Ethics

April 20, 2007
By
Robert E. Kleinpeter

1. Advertising

The Louisiana State Bar Association (LSBA) House of Delegates will consider proposed amendments to the rules governing lawyer advertising on June 7, 2007 at the LSBA Annual Meeting in Destin, Florida. The LSBA Rules of Professional Conduct Committee has drafted proposed amendments to rules dealing with lawyer advertising and solicitation after multiple hearings and much feedback regarding the proposed rules.

A current draft of the rules may be viewed and/or downloaded from the LSBA website at, www.lsba.org/committees/ProposedLARules7-1_12-2006.pdf. LSBA says "[a]n important component of the draft is the provision which requires evaluation by the Rules of Professional Conduct Committee of nearly all advertisements for compliance with the Rules governing lawyer advertising and solicitation, and provides for optional advance written advisory opinions concerning compliance."

2. Trust Accounts and Overdraft Notification

Louisiana Supreme Court Rule XIX governs lawyer disciplinary proceedings. The rule includes this section which took effect March 15, 2006:

> SECTION 28. MAINTENANCE OF TRUST ACCOUNTS BY LAWYERS; ACCESS TO LAWYERS' FINANCIAL ACCOUNT RECORDS;
>
> OVERDRAFT NOTIFICATION.
>
> A. Clearly Identified Trust Accounts in Financial Institutions Required.
>
> (1) Lawyers who practice law in Louisiana shall deposit all funds held in trust in a bank or similar institution in this state, or elsewhere with the consent of the client or third party, in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.
>
> (2) Every lawyer engaged in the practice of law in Louisiana shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records, check stubs, vouchers, ledgers, journals, closing statements, accounts or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the

date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client.

B. Access to Lawyers' Financial Account Records.

Every lawyer practicing or admitted to practice law in Louisiana shall, as a condition thereof, be conclusively deemed to have consented to the production by the depository institution of records of all financial accounts maintained by the lawyer in any bank or similar institution.

C. Request for Production of Records.

A request by disciplinary counsel directed to a bank or other financial institution for production of records pursuant to this Section shall certify that the request is issued in accordance with the requirements of this Section and Section 29 of these Rules of Lawyer Disciplinary Enforcement.

D. Overdraft Notification.

Any lawyer or law firm maintaining a client trust or escrow account in accordance with this rule and Rule 1.15 of the Louisiana Rules of Professional Conduct shall execute an agreement with the federally-insured financial institution or its affiliate that holds the attorney's trust or escrow account funds. The agreement shall authorize the electronic notification to the Office of Disciplinary Counsel of any overdraft on such account(s). Notification of trust or escrow account overdrafts shall be made in accordance with the written agreement between the federally insured financial institution and the attorney or law firm and in accordance with La. R.S. 6:332 and La. R.S. 6:333(F)(16).

Every lawyer practicing or admitted to practice in Louisiana shall, as a condition thereof, be conclusively deemed to have consented to the overdraft provisions mandated by this rule.

A copy of the executed agreement shall be forwarded to the Office of Disciplinary Counsel within thirty (30) days of its execution. A Court-approved overdraft notification agreement that attorneys and federally-insured financial institutions and their affiliates shall utilize is included as Appendix F to these rules.

The Office of Disciplinary Counsel has issued a "Statement of Protocol" regarding the application of this new rule, which reads:

Statement of Protocol Regarding Overdraft Notification on Client Trust Accounts

The Office of Disciplinary Counsel is aware of and grateful for the support of the Louisiana Supreme Court, the Louisiana Legislature, and the Louisiana State Bar Association in the creation of an overdraft notification rule which would provide the basis for the report of client trust account overdrafts to this office. At least 32 other states have enacted such a rule and all have reported substantial reductions in the instances of conversions and thefts of client and third party funds by dishonest

lawyers. Our own experience indicates that in almost every instance where conversion of client funds has occurred, such dishonest acts were preceded by at least one instance of an overdraft having occurred on the client trust account. This 'early warning' provides the Office of Disciplinary Counsel with an opportunity to intervene and, if not prevent, at least limit the extent of harm caused to clients and third parties.

Rational and appropriate concerns have been expressed by some that the creation of an overdraft notification rule would trigger lengthy and costly investigations, even in instances of bank error or simple inadvertence. Those understandable concerns can and are addressed by the public disclosure of the protocol which the Office of Disciplinary Counsel intends to follow in its handling of client trust account overdraft notifications provided by banks. The following protocol will be put in place at the initial screening level (which occurs prior to the opening of a formal investigation) to allow for some preliminary review of the overdraft incident.

