (4th Cir.), *cert. denied*, 531 U.S. 994 (2000) (affirming district court insistence that defendant proceed with appointed counsel).

18. *See* Iowa Bar Ass'n, Ethics & Practice Guidelines Committee, Opinion Concerning Representation (Feb. 24, 2006), available at http://www.defenselink.mil/news/Mar2006/d20060329Bahlulvol11.pdf at 137 ("officer of the court" notion overrides lawyer's obligation to respect will of a client who refuses representation). We disagree with the Iowa Bar's conclusion.

19. The term used by the Rules in Preamble paragraph [1] is "officer of the legal system."

20. *See* Beth M. Coleman, *The Constitutionality of Compulsory Attorney Service: The Void Left by Mallard*, 68 N.C. L. REV. 575, 586 (1990).

in this sense.[21] The Rules generally implicated by the concept of lawyers as officers of the legal system are those that limit the lawyer's ability to comply with a client's objectives, not those that address the duties owed directly to the client.[22] This does not undercut the basic principle that a client-lawyer relationship arises only when a client consents to a representation.

A lawyer whose would-be client never has accepted the client-lawyer relationship, therefore, has no such relationship, and the unwilling client has no representation, at least as that term is used in the Rules. Any legal obligation owed by the lawyer to the defendant, which may be analogous to those embodied in the ethics rules, arises from the authority of the appointing tribunal and includes whatever obligations the tribunal may identify.[23] The lawyer's ethical duties are limited to complying with the Rules defining a lawyer's obligations to persons other than a client.

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21. *See* Cammer v. United States, 350 U.S. 399, 405 (1956) (lawyers are not "officers" under a statute empowering the court to punish "misbehavior of any of its officers").

22. *See* United States v. Cuevas-Andrade, 232 F.3d 440, 445 (5th Cir. 2000), *cert. denied*, 532 U.S. 1014 (2001) (as officer of the court, an attorney has "an obligation and an interest in insuring that a guilty plea proceeding complies with all constitutional and statutory requirements" [*see Model* Rule 3.8]); McCleod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1486 (5th Cir. 1990) (lawyer as officer of the court must "assist in the discovery process by making diligent, good-faith responses to legitimate discovery requests" [*see* Model Rule 3.4]); United States v. Singleton, 107 F.3d 1091, 1102 (4th Cir.), *cert. denied*, 522 U.S. 825 (1997) (as officer of the court, the lawyer has the "duty of disclosure, the duty to ask only appropriate questions, and the duty not to suborn perjury" [*see* Model Rule 3.4]); In re Solerwitz, 848 F.2d 1573, 1577 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989) (lawyer as officer of the court has a duty to "promote the administration of justice and to comply with the court's rules, notices, and orders" [*see* Model Rules 3.1, 3.4, & 8.4]); Shisler v. Heckler, 787 F.2d 76, 84 (2d Cir. 1986), *aff'd in part & rev'd in part*, 851 F.2d 43 (1988) (lawyer as officer of the court has a duty of candor to the court [*see* Model Rule 3.3]).

23. It may happen that a court or other tribunal, when appointing counsel for a client unwilling to be represented, expressly or impliedly requires a lawyer to behave as if the client had accepted the representation, thereby imposing on the lawyer obligations similar to those a client could expect of the lawyer if the representation had been accepted. If that happens, however, the obligations arise from the authority of the tribunal, not from obligations the lawyer has to the client by virtue of the Rules.

Rules of Professional Conduct

Rule 1.7: Conflict of Interest: General Rule

(a) A lawyer shall not advance two or more adverse positions in the same matter.

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;

(2) Such representation will be or is likely to be adversely affected by representation of another client;

(3) Representation of another client will be or is likely to be adversely affected by such representation;

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if

(1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and

(2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

(d) If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

Comment

[1] Rule 1.7 is intended to provide clear notice of circumstances that may constitute a conflict of interest. Rule 1.7(a) sets out the limited circumstances in which representation of conflicting interests is absolutely prohibited even with the informed consent of all involved clients. Rule 1.7(b) sets out those circumstances in which representation is barred in the absence of informed client consent. For the definition of "informed consent," *see* Rule 1.0(e). The difference between Rule 1.7(a) and Rule 1.7(b) is that in the former, the lawyer is representing multiple interests in the same matter, while in the latter, the lawyer is representing a single interest, but a client of the lawyer who is represented by different counsel has an interest adverse to that advanced by the lawyer. The

application of Rules 1.7(a) and 1.7(b) to specific facts must also take into consideration the principles of imputed disqualification described in Rule 1.10. Rule 1.7(c) states the procedure that must be used to obtain the client's informed consent if representation is to commence or continue in the circumstances described in Rule 1.7(b). Rule 1.7(d) governs withdrawal in cases arising under Rule 1.7(b)(1).

Representation Absolutely Prohibited – Rule 1.7(a)

[2] Institutional interests in preserving confidence in the adversary process and in the administration of justice preclude permitting a lawyer to represent adverse positions in the same matter. For that reason, paragraph (a) prohibits such conflicting representations, with or without client consent.

[3] The same lawyer (or law firm,*see*Rule 1.10) should not espouse adverse positions in the same matter during the course of any type of representation, whether such adverse positions are taken on behalf of clients or on behalf of the lawyer or an association of which the lawyer is a member. On the other hand, for purposes of Rule 1.7(a), an "adverse" position does not include inconsistent or alternative positions advanced by counsel on behalf of a single client. Rule 1.7(a) is intended to codify the result reached in D.C. Bar Legal Ethics Committee Opinion 204, including the conclusion that a rulemaking whose result will be applied retroactively in pending adjudications is the same matter as the adjudications, even though treated as separate proceedings by an agency. However, if the adverse positions to be taken relate to different matters, the absolute prohibition of paragraph (a) is inapplicable, even though paragraphs (b) and (c) may apply.

[4] The absolute prohibition of paragraph (a) applies only to situations in which a lawyer would be called upon to espouse adverse positions for different clients in the same matter. It is for this reason that paragraph (a) refers to adversity with respect to a "position taken or to be taken" in a matter rather than adversity with respect to the matter or the entire representation. This approach is intended to reduce the costs of litigation in other representations where parties have common, non-adverse interests on certain issues, but have adverse (or contingently or possibly adverse) positions with respect to other issues. If, for example, a lawyer would not be required to take adverse positions in providing joint representation of two clients in the liability phase of a case, it would be permissible to undertake such a limited representation. Then, after completion of the liability phase, and upon satisfying the requirements of paragraph (c) of this rule, and of any other applicable Rules, the lawyer could represent either one of those parties as to the damages phase of the case, even though the other, represented by separate counsel as to damages, might have an adverse position as to that phase of the case. Insofar as the absolute prohibition of paragraph (a) is concerned, a lawyer may represent two parties that may be adverse to each other as to some aspects of the case so long as the same lawyer does not represent both parties with respect to those positions. Such a representation comes within paragraph (b), rather than paragraph (a), and is therefore subject to the consent provisions of paragraph (c).

[5] The ability to represent two parties who have adverse interests as to portions of a case may be limited because the lawyer obtains confidences or secrets relating to a party while jointly representing both parties in one phase of the case. In some circumstances, such confidences or secrets might be useful, against the interests of the party to whom they relate, in a subsequent part of the case. Absent the informed consent of the party whose confidences or secrets are implicated,

the subsequent adverse representation is governed by the "substantial relationship" test, which is set forth in Rule 1.9.

[6] The prohibition of paragraph (a) relates only to actual conflicts of positions, not to mere formalities. For example, a lawyer is not absolutely forbidden to provide joint or simultaneous representation if the clients' positions are only nominally but not actually adverse. Joint representation is commonly provided to incorporators of a business, to parties to a contract, in formulating estate plans for family members, and in other circumstances where the clients might be nominally adverse in some respect but have retained a lawyer to accomplish a common purpose. If no actual conflict of positions exists with respect to a matter, the absolute prohibition of paragraph (a) does not come into play. Thus, in the limited circumstances set forth in Opinion 143 of the D.C. Bar Legal Ethics Committee, this prohibition would not preclude the representation of both parties in an uncontested divorce proceeding, there being no actual conflict of positions based on the facts presented in Opinion 143. For further discussion of common representation issues, including intermediation, see Comments [14]-[18].

Representation Conditionally Prohibited – Rule 1.7(b)

[7] Paragraphs (b) and (c) are based upon two principles: (1) that a client is entitled to wholehearted and zealous representation of its interests, and (2) that the client as well as the lawyer must have the opportunity to judge and be satisfied that such representation can be provided. Consistent with these principles, paragraph (b) provides a general description of the types of circumstances in which representation is improper in the absence of informed consent. The underlying premise is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

[8] A client may, on occasion, adopt unreasonable positions with respect to having the lawyer who is representing that client also represent other parties. Such an unreasonable position may be based on an aversion to the other parties being represented by a lawyer, or on some philosophical or ideological ground having no foundation in the Rules regarding representation of conflicting interests. Whatever difficulties may be presented for the lawyer in such circumstances as a matter of client relations, the unreasonable positions taken by a client do not fall within the circumstances requiring notification and informed consent. Clients have broad discretion to terminate their representation by a lawyer and that discretion may generally be exercised on unreasonable as well as reasonable grounds.

[9] If the lawyer determines or can foresee that an issue with respect to the application of paragraph (b) exists, the only prudent course is for the lawyer to make disclosure, pursuant to paragraph (c), to each affected client and enable each to determine whether in its judgment the representation at issue is likely to affect its interests adversely.

[10] Paragraph (b) does not purport to state a uniform rule applicable to cases in which two clients may be adverse to each other in a matter in which neither is represented by the lawyer or in a

situation in which two or more clients may be direct business competitors. The matter in which two clients are adverse may be so unrelated or insignificant as to have no possible effect upon a lawyer's ability to represent both in other matters. The fact that two clients are business competitors, standing alone, is usually not a bar to simultaneous representation. Thus, in a matter involving a specific party or parties, paragraphs (b)(1) and (c) require notice and informed consent if the lawyer will take a position on behalf of one client adverse to another client even though the lawyer represents the latter client only on an unrelated position or in an unrelated matter. Paragraphs (b)(2), (3), (4) and (c) require disclosure and informed consent in any situation in which the lawyer's representation of a client may be adversely affected by representation of another client or by any of the factors specified in paragraph (b)(4).

Individual Interest Conflicts

[11] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could adversely affect the lawyer's representation of the client. *See* D.C. Bar Legal Ethics Committee Opinion No. 210 (defense attorney negotiating position with United States Attorney's Office). In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.*See*Comment [34] for specific commentary concerning affiliated business interests; Rule 1.8 for specific Rules pertaining to a number of individual attorney's interest conflicts, including business transactions with clients; Rule 1.8(j) for the effect of firm-wide imputation upon individual attorney interests.

[12] For the effect of a blood or marital relationship between lawyers representing different clients, *see* Rule 1.8(h). Disqualification arising from a close family relationship is not imputed.*See*Rule 1.8(j).

Positional Conflicts

[13] Ordinarily a lawyer may take inconsistent legal positions in different forums at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not, without more, create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client in a given matter, as referred to in Rule 1.7(b), will adversely affect the lawyer's effectiveness in representing another client in the same or different matter; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position being taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the matters are pending, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then, absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or

both matters, subject to the exception provided in Rule 1.7(d). *See* D.C. Legal Ethics Committee Opinion No. 265.

Special Considerations in Common Representation

[14] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[15] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[16] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit.*See*Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information relevant to the common representation will be shared, and explain the circumstances in which the lawyer may have to withdraw from any or all representations if one client later objects to continued common representation or sharing of such information. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[17] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(c).

[18] Subject to the above limitations, each client in the common representation has the right to

loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Lawyer's Duty to Make Inquiries to Determine Potential Conflicts

[19] The scope of and parties to a "matter" are typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the identity and the position of the parties exists. In Rule 1.7(b)(1), the phrase "matter involving a specific party or parties" refers to such situations. In other situations, however, it may not be clear to a lawyer whether the representation of one client is adverse to the interests of another client. For example, a lawyer may represent a client only with respect to one or a few of the client's areas of interest. Other lawyers, or non-lawyers (such as lobbyists), or employees of the client (such as government relations personnel) may be representing that client on many issues whose scope and content are unknown to the lawyer. Clients often have many representatives acting for them, including multiple law firms, nonlawyer lobbyists, and client employees. A lawyer retained for a limited purpose may not be aware of the full range of a client's other interests or positions on issues. Except in matters involving a specific party or parties, a lawyer is not required to inquire of a client concerning the full range of that client's interests in issues, unless it is clear to the lawyer that there is a potential for adversity between the interests of clients of the lawyer. Where lawyers are associated in a firm within the meaning of Rule 1.10(a), the rule stated in the preceding sentence must be applied to all lawyers and all clients in the firm. Unless a lawyer is aware that representing one client involves seeking a result to which another client is opposed, Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. The test to be applied here is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place.

Situations That Frequently Arise

[20] A number of types of situations frequently arise in which disclosure and informed consent are usually required. These include joint representation of parties to criminal and civil litigation, joint representation of incorporators of a business, joint representation of a business or government agency and its employees, representation of family members seeking estate planning or the drafting of wills, joint representation of an insurer and an insured, representation in circumstances in which the personal or financial interests of the lawyer, or the lawyer's family, might be affected by the representation, and other similar situations in which experience indicates that conflicts are likely to exist or arise. For example, a lawyer might not be able to represent a client vigorously if the client's adversary is a person with whom the lawyer has longstanding personal or social ties. The client is entitled to be informed of such circumstances so that an informed decision can be made concerning the advisability of retaining the lawyer who has such ties to the adversary. The principles of disclosure and informed consent are equally applicable to all such circumstances, except that if the positions to be taken by two clients in a matter as to which the lawyer represents both are actually adverse, then, as provided in paragraph (a), the lawyer may not undertake or continue the representation with respect to those issues even if disclosure has been made and informed consent obtained.

