

Ethical Considerations and Quick Reference Guide for Opening and Running A Law Practice



THE Brocker Law Firm P.A.



Our Firm concentrates its practice on representing professionals in ethical, licensing and disciplinary matters before their respective licensing boards and agencies. We have a particular emphasis on assisting lawyers in providing ethics advice and defending them in matters before the State Bar. Our Firm's principals, Doug and Deanna Brocker, both worked at the State Bar for numerous years handling ethics and disciplinary matters before founding the Firm. We strive to provide our clients with only the targeted level of representation they need, typically beginning with a consultation.

This publication is our attempt to provide a summary and quick reference for some of the most important and recurring issues involved in establishing and running a law practice and law firm. It is not intended as a comprehensive summary of all the possible legal ethics issues and resources. It is designed for use as general information and reference but is not intended as specific legal advice for anyone's particular situation.

Additional publications, information and explanatory video clips are available on the Firm's website at brockerlawfirm.com and our social media sites, which are referenced on the website. We also regularly publish blogs and issue an e-newsletter to current and former clients and anyone else interested can subscribe at no cost. If you need specific advice or representation, please contact our office to set up a consult with one of the Firm's attorneys.

CONFIDENTIALITY

- a. Primary Rules: 1.6, 1.8(b), 1.9(c), 1.18, 3.3, 8.3(c)
- b. Instructive Opinions:
 - RPC 12 Implied Authorization to Disclose
 - RPC 215 Communication via E-mail
 - 99 FEO 15 Fraud upon Tribunal
 - 2006 FEO 14 Duty to Prospective Client
 - 2008 FEO 5 Clients' Electronic Files
 - 2009 FEO 1 Disclosure of Metadata
 - 2010 FEO 12 Disclosure to Hiring Firm to Enable Conflicts Checking
 - 2011 FEO 6 Subscribing to Saas or Cloud Computing
 - 2015 FEO 5 Authority to Discuss Former Client's Case with Successor Lawyer
 - 2020 FEO 1 Responding to Negative Reviews
- Confidential information is any information learned in the professional relationship; it includes but is much broader than privileged communications.
- Even a client's identity may be considered confidential information.
- Confidential information does not lose its confidential nature simply because it is a matter of public record.
- The duty of confidentiality continues after representation is terminated.
- A client may give informed consent to disclosure of confidential information after the lawyer has given the client sufficient information and explanation of the circumstances.
- Confidential information may be disclosed if one of the exceptions in Rule 1.6(b) applies.
- For example, a lawyer may disclose client confidences necessary to defend himself where a claim is brought by a former client. See RPC 62.

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STRUCTURING, SETTING AND HANDLING FEES

- a. Primary Rules: 1.5, 1.8(i), 1.16(d)
- b. Primary Opinions:
 - 2008 FEO 10 Types of Fees and Fee Agreements
 - 2004 FEO 8 Advertising Contingent Fees
 - 2011 FEO 13 Disputed Fees in Trust
 - 2006 FEO 16 Distribution of Disputed Fees
 - 2002 FEO 4 Contingent and Court-awarded Fees
 - 2015 FEO 4 Disclosing Potential Malpractice to a Client
 - 2019 FEO 5 Receipt of Virtual Currency

Division of Fees

- RPC 148 Between Lawyers in Different Firms
- RPC 205 Referral Fees
- 2008 FEO 8 Between Departing Lawyer and Firm
- 2013 FEO 12 Disclosure of Settlement Terms To Former Lawyer Asserting a Claim for Fee Division