• Upon initial receipt of the overdraft notification, a preliminary review will be conducted to determine if the incident was triggered by bank error. If so, then no investigative file would be opened.

• If the overdraft incident was not as a result of banking error, then the screening department of ODC would be required to contact the lawyer directly to see if the overdraft is attributable to simple inadvertence or employee mistake. If that fact can be established at the screening level, the lawyer would merely be cautioned to exercise continued care in the future and no formal disciplinary investigation would be opened.

• If the incident was determined to be as a result of a lack of proper accounting procedures within the office or a lack of accounting knowledge, the screening counsel would have the option of diverting the lawyer to the excellent LSBA Accounting School and/or the LSBA Ethics School so as to acquire the necessary skills and understanding needed to properly handle client and third party funds.

• Where the screening efforts reflect concern that the overdraft was not caused by simple inadvertence, where there are multiple instances of client trust account overdrafts, or if the lawyer has previously been cautioned or diverted to Accounting or Ethics School and the problems persist, the Office of Disciplinary Counsel obviously will reserve the right to open the matter as a formal disciplinary investigation.

This protocol represents an adaptation of what already occurs within the Office of Disciplinary Counsel when complaints are received. While historically the office receives nearly 3200 complaints per year, nearly 1000 or more are screened out either on the basis that the individual about whom the complaint has been filed is not a Louisiana licensed attorney, or because the facts alleged against the attorney, if true, would not constitute a violation of the Rules of Professional Conduct. Additionally, between 300 and 500 matters are diverted out of the discipline system annually at the screening level, typically because the misconduct involved is relatively minor and there is little likelihood that it will be repeated by the attorney. Where the attorney agrees to such a diversion opportunity, the excellent programs of the Louisiana State Bar Association, administered by the Lawyer Client Assistance Counsel, provides an opportunity to educate and address the lawyer's mistake without a disciplinary

investigation or a disciplinary record. The protocol set forth above would effectively 'weed out' those matters which are minor or which do not reflect a violation of ethics rules.

The rule which allows for overdraft notification to the Office of Disciplinary Counsel on a lawyer's client trust account reflects a time proven mechanism for limiting and, in many instances, preventing the harm caused by the rare dishonest lawyer who places his or her own interests above those of the client. This protocol reflects an excellent opportunity to balance the need for early detection and prevention of dishonest conduct with employee inadvertence or mistake. The Office of Disciplinary Counsel supports the universal goal of providing protection for both innocent clients who are victims of lawyer dishonesty as well as those lawyers whose conduct is ethical and otherwise appropriate.

3. Financial Assistance

A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest and other charges, and the scope of limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e)

Rule 1.4 (c)

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Rule 1.5 (c)

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except as follows.

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, provided that the expenses were reasonably incurred. Court costs and expenses of litigation include, but are not necessarily

limited to, filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees; related travel expenses; litigation related medical expenses; and any other case specific expenses directly related to the representation undertaken, including those set out in Rule 1.8(e)(3).

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

(3) Overhead costs of a lawyer's practice which are those not incurred by the lawyer solely for the purposes of a particular representation, shall not be passed on to a client. Overhead costs include, but are not necessarily limited to, office rent, utility costs, charges for local telephone service, office supplies, fixed asset expenses, and ordinary secretarial and staff services.

> With the informed consent of the client, the lawyer may charge as recoverable costs such items as computer legal research charges, long distance telephone expenses, postage charges, copying charges, mileage and outside courier service charges, incurred solely for the purposes of the representation undertaken for that client, provided they are charged at the lawyer's actual, invoiced costs for these expenses.
>
> With client consent and where the lawyer's fee is based upon an hourly rate, a reasonable charge for paralegal services may be chargeable to the client. In all other instances, paralegal services shall be considered an overhead cost of the lawyer.

(4) In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances, subject however to the following restrictions.

(I) Upon reasonable inquiry, the lawyer must determine that the client's necessitous circumstances, without minimal financial assistance, would adversely affect the client's ability to initiate and/or maintain the cause for which the lawyer's services were engaged.

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

(iv) Financial assistance under this rule may provide but shall not exceed that minimum sum necessary to meet the client's, the client's spouse's, and/or dependents' documented obligations for food, shelter, utilities, insurance, non-litigation related medical care and treatment, transportation expenses, education, or other documented expenses necessary for subsistence.