Organization Clients

[21] As is provided in Rule 1.13, the lawyer who represents a corporation, partnership, trade association or other organization-type client is deemed to represent that specific entity, and not its shareholders, owners, partners, members or "other constituents." Thus, for purposes of interpreting this rule, the specific entity represented by the lawyer is the "client." Ordinarily that client's affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer. Generally, the lawyer for a corporation is not prohibited by legal ethics principles from representing the corporation in a matter in which the corporation's stockholders or other constituents are adverse to the corporation. *See* D.C. Bar Legal Ethics Committee Opinion No. 216. A fortiori, and consistent with the principle reflected in Rule 1.13, the lawyer for an organization normally should not be precluded from representing an unrelated client whose interests are adverse to the interests of an affiliate (*e.g.,*parent or subsidiary), stockholders and owners, partners, members, etc., of that organization in a matter that is separate from and not substantially related to the matter on which the lawyer represents the organization.

[22] However, there may be cases in which a lawyer is deemed to represent a constituent of an organization client. Such de facto representation has been found where a lawyer has received confidences from a constituent during the course of representing an organization client in circumstances in which the constituent reasonably believed that the lawyer was acting as the constituent's lawyer as well as the lawyer for the organization client. *See generally* ABA Formal Opinion 92-365. In general, representation may be implied where on the facts there is a reasonable belief by the constituent that there is individual as well as collective representation. *Id.* The propriety of representation adverse to an affiliate or constituent of the organization client, therefore, must first be tested by determining whether a constituent is in fact a client of the lawyer. If it is, representation adverse to the constituent requires compliance with Rule 1.7. *See* ABA Opinion 92-365. The propriety of representation must also be tested by reference to the lawyer's obligation under Rule 1.6 to preserve confidences and secrets and to the obligations imposed by paragraphs (b)(2) through (b)(4) of this rule. Thus, absent informed consent under
Rule 1.7(c), such adverse representation ordinarily would be improper if:

(a) the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client,

(b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or

(c) such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.

[23] In addition, the propriety of representation adverse to an affiliate or constituent of the organization client must be tested by attempting to determine whether the adverse party is in substance the "alter ego" of the organization client. The alter ego case is one in which there is likely to be a reasonable expectation by the constituents or affiliates of an organization that each has an individual as well as a collective client-lawyer relationship with the lawyer, a likelihood that a result adverse to the constituent would also be adverse to the existing organization client, and a risk that both the new and the old representation would be so adversely affected that the conflict would not

be "consentable." Although the alter ego criterion necessarily involves some imprecision, it may be usefully applied in a parent-subsidiary context, for example, by analyzing the following relevant factors: whether (i) the parent directly or indirectly owns all or substantially all of the voting stock of the subsidiary, (ii) the two companies have common directors, officers, office premises, or business activities, or (iii) a single legal department retains, supervises and pays outside lawyers for both the parent and the subsidiary. If all or most of those factors are present, for conflict of interest purposes those two entities normally would be considered alter egos of one another and the lawyer for one of them should refrain from engaging in representation adverse to the other, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable. Similarly, if the organization client is a corporation that is wholly owned by a single individual, in most cases for purposes of applying this rule, that client should be deemed to be the alter ego of its sole stockholder. Therefore, the corporation's lawyer should refrain from engaging in representation adverse to the sole stockholder, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable.

[24] If representation otherwise appropriate under the preceding paragraphs seeks a result that is likely ultimately to have a material adverse effect on the financial condition of the organization client, such representation is prohibited by Rule 1.7(b)(3). If the likely adverse effect on the financial condition of the organization client is not material, such representation is not prohibited by Rule 1.7(b)(3). Obviously, however, a lawyer should exercise restraint and sensitivity in determining whether to undertake such representation in a case of that type, particularly if the organization client does not realistically have the option to discharge the lawyer as counsel to the organization client.

[25] The provisions of paragraphs [20] through [23] are subject to any contrary agreement or other understanding between the client and the lawyer. In particular, the client has the right by means of the original engagement letter or otherwise to restrict the lawyer from engaging in representations otherwise permissible under the foregoing guidelines. If the lawyer agrees to such restrictions in order to obtain or keep the client's business, any such agreement between client and lawyer will take precedence over these guidelines. Conversely, an organization client, in order to obtain the lawyer's services, may in the original engagement letter or otherwise give informed consent to the lawyer in advance to engage in representations adverse to an affiliate, owner or other constituent of the client not otherwise permissible under the foregoing guidelines so long as the requirements of Rule 1.7(c) can be met.

[26] In any event, in all cases referred to above, the lawyer must carefully consider whether Rule 1.7(b)(2) or Rule 1.7(b)(4) requires informed consent from the second client whom the lawyer proposes to represent adverse to an affiliate, owner or other constituent of the first client.

Disclosure and Consent

[27] Disclosure and informed consent are not mere formalities. Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation. If a lawyer's obligation to one or another client or to others or some other consideration precludes making such full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue. Full disclosure also requires that clients be made aware of the possible extra expense,

inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation.

[28] It is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent, although the rule does not require that disclosure be in writing or in any other particular form in all cases. Lawyers should also recognize that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. Moreover, under the District of Columbia substantive law, the lawyer bears the burden of proof that informed consent was secured.

[29] The term "informed consent" is defined in Rule 1.0(e). As indicated in Comment [2] to that rule, a client's consent must not be coerced either by the lawyer or by any other person. In particular, the lawyer should not use the client's investment in previous representation by the lawyer as leverage to obtain or maintain representation that may be contrary to the client's best interests. If a lawyer has reason to believe that undue influence has been used by anyone to obtain agreement to the representation, the lawyer should not undertake the representation.

[30] The lawyer's authority to solicit and to act upon the client's consent to a conflict is limited further by the requirement that the lawyer reasonably believe that he or she will be able to provide competent and diligent representation to each affected client. Generally, it is doubtful that a lawyer could hold such a belief where the representation of one client is likely to have a substantial and material adverse effect upon the interests of another client, or where the lawyer's individual interests make it likely that the lawyer will be adversely situated to the client with respect to the subject-matter of the legal representation.

[31] Rule 1.7 permits advance waivers within certain limits and subject to certain client protections. Such waivers are permissible only if the prerequisites of the rule – namely "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation" – are satisfied. Under the Rules' definition of "informed consent," the client must have "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action." See Rule 1.0(e). Ordinarily this will require that either (1) the consent is specific as to types of potentially adverse representations and types of adverse clients (e.g., a bank client for whom the lawyer performs corporate work waives the lawyer's representation of borrowers in mortgage loan transactions with that bank) or (2) the waiving client has available in-house or other current counsel independent of the lawyer soliciting the waiver.

[32] Rule 1.7(a) provides that a conflict arising from the lawyer's advancing adverse positions in the same matter cannot be waived in advance or otherwise. Although an advance waiver may permit the lawyer to act adversely to the waiving client in matters that are substantially related to the matter in which the lawyer represents that client, lawyers should take particular care in obtaining and acting pursuant to advance waivers where such a matter is involved.

Withdrawal

[33] It is much to be preferred that a representation that is likely to lead to a conflict be avoided before the representation begins, and a lawyer should bear this fact in mind in considering whether disclosure should be made and informed consent obtained at the outset. If, however, a conflict arises after a representation has been undertaken, and the conflict falls within paragraph (a), or if a conflict

arises under paragraph (b) and informed and uncoerced consent is not or cannot be obtained pursuant to paragraph (c), then the lawyer should withdraw from the representation, complying with Rule 1.16. Where a conflict is not foreseeable at the outset of representation and arises only under Rule 1.7(b)(1), a lawyer should seek informed consent to the conflict at the time that the conflict becomes evident, but if such consent is not given by the opposing party in the matter, the lawyer need not withdraw. In determining whether conflict is reasonably foreseeable, the test is an objective one. In determining the reasonableness of a lawyer's conduct, such factors as whether the lawyer (or lawyer's firm) has an adequate conflict-checking system in place, must be considered. Where more than one client is involved and the lawyer must withdraw because a conflict arises after representation has been undertaken, the question of whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.

Imputed Disqualification

[34] All of the references in Rule 1.7 and its accompanying Comment to the limitation upon a "lawyer" must be read in light of the imputed disqualification provisions of Rule 1.10, which affect lawyers practicing in a firm.

[35] In the government lawyer context, Rule 1.7(b) is not intended to apply to conflicts between agencies or components of government (federal, state, or local) where the resolution of such conflicts has been entrusted by law, order, or regulation to a specific individual or entity.

Businesses Affiliated With a Lawyer or Firm

[36] Lawyers, either alone or through firms, may have interests in enterprises that do not practice law but that, in some or all of their work, become involved with lawyers or their clients either by assisting the lawyer in providing legal services or by providing related services to the client. Examples of such enterprises are accounting firms, consultants, real estate brokerages, and the like. The existence of such interests raises several questions under this rule. First, a lawyer's recommendation, as part of legal advice, that the client obtain the services of an enterprise in which the lawyer has an interest implicates paragraph 1.7(b)(4). The lawyer should not make such a recommendation unless able to conclude that the lawyer's professional judgment on behalf of the client will not be adversely affected. Even then, the lawyer should not make such a recommendation without full disclosure to the client so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the lawyer's or the firm's interest in the related enterprise, alternative sources for the non-legal services in question, and sufficient information so that the client understands that the related enterprise's services are not legal services and that the client's relationship to the related enterprise will not be that of a client to attorney. Second, such a related enterprise may refer a potential client to the lawyer; the lawyer should take steps to assure that the related enterprise will inform the lawyer of all such referrals. The lawyer should not accept such a referral without full disclosure of the nature and substance of the lawyer's interest in the related enterprise. *See also* Rule 7.1(b). Third, the lawyer should be aware that the relationship of a related enterprise to its own customer may create a significant interest in the lawyer in the continuation of that relationship. The substantiality of such an interest may be enough to require the lawyer to decline a proffered client representation that would conflict with that interest; at least Rule 1.7(b)(4) and (c) may require the prospective client to be informed and to give informed consent

before the representation could be undertaken. Fourth, a lawyer's interest in a related enterprise that may also serve the lawyer's clients creates a situation in which the lawyer must take unusual care to fashion the relationship among lawyer, client, and related enterprise to assure that the confidences and secrets are properly preserved pursuant to Rule 1.6 to the maximum extent possible. *See* Rule 5.3.

Sexual Relations Between Lawyer and Client

[37] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns may be particularly acute when a lawyer has a sexual relationship with a client. Such a relationship may create a conflict of interest under Rule 1.7(b)(4) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.

[38] Especially when the client is an individual, the client's dependence on the lawyer's knowledge of the law is likely to make the relationship between lawyer and client unequal. A sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and thereby violate the lawyer's basic obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant risk that the lawyer's emotional involvement will impair the lawyer's independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client privilege, because client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. The client's own emotional involvement may make it impossible for the client to give informed consent to these risks.

[39] Sexual relationships with the representative of an organization client may not present the same questions of inherent inequality as the relationship with an individual client. Nonetheless, impairment of the lawyer's independent professional judgment and protection of the attorney-client privilege are still of concern, particularly if outside counsel has a sexual relationship with a representative of the organization who supervises, directs, or regularly consults with an outside lawyer concerning the organization's legal matters. An in-house employee in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the employee's personal involvement, and another representative of the organization may be required to determine whether to give informed consent to a waiver. The lawyer should consider not only the disciplinary rules but also the organization's personnel policies regarding sexual relationships (for example, prohibiting such relationships between supervisors and subordinates).

Short-Term Limited Legal Services

[40] For the application of this rule and Rules 1.9 and 1.10 when the lawyer undertakes to provide short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court, see Rule 6.5(a).

Rules of Professional Conduct

Rule 1.8: Conflict of Interest: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client gives informed consent in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

(c) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:

(1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and

(2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.

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

(1) The client gives informed consent after consultation;

(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) Information relating to representation of a client is protected as required by Rule 1.6.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, or in a criminal case an aggregated agreement as to guilty or *nolo contendere* pleas, unless each client gives informed consent in a writing signed by the client after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(g) A lawyer shall not:

(1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) Settle a claim or potential claim for malpractice arising out of the lawyer's past conduct with unrepresented client or former client unless that person is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable opportunity to do so in connection therewith.

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

(i) A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

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

Comment

Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to the existing clients of the lawyer's legal practice. *See* Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although the requirements of this rule must be met when the lawyer accepts an interest in the client's business or other non-monetary property as payment of all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products and services that the client generally markets to others; for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] The client's consent need not be an actual or electronic signature but must be in written or electronic form and show the client's assent to the terms communicated by the lawyer, *e.g.,* a return electronic mail. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and, where appropriate, should explain that the client may wish to seek the advice of independent counsel.

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the

transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be adversely affected by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. For the definition of "informed consent," *see* Rule 1.0(e). In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client, as paragraph (a)(1) requires.

[5] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should be advised by the lawyer to obtain the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[6] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will adversely affect the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[7] This rule does not prevent a lawyer from entering into a contingent fee arrangement with a client in a civil case, if the arrangement satisfies all the requirements of Rule 1.5(c).

Literary Rights

[8] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures that might otherwise be taken in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5.

Paying Certain Litigation Costs and Client Expenses

[9] Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this court in 1980 in an amendment to DR 5-103(B) that eliminated the requirement that the client remain ultimately liable for costs of litigation, even if

the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the result of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client that are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to "bid" for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The rule merely permits such payments to be made without requiring reimbursement by the client.

