ALASKA BAR
ASSOCIATION


# Don't Cross That Line! – Practicing Ethically & Successfully in Your First Years: A Mandatory Course for New Admittees in Alaska

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## FACULTY

**Gregory Miller** is a shareholder at Birch, Horton, Bittner and Cherot, and his practice includes aviation law, personal injury defense, business torts, contract law, and education law. He is a member of the Alaska Bar Association fee arbitration, fee mediation, and attorney disciplinary committees.

**Susan Orlansky** received her B.A. degree from Reed College (1975) and was elected to Phi Beta Kappa. She received her J.D. degree from Harvard University (Magna Cum Laude, 1979), where she served as an editor of the Harvard Law Review. Ms. Orlansky is admitted to practice in Alaska and also before the United States District Court for the District of Alaska, the Ninth U.S. Circuit Court of Appeals, and the United States Supreme Court. Ms. Orlansky's practice focuses on trials and appeals, with an emphasis on complex civil and criminal litigation. Before entering private practice, she served as an Assistant Public Defender (Appellate Supervisor) for the Alaska Public Defender Agency (1981-1992), was the Staff Attorney for the Alaska Appellate Courts (1980-1981), and served as Law Clerk to the Honorable John Dooling, United States District Court for the Eastern District of New York (1979-1980).

**Steve Van Goor** is Bar Counsel for the Alaska Bar Association, a position he has held since 1983. Prior to his work for the Bar, he served as a military lawyer in the U.S. Army and was in private practice in Anchorage. In addition to the Alaska Rules of Professional Conduct Committee, Mr. Van Goor is a member of the Ethics Committee and frequently provides informal ethics advice to members of the Bar. He is a 1975 graduate of the University of Kansas Law School and is admitted in Alaska and Kansas.

Alaska Bar Association

To obtain additional copies of this material contact the Alaska Bar Association at 907-272-7469/fax 907-272-2932 or e-mail info@alaskabar.org

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# Ethics Resources

## Alaska Bar Association

**Call Phil Shanahan at 907-272-7469** (fax: 907-272-2932) for informal ethics opinions -- get some guidance the minute