- To comply with the Rules concerning legal fees, it is essential to understand the types of advanced payments and the appropriate ways to handle them:
 - > A true general retainer is a fee used to reserve services and is earned upon receipt. The money is paid to reserve the lawyer's time and to ensure the lawyer will not represent anyone else in association with the client's matter. See 2008 FEO 10.
 - > A flat fee is a set amount for representation that can be earned upon receipt if the client agrees. If the fee is clearly excessive under the circumstances of the representation, a refund to the client of some or the entire fee is required. See 97 FEO 4.
 - > An advance payment is a deposit securing the payment of a fee that is yet to be earned. The funds held in trust will be billed against in future (typically hourly) billing and is the client's money until earned. See RPC 158 and 2008 FEO 10.
 - > A minimum "hybrid" fee is paid at the beginning of the representation that is both a general retainer and an advance payment to secure the payment of fees yet to be earned. The client must agree and consent if the fee is earned immediately upon receipt. See 2005 FEO 13 and 2008 FEO 10.
- If the funds are not all yours at the time you get them (e.g., advanced payments, mix of fees and client funds), they must be placed in the trust account and cannot be removed until they are earned.
- Regardless of the type of fee, all fees must meet the standard set out in Rule 1.5(a) and may not be "clearly excessive."
- You must timely remove your funds from trust when earned and cleared.
- Contingent fees are specifically governed by Rule 1.5, and the fee arrangement must be in writing, signed by the client, and state the method by which the fee is to be determined.
- Never call any fee "nonrefundable."
- In the event you make a mistake during the course of representation, you should not charge or collect legal fees for any legal work or expenses necessitated by your attempt to mitigate the consequence of your error. See 2015 FEO 4.

COMMUNICATIONS WITH CLIENTS

- a. Rules: 1.2(a), 1.4, 1.14,
- b. Instructive Opinions:
 - RPC 157 Appointment of Guardian
 - RPC 223 Constructive Discharge
 - 98 FEO 18 Disclosures to Minor's Legal Guardian
 - 2006 FEO 1 Multiple Representation
 - 2015 FEO 4 Disclosing Potential Malpractice to a Client
- The most common type of grievance filed against attorneys is one of the easiest to avoid. Clients most frequently complain about being ignored or about an inability to communicate with their lawyer. If a client feels like they are being ignored, sooner or later they may turn to the State Bar for help.
- The following are some tips for avoiding client complaints of this nature. In client relationships, remember BRACE:
 - > **Be Choosy.** Go with your gut feeling and instinct. The highest risk for taking on bad cases or bad clients is when business is slow.
 - > **Responsiveness.** Return clients' calls and messages within 24 hours. Use support staff when you are unavailable.
 - > **Appearance.** Show respect for the legal system and the client's matter by being prepared, on time, and professionally dressed.
 - > **Communication.** Keep clients informed by giving regular status updates, using staff if necessary, and forward letters and emails related to the case where appropriate. The client wants to feel that their matter is as important to you as it is to them.
 - > **Explanation.** Get a signed engagement letter that spells out all of the material terms of the representation such as scope, fees, payment, and any conditions. Let the client know who at the firm will be the client's primary contact. Set and manage client expectations and explain the process and timing related to the matter. Non-engagement and disengagement letters are also important.
- Disclosure of a significant error committed by the lawyer during the course of representation falls within the duty of communication. See 2015 FEO 4.

CONFLICTS AVOIDANCE

- a. Primary Rules: 1.7, 1.8, 1.9, 1.10, 1.18
- b. Primary Opinions:
 - 2006 FEO 14 Prospective Client Consultation
 - 2007 FEO 11 Revocation of Consent
 - 2009 FEO 9 Computer-based Conflicts Checking
 - 2010 FEO 12 Prior Employment as a Law Clerk
 - 2015 FEO 4 Disclosing Potential Malpractice to Client
 - 2016 FEO 3 Negotiating Employment at Opposing Firm

- A conflict may exist anytime you believe that your duty to other clients, former clients, third parties, or your personal interests may interfere with your ability to exercise independent professional judgment on behalf of a client.
- Lawyers are fiduciaries who owe their clients a duty of loyalty. This means that a lawyer may not place his own personal interest above that of his client, even in matters unrelated to the representation.