Person Paying for Lawyer's Services

[10] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. In some circumstances, such as the relationship among insured, insurer, and defense counsel, substantive law regarding the role of the third-party payer may affect the applicability of this rule. Paragraph (e) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. *See also* Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another). The requirements of Rule 1.8(e)(1) do not apply to lawyers appointed to represent indigent criminal defendants whose fees are paid under the Criminal Justice Act or any similar statute or rule.

[11] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(b)(4), a conflict of interest exists if there is a significant risk that the lawyer's representation will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7, the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under Rule 1.7(a).

Aggregate Settlements

[12] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or *nolo contendere* plea in a criminal case. The rule stated in paragraph (f) of this rule is a corollary of both Rules 1.7 and 1.2(a), and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[13] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen. Rule 1.8(g) does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, to the extent that such an agreement is valid and enforceable and the client is fully informed of the scope and effect of the agreement. Nor does the rule prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[14] Agreements settling a claim or potential claim for malpractice arising out of the lawyer's past conduct are not prohibited by Rule 1.8(g). Nevertheless, in view of the danger that the lawyer will take unfair advantage of an unrepresented client or a former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel. Settlement of a potential claim most often will occur in the context of the resolution of an actual dispute between the attorney and the client, whether concerning the claim itself or a dispute concerning fees. The rule does not authorize the lawyer to solicit a blanket release from the client as a routine incident of the conclusion of the legal representation.

[15] Paragraph (h) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. Pursuant to the provisions of Rule 1.8(j), the disqualification stated in paragraph (h) is personal and is not imputed to members of firms with whom the lawyers are associated. Since each of the related lawyers is subject to paragraph (h), the effect is to require the informed consent of all materially affected clients. Romantic relationships between lawyers may create conflicts of interest under Rule 1.7(b)(4), likewise requiring informed consent of all materially affected clients.

[16] The substantive law of the District of Columbia has long permitted lawyers to assert and enforce liens against the property of clients. *See, e.g., Redevelopment Land Agency v. Dowdey,* 618

A.2d 153, 159-60 (D.C. 1992), and cases cited therein. Whether a lawyer has a lien on money or property belonging to a client is generally a matter of substantive law as to which the ethics rules take no position. Exceptions to what the common law might otherwise permit are made with respect to contingent fees and retaining liens. See, respectively, Rule 1.5(c) and Rule 1.8(i).

[17] Rule 1.16(d) requires a lawyer to surrender papers and property to which the client is entitled when representation of the client terminates. Paragraph (i) of this rule states a narrow exception to 1.16(d): a lawyer may retain anything the law permits – including property – except for files. As to files, a lawyer may retain only the lawyer's own work product, and then only if the client has not paid for the work. However, if the client has paid for the work product, the client is entitled to receive it, even if the client has not previously seen or received a copy of the work product. Furthermore, the lawyer may not retain the work product for which the client has not paid, if the client has become unable to pay or if withholding the work product might irreparably harm the client's interest.

[18] Under Rule 1.16(d), for example, a lawyer would be required to return all papers received from a client, such as birth certificates, wills, tax returns, or "green cards." Rule 1.8(i) does not permit retention of such papers to secure payment of any fee due. Only the lawyer's own work product – results of factual investigations, legal research and analysis, and similar materials generated by the lawyer's own effort – could be retained. (The term "work product" as used in paragraph (i) is limited to materials falling within the "work product doctrine," but includes any material generated by the lawyer that would be protected under that doctrine whether or not created in connection with pending or anticipated litigation.) And a lawyer could not withhold all the work product merely because a portion of the lawyer's fees had not been paid.

[19] There are situations in which withholding the work product would not be permissible because of irreparable harm to the client. The possibility of involuntary incarceration or criminal conviction constitutes one category of irreparable harm. The realistic possibility that a client might irretrievably lose a significant right or become subject to a significant liability because of the withholding of the work product constitutes another category of irreparable harm. On the other hand, the mere fact that the client might have to pay another lawyer to replicate the work product does not, standing alone, constitute irreparable harm. These examples are merely indicative of the meaning of the term "irreparable harm," and are not exhaustive.

Attribution of Prohibitions

[20] Under paragraph (j), a prohibition of conduct by an individual lawyer in paragraphs (a) through (g) and (i) applies also to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (h) is personal and is not applied to associated lawyers.

Sexual Relationships with Clients

[21] Concerns about personal relationships, including sexual relationships, between lawyers and clients are addressed in Comments [37]-[39] to Rule 1.7.

Rules of Professional Conduct

Rule 1.15: Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). 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.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, see D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) of Rule 1.15 requires lawyers to keep "[c]omplete records of [client] funds and property. . . ." The D.C. Court of Appeals addressed the meaning of "complete records" in In re Clower, 831 A.2d 1030, 1034 (D.C. 2003): "The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Disciplinary Counsel can be completed even if the attorney or the client, or both, are not available." Rule 1.15 requires that lawyers maintain records such that ownership or any other question about client funds can be answered without assistance from the lawyer or the lawyer's clients. The precise records that achieve this result obviously can vary, but lawyers may wish to look for guidance on records from the 2010 ABA Model Rules For Client Trust Account Records.

[3] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted pro hac vice, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[5] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[6] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer–specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[7] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[8] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. See D.C. Bar Legal Ethics Committee Opinion 293.

[9] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[10] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, see Rule 3.4(a).

Ethics Opinion 293

Disposition of Property of Clients and Others Where Ownership Is in Dispute

In certain situations, a lawyer is obligated to safeguard funds that come into the lawyer's possession where ownership interests are claimed by both the lawyer's client and a third party or parties. If the third party has a "just claim" to the property that the lawyer has a duty under applicable law to protect against wrongful interference by the lawyer's client, the lawyer must hold any disputed portion of the property until the dispute has been resolved.

Applicable Rule

- Rule 1.15 (Safekeeping Property)

Inquiry

The Ethics Committee has received numerous inquiries from lawyers concerning the proper disposition of settlement funds that a lawyer receives on behalf of a client when persons other than the client assert ownership interests in the funds. The purpose of this opinion is to provide guidance for the lawyer who is unsure how to respond to a third party's claim or her client's dispute with that claim.

Discussion

When a lawyer receives property belonging to others, two duties on the part of the lawyer arise: (1) the duty to notify promptly those who have ownership interests in the property of its receipt by the lawyer; and (2) the duty to promptly deliver the property and an accounting, if requested, to its owner. Rule 1.15(b) reads:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

Rule 1.15(c) outlines a lawyer's duties with respect to the distribution of property where disputes arise as to its ownership:

> When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of Paragraph (a).

If the text of the rule were all that lawyers had to guide them, the rule would be difficult to interpret. The quoted portions of the rule speak of "interests" in property and "interests" claimed by competing parties. The rules, taken by themselves, do not define what is an interest sufficient to give rise to the safekeeping obligations of the lawyer and what sort of "claim" is sufficient to trigger the lawyer's obligation to safeguard the property until the dispute is resolved.

Comment [4] to Rule 1.15, however, provides further guidance:

> Third parties, such as a client's creditors, may have *just claims* against funds or other property in a lawyer's custody. A lawyer may have a duty *under applicable law* to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer shall not unilaterally assume to arbitrate a dispute between a client and the third party.

D.C. R. Prof. Conduct 1.15, comment [4] (emphasis added).

The rules and comments have been further elucidated in decided cases, ethics opinions from this and other jurisdictions, and in the secondary literature. Taken together, these materials offer guidance as to how to handle these matters.

1. **Client Claims**

One set of considerations applies when a dispute arises between a lawyer and the client concerning the property held by the lawyer. Because of the lawyer's duty of loyalty to the client, the client's mere assertion of a claim is enough to prevent the lawyer from withdrawing any disputed property: "There is no requirement that the dispute be genuine, serious, or bona fide, . . . The lawyer may not take possession of property the ownership of which is disputed by the client until it is absolutely clear that the dispute with the client has been finally resolved." *In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995).[1]

The lawyer's obligation is to safeguard the funds in a segregated account until the dispute is resolved. Moreover, the lawyer should take steps to promote a resolution. The lawyer should reason with the

client, suggest mediation, and suggest other alternative dispute resolution mechanisms where those steps fail.[2] If no other device is effective, the lawyer may ultimately be forced to seek a judicial resolution of the client's claim.

2. **Third Party Claims**

The claims of third parties to property coming into a lawyer's possession stand on a quite different footing. For one thing, the mere assertion of a claim by a third party is not enough by itself to freeze property in the lawyer's possession until the dispute is resolved. Indeed, the imposition of such a requirement by the Rules of Professional Conduct, which are prescribed by the District of Columbia Court of Appeals and hence have the force of law, could raise significant due process issues as constituting, in effect, a prejudgment attachment. *See* Conn. Informal Op. 95-20 (May 1, 1995) (citing *Connecticut v. Doehr*, 500 U.S. 1, 11 (1991) (attachment by private party under state aegis constitutes state action); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (holding prejudgment garnishment of wages unconstitutional); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding prejudgment seizure of goods unconstitutional where application ruled upon by clerk rather than judge, no requirement for detailed affidavit, and no requirement to show exigent circumstances); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (holding prejudgment seizure of bank account unconstitutional notwithstanding requirements of bond and showing of exigency). Unlike the claims of a client, which need not be justified even superficially in order to bar the lawyer from making distribution, *In re Haar*, 667 A.2d at 1353, the claims of the third party must rise to a higher level. The third party must have a "just claim" as to which "applicable law" imposes a duty on the lawyer to distribute the funds to the third party or withhold distribution. D.C. R. Prof. Conduct 1.15, comment [4].

The focus of this opinion is the precise level to which such a third-party claim must rise to trigger a duty of preservation by the lawyer in the face of a demand that she make disbursement to the client.[3] To begin with, the rule does not apply to claims of which the lawyer lacks knowledge. *Shapiro v. McNeill*, 92 N.Y.2d 91, 96, 699 N.E.2d 407, 409 (1998) (interpreting N.Y. DR 9-102); Conn. Informal Op. 95-20, at n. 3 (May 1, 1995). Similarly, if there is no legitimate dispute about who is entitled to part or all of the funds, the lawyer must disburse the undisputed portion accordingly. N.Y. State Op. 717 (Apr. 15, 1999); Arizona Op. 88-06. Further, the lawyer is not required to make ultimate decisions about who is correct in a dispute between the lawyer's client and a competing third party for property in the lawyer's possession. D.C. R. Prof. Conduct 1.15, comment [4]. In other words, a lawyer is not called on to decide the merits of the dispute at the lawyer's peril, thereby exposing the lawyer to suit from the disappointed party. *See Heffelfinger v. Gibson*, 290 A.2d 390 (D.C. 1972) (lawyer who had contracted to respect medical provider's lien personally liable for funds disbursed to client in knowing disregard of that lien); *Kaiser Foundation Health Plan, Inc. v. Aquiluz*, 47 Cal. App. 4th 302, 54 Cal. Rptr. 2d 665 (Ct. App. 1996) (same). As comment [4] makes clear, the "lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party."

In general, a "just claim" that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general

unsecured obligation of the client. The problems addressed by this opinion most commonly arise in the context of the disbursement of settlement funds or proceeds of a transaction, such as the sale of real estate. In those cases, several types of claims that frequently are received by lawyers are illustrative of "just claims" that would require the lawyer to give notice, make disbursement promptly where there is no dispute, and safeguard the funds in the event of a dispute until the dispute is resolved. These are:

1. an attachment or garnishment arising out of a money judgment against the client (or ordered judicially prior to judgment) and duly served upon the lawyer, regardless of whether the attachment or garnishment is related to the matter being handled by the lawyer, *see* Phila. Op. 94-9 (June 1994); Conn. Informal Op. 95-20 (May 1, 1995) ("valid judgment concerning disposition of the property"); Cleveland Op. 87-3 (1988);

2. a statutory lien that applies to the proceeds of the suit being handled by the lawyer, *e.g.* D.C. Op. 251 (lawyer must disregard client's direction to disburse settlement proceeds to client in face of statutory Medicaid lien); *see Aetna Casualty Co. v. Gilreath*, 625 S.W.2d 269 (Tenn. 1981) (lawyer under duty to recognize statutory lien of client's employer on workers' compensation recovery proceeds); Conn. Informal Op. 95-20 (May 1, 1995); R.I. Op. 95-29 (July 13, 1995); Colo. Formal Op. 94 (Nov. 20, 1993);

3. a court order relating to the specific funds in the lawyer's possession, *e.g.,* S.C. Op. 89-13; Colo. Formal Op. 94 (Nov. 20, 1993); and

4. a contractual agreement made by the client and joined in or ratified by the lawyer[4] to pay certain funds in the possession of the lawyer (e.g., client expenses in consideration of the supplier's agreement to forebear collection action during the pendency of the lawsuit) to a third party, regardless of whether such an agreement arises from the matter being handled by the lawyer, *Heffelfinger v. Gibson*, 290 A.2d 390 (D.C. 1972); *Florida Bar v. Neely*, 587 So. 2d 465 (Fla. 1991); *Romero v. Earl*, 111 N.M. 789, 810 P.2d 808 (1991); *American State Bank v. Enabnit*, 471 N.W.2d 829 (Iowa 1991); Calif. Formal Op. 1988-101.[5]

The last type of agreement, which is commonly known as an "Authorization and Assignment" in this jurisdiction, is frequently utilized in contingent fee personal injury matters. It may be known by other names in other jurisdictions.[6] The District of Columbia Court of Appeals has held that a lawyer who signs such an agreement remains liable where successor counsel ends up handling the case, at least where the original lawyer retains an interest in the matter and receives a referral fee from successor counsel when the matter is settled. *Heffelfinger*, 290 A.2d at 393 & n. 2. The Court of Appeals apparently has not addressed the liability of successor counsel in such a situation. We think that from the standpoint of Rule 1.15, however, successor counsel who is aware of the contractual commitment of her client and of predecessor counsel is prohibited ethically from disbursing the funds to the client.

