The Attorney-Client Relationship:
creating it, managing it, and avoiding problems

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PART 1: OVERVIEW OF THE RULES OF PROFESSIONAL CONDUCT (RPC)

A. All the Rules

Preamble: A Lawyer's Responsibilities – States the aims of the Rules
Scope: How the Rules should be used and interpreted
Terminology [Rule 1.0]: Defines frequently used terms such as "informed consent and "knowingly"
Article 1: Client-Lawyer Relationship – 18 rules with mandates and prohibitions
Article 2: Counselor – 3 rules on expanding the lawyer's role
Article 3: Advocate – 9 rules relating to lawyer behavior in litigation and other proceedings
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Article 5: Law Firms and Associations – 7 rules on firms, supervision, assistants, and multi-jurisdictional practice
Article 6: Public Service – 5 rules on pro bono, court appointments, and legal services organizations
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B. Article 1 – The Client-Lawyer Relationship

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C. <u>What the Rules Fail to Address</u>
1. Formation
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3. Malpractice

PART 2: CASE LAW AND RELEVANT RULES

Note: The rules cited below are the Nebraska version. Iowa's Rules vary somewhat. Any underlining in the rules quoted below has been added by the presenter for emphasis.

PROPOSITION 1. ***An attorney-client relationship may exist even if the attorney turns down the representation.***

Case Law Illustrations

--Mrs. Togstad met with Attorney A to discuss a medical malpractice action on behalf of her husband against their doctor and a hospital. After a one-hour meeting Attorney A stated that he did not think the Togstads had a case, that he would discuss the matter with one of his partners, and that if the firm (Firm A) changed its mind they would call Mrs. Togstad. When Attorney A did not contact her, she concluded that Firm A stood by its opinion. One year later Mrs. Togstad contacted a different law firm (Firm B), but by then the two-year statute of limitations had passed. In a legal malpractice action against Firm A, Attorney A testified that he had told Mrs. Togstad that Firm A was not expert in the field of medical malpractice, and that he had encouraged her to consult with a different law firm. Nevertheless, the jury found that an attorney-client relationship had existed, that Attorney A had been negligent in rendering advice, and that but for Attorney A's negligence the Togstads would have been successful in pursuing a medical malpractice action. The jury awarded Mr. Togstad (who had never met Attorney A) $610,500 and Mrs. Togstad $39,000. When the trial court denied the Firm A's motion for a judgment N.O.V., appeal was taken to the Minnesota Supreme Court, which affirmed. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W. 2d 686 (Minn. 1980).

--The attorney-client privilege and the attorney's duty of confidentiality govern the use of information received by an attorney from a potential client even if no representation is undertaken. The privilege "applies to all confidential communications made to an attorney during preliminary discussions of the prospective professional employment, as well as those made during the course of any professional relationship resulting from such discussions." Hooser v. Superior Court, 101 Cal. Rptr. 2d 341 (Ct. App. 2000).

--NOTE: No formalism is required to create an attorney-client relationship, although certain fee agreements must be in writing. See Rule 1.5(c).

Relevant Rules and Comments

--Preamble, para. 17: *Furthermore, for purposes of determining the lawyer's authority and responsibility, <u>principles of substantive law external to these Rules determine whether a client-lawyer relationship exists</u>. Most of the duties flowing from the client-*

lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

--Rule 1.4 ***Communication:*** **(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

--Rule 1.5 ***Fees:*** **(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.**

--Rule 1.13 ***Organization as Client:*** **(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing….**

--Rule 1.13, Comment 10: *There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.*

> --Case example: The former CEO of a corporation reasonably believed that the company's law firm represented him individually, and thus the law firm was conflicted out of representing the company in a dispute with the CEO over his severance agreement. Home Care Indus., Inc. v. Murray, 154 F. Supp. 2d 861 (D.N.J. 2001)

--Rule 1.16 ***Declining or Terminating Representation:*** **(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client….**

--Rule 1.18 ***Duties to Prospective Client:*** **(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.**

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee there from; and

(ii) written notice is promptly given to the prospective client.

--Rule 1.18, comments: *[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.*

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether

there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

--NOTE: Rule 1.18 issues arise most often in a motion to disqualify one side's attorney because of a prior consultation with someone on the other side. In North Carolina (and presumably everywhere else) it is an ethical violation for a lawyer to encourage a client to try to disqualify other lawyers from representing the client's adversaries by engaging in a series of initial consultations during which the client discloses confidential information to the other lawyers. N.C. Ethics Op. 244 (1997)

--<u>Rule 4.3</u> *Dealing with Unrepresented Person:* In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. <u>The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel,</u> if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

--Rule 4.3, comments: *[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. . . .*

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

<u>Practice Considerations</u>

--Consultation with a prospective client should be conducted in good faith and with your radar fully functioning. Many law firms run their conflict of interest inquiry on the basis of a very basic initial consultation in which the prospective client is identified along with its principals and all potential adverse parties. As to the substance of the potential representation,

the bare minimum is discussed until the conflict check is done.

--In an initial consultation be very aware of when you may be on the verge of receiving confidential information, and when you may be on the verge of giving advice. Cut off a discussion on such matters, if you feel that representation may not be undertaken.

--Before, during and after a consultation with a prospective client, communication is the key. Be very clear in your conversations that until you and the client formally agree on representation, you are not the client's attorney. When you think there may be any doubt in the client's mind as to your relationship, immediately follow up the meeting with something in writing, such as an email or letter. And always be aware of possible statutes of limitation and the need for the prospective client to seek other counsel if you decline – put this in writing if you have any concerns about the client's perceptions.