(5) Any financial assistance provided by a lawyer to a client, whether for court

costs, expenses of litigation, or for necessitous circumstances, shall be subject to the following additional restrictions.

(I) Any financial assistance provided directly from the funds of the lawyer to a client shall not bear interest, fees or charges of any nature.

(ii) Financial assistance provided by a lawyer to a client may be made using a lawyer's line of credit or loans obtained from financial institutions in which the lawyer has no ownership, control and/or security interest; provided, however, that this prohibition shall not apply to publicly traded financial institutions where the lawyer's ownership control and/or security interest is less than 15%. Where the lawyer uses such loans to provide financial assistance to a client, the lawyer should make reasonable, good faith efforts to procure a favorable interest rate for the client.

(iii) Where the lawyer uses a line of credit or loans obtained from financial institutions to provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third party lender, or ten percentage points above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding, whichever is less.

(iv) A lawyer providing a guarantee or security on a loan made in favor of a client may do so only to the extent that the interest charges, including fees or other charges attendant to such a loan, do not exceed ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding. Interest together with other charges attendant to such loans which exceeds this maximum may not be the subject of the lawyer's guarantee or security.

(v) The lawyer shall procure the client's written consent to the terms and conditions under which such financial assistance is made. Nothing in this rule shall require client consent in those matters in which a court has certified a class under applicable state or federal law; provided, however that the court must have accepted and exercised responsibility for making the determination that interest and fees are owed, and that the amount of interest and fees chargeable to the client is fair and reasonable considering the facts and circumstances presented.

(vi) In every instance where the client has been provided financial assistance by the lawyer, the full text of this rule shall be provided to the client at the time of execution of any settlement documents, approval of any disbursement sheet as provided for in Rule 1.5, or upon submission of a bill for the lawyer's services.

(vii) For purposes of Rule 1.8 (c), the term "financial institution" shall include a federally insured financial institution and any of its affiliates, bank, savings and loan, credit union, savings bank, loan or finance company, thrift, and any other business or person that, for a commercial purpose, loans or advances money to attorneys and/or the clients of attorneys for court costs, litigation expenses, or for necessitous circumstances.

4. Highlights of The New Rules on Financial Assistance

A lawyer who provides any form of financial assistance . . . shall prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made . . .

Contingent fee agreement considerations include:

A writing signed by the client
A copy or duplicate original furnished client at execution
Contingency fee shall state method of calculation
List the litigation and other expenses to be deducted
Provide client with a written statement upon conclusion

Court costs and expenses of litigation include:

Filing fees
Deposition costs
Expert witness fees
Transcript costs
Witness fees
Copy costs
Photographic, electronic, or digital evidence productions
Investigation fees
Related travel expenses
Litigation related medical expenses

With informed consent of the client the lawyer may charge:

Computer legal research charges
Long distance telephone
Postage and copying
Mileage and outside courier service
Actual invoice costs incurred solely for the purposes of the representation

Paralegal services are overhead except if the lawyer's fee is based upon an hourly rate.

Financial assistance, if made by a lawyer's line of credit, or financial institution loan requires:

Good faith effort to procure favorable interest rate
Can't be more than 10% over prime as of 1/15 of each new year
Must pass on actual charges only
Applies to a guarantee or a security on a loan
Written consent of client to terms
Full text of this rule shall be provided to the client at execution of settlement, disbursement, or submission of a bill

5. Sharing Legal Fees I

A division of fee between lawyers who are not in the same firm may be made only if:

(1) The client agrees in writing to representation by all of the lawyers involved and is advised in writing as to the share of the fee that each lawyer will receive;

(2) The total fee is reasonable; and

(3) Each lawyer renders meaningful legal services for the client in the matter.

Rule 1.5(e)

6. Sharing Legal Fees II

The client must be ADVISED IN WRITING of the SHARE OF THE FEE that each lawyer will receive. The client does NOT have to approve or agree in writing to the fee division, and the information may be conveyed to the client at any time before the payment of the fee. For example, it can be contained in the settlement disbursement sheet.

Rule 1.5

7. Sharing Legal Fees III

Each lawyer must render "meaningful" legal services for the client in the matter to share in the fee. "Meaningful" probably means less than "substantial," but more than "case brokering" or a mere referral.

Rule 1.5

8. No Aggregate Settlement Without Each Client's Consent

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, or a court approves a settlement in a certified class action. 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.