In a recent decision, the District of Columbia Court of Appeals affirmed disciplinary action against a lawyer who, among other things, failed to retain funds as to which a third party, an insurance carrier, had a statutory lien. *In re Thomas*, 740 A.2d 538 (D.C. 1999). In the *Thomas* case, the insurance carrier paid the medical expenses of the attorney's client and informed the defendant and the lawyer, who represented the plaintiff, that it was asserting its statutory lien for the amount of its medical payments. Upon settlement, the defendant sent a check to the plaintiff's attorney, made payable to the client, the attorney and the insurance company as the "lienholder." The attorney prepared and sent to his client a settlement statement apportioning funds to the insurance company, which was not disputed by the client. Thereafter, the client and the attorney endorsed the check from the defendant and the attorney deposited the payment in the attorney's client escrow fund, without advising the insurance company that he had received the check or that he had deposited it without the insurance company's endorsement. Ultimately, the attorney wrote checks to himself from that account that effectively depleted the account, paying none of the funds either to the client or to the insurance company.

The Board on Professional Responsibility concluded that the insurance carrier had a statutory lien on some of the funds that came into the lawyer's possession but that the exact amount was unknown. The Board found that the attorney was liable for, among other things, commingling funds in violation of Rule 1.15(a), misappropriation in violation of Rule 1.15(b) and failing to notify a third party promptly of funds in which the third party had an interest in violation of Rule 1.15(b). The District of Columbia Court of Appeals upheld the Board's determination that the insurance carrier had a lien in some amount, leaving unresolved the amount of the lien and whether the lien had been waived. Under these circumstances, the court held that the lawyer should not have withdrawn funds from the account while the insurance company's right to those funds was in legitimate dispute.

We believe that the facts and holding of this case come within standards (2) and (4) above. The insurance carrier was found by clear and convincing evidence to have a statutory lien, although whether it was fully perfected and whether it had been waived were disputed. Further, the lawyer and the client appeared to have had an agreement to recognize the propriety of the third party's claim and a commitment to pay it. While there is very broad language in the opinion suggesting that any third party claim may be sufficient to freeze client funds in the lawyer's possession, we believe that the decision should be limited to its facts, namely that (1) the claim related to particular funds that were made payable to the attorney and third party and (2) the third party had a lien that was recognized both by the lawyer and the client. As noted above, a broader reading that would let a third party freeze a client's funds indefinitely simply by lodging a claim with the client's attorney would raise significant due process questions. We do not believe that such a reading was intended by the Court.

Where such a "just claim" exists, the lawyer is ethically obliged to disregard her client's demand for the property. *See* D.C. Op. 251 (1994); S.C. Op. 95-29; Ohio Op. 95-12 (Oct. 6, 1995); S.C. Op. 93-14. Thus, this rule concerning "just claims" is an exception to the general principle of client loyalty.

On the other hand, a lawyer is not required to pay the general unsecured creditors of her client, including judgment creditors who have not attached or garnished the funds in the lawyer's possession, where there is not a "just claim" of the type described above. *Scharf v. Statewide Grievance Comm.*, No. Civ. 94-0536033, 1995 Conn. Super. LEXIS 1471, 1996 WL 317090 (Conn. Super. Ct. May 11, 1995) (general unsecured creditor of client does not have interest sufficient to impose duty on lawyer to surrender funds); Conn. Informal Op. 95-20 (1995) (mere assertion of claim insufficient to create duty); Phila. Op. 94-24 (1994) (on lawyer's representation that clients had personal injury claim, clients' mortgagee stayed foreclosure sale of clients' property; lawyer's representation notwithstanding, no duty on lawyer to pay claim proceeds to mortgagee); Cleveland Op. 87-3 (1988) (mere judgment, without court order directed to attorney, insufficient to require attorney to pay funds to third party). In the words of the California Court of Appeals,

> as a general matter, an attorney receiving payment of a judgment or settlement on behalf of his or her client has no obligation to satisfy the client's debts out of that fund. The attorney is not obligated to pay, for example, the client's dry cleaning bill or credit card debts even if on notice thereof. It is only when the creditor has some property interest in the fund or a trust relationship exists that such an obligation might arise.

Farmers Ins. Exch. v. Zerin, 53 Cal. App. 4th 445, 459, 61 Cal. Rptr. 2d 767 (Ct. App. 1997).

Commentators have also suggested that comment [4] to Rule 1.15 uses the phrases "just claims" and "duty under applicable law" to suggest that the third party must have a "matured legal or equitable claim in order to qualify for special protection." 1 Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering*, § 1.15:302, at 460 (2d ed. 1990). Hazard and Hodes suggest that garnishment of the client's funds in the lawyer's possession is a potential means of protecting the third party's interest, but that the creditor must rely upon a court, rather than the client's lawyer, for such assistance. *Id.* § 1.15:303. Further, a comment to the draft Restatement of the Law Governing Lawyers states:

> If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs.

Restatement of the Law Governing Lawyers § 57 comment *d.* (Prop. Final Draft No. 1, 1996) (emphasis added).

Even more difficult problems arise when the proceeds of the recovery (whether by settlement or judgment) are insufficient to satisfy the "just claims" of various service providers. For example, where the litigation results in a recovery in which, after deduction of the lawyer's contingent fee,[7] the remainder is insufficient to satisfy all the assignments the client has made to his medical providers, the lawyer is faced with difficult questions of how to disburse the funds. An obvious solution would be to pro rate the funds among the various providers but the disbursing lawyer presumably would be obliged to secure the consent of all the providers before doing so. Otherwise, the question may

become one of priority of claims, which is a subject beyond the purview of this Committee. In such a case, a lawyer holding disputed funds would have to permit the competing claimants to resolve the matter among themselves. If the competing claimants were unable to resolve the disputed issues among themselves, filing an interpleader action might be the only avenue open to the lawyer.

Inquiry No. 98-7-21
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1. In Haar, the client offered $4,000—less than half the fee the lawyer was claiming—to settle the lawyer's claim. The lawyer rejected the client's offer but withdrew $4,000 on the ground that it was no longer disputed because the client had offered it in settlement. The court found that the lawyer's conduct violated Rule 1.15. Haar was decided under DR 9-103(A)(2) of the former D.C. Code of Professional Responsibility but the Court indicated that Rule 1.15 of the D.C. Rules of Professional Conduct is "similar" to the Code provisions. In re Haar, 667 A.2d at 1352 n.1.
2. Of course, if the client demands arbitration of a fee dispute, District of Columbia law requires the lawyer to consent to arbitration. Rule XIII of Rules governing the Bar of the District of Columbia Court of Appeals.
3. This committee "ordinarily will not respond to questions of law, other than those arising under the Rules of Professional Conduct." Rule C-4, Rules of the D.C. Bar Legal Ethics Comm. Because comment [4] to Rule 1.15 incorporates by reference the "applicable law" on attorney liability, though, some reference to civil liability standards is unavoidable. The law in the District of Columbia appears to be that where a lawyer disburses to her client funds claimed by another, the lawyer is liable civilly if she has agreed to protect the third party's interest. Heffelfinger v. Gibson, 290 A.2d 390 (D.C. 1972). The D.C. Office of Bar Counsel has taken the position that the same standard obtains under Rule 1.15. Letter from Leonard H. Becker, Bar Counsel, to Irvin B. Nathan, Chair, D.C. Bar Legal Ethics Comm. at 2 (Aug. 23, 1999). The Court of Appeals also has ruled that a lawyer is not liable where she is aware of the client's liability to the third party but has made no independent undertaking to protect the third party. Travelers Ins. Co. v. Haden, 418 A.2d 1078 (D.C. 1980). Liability in the former circumstance may continue even after the lawyer has transferred the case to another lawyer unless the creditor has absolved the first lawyer of responsibility. Heffelfinger, 290 A.2d at 393 & n. 2. Further, and as noted above, there may be constitutional limitations upon requiring a lawyer to turn client funds over to a third party—or even to withhold them from the client—absent a matured claim to the particular funds in question. The District of Columbia statutes permit prejudgment attachment only in exigent circumstances, D.C. Code § 16-501(d) (1997), ordinarily require the posting of a bond by the party seeking the writ that is twice the amount of the claim, id. § 16-501(e), and require a postattachment hearing, id. § 16-506. Even in the post-judgment context, no lien is created until a writ of fieri facias or other writ of execution is issued. D.C. Code § 15-307 (1995).
4. Some jurisdictions other than the District of Columbia require the lawyer to withhold funds from a client who has agreed to pay them to a third party, even if the lawyer has not joined in or agreed to adhere to that arrangement. E.g., Advance Finance Co., Inc. v. Clients Security Trust Fund, 337 Md. 195, 652 A.2d 660 (1995); Kaiser Foundation Health Plan, Inc. v. Aguiluz, 47 Cal. App. 4th 302, 54 Cal. Rptr. 2d 665 (Ct. App. 1996); Herzog v. Irace, 594 A.2d 1106 (Me. 1991); Berkowitz v. Haigood, 256 N.J. Super. 342, 606 A.2d 1157 (1992); Leon v. Martinez, 84 N.Y.2d 83, 638 N.E.2d 511 (1994) (lawyer had not executed or acknowledged, but had drafted, assignment agreement); Formal Op. 98-06, Ariz. Comm. on Rules of Prof. Conduct (June 3, 1998); Informal Op. 95-20, Conn. Comm. on Prof. Ethics (May 1, 1995) (requiring withholding but not payment to third party claimant); Op. 93-14, S.C. Bar Ethics Adv. Comm.; Op. 93-31, S.C. Bar Ethics Adv. Comm. (insurer's subrogation claim); Op. 94-20, S.C. Bar Ethics Adv. Comm. This jurisdiction and others appear to disagree. See Travelers Ins. Co. v. Haden, 418 A.2d 1078 (D.C. 1980) (mere knowledge of insurer's claim insufficient to create liability on part of lawyer); Farmers Ins. Exchange v. Zerin, 53 Cal. App. 4th 445, 61 Cal. Rptr. 2d 707 (1997) (attorney not liable where he made no promise to protect subrogee's rights or property); Op. 95-12, Ohio Bd. of Comm'rs on Grievances and Discipline (Oct. 6, 1995); Op. 94-24, Phila. Bar Ass'n Prof. Guidance Comm. (Nov. 1994) (permissible to pay client where lawyer had made no promise to protect third party's interest); Inquiry 86-134, Phila. Bar Ass'n (no duty to pay medical service provider, or even to withhold funds, where no agreement by client to pay provider from settlement funds).
5. A valid escrow agreement covering funds in the lawyer's possession conceivably also could be viewed as a "just claim" but

such an arrangement involves a fiduciary duty on the part of the lawyer to all the parties to the agreement, not just to her own client. See Janson v. Cozen and O'Connor, 450 Pa. Super. 415, 676 A.2d 242 (1996) (no lawyer liability for third party claim where valid escrow agreement did not exist).

6. See the discussion of "letters of protection" in Ohio Op. 95-12, 11 Law Man. Prof. Conduct 366 (1995); Conn. Informal Op. 95-20 (May 1, 1995).

7. The D.C. Office of Bar Counsel has "taken the position that the attorney's right to claim a priority for his or her own fees and expenses presents a legal question . . . beyond the scope of [Rule 1.15] to address as an ethical question." Letter of Leonard H. Becker, Bar Counsel, to Irvin B. Nathan, Chair, D.C. Bar Legal Ethics Comm., at 2 (Aug. 23, 1999) (copy in the files of this Committee).

Rule 1.7 Conflict of Interest: Current Clients
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

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

(2) the representation is not prohibited by law; and

(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.

(e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,* or a discrete and identifiable class of persons.*

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits

undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. (See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].) A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person* in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm.* Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[3] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that paragraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[4] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be

able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially by the resolution of the matter.

[5] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[6] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals* at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[7] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code, § 6068, subd. (e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this rule is likewise precluded.

[8] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr.

185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[9] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. (See rule 1.8.8.)

[10] A material change in circumstances relevant to application of this rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. (See rule 1.9(c).)

[11] For special rules governing membership in a legal service organization, see rule 6.3; and for work in conjunction with certain limited legal services programs, see rule 6.5.

Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client
(Rule Approved by the Supreme Court, Effective November 1, 2018)

A lawyer shall not enter into a business transaction with a client, or knowingly* acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(a) the transaction or acquisition and its terms are fair and reasonable* to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing* to the client in a manner that should reasonably* have been understood by the client;

(b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing* to seek the advice of an independent lawyer of the client's choice and is given a reasonable* opportunity to seek that advice; and

(c) the client thereafter provides informed written consent* to the terms of the transaction or acquisition, and to the lawyer's role in it.

Comment

[1] A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. (See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68 [14 Cal.Rptr.3d 58]; see also Bus. & Prof. Code, § 6175.3 [Sale of financial products to elder or dependent adult clients; Disclosure]; Fam. Code, §§ 2033-2034 [Attorney lien on community real property].) However, this rule does not apply to a charging lien given to secure payment of a contingency fee. (See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].)