--Don't overlook the fact that Comment 5 to Rule 1.18 permits you to tell the prospective client at the outset of the initial consultation that you will not be restricted from adverse representation as a result of information disclosed in the meeting, and you will not be restricted from using information obtained in the meeting. Such a disclaimer may be most effective if done in writing acknowledged by the prospective client, but even then your receipt of too much information may make the disclaimer ineffective. N.C. Ethics Opinion 244 (1997)

--Telling a person to obtain other counsel is not considered giving them legal advice. See Rule 4.3.

--When dealing with an unrepresented person on behalf of a client, do not give legal advice to the unrepresented person.

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PROPOSITION 2. ***An attorney-client relationship may continue to exist even if considerable time has passed since the last activity by the attorney.***

<u>Case Law Illustrations</u>

--An attorney-client relationship is ongoing unless and until the client understands or reasonably should understand that the relationship has ended. People v. Bennett, 810 P. 2d 661 (Colo. 1991).

--If the client believes the relationship to be ongoing, the attorney may have an obligation to keep the client informed of tax law changes. Lama Holding Co. v. Shearman & Sterling, 758 F. Supp 159 (S.D.N.Y. 1991)

--A pattern of repeated retainers over a period of time may constitute a continuing relationship, even if at a particular moment there is no representation being carried out. This can result in a firm being conflicted out of representing a party adverse to the original client. International Business Machines Corp. v. Levin, 579 F. 2d 271 (3rd Cir. 1978).

--Intermittent representation of a client over a period of more than ten years has been interpreted to mean that the law firm is still that client's firm, even though more than a year has passed since the most recent representation. Oxford Systems, Inc. v. CellPro, Inc., 45 F. Supp. 2d 1055 (W.D. Wash. 1999); Shearing v. Allergan, Inc., 1994 Westlaw 382450 (D. Nev. 1994).

Relevant Rules and Comments

--Rule 1.2(b) ***Scope of Representation and Allocation of Authority Between Client and Lawyer:*** **A lawyer may limit the scope of his or her representation if the limitation is reasonable under the circumstances and the client gives informed consent to such limited representation.**

--Rule 1.2, comments: *[5] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.*

[6] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

--One court's approach: A lawyer and client may agree that the lawyer will represent the client in a specific transaction only and will not assume any general duties to the client beyond that transaction. Grand Isle Campsites, Inc. v. Cheek, 262 So. 2d 350 (La. 1972)

--Rule 1.3 ***Diligence:*** **A lawyer shall act with reasonable diligence and promptness in representing a client.**

--Rule 1.3, Comment 4: *Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates*

when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

--Rule 1.4 *Communications:* (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

--Rule 1.9 *Duties to Former Clients:* (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

--Rule 1.16 *Declining or Terminating Representation:* (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Practice Considerations

--Does it make sense to send a formal termination letter? Would you be reluctant to do so? Could the limits of the representation be spelled out in the initial engagement letter or in correspondence while the representation is being carried out?

--When dealing with small entity clients that you have formed, you should set the ground rules at the time of the initial work as to whether you or the client will take care of annual filings and annual board and shareholder meetings. If you retain that responsibility, it is clear enough that your representation is ongoing. If you do not have any responsibility for annual documentation, you should consider the best way to clarify with the client as to whether you are or are not in a continuing professional relationship.

PROPOSITION 3. ***The duty of confidentiality and the attorney-client privilege extend beyond the death of the client.***

Case Law Illustrations

--The attorney-client privilege "although important, is not sacrosanct. It may be pierced upon a showing of need, relevance and materiality, and the fact that the information could not be secured from any less intrusive source." Payton v. New Jersey Turnpike Authority, 691 A. 2d 321 (N.J. 1997) (case relating to sexual harassment and a "tenuous" claim of privilege).

--Attorney-client privilege may yield "in a proper case where strong public policy requires disclosure." People v. Osorio, 549 N.E. 2d 1183 (N.Y. 1989).

--When Independent Counsel Kenneth Starr sought privileged information from the attorney for Clinton White House Deputy Counsel Vincent Foster, who had committed suicide, the United States Supreme Court in a 6-3 opinion declared: "Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. . . . Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime." For the dissent Justice O'Connor stated: "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication. In my view, the cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client." Swidler & Berlin v. United States, 524 U.S. 399 (1998).

--The Supreme Judicial Court of Massachusetts rejected a request to question the attorney for a deceased husband who was suspected of participating with others in the murder of his wife. Matter of John Doe Grand Jury Investigation, 562 N.E. 2d 69 (Mass. 1990).

--The Illinois Supreme Court has refused to adopt a "generalized public interest exception" to the standard rule of attorney-client privilege. People v. Knuckles, 650 N.E. 2d 974 (Ill. 1995).

Relevant Rules and Comments

--Rule 1.6 ***Confidentiality of Information:*** **(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**

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

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

--Rule 1.6, comment: *[17] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.*

--Rule 1.9 ***Duties to Former Clients:*** **(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:**

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

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

Practice Considerations

--If a mechanical adherence to the non-disclosure rule seems unnecessary or problematic under the circumstances, you might begin by asking the logical question of who could possibly be harmed by revealing the confidences of the deceased client. The client's family, business or others who were significantly connected to the client? The client's reputation? Is there anyone conceivable who could complain?

--On the other hand, weigh the benefits that would ensue if you reveal the confidential information.