

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



THE Brocker Law Firm P.A.

Our Firm represents professionals in ethical, licensing and disciplinary matters before various 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. The 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 a summary and quick reference for some of the most important and recurring ethical issues involved with 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, nor as specific legal advice for anyone's particular situation.

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
 - 2011 FEO 6 Subscribing to SaaS or Cloud Computing
- Confidential information is any information learned in the professional relationship; it includes but is much broader than privileged communications.
- Even a client's identity is 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 disclose 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 protect himself where a malpractice claim is brought by a former client. See RPC 62.

COMMUNICATION 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
- The most common type of grievance filed against attorneys is one of the easiest to avoid -- lack of communication.
- 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 client calls and messages within 24 hours. Use your support staff.
 - > **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 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, who is handling the matter and any conditions. Set and manage client expectations and explain the process and timing related to the matter. Non-engagement and disengagement letters are also important.

PROPERLY HANDLING AND ACCOUNTING FOR TRUST FUNDS

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

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

- 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 provides examples and forms.
- Have well-documented and sound accounting procedures in place that are followed consistently, and consult an expert if you are unsure of the procedures that should be implemented.
- Always be vigilant about entrusted funds.
- Lawyers have a professional duty to supervise their non-lawyer staff and can be disciplined by the Bar for failure to do so.
- Best practices dictate that non-lawyers should not be signatories on trust accounts, although it is not prohibited by the Rules.
- 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.
- The failure to balance and reconcile is still the number one problem with attorney trust accounts. Compare your general trust ledger to your bank statement every month.
- The 3-way reconciliation compares the sum of the individual client ledgers to the firm's general ledger and also to the bank statement. Although 3-way reconciliations are only required quarterly, it is a better practice to do them monthly.
- Implement a system so that different employees perform different functions, such as:
 - > The person who opens and reviews the trust account statements should not also reconcile the accounts.
 - > The person who issues checks should not complete the reconciliations;
 - > The person completing the reconciliations should not be the only one to review the reconciliations.
- An attorney needs to carefully review the reconciliations and periodically spot check the source documents (account statements, checks and deposit slips).

- Consider Positive Pay. It is an anti-fraud service offered by banks that protects firms against altered and counterfeit check fraud.
- Make sure you have a process in place to determine if funds should be escheated according to N.C.G.S. § 116B-53.
- 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 client, name of bank and check number on all trust account deposit slips and keep a copy; and (6) Keep all trust account records for 6 years.

PROPER USE OF NON-LAWYERS:

Ethical Issues in Training and Supervising Employees

a. Primary Rules: 5.1, 5.2, 5.3

b. Primary Opinions:

RPC 183	Role of Legal Asst. in Deposition
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

- 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 all staff include: conflicts, confidentiality, the unauthorized practice of law [UPL], trust accounting, communications, 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" or 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.

CONFLICTS AVOIDANCE:

Implementing Checking Systems and Managing Conflicts

- 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 12Prior Employment as a Law Clerk
- 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.
- 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 worked on must be included in your new conflicts checking system.

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- Screening can be employed for law clerks and lateral hires, but not 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.”
- 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 a potential client pays you for a consultation, then he becomes a client for conflict purposes, and you cannot take on a matter adverse to that person on the same or a substantially related matter. See 2006 FEO 14.
- If you intend to represent multiple clients on the same matter, always obtain consent to the multiple representations 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 properly obtained 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.

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 08.....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
- Division of Fees
 - RPC 148.....Between Lawyers in Different Firms
 - RPC 205.....Referral Fees
 - 2008 FEO 08.....Between Departing Lawyer and Firm
- 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 specific legal services that can be earned upon receipt if the client agrees. If, at the end of the representation, the fee is clearly excessive under the circumstances, a refund to the client of some or all of the 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 are the client’s funds until earned. See RPC 158 and 2008 FEO 10.
 - > A minimum “hybrid” fee is paid at the beginning of the representation, and 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 clients 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.”





THE ETHICS OF MARKETING:

Complying with Detailed Ethics Advertising Rules and Requirements

a. Primary Rules: 7.1, 7.2, 7.3, 7.4, 7.5

b. Primary Opinions:

Website advertising

- 2005 FEO 8 URL as Trade Name
- 2005 FEO 10 Virtual Law Practice
- 2009 FEO 16 Info on Verdicts/Settlements
- 2011 FEO 8 Use of Live Chat Support Service
- 2012 FEO 1 Testimonials in Advertising

Other On-line advertising

- RPC 241 On-line directory
- 2000 FEO 3 Message Board Inquiries
- 2004 FEO 1 On-line Matching Service

Targeted Direct Mail

- 2004 FEO 2 Offer Promotional Materials
- 2006 FEO 6 Extraneous Statements
- 2007 FEO 15 Clarifies Requirements

- The golden rules of lawyer marketing: (1) statements must be truthful and not misleading; (2) you cannot promise results; and (3) do not compare your services with other lawyers unless you can factually substantiate the comparison.

(7) “the most” (same); (8) “the highest” (same), (9) “never” (stay away from absolutes); and (10) “always” (same).

- Rule 7.1 applies to any communication about your services, including business cards, letterheads, e-mail signatures, etc.
- The advertising rules govern social media if you are communicating about your legal services or your firm and you have control over the content.
- Website advertising is often a cost-effective advertising method, but you need to follow the advertising rules when doing so:

- > Because websites can be updated so easily and quickly, the State Bar will require a higher degree of accuracy in its content.

- > URL names that depart substantially from the firm name must be approved by and registered with the State Bar as a trade name.

- > Make clear your jurisdictional limitations and do not suggest that you can practice law in any jurisdiction unless you are licensed there.

- > If you accept potential client inquiries on your website, limit the information that can be provided and include an appropriate disclaimer to avoid creating an attorney-client relationship or a conflict.

- > If you include any information about your successes, past results, or your proven track record, then you must include an appropriate and conspicuous disclaimer. See 2009 FEO 16.

- > If you use testimonials, you cannot include dollar figures; and if the testimonial discusses any results achieved, you must include the required disclaimer. See 2012 FEO 1.

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. Anyone else interested can subscribe at no cost. If you need specific advice or representation, please contact our office to set up a consultation or meeting with one of the Firm’s attorneys.



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.

WEBSITE ADVERTISING IS OFTEN A COST-EFFECTIVE ADVERTISING METHOD, BUT YOU NEED TO FOLLOW THE RULES WHEN DOING SO.

- The top ten list of “dirty words” in lawyer advertising include: (1) “promise” (as to result or services); (2) “guarantee” (same); (3) “specialize” or “specialist” (unless you are a certified specialist); (4) “expert” (unless you can prove it objectively); (5) “the best” (because you can’t prove you are); (6) “the top” (same);