[2] For purposes of this rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition; and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] In some circumstances, this rule may apply to a transaction entered into with a former client. (Compare *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 370-71 ["[W]hen an attorney enters into a transaction with a former client regarding a fund which resulted from the attorney's representation, it is reasonable to examine the relationship between the parties for indications of special trust resulting therefrom. We conclude that if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [the predecessor rule) even if the representation has otherwise ended [and] It appears that [the client] became a

target of [the lawyer's] solicitation because he knew, through his representation of her, that she had recently received the settlement fund [and the court also found the client to be unsophisticated]."] with *Wallis v. State Bar* (1942) 21 Cal.2d 322 [finding lawyer not subject to discipline for entering into business transaction with a former client where the former client was a sophisticated businesswoman who had actively negotiated for terms she thought desirable, and the transaction was not connected with the matter on which the lawyer previously represented her].)

[5] This rule does not apply to the agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 1.5. This rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by rules 1.5 and 1.15.

[6] This rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

Rule 1.8.6 Compensation from One Other than Client
(Rule Approved by the Supreme Court, Effective November 1, 2018)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;

(b) information is protected as required by Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6; and

(c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

(1) nondisclosure or the compensation is otherwise authorized by law or a court order; or

(2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this rule as soon thereafter as is reasonably* practicable.

[5] This rule is not intended to alter or diminish a lawyer's obligations under rule 5.4(c).

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

(c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:

(1) funds reasonably* sufficient to pay bank charges; and

(2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(d) A lawyer shall:

(1) promptly notify a client or other person* of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;

(2) identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other property of a client or other person* coming into the possession of the lawyer or law firm;*

(4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;

(5) preserve records of all funds and property held by a lawyer or law firm* under this rule for a period of no less than five years after final appropriate distribution of such funds or property;

(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and

(7) promptly distribute, as requested by the client or other person,* any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.

(e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Standards:

Pursuant to this rule, the Board of Trustees of the State Bar adopted the following standards, effective November 1, 2018, as to what "records" shall be maintained by lawyers and law firms* in accordance with paragraph (d)(3).

(1) A lawyer shall, from the date of receipt of funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:

(i) the name of such client or other person;*

(ii) the date, amount and source of all funds received on behalf of such client or other person;*

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person;* and

(iv) the current balance for such client or other person;*

(b) a written* journal for each bank account that sets forth:

(i) the name of such account;

(ii) the date, amount and client affected by each debit and credit; and

(iii) the current balance in such account;

(c) all bank statements and cancelled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:

(a) each item of security and property held;

(b) the person* on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person* to whom the security or property was distributed.

Comment

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. (See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665].) However, civil liability by itself does not establish a violation of this rule. (Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] ["'When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.'"] with *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] [lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds].)

[2] As used in this rule, "advances for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer

and a flat fee, which is one type of advance fee, see rule 1.5(d) and (e). Subject to rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client's agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

The repealed prior version of this rule that was effective from November 1, 2018 to December 31, 2022, and the Executive Summary concerning those amendments can be found here.

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons
(Rule Approved by the Supreme Court, Effective January 1, 2023)

(a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

(c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:

(1) funds reasonably* sufficient to pay bank charges; and

(2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(d) A lawyer shall:

(1) absent good cause, notify a client or other person* no later than 14 days of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;

(2) identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other property of a client or other person* coming into the possession of the lawyer or law firm;*

(4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;

(5) preserve records of all funds and property held by a lawyer or law firm* under this rule for a period of no less than five years after final appropriate distribution of such funds or property;

(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and

(7) promptly distribute any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.

(e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

(f) For purposes of determining a lawyer's compliance with paragraph (d)(7), unless the lawyer, and the client or other person* agree in writing that the funds or property will continue to be held by the lawyer, there shall be a rebuttable presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606 that a violation of paragraph (d)(7) has occurred if the lawyer, absent good cause, fails to distribute undisputed funds or property within 45-days of the date when the funds become undisputed as defined by paragraph (g). This presumption may be rebutted by proof by a preponderance of evidence that there was good cause for not distributing funds within 45 days of the date when the funds or property became undisputed as defined in paragraph (g).

(g) As used in this rule, "undisputed funds or property" refers to funds or property, or a portion of any such funds or property, in the possession of a lawyer or law firm* where the lawyer knows* or reasonably should know* that the ownership interest of the client or other person* in the funds or property, or any portion thereof, has become fixed and there are no unresolved disputes as to the client's or other person's* entitlement to receive the funds or property.

Standards:

Pursuant to this rule, the Board of Trustees of the State Bar adopted the following standards, effective November 1, 2018, as to what "records" shall be maintained by lawyers and law firms* in accordance with paragraph (d)(3).

(1) A lawyer shall, from the date of receipt of funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:

(i) the name of such client or other person;*

(ii) the date, amount and source of all funds received on behalf of such client or other person;*

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person;* and

(iv) the current balance for such client or other person;*

(b) a written* journal for each bank account that sets forth:

(i) the name of such account;

(ii) the date, amount and client affected by each debit and credit; and

(iii) the current balance in such account;

(c) all bank statements and cancelled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:

(a) each item of security and property held;

(b) the person* on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person* to whom the security or property was distributed.

Comment

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. (See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665].) However, civil liability by itself does not establish a violation of this

rule. (Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] ["'When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.'"] with *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] [lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds].)

[2] As used in this rule, "advances for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see rule 1.5(d) and (e). Subject to rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client's agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

[4] Subparagraph (d)(7) is not intended to apply to a fee or expense the client has agreed to pay in advance, or the client file, or any other property that the client or other person* has agreed in writing that the lawyer will keep or maintain. Regarding a lawyer's refund of a fee or expense paid in advance, see rule 1.16(e)(2). Regarding the release of a client's file to the client, see rule 1.16(e)(1).

[5] Upon rebuttal by proof by a preponderance of the evidence of the presumption set forth in paragraph (f), a violation of paragraph (d)(7) must be established by clear and convincing evidence without the benefit of the rebuttable presumption.

[6] Whether or not the rebuttable presumption in paragraph (f) applies, a lawyer must still comply will all other applicable provisions of this rule. This includes a lawyer's duty to take diligent steps to initiate and complete the resolution of disputes concerning a client's or other person's* entitlement to funds or property received by a lawyer.

[7] Under paragraph (g), possible disputes requiring resolution may include, but are not limited to, disputes concerning entitlement to funds arising from: medical liens; statutory liens; prior attorney liens; costs or expenses; attorney fees; a bank's policies and fees for clearing a check or draft; any applicable conditions on entitlement such as a plaintiff's execution of a release and dismissal; or any legal proceeding, such as an interpleader action, concerning the entitlement of any person to receive all or a portion of the funds or property.

The State Bar of California

Handbook on Client Trust Accounting for California Attorneys

2023

Acknowledgments

The State Bar of California gratefully acknowledges that the idea for this Handbook arose out of the exhaustive book on client trust accounting prepared by David Johnson, Jr., the Director of Attorney Ethics of the Supreme Court of New Jersey. Although the client trust accounting rules in New Jersey differ from those in California, the same basic principles of accounting apply. As the discussion of the basic principles in the New Jersey materials is so good, this Handbook borrows extensively from it.

This Handbook was developed by Jay Ladin, Senior Administrative Assistant in the Office of Professional Competence, Planning and Development, with the assistance of Dominique Snyder, Senior Trial Counsel, Office of Intake/Legal Advice, and Karen Betzner, Associate Senior Executive for Professional Competence, Standards and Certification. Production of the Handbook, and subsequent updates were coordinated by Lauren McCurdy, Sr. Administrative Specialist, as assisted by Felicia Soria, Administrative Secretary, Office of Professional Competence.

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The Handbook contains legal information, not legal advice. Nothing contained in this Handbook is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or for obtaining the advice of legal counsel with respect to legal problems.

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All other appendices are current as of January 1, 2023.

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SECTION III: KEY CONCEPTS IN CLIENT TRUST ACCOUNTING

The following seven key concepts are all the background you need in order to understand your client trust accounting responsibilities.

KEY CONCEPT 1: SEPARATE CLIENTS ARE SEPARATE ACCOUNTS

Client A's money has nothing to do with Client B's money. Even when you keep them in a common client trust bank account (such as in an IOLTA account), each client's funds are completely separate from those of all your other clients. In other words, you are **NEVER** allowed to use one client's money to pay either another client's or your own obligations.

When you keep your clients' money in a common client trust bank account, the way to distinguish one client's money from another's is to keep a client ledger of each individual client's funds (as required by rule 1.15(d)(3) and the recordkeeping standards under rule 1.15(e)). The client ledger tells you how much money you've received on behalf of each client, how much money you've paid out on behalf of each client, and how much money each client has left in your common client trust bank account. If you are holding money in your common client trust bank account for 10 clients, you have to maintain 10 separate client ledgers. If you keep each client's ledger properly, you will always know exactly how much of the money in your common client trust bank account belongs to each client. If you don't, you will lose track of how much money each client has, and when you make payments out of your client trust bank account, you won't know which client's money you are using.

Also note, if your client's money can earn income in excess of the costs incurred to hold the account, either because the funds are large enough in amount or are held for a long period of time, then you cannot place the funds in an IOLTA account. (See **IOLTA Accounts** and **What MUST Be Held in Your IOLTA Account?**.)

KEY CONCEPT 2: YOU CAN'T SPEND WHAT YOU DON'T HAVE

Each client has only his or her own funds available to cover their expenses, no matter how much money belonging to other clients is in your common client trust bank account. Your common client trust bank account might have a balance of $100,000, but if you are only holding $10.00 for a certain client, you can't write a check for $10.50 on behalf of that client without using some other client's money.

The following example graphically illustrates this concept. Assume you are holding a total of $5,000 for four clients in your common client trust bank account as follows:

Client A	$1,000
Client B	$2,000
Client C	$1,500
Client D	$ 500
Total	$5,000

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.

Adopted July 1, 2009, effective January 1, 2010.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For a definition of "informed consent" see Rule 1.0(e).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a

lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[20] Reserved.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not

reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, *e.g.*, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties

on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege generally does not attach. Hence, it should generally be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely

to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(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.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or *nolo contendere* pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(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.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(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.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood.

Paragraph (a)(2) requires that the lawyer inform the client in writing that the client may seek the advice of independent legal counsel and provide a reasonable opportunity for the client to do so. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent). The common law regarding business transactions between lawyer and client may impose additional requirements, such as encouraging the client to seek independent legal counsel, in lawyer liability and other nondisciplinary contexts.

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or *nolo contendere* plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Adopted July 1, 2009, effective January 1, 2010.

M.R. 3140

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

Order entered April 7, 2015.

(Deleted material is struck through and new material is underscored.)

Effective July 1, 2015, Rule 1.15 of the Illinois Rules of Professional Conduct of 2010 is amended, as follows.

Amended Rule 1.15

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 deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. For the purposes of this Rule, a client trust account means an IOLTA account as defined in paragraph ~~(i)(2)~~ (j)(2), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in paragraph (f). Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

Maintenance of complete records of client trust accounts shall require that a lawyer:

(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, and the date, payee and purpose of each disbursement;

(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the date of each deposit, the names of all persons for whom the funds are or were held, the amount of such funds, the dates, descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;

(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;

(4) maintain all client trust account checkbook registers, check stubs, bank statements,

records of deposit, and checks or other records of debits;

(5) maintain copies of all retainer and compensation agreements with clients;

(6) maintain copies of all bills rendered to clients for legal fees and expenses;

(7) prepare and maintain reconciliation reports of all client trust accounts, on at least a quarterly basis, including reconciliations of ledger balances with client trust account balances;

(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer.

Each client trust account shall be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary prudence.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:

(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;

(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

(3) the manner in which the retainer will be applied for services rendered and expenses incurred;

(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;

(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such

property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All funds of clients or third persons held by a lawyer or law firm which are nominal in amount or are expected to be held for a short period of time, including advances for costs and expenses, and funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more IOLTA accounts, as defined in paragraph ~~(i)(2)~~ (j)(2). A lawyer or law firm shall deposit all funds of clients or third persons which are not nominal in amount or expected to be held for a short period of time into a separate interest- or dividend-bearing client trust account with the client designated as income beneficiary. Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Each IOLTA account shall comply with the following provisions:

(1) Each lawyer or law firm in receipt of nominal or short-term client funds shall establish one or more IOLTA accounts with an eligible financial institution authorized by federal or state law to do business in the state of Illinois and which offers IOLTA accounts within the requirements of this Rule as administered by the Lawyers Trust Fund of Illinois.

(2) Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility guidelines, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.

(3) An IOLTA account that meets the highest comparable rate or dividend standard set forth in paragraph (f)(2) must use one of the identified account options as an IOLTA account, or pay the equivalent yield on an existing IOLTA account in lieu of using the highest-yield bank product:

(a) a checking account paying preferred interest rates, such as money market or indexed rates, or any other suitable interest-bearing deposit account offered by the eligible institution to its non-IOLTA customers.

(b) for accounts with balances of $100,000 or more, a business checking account with automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities as defined in paragraph (h).

(c) for accounts with balances of $100,000 or more, a money market fund with, or tied to, check-writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total assets of at least $250 million.

(4) As an alternative to the account options in paragraph (f)(3), the financial institution

may pay a "safe harbor" yield equal to 70% of the Federal Funds Target Rate or 1.0%, whichever is higher.