Rule 1.8(g)

9. No Pre-Settlement Power of Attorney

A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement.

Rule 1.8(k)

10. Distributing Funds Involving Third Persons

"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. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property."

Rule 1.15(d) (in pertinent part)

11. Problem Areas Involving Third Persons

¬ Medicare Liens

¬ Health insurance reimbursement or subrogation

¬ Healthcare provider bill for services

¬ See Kleinpeter & Schwartzberg website, www.kleinpeter-schwartzberg.com, under publications.

12. Distributing Funds In Which Someone Claims An Interest

"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."

Rule 1.15(e)

13. Lawyer Must Pay Litigation Costs

The Office of Disciplinary Counsel of the Louisiana Attorney Disciplinary Board takes the further position that a lawyer must pay costs associated with litigation, although not necessarily out of the proceeds of a settlement. Litigation costs include, for example, court reporter's fees, expert's fees, and filing fees.

Rule 1.15 Caveat
From Office of Disciplinary Counsel Letter

14. Termination

Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues related to the expense of

copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Rule 1.16(d) (in pertinent part)

15. Candor Toward the Tribunal I

A lawyer shall not knowingly:

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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter. . .

Rule 3.3(a) (in pertinent part)

16. Candor Toward the Tribunal II

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

Rule 3.3(b) (in pertinent part)

17. Communication with Person Represented by Counsel I

In representing a client, a lawyer shall not communicate about the subject of the representation with:

a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.2(a)

18. Communication with Person Represented by Counsel II

a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and

(1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;

(2) who has the authority to obligate the organization with respect to the matter; or

(3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Rule 4.2(b)

19. 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 a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, 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

20. Respect for Rights of Third Persons

A lawyer who receives a writing that, on its fact, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

Rule 4.4(b)

21. Responsibility of Partners, Managers, And Supervisory Lawyers I

A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Rule 5.1 (a) and (b)

22. Responsibility of Partners, Managers, And Supervisory Lawyers II

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if

(1) the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.1(c)

23. Internet Advertising I

Beware of services that "screen" clients or phone calls about a case. It may be the unauthorized practice of law.

> A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Rule 5.5(b)

24. Internet Advertising II

Beware of services that assign you all cases in a venue or area code. This violates advertising rules.

A lawyer shall not give anything of value to a person for recommending the lawyer's services; provided, however, that

A lawyer may pay usual, reasonable and customary charges of a lawyer referral service operated by the Louisiana State Bar Association, any local bar association, or any other not-for-profit organization, provided the lawyer referral service:

(I) prohibits lawyers from increasing their fee to a client to compensate for the referral service charges; and

(ii) refers all persons who request legal services to a participating lawyer;

(iii) fairly and equitably distributes referral cases among the participating lawyers, within their area of practice, by random allotment or by rotation.

Rule 7.2(b)

25. No Blanket Or "Administrative" Fee May Be Charged Client

Charging an "administrative fee" is not provided for by the rules. An attorney may recover out-of-pocket expenses. These out-of-pocket expenses may include items such as postage and copying costs. These expenses, if deducted from the client's portion of any recovery, should be itemized and included in any "case settlement sheet" reflecting the disbursement of funds. A blanket fee, however, is not permissible.

26. Insurance Coverage For Disciplinary Proceedings

Lawyer malpractice policies typically provide for insurance coverage for disciplinary proceedings. For example, a standard policy provision is:

Although not Damages, the Company will pay, in addition to the applicable limit of liability:

Up to $10,000.00 for any Insured and in the aggregate, for attorney fees and other reasonable costs, expenses or fees (the "Disciplinary Fees") resulting from a Disciplinary Proceeding incurred as the result of a notice of such Disciplinary Proceeding both first received by the Insured and reported to the Company during the policy period, arising out of an act or omission in the rendering of legal services by such insured. Except as set forth below, the amount payable hereunder shall not exceed $10,000.00 despite the number of Insureds hereunder or the number of proceedings.

27. Recommended Sources for Ethics

(a) Dane S. Ciolino, *Louisiana Professional Responsibility Law and Practice (2007).* You may order a copy through www.lsba.org/publications/profrespbook2007.pdf.

(b) LSBA's Practice Aid Guide contains forms and checklists for attorneys, staff, and clients which are designed to increase the competency of your law practice. The Practice Aid Guide contains the Louisiana Rules of Professional Conduct and may be found at www.lsba.org/publications/practice_aid_guide.asp. The Practice Aid Guide may be downloaded free at this web address.