USE AT LEAST TWO CONFLICT CHECKING METHODS FOR BEST PRACTICE

- You need a conflict checking system in place, other than your memory. The better practice is to employ two different methods of conflict checking.
- If you are leaving a law firm and starting your own practice or joining a new firm, the clients whose matters you actually worked on must be included in your new conflicts checking system.
- Screening can be employed for law clerks and lateral hires. Screening cannot be used for imputed conflicts developed within a firm.
- The duty to avoid conflicts and the duty of confidentiality must be maintained indefinitely. There is no “Statute of Limitations.” See 2009 FEO 9.
- Prospective clients, e.g. persons with whom you consult but they do not hire you, should be included in conflicts checking systems. Rule 1.18.
- If you are paid by a prospective client for a consultation, even if you don’t continue representation, that person is a former client under Rule 1.9. See 2006 FEO 14.
- If you represent multiple clients on the same matter, even if their interests are initially aligned, always obtain consent to the multiple representation, confirmed in writing. Rule 1.7. It is always better to have a written waiver that is signed by the client, but certain Rules only require consent be confirmed in writing.
- A client can revoke consent but only for good cause, including materially changed circumstances. Otherwise, a lawyer can continue representation of the other party even when another client tries to revoke prior consent. See 2007 FEO 11.
- If you discover a mistake was made during the course of representation that may give rise to a malpractice claim against you, you must consider whether a personal conflict of interest prevents continued representation of your client. Rule 1.7 and 2015 FEO 4.
- You may not negotiate employment with another law firm if that law firm represents a party adverse to your client, unless both your client and the adverse party provide informed consent. 2016 FEO 3.

TRAINING AND SUPERVISING EMPLOYEES

- a. Primary Rules: 5.1, 5.2, 5.3
- b. Primary Opinions:
 - RPC 183 Role of Legal Asst. in Deposition
 - 99 FEO 6 Ownership in Title Companies
 - 2000 FEO 10 Non-Lawyer Employee at Calendar Call
 - 2002 FEO 9 Delegation to Non-Lawyer of Tasks
 - 2006 FEO 13 Non-Lawyer Signing Lawyer’s Name
 - 2007 FEO 12 Outsourcing Legal Support Services

- Once your practice is up and running, you will likely need to employ assistants as you may not be able to do everything on your own.
- Supervisory lawyers are responsible for implementing measures that reasonably ensure that all firm employees conform to the Rules of Professional Conduct; it is a good idea to have a written policy manual.
- Items to address with attorneys and staff include: conflicts, confidentiality, the unauthorized practice of law [UPL], trust accounting, communications with clients or others, competence, billing, and fees.
- Of these issues, confidentiality, UPL, and trust accounting issues most frequently get attorneys in trouble with the State Bar, often resulting from “over-delegation” and insufficient oversight.
- Communication policies may cover a number of topics such as, when and how to communicate with clients (e.g., within 24 hours of any inquiry), electronic communications -- both personal and business -- on firm computers, communications with represented or unrepresented persons, communications to potential clients about the firm’s services, and communications that may constitute UPL.
- You can be held responsible for others’ intentional conduct, mistakes, or unauthorized practice of law if you are the supervising attorney.



TRUST ACCOUNTING

a. Primary Rules: 1.15-1, 1.15-2, 1.15-3, 1.15-4

b. Primary Opinions:

RPC 51	Costs
RPC 149	Escheat of Abandoned Funds
RPC 158	Advance Payment of Fees
RPC 191	Disbursement Against Provisional Credit
2006 FEO 8	Disbursement of Trust Funds
2011 FEO 13	Disputed Fees
2013 FEO 3	Entrusted Funds
2013 FEO 13	Disbursement Against Funds Credited to Trust by ACH and EFT
2015 FEO 6	Professional Responsibility when Third-Party Steals Funds from Trust
2017 FEO 4	Settlement Funds Subject to a Statutory Lien
2020 FEO 5	Lawyer's Responsibility in Avoiding Fraud
2021 FEO 2	A Lawyer's Professional Responsibility in Identifying and Avoiding Counterfeit Checks

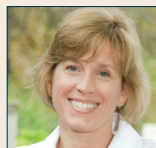
- If any funds or any portion of funds you receive are not presently your earned fee, you must deposit the instrument into trust first. Then promptly disburse funds owing to yourself, your client, and others when those funds have cleared.
- Implement smart and effective trust accounting practices to safeguard all entrusted funds and your law license.
- Go through the Trust Accounting Q & A in the lawyer handbook. It helps with most questions and gives examples and forms.
- Have well-documented and sound accounting procedures in place that are followed consistently.
- Consult an expert if you are unsure of the procedures that should be implemented.
- Always be vigilant about entrusted funds.
- It is good practice to write a letter to your bank stating that the owners/principals/members/partners are the only ones authorized to transfer/withdraw money and specify the only authorized methods.
- Balance and Reconcile. The failure to reconcile is still the number one problem with attorney trust accounts.
- There are three reports required by the State Bar. The 3-way reconciliation compares the sum of the individual client ledgers to both the firm's general ledger and the bank statement. This reconciliation must be done on a quarterly basis. The review report, which is also done quarterly, examines three random transactions that must be verified by source documentation. Finally, the bank statement must be reconciled with the general ledger on a monthly basis. There are forms for each of these reports on the State Bar's website.
- Lawyers have a professional duty to supervise their non-lawyer staff and can be disciplined by the Bar for failure to do so. If you delegate tasks, implement a system so that different employees do different functions, such as:
 - > The employee who opens and reviews the trust account statements should not also reconcile the accounts.

- > The employee who signs checks cannot complete the reconciliations. This is strictly prohibited. Any person who signs the checks must complete a one-hour trust accounting CLE. No electronic signatures, pre-printed signatures, or stamped signatures are permitted on trust account checks.
- > The lawyer must supervise any employees involved with the trust account and must review, sign, and date all reconciliation reports. Appropriate reconciliation review includes review of the bank statements and cancelled checks on a monthly basis.

- Keep all required trust records, including deposit slips; cancelled checks or digital images; instructions for wired funds; bank statements; ledgers; etc. The requirements for source documents are very specific, including what must be contained in each document.
- Consider Positive Pay. It is an anti-fraud service offered by banks and protects firms against altered and counterfeit check fraud. Best practices dictate that non-lawyers should not be signatories on trust accounts, although it is not prohibited by the Rules.
- If entrusted funds remain unclaimed, after reasonable efforts to locate and identify the owner, the funds may qualify for escheatment according to N.C.G.S. § 116B-53. Make sure you have a process in place to determine if funds should be escheated.
- A lawyer may only take funds remaining in the trust account if the funds can be conclusively documented as the lawyer's money.
- If you plan to accept credit cards for fees, read the three opinions listed below. Fees and chargebacks cannot simply come out of the trust account. See RPC 247, 97 FEO 9, and 2009 FEO 4.
- Miscellaneous items for a trust account: (1) Make sure the account is set up as an IOLTA account; (2) When you meet with your bank, go with your NSF directive form; (3) Bank statements must include copies of canceled checks; (4) SIZE does matter (when it comes to check copies from the bank) and the rules are very specific; (5) Specify clients, name of bank, and check number on all trust account deposit slips and keep a copy; (6) Keep trust records for 6 years; (7) Words not to use with trust accounts are borrow, adjustment, and auto-reconcile; (8) Review the trust account rules; this is only a summary; and (9) Don't forget to provide annual accountings to clients whose funds are held longer than 1 year.

For information on the ethics of advertising, please see the separate publication, *The Ethics of Legal Advertising*, on this website.

Additional publications, information and explanatory video clips are available on the Firm's website at brockerlawfirm.com.



Deanna Brocker represents attorneys before the State Bar on grievance matters and also counsels attorneys on ethics matters. She previously served as Assistant Ethics Counsel to the NC State Bar for over ten years.



Doug Brocker concentrates on representing attorneys before the State Bar and representing various other professionals, or aspiring professionals, before their respective licensing boards or agencies. He previously worked for the State Bar prosecuting disciplinary cases.