(5) Each lawyer or law firm shall direct the eligible financial institution to remit monthly earnings on the IOLTA account directly to the Lawyers Trust Fund of Illinois. For each individual IOLTA account, the eligible financial institution shall provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent; the account number; the remittance period; the rate of interest applied; the account balance on which the interest was calculated; the reasonable service fee(s) if any; the gross earnings for the remittance period; and the net amount of earnings remitted. Remittances shall be sent to the Lawyers Trust Fund electronically unless otherwise agreed. The financial institution may assess only allowable reasonable fees, as defined in paragraph ~~(i)(8)~~ (j)(8). Fees in excess of the earnings accrued on an individual IOLTA account for any month shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

(g) A lawyer or law firm should exercise reasonable judgment in determining whether funds of a client or third person are nominal in amount or are expected to be held for a short period of time. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's or law firm's exercise of reasonable judgment under this rule or decision to place client funds in an IOLTA account or a non-IOLTA client trust account on the basis of that determination. Ordinarily, in determining the type of account into which to deposit particular funds for a client or third person, a lawyer or a law firm shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be held and the likelihood of delay in the relevant transaction or proceeding;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

(h) All trust accounts, whether IOLTA or non-IOLTA, shall be established in compliance with the following provisions on dishonored instrument notification:

(1) A lawyer shall maintain trust accounts only in eligible financial institutions that have filed with the Attorney Registration and Disciplinary Commission an agreement, in a form provided by the Commission, to report to the Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days notice in writing to the Commission. The Commission shall annually publish a list of financial institutions that have agreed to comply with this rule and shall establish rules and procedures governing amendments to the list.

(2) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the

dishonored instrument, if such a copy is normally provided to depositors; and

(b) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(3) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(4) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by paragraph (h) of this Rule. Fees charged for the reasonable cost of producing the reports and records required by paragraph (h) are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as those are defined in paragraph ~~(i)(8)~~ (j)(8).

(i) A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If after 12 months of the discovery of the unidentified funds the lawyer determines that ascertaining the ownership or securing the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (i).

A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Lawyers Trust Fund, which after verification of the claim will return the funds to the lawyer.

~~(i)~~(j) Definitions

(1) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders or sales drafts, and electronic fund transfers.

(2) "IOLTA account" means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of nominal or short-term funds of clients or third persons as defined in paragraph (f) and from which funds may be withdrawn upon request as soon as permitted by law.

(3) "Eligible financial institution" is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide dishonored instrument notification regarding any type of client trust account as provided in paragraph (h) of this Rule; and that with respect to IOLTA accounts, offers IOLTA accounts within the requirements of paragraph (f) of this Rule.

(4) "Properly payable" refers to an instrument which, if presented in the normal course of

business, is in a form requiring payment under the laws of this jurisdiction.

(5) "Money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.

(6) "U.S. Government securities" refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement ("repo") may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

(7) "Safe harbor" is a yield that if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return in compliance with this Rule. Such yield shall be calculated as 70% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month.

(8) "Allowable reasonable fees" for IOLTA accounts are per-check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(9) "Unidentified funds" are amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

~~(j)~~(k) In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:

(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or

(2) has met the "good-funds" requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits: (a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States, (c) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government, (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state, (e) a personal check or checks in an aggregate amount not exceeding $5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA, (f) a check drawn on the account of or issued by a

lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2, (g) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more client trust accounts. Client trust accounts should be made identifiable through their designation as "client trust account" or "client funds account" or words of similar import indicating the fiduciary nature of the account. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis complete records of client trust account funds as required by paragraph (a), including subparagraphs (1) through (8). These requirements articulate recordkeeping principles that provide direction to a lawyer in the handling of funds entrusted to the lawyer by a client or third person. Compliance with these requirements will benefit the attorney and the client or third party as these fiduciary funds will be safeguarded and documentation will be available to fulfill the lawyer's fiduciary obligation to provide an accounting to the owners of the funds and to refute any charge that the funds were handled improperly.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed. Specific guidance concerning client trust accounts is provided in the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission as well as on the website of the Illinois Attorney Registration and Disciplinary Commission.

[3A] Paragraph (c) relates to legal fees and expenses that have been paid in advance. The

reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.

[3B] Paragraph (c) must be read in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). In *Dowling*, the Court distinguished different types of retainers. It recognized advance payment retainers and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true," "engagement," or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expense, and must be deposited in a client trust account pursuant to paragraph (a). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[3C] An advance payment retainer is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of an advance payment retainer that is not earned must be refunded to the client. An advance payment retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. An advance payment retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (c). An advance payment retainer is distinguished from a fixed fee (also described as a "flat" or "lump-sum" fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike an advance payment retainer, a fixed fee is generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[3D] The type of retainer that is appropriate will depend on the circumstances of each case. The guiding principle in the choice of the type of retainer is protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, pursuant to this Rule.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the

property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] Paragraphs (a), (f) and (g) require~~s~~ that nominal or short-term funds belonging to clients or third persons be deposited in one or more IOLTA accounts as defined in paragraph ~~(i)(2)~~(j)(2) and provide~~s~~ that the interest earned on any such accounts shall be submitted to the Lawyers Trust Fund of Illinois. The Lawyers Trust Fund of Illinois will disburse the funds so received to qualifying organizations and programs to be used for the purposes set forth in its by-laws. The purposes of the Lawyers Trust Fund of Illinois may not be changed without the approval of the Supreme Court of Illinois. The decision as to whether funds are nominal or short-term shall be in the reasonable judgment of the depositing lawyer or law firm. Client and third-person funds that are neither nominal or short-term shall be deposited in separate, interest- or dividend-bearing client trust accounts for the benefit of the client as set forth in paragraphs (a) and (f).

[7] Paragraph (h) requires that lawyers maintain trust accounts only in financial institutions that have agreed to report trust account overdrafts to the ARDC. The trust account overdraft notification program is intended to provide early detection of problems in lawyers' trust accounts, so that errors by lawyers and/or banks may be corrected and serious lawyer transgressions pursued.

[8] Paragraph (i) applies when accumulated balances in an IOLTA account cannot be documented as belonging to an identifiable client or third party, or to the lawyer or law firm. This paragraph provides a mechanism for a lawyer to remove these funds from an IOLTA account when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful. This procedure facilitates the effective management of IOLTA accounts by lawyers; addresses situations where an IOLTA account becomes the responsibility of a lawyer's successor, law partner, or heir; and supports the provision of civil legal aid in Illinois.

The Lawyers Trust Fund of Illinois will publish instructions for lawyers remitting unidentified funds. Proceeds of unidentified funds received under paragraph (i) will be distributed to qualifying organizations and programs according to the purposes set forth in the by-laws of the Lawyers Trust Fund. When a lawyer learns that funds have been remitted in error or later identifies the owner of remitted funds, the lawyer may make a claim to the Lawyers Trust Fund for the return of the funds. After verification of the claim, the Lawyers Trust Fund will return the funds to the lawyer who then ensures the funds are restored to the owner.

Paragraph (i) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts—funds whose owner is known but have not been claimed—should be handled according to applicable statutes including the Uniform Distribution of Unclaimed Property Act (765 ILCS 1025 et seq.).

~~[8]~~[9] Paragraph ~~(i)~~(j) provides definitions that pertain specifically to Rule 1.15. Paragraph

(1) defines expansively the meaning of "funds," to include any form of money, including electronic fund transfers. Paragraph (2) defines an IOLTA account and paragraph (3) defines an eligible financial institution for purposes of the overdraft notification and IOLTA programs. Paragraph (4) defines "properly payable," a term used in the overdraft notification provisions in paragraph (h)(1). Paragraphs (5) through (8) define terms pertaining to IOLTA accounts. Paragraph (9) defines "unidentified funds" as that term is used in paragraph (i).

~~[9]~~[10] Paragraph ~~(j)~~(k) applies only to the closing of real estate transactions and adopts the "good-funds" doctrine. That doctrine provides for the disbursement of funds deposited but not yet collected if the lawyer has already established an appropriate Real Estate Funds Account and otherwise fulfills all of the requirements contained in the Rule.

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015.

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March 17, 2023

Adam Wolfson
Quinn Emanuel Urquhart & Sullivan
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Email: adamwolfson@quinnemanuel.com

Re: Health Republic and Common Ground v. USA/Attorney Fee Award

Adam:

I am following up on our conversation this past Tuesday. As I mentioned during the call, in light of the Federal Circuit's decision vacating the fee award, the objecting class members have concerns and questions regarding the current location of the funds. During the call we requested that you return the funds to the class administrator. You said that the funds have already been "distributed" and that, if we want them returned, we should file a motion.

The objecting class members consider these funds disputed funds under Rule 1.15 of the Rules of Professional Conduct and request a full accounting and confirmation of their location, including confirmation and evidence that the funds are being held in an interest bearing trust account for the benefit of the clients.

Please provide this information by Monday, March 20, 2023.

Sincerely,

Moe Keshavarzi
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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March 20, 2023

VIA E-MAIL
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Re: Health Republic and Common Ground v. USA/Attorney Fee Award

Dear Moe:

I have your letter dated March 17, 2023, which follows on the call we held at your request earlier last week. To reiterate what I told you on our call, although the Court of Federal Claims previously ruled your clients may not make any direct filings or otherwise appear at hearings in the *Health Republic* and *Common Ground* matters, we have no objection (subject to Court permission) to you appearing at the upcoming status conference to discuss the briefing on Quinn Emanuel's renewed fee application. I also confirmed in response to your request that, if the Court maintains its position you cannot appear in the actions, we would certainly let it know your clients request the opportunity to provide a response to that renewed fee application.

During our call, I mentioned that we intend to renew our request for a 5% fee award and intend to provide supplemental support for that request, in line with the Federal Circuit's recent opinion. When I asked whether your clients (*i.e.*, the unnamed class members who originally objected to our 5% fee request) intended to maintain their argument that Quinn Emanuel should be awarded a 0.8x lodestar multiplier as fees for its risk corridors work, you demurred until you saw the renewed submission. That is where I understood we left things, but we are happy to provide additional information in response to your March 17, 2023 letter.

As an initial matter, I would like to highlight how seriously Quinn Emanuel takes its responsibilities as Court-appointed class counsel in these cases. We noted this in our original fee application, but the legal theory we originated in 2016 and doggedly pursued for the class ever

since is one in which we believe deeply. As your clients are aware, Quinn Emanuel requested (and the Court permitted) the class administrator to pay out 95% of the risk corridors claims while our original fee application was pending, so class members could receive their proceeds from the case as soon as reasonably possible. Further, you may have not followed the class actions since the fee application briefing, but Quinn Emanuel has continued to resolve multiple disputes for the remaining risk corridors subclasses, and we have also continued to pursue resolution of the claims for cost-sharing reduction class members. These cases remain a continuing priority that we are honored to undertake and, while we disagree with arguments you have levied against our firm specifically in the context of the fee application, we take pride in what we achieved for your clients and every other affected qualified health plan provider.

Moving to your contention that the Court's original fee award constitutes "disputed funds under Rule 1.15 of the Rules of Professional Conduct," we respectfully disagree. Quinn Emanuel does not have an engagement agreement with any of the objecting class members, nor are they named class members in either case. As comment 25 to Rule 1.7 of the Rules of Professional Conduct makes clear, unnamed class members are not "clients" of class counsel in the sense that the Rules of Professional Conduct identify. Rule 1.15 is thus inapplicable; instead, the Court oversees those funds and how they are handled.

Further, even if Rule 1.15 applied here, the Court issued a final judgment on Quinn Emanuel's fee application, which became final and executable long ago under Rule of the Court Federal Claims 62(a). *See also* 5 Newberg and Rubenstein on Class Actions § 15:20 (6th ed.). No party sought to stay or otherwise modify the execution of that judgment—even pending appeal. Quinn Emanuel therefore instructed the class administrator to distribute the funds to it pursuant to that Court order and judgment.

Finally, we understand there is the possibility the Court of Federal Claims may award Quinn Emanuel a lower fee as part of the upcoming proceedings. If that occurs, consistent with our obligations as class counsel, when the Court once again issues a judgment on Quinn Emanuel's fee application, we will pay back any ordered amounts to the class administrator, who will then distribute those funds to the entire class *pro rata*. That is the proper procedure.

Best regards,

/s/ Adam Wolfson

Adam Wolfson

Practical Guidance

Litigation, Professional Perspective - Judgment Preservation Insurance: Protecting Plaintiffs' Awards

Judgment Preservation Insurance: Protecting Plaintiffs' Awards

Editor's Note: The information contained in this article is for informational purposes only and should not be considered legal/financial advice.

Contributed by ***Ross Weiner****, Risk Settlements*

April 2022

With any significant trial court judgment, there is always a risk that an appellate court will reverse (in whole or in part) or reduce a damages award. Judgment preservation insurance (JPI) allows plaintiffs who prevailed at the trial court to insure all or part of a damage award while an appeal is pending.

It is axiomatic that the wheels of justice move slowly. An appeal from a favorable legal judgment can take many years to resolve. Indeed, in some circumstances, the delay is the point. Transforming a legal skirmish into a war of attrition can cause a plaintiff to cry uncle, opting to settle the matter while leaving money on the table. But JPI can change that.

Put simply, JPI is a targeted way to ring-fence appellate risk while allowing companies with a favorable judgment to immediately leverage the financial benefits of the award. JPI can be used in the context of summary judgment awards, trial verdicts, and arbitration wins. With JPI, plaintiffs who prevail at the trial court level can obtain immediate protection of judgments that are threatened with reversal or reduction in damages on appeal. For corporate plaintiffs, JPI may provide additional final statement benefits.

What is Judgment Preservation Insurance?

JPI is a form of insurance that guarantees a prevailing plaintiff will receive all or part of the trial court's judgment regardless of what happens to the judgment on appeal, or, in some cases, after a retrial. Generally, JPI is concerned only with final judgments. There can be no loss unless and until the judgment is final and there is no longer any chance of further appeal.

Essentially, JPI is appellate risk insurance—a certain way to "neutralize" the risks associated with appeal. JPI can be obtained by either a party to the litigation or a litigation funder looking to lock in a certain level of return. Depending on the amount of the policy, JPI indemnifies the policy holder for some or all of a judgment. Indeed, it may insure all of the judgment, or it may be targeted at a specific legal issue that is challenged on appeal, such as attorneys' fees or statutory damages.

Example:

Following a patent infringement trial, a corporate plaintiff wins a $50 million verdict, which the defendant timely appeals. The plaintiff (or its funder if it has one) could seek to obtain JPI. For example, the plaintiff could request a $50 million policy, with $40 million in coverage in excess of a $10 million self-insured retention (SIR), all in exchange for a one-time premium, which for the purpose of this example we will set at $5 million.

If the defendant's appeal is successful and the court reverses and renders the judgment on appeal, meaning the plaintiff is entitled to nothing, after the decision is final (and itself no longer subject to appeal), the JPI policy would pay $40 million to the plaintiff, leaving the plaintiff in a far superior position than it would have been without JPI.

		a	b	c	d	
	Final Judgment	Loss	SIR	Gross Proceeds	Premium	Net Proceeds
Scenario 1: Plaintiff elects not to purchase JPI	Zero	$ 50,000,000	N/A	Zero	N/A	Zero

	Final Judgment	Loss	SIR	Gross Proceeds	Premium	Net Proceeds
Scenario 1: Plaintiff elects not to purchase JPI	Zero	$ 50,000,000	N/A	Zero	N/A	Zero
Scenario 2: Plaintiff purchase for JPI for a $5 million premium	Zero	$50,000,000	$10,000,000	$40,000,000 a - b	$5,000,000	$35,000,000 c - d

If the defendant's appeal results in a reduced award (say $30 million), then the JPI policy would pay $10 million after the insured's $10 million retention is applied, leaving the plaintiff in a superior position than it would have been without JPI.

	a		b	c	d	
	Final Judgment	Loss	SIR	Gross Proceeds	Premium	Net Proceeds
Scenario 1: Plaintiff elects not to purchase JPI	$30,000,000	$20,000,000	N/A	$30,000,000	N/A	$30,000,000
Scenario 2: Plaintiff purchase for JPI for a $5 million premium	$30,000,000	$20,000,000	$10,000,000	$40,000,000 a + b - c	$5,000,000	$35,000,000 d - e

Of course, purchasing JPI is not without risk. If the defendant's appeal is unsuccessful and the court affirms the judgment in full ($50 million), then the insured would be $5 million worse off for having purchased JPI.

	a		b	c	d	
	Final Judgment	Loss	SIR	Gross Proceeds	Premium	Net Proceeds
Scenario 1: Plaintiff elects not to purchase JPI	$50,000,000	$ -	N/A	$50,000,000	N/A	$50,000,000
Scenario 2: Plaintiff purchase for JPI for a $5 million premium	$50,000,000	$ -	$10,000,000	$50,000,000	$5,000,000	$45,000,000

Why Use JPI?

JPI's benefits are vast. Some of the most notable are:

- **Provides Certainty.** The key benefit JPI affords is assurance of recovery from hard-fought litigation. Appeals add years of uncertainty and waiting for successes to monetize. Even after a party prevails at the trial court, the threat of appeal makes the timing and likelihood of recovering on that judgment far less certain. JPI mitigates this risk, ensuring that regardless of what happens on appeal or in subsequent proceedings, the plaintiff will recover an agreed-upon amount of the judgment or award.
- **Alleviates Litigation Fatigue.** It is no secret that civil litigation is lengthy, burdensome, and taxing on parties. Once a plaintiff prevails but is threatened with a prolonged appeal, litigants are often tired and less motivated to continue the fight. JPI gives those fatigued plaintiffs the security they need to continue the fight.
- **Guarantees Financial Returns.** JPI can be used by corporate plaintiffs to recognize gains in earnings on a balance sheet because there is no collection risk and the return from the litigation is guaranteed. For a plaintiff who has won a case, JPI provides a guarantee that the plaintiff will receive at least the amount of insurance limits it purchases.
- **Augments Additional Monetization.** JPI is often used in conjunction with litigation funding. This allows a plaintiff to insure the award and then sell some or part of the plaintiff's interest in the judgment at a better rate because there is no appellate risk for the funder to price into the rate. Funders can also obtain JPI once they have invested in a case.

- **Guarantees Financial Returns.** JPI can be used by corporate plaintiffs to recognize gains in earnings on a balance sheet because there is no collection risk and the return from the litigation is guaranteed. For a plaintiff who has a judgment, JPI provides a guarantee that the plaintiff will receive at least the amount of insurance limits it purchases.

- **Augments Additional Monetization.** JPI is often used in conjunction with litigation funding. This allows a plaintiff to insure the award and then sell some or part of the plaintiff's interest in the judgment at a better rate because there is no appellate risk for the funder to price into the rate. Funders can also obtain JPI once they have invested in a case.

- **Serves As a Useful Settlement Tool.** Particularly when there is financial asymmetry between the two litigating parties, JPI helps level the playing field. A defendant's settlement posture might be premised on the notion that a cash-strapped plaintiff will settle on the cheap. JPI allows a plaintiff to feel confident that it can see the appeal through on the merits.

- **Each Judgment Preservation Insurance Policy is Bespoke.** Every JPI policy is customized specifically to meet the insured's coverage needs. This customization allows many insurers to be extremely flexible in structuring the exact coverage and the amount of coverage. Depending on a plaintiff's situation, certain features (higher SIR/lower premium or lower SIR/higher premium) might make the proposition more attractive.

How Does Judgment Preservation Insurance Work?

First, consider whether your judgment is appropriate for JPI. The most insurable cases are those with solid appellate legal issues. Other factors that are important for the insurer's consideration are the jurisdiction of the pending litigation, the makeup of the appellate panel, the skill and experience of appellate counsel, the sophistication of parties, and the parties' general litigation conduct. JPI also tends to be most suitable with multi-million-dollar judgments, because insuring smaller risks may be cost-prohibitive for both the insurer and insured.

Once you have identified a case you think may benefit from JPI protection, the insurer will conduct an underwrite of the risk. The insurer's underwrite of the risk requires substantial diligence because of the complex legal and factual review of the entire record. Factors that are generally necessary for a successful underwrite:

- The record is generally complete and final
- The appellate arguments are apparent from the post-trial briefing
- The appellate arguments are crystalized in any appellate briefing

Once the insurer has completed the underwrite, it will usually engage in a Q&A with the insured (for any items that might need clarification) before determining whether the risk is insurable and proposing policy terms and pricing.

The bottom line is that if you have a strong case on the facts and the law and have a sufficiently developed record, JPI may be right for you.

What Does JPI Cost?

After underwriting is complete and the insurer agrees to insure the risk of appeal, the insured pays a one-time premium in exchange for a guarantee that the insured will receive the full limits of insurance regardless of what happens to the judgment on appeal, or even, retrial in some cases.

Depending on the case, the policy may also require an SIR amount (similar to a deductible) before coverage is triggered.

Risks JPI Does Not Cover

As with any insurance policy, the scope of coverage provided by Judgment Preservation Insurance will depend on the specific case and the premium paid. Generally, however, there are certain costs and items that JPI does not traditionally cover unless they are specifically bargained for:

- Generally, JPI does not cover attorneys' fees or costs associated with the appeal.
- Generally, JPI does not cover the costs of settlement.
- Generally, JPI does not insure the collectability of the judgment. An optimal situation is when the defendant has posted an appellate bond so that the insurer does not have to price in the chance that the insured wins the appeal but cannot collect the judgment.

Also critical to JPI coverage is that, generally, a JPI policy does not allow the insurer to take control over the litigation. There may be times when the insurer requires an insured to maintain current counsel through appeal, remand, retrial or when the insurer requires insured to vigorously prosecute all arguments that could result in an appellate win. But, overall, although substitution of counsel and settlement may need to be approved, JPI policies allow the parties to maintain complete control of their case with counsel of their choosing (substitution of counsel and settlement may need to be approved).

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Conclusion

If you have a judgment that needs protecting, JPI may be an effective tool to help you protect that judgment. While litigation can be uncertain, the risk associated with a final judgment doesn't always have to be.

Emerging Trends In Litigation Risk Insurance

By Matthew Grosack, Alex Gonzalez, Robert Hill and Leonie Huang | March 7, 2022

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Litigation risk insurance refers to a relatively new set of insurance offerings that allow businesses to better manage the legal risks stemming from known litigation.

There is a growing market for such products, which gives companies a new set of tools for dealing with the uncertainty of high-stakes litigation. While these policies are all highly bespoke and cover a number of different risks, one form of litigation risk insurance, known as adverse judgment insurance, offers coverage for final judgments in litigation, but typically not for defense or settlement. This kind of insurance can be especially helpful in the mergers and acquisitions (M&A) context, where an otherwise attractive target company is involved in material litigation.

An adverse judgment policy can give a prospective buyer or merger partner the

An adverse judgment policy can give a prospective buyer or merger partner the certainty to move forward with the transaction, even while the underlying case remains pending. Another form of litigation risk insurance, known as judgment preservation insurance, allows successful litigants who have won money damages to "lock in" some or all of that award, pending appeal. Given the expense and disruption of high-stakes litigation, in many cases such insurance would add great value by setting a "floor" for recovery and achieving considerable certainty well in advance of the appellate outcome. Decision-makers involved in M&A activity and big-ticket litigation may consider litigation risk insurance as a potential solution when facing material litigation uncertainty.

Adverse Judgment Insurance

As introduced above, and as its name suggests, adverse judgment insurance is designed to protect a defendant (or other intended beneficiary) in the event of an adverse judgment. This kind of insurance can be a valuable tool for businesses engaged in M&A activity.

Litigation risk can be one of the biggest problems in the context of deal diligence. In addition to the substantive risk of loss, in many cases prospective buyers will find litigation risk much harder to evaluate than the ordinary course aspects of the business. As such, open litigation can be a significant problem for otherwise attractive target companies, especially where target companies are defendants. In some cases, open litigation will make an otherwise attractive target too risky to acquire.

To address this issue, a target company may attempt to achieve a settlement pre-transaction, but this gives significant leverage to the other side and may fail in any event.

Indemnification agreements are another alternative in some situations, but these can raise their own risks of future litigation.

Adverse judgment insurance is an option that can help to cabin the risk of pending litigation — and give comfort to a potential buyer — without having to deal with an adverse party or the potential complexity of an indemnification situation.

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Adverse judgment insurance is an option that can help to cabin the risk of pending litigation — and give comfort to a potential buyer — without having to deal with an adverse party or the potential complexity of an indemnification situation.

Adverse judgment insurance may also eliminate the need for large escrows, and the resulting loss in liquidity, for potentially lengthy and uncertain periods of time. The coverage may also offer value where a litigant wishes to offer additional assurance to investors, commercial partners or the market as a whole as to its financial and commercial stability. This approach may also provide some level of certainty on a balance sheet by making a contingent liability a quantifiable insurance cost, which can be a considerable advantage for some companies.

Adverse judgment insurance can potentially add value outside the M&A context, as well. Litigation financing is here to stay, and many commentators predict a rapid rise in such activity in the coming years as capital providers look to turn lawsuits into investment portfolios. Adverse judgment insurance potentially provides a way to counterbalance the strategic asymmetry that can occur when a financed plaintiff sues an uninsured defendant. In this dynamic, plaintiff side risk is distributed across multiple entities (a strategic advantage), but the uninsured defendant is burdened with all downside risk, which may prompt it to consider less attractive settlement possibilities.

Whether or not a plaintiff has outside funding, there are many circumstances where the underlying litigation dynamics tend to favor the plaintiff obtaining an early settlement that is "too large" compared to the underlying merits of the case. For example, many forms of litigation that can generate large damages awards — including patent, antitrust, securities and products liability class actions — require extensive fact and expert discovery, which tends to drive the high cost of litigation. These costs, plus the inherent uncertainty of litigation and the risk of loss down the road, mean that many defendants will be willing to settle at significant amounts even where they think that plaintiffs' claims are weak. Even a remote chance of a bad outcome can push a defendant to make expensive settlement decisions, especially if it would exceed other insurance coverage or otherwise be particularly disruptive.

However, in cases where there is sufficient information for an insurer to underwrite litigation risk, adverse judgment insurance can help level the playing field by allowing a defendant to negotiate a more reasonable early settlement with the understanding that the risk of not settling has been controlled.

Judgment Preservation Insurance

Judgment preservation insurance, also as its name implies, is designed to underwrite the risk associated with a judgment being overturned or significantly decreased on appeal. In this case, a plaintiff who has prevailed at trial can be confident that a win is insured at a certain level slightly below the total award, even in the unlikely, yet possible, event of reversal on appeal.

This is particularly applicable in the intellectual property (IP) litigation context. Take the example of patent litigation or contractual licensing dispute involving underlying confidential or otherwise protected and extremely valuable IP. The winning IP owner may have spent significant amounts of money, not to mention significant time, to secure a litigation victory at the trial court level. But that successful plaintiff now faces an even longer appeal horizon and continued uncertainty as to whether the trial court result will be upheld, reduced after more time on remand to the lower court, or overturned entirely on appeal.

Indeed, the larger the damages award at trial, the greater defendant's motivation to pursue a vigorous appellate challenge to that outcome. On top of an already lengthy

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Indeed, the larger the damages award at trial, the greater defendant's motivation to pursue a vigorous appellate challenge to that outcome. On top of an already lengthy trial process, appellate timelines are often measured in years, significantly reducing the practical value of a hard-fought judgment. Another concern is that the uncertainty involved in preserving the value of the judgment may be material to a corporate earnings report or other important communications with investors, commercial partners or the market. All things considered, even after a victory at trial, uncertainty still looms.

In each case, judgment preservation insurance can be used to provide further certainty and potentially accelerate recording a significant amount in earn-ings or other income, serve as collateral for more competitively priced financing than might otherwise be offered by a judgment monetization lender, or otherwise improve the successful litigant's position.

How It Works: The Numbers

So, how does litigation insurance work in terms of the numbers? Much like other insurance products, potential insureds pay a premium for the coverage subject to a retention and certain defined limits. In return, insureds receive bespoke coverage, and peace of mind, for many of the litigation risks discussed above. These are highly tailored and bespoke policies and subject to detailed diligence, given the sophisticated and high-stakes nature of the underlying litigation, so the specific terms will vary.

For illustrative purposes only, for example, a carrier providing coverage for an adverse judgment after underwriting may determine that damages claimed are in the range of $60 million to $100 million. The carrier may assess the claimed amount and determine that a more likely damages award is closer to about $8 million to $10 million. In such a situation, assuming the insured and carrier can come to agreement on premiums, retentions and limits, a carrier may provide coverage that exceeds $10 million in likely damages, up to the full damages claimed of $100 million. Thus, if a final non-appealable adverse judgment is entered against the defendant for $100 million, under this illustrative example, an insured would be exposed only to a $10 million retention, and the carrier would bear the risk of damages in excess of $10 million up to $100 million (or $90 million of covered loss). If the final decision was $25 million, then the insured would be subject to satisfying a $10 million retention, and the carrier would cover the additional $15 million, subject to other terms in the policy (such as bespoke exclusions).

For judgment preservation (and drawing on our earlier example of the hypothetical IP dispute), assume an IP plaintiff wins a $100 million judgment at trial. The plaintiff could insure the appellate risk in preserving the $100 million damages judgment less a retainer (usually tied to the amount thought likely to be reduced), for example $10 million, such that coverage extends up to $90 million. In the event the final award is reduced by the expected $10 million, to $90 million, there would be no payout due to the retention.

But, if after all appeals have been exhausted, the award is reduced to $60 million, the insurance policy would pay out $30 million (the $90 million coverage less the $60 million final award, subject to a $10 million retention). In the event of complete defense victory on appeal and the damages award is zeroed out, then the policy would pay out the $90 million.

Again, the above figures are purely hypothetical; premium, coverage limits and retentions will vary greatly depending on the facts of the underlying litigation (potential

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Again, the above figures are purely hypothetical; premium, coverage limits and retentions will vary greatly depending on the facts of the underlying litigation (potential exposure, procedural posture, previous settlement interactions, etc.).

Other Material Considerations

Much like the bespoke provisions of the policy, litigation risk insurance has its own unique facets. First, coverage will typically be excluded for losses resulting from material misrepresentations or omissions made during the underwriting process.

Second, coverage under litigation risk insurance is almost uniformly triggered on the ultimate and non-appealable final judgment or disposition of a litigation. Thus, while flexible in the sense that each coverage plan is customized and can provide other more immediate benefits, the insurance payout comes only if there is a judgment and after any applicable appeals are exhausted, such that the triggering adverse judgment or order is truly final and can no longer be challenged. For certain coverage, this could mean that if a case settles, the litigation insurance policy would be inapplicable since there would not be a final judgment on the merits, and therefore those seeking to include coverage for defense costs including settlement would need to be clear as to that goal for the coverage.

Additionally, the coverage applies to the final judgment and would not protect against the risk of a judgment-proof defendant, where the plaintiff receives only a portion of the full award because the judgment debtor cannot pay or be collected against.

Third, due diligence and underwriting of these policies are fact-intensive and detailed. A prospective insured should be ready to provide feedback on the opposing party's litigation tactics and tone, potential damages, and, in the context of adverse judgment insurance, an assessment of the procedural path forward (timeline, dispositive motions, trial and appellate issues). While this process is unavoidably involved, the insured not only benefits from the coverage that may be afforded by the policy, but also the value of an objective review and assessment of litigation risks by a carrier that has aggregated hard data on litigation trends and risks.

Conclusion

In summary, litigation insurance is not a solution for any and all litigation risk, but in the case of the winnable or defensible legal position, it can provide an important tool for safeguarding against the vagaries of civil litigation. And at the stage where there is sufficient information for an insurer to conduct its diligence review, a litigant would do well to consider the benefits of a stronger negotiating position and the peace of mind that custom litigation risk insurance can provide.

TOPICS LAWSUITS TRENDS

Was this article valuable? YES NO

WRITTEN BY
Matthew Grosack
Grosack is a litigation attorney in Holland & Knight's Miami office who focuses on claims, controversies and trial practice involving high-stakes dispute resolution involving mergers and acquisitions, other change-of-control transactions and the healthcare industry in general.

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Business & Practice

April 13, 2023, 9:30 AM

Quinn Emanuel's Juicy Obamacare Fee Tests Litigation Insurers

COLUMN

Roy Strom
Reporter

Welcome back to the Big Law Business column. I'm Roy Strom, and today we look at a pivotal case for the burgeoning litigation insurance market. Sign up to receive this column in your Inbox on Thursday mornings.

Everybody looked like a winner in Quinn Emanuel Urquhart & Sullivan's long-running class-action over Obamacare payments—until January.

The firm in 2020 had won $3.7 billion for more than 150 health insurers stiffed when Congress decided not to pay them for offering risky Obamacare policies. Quinn Emanuel itself received a $185 million fee the following year for its work.

Then in January, the Federal Circuit placed the nine-figure fee award in jeopardy. The Circuit ordered a district court judge to re-calculate the award based on a procedure that wasn't used the first time around.

If the award is knocked down, an insurer might be on the hook for much of the difference. And a young but growing litigation insurance market could suffer.

At issue is something called a judgment preservation insurance policy. Quinn Emanuel took out such a policy on its big award, court documents show.

The policies insure award judgments against the legal risk of being overturned on appeal. Brokers have said the policies are gaining popularity as litigation grows increasingly financialized.

The big advantage for law firms or companies that take out the policies is [illegible] Quinn Emanuel's case, the policy allowed the firm to

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Emanuel took out such a policy on its big award, court documents show.

The policies insure award judgments against the legal risk of being overturned on appeal. Brokers have said the policies are gaining popularity as litigation grows increasingly financialized.

The big advantage for law firms or companies that take out the policies is financial flexibility. In Quinn Emanuel's case, the policy allowed the firm to distribute the fee to its partners before the appeal process concluded. Companies can also borrow money more easily when a highly-rated insurance company backs an award.

Policies typically carry a premium of about 10% to 15% of the judgment they're insuring. So a $100 million judgment could cost a firm $10 million to $15 million.

Policies often cover only a portion of the judgment, and there's plenty of wiggle-room in the pricing. Some deals provide insurers some upside in judgments that make it safely through an appeals process, according to industry insiders.

The details of Quinn's policy have not been made public. A group of health insurers in the class have asked a judge for access to it.

The insurers have objected to the size of the fee award, arguing the firm should earn about $9 million—about 95% less than the court originally approved.

If the health insurers are successful, the firm's unknown insurer will likely be on the hook for some portion of the difference.

Some fear that if the award is knocked down, the market for judgment preservation insurance will take a hit. Policies could become more expensive, or the business could become unpalatable for insurers, law firms or both.

"If there is a big loss where there is a sense within the insurance community that there has been some flawed underwriting or mispricing of the risk, at minimum, you'd see an adjustment in the pricing," said Charles Agee, chief executive officer of litigation finance advisory firm Westfleet Advisors. "But it could really have a broader chilling effect."

Quinn Emanuel has argued its $185 million award is justified by the positive result it obtained for the class-members, who received 100% of the claims they pursued against the federal government. The fee represented 5% of the total award, which is what Quinn Emanuel told prospective clients it would request from the judge.

The problem with the award, according to the Federal Circuit, was that Quinn Emanuel also promised clients its fee would be subject to a "lodestar cross-check," which didn't happen. Under the lodestar method, courts consider the hours lawyers worked on a case, applying a multiplier to reward lawyers for results and the risk they take on.

The Federal Circuit has required a district court judge to apply the formula to calculate the award. If the court strictly applies the lodestar method, the fee could be cut considerably.

Quinn Emanuel has said its lawyers worked nearly 10,000 hours on the case. Its original award represented a lodestar multiplier of around 18 to 19 times its normal billable rate.

A multiplier of two, which is closer to the historical average, would generate an award of about $20 million—or about $165 million less than the original amount.

Lodestar multipliers in a two-year study of rulings published in 2010 ranged from .07 to 10.3, with an average of 1.65. Still, they'd reached much higher in some cases, according to the study by Brian Fitzpatrick, a Vanderbilt Law School professor.

An award knockdown for Quinn Emanuel would trigger the next question in the [illegible] insurance market: How readily will insurers pay

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An award knockdown for Quinn Emanuel would trigger the next question in the development of the litigation insurance market: How readily will insurers pay claims?

While there have been no public losses for insurers yet, they are likely to pay claims early in the development of the market, said Tom Baker, a University of Pennsylvania Carey Law School professor who studies insurance.

"My view has been that they are definitely going to pay in the beginning because otherwise the market will go away," he said.

More broadly, Baker sees potential for litigation insurance to grease the wheels for a more efficient litigation finance market.

For now, insurers are picking the "safest, easiest-to-price" situations where policy holders have strong business reasons for the insurance, Baker said.

"That's getting their toe in the water," he said. "We'll see if it works."

Worth Your Time

On Big Law Associates I: The disruption in the associate market continued this week, with Cooley delaying the start for first-year associates to January 2024, Meghan Tribe reports. They were set to start in November. Have a happy holiday.

On Big Law Associates II: Sometimes success comes early for Big Law associates. Former Skadden, Arps, Slate, Meagher & Flom associate Adeeb Sahar nabbed a top legal job at Twitter, Brian Baxter reports. Sahar had spent just four years as an associate at Skadden, but he has significant business experience.

On Accounting Firms: Ernst & Young scrapped a split of the firm's consulting and audit practices, Amanda Iacone reports. The plan hit the skids after struggling to get consensus from partners over compensation and staffing issues. Might sound familiar to Big Law partners.

That's it for this week! Thanks for reading and please send me your thoughts, critiques, and tips.

To contact the reporter on this story: Roy Strom in Chicago at rstrom@bloomberglaw.com

To contact the editors responsible for this story: Chris Opfer at copfer@bloombergindustry.com; John Hughes at jhughes@bloombergindustry.com

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Ernst & Young's scuttling of a plan to spin off its consulting business and much of its tax practice gives breathing room to US law firms who fear new competition from big accounting operations.

Paul Hastings Burns Coca-Cola, Reputation in Conflict Fight

A recent dust-up between The Coca-Cola Co. and law firm Paul Hastings should put in-house lawyers on notice: Be wary of signing anything, even if your own counsel puts it in front of you.

Kirkland Absent from High Court Lectern After Clement (2)

Kirkland & Ellis LLP was noticeably missing from the list of more than three dozen law firms arguing before the Supreme Court this term.

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DeSantis Board Sues Disney After Company Retaliation Lawsuit (1)

The Ron DeSantis-appointed board of the municipal authority overseeing Walt Disney Co.'s Florida parks sued the company Monday, claiming Disney violated state law in trying to ward off the board's efforts to govern park operations.

Supreme Court to Mull Voiding Chevron Ruling on Agency Power (2)

The US Supreme Court will consider overturning a decades-old legal doctrine that has given federal regulators broad power to define their authority, accepting an appeal that aims to put new constraints on environmental, consumer-protection and financial-watchdog agencies.

King & Spalding Gains Former Texas District Court Judge Yeakel

Former US District Judge Lee Yeakel has joined King & Spalding as senior counsel in the trials and global disputes practice group in Austin, the firm said Monday.

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:16-cv-259C-KCD (Judge Davis)
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-KCD (Judge Davis)

[PROPOSED] ORDER

On May 2, 2023, Objecting Class Members of the Non-Dispute Subclass filed a Motion for an Accounting, Safekeeping of the Disputed Funds, and Limited Discovery (Health Republic Dkt. ___, Common Ground Dkt. ___). The Court finds that good cause exists to **GRANT** the motion and order the following:

Class Counsel is **ORDERED** to provide a full accounting of the disputed portions of the common fund released to it from the claims administrator pursuant to the Court's September 17, 2021 Judgments (Health Republic Dkt. 143, Common Ground Dkt. 155) in accordance with the

ABA Model Rules on Client Trust Account Records, Rule 1. Class Counsel shall provide this accounting no later than _____.

Class Counsel is **ORDERED** to sequester the disputed portions of the common fund released to it from the claims administrator pursuant to the Court's September 17, 2021 Judgments (Health Republic Dkt. 143, Common Ground Dkt. 155), and maintain those funds in an interest-bearing client trust account until the dispute concerning the attorney's fee award is finally resolved.

It is further **ORDERED** that Objecting Class Members are permitted to conduct limited discovery into any agreements Class Counsel entered about the subject attorney's fees, including any judgment preservation insurance policies related to the Court's prior fee awards (Health Republic Dkt. 138, 143, Common Ground Dkt. 153, 155), and any communications with insurers related to such policies. Class Counsel and Objecting Class Members shall complete this discovery by _____.

Pursuant to this Court's April 18, 2023 Order (Health Republic Dkt. 189, Common Ground Dkt. 184), the Court **ORDERS** the following schedule regarding Class Counsel's fee request:

Objectors' Response to Class Counsel's Opening Supplemental Brief	
Class Counsel's Reply in Support of Opening Supplemental Brief	

IT IS SO ORDERED.

DATED: _____

KATHRYN C. DAVIS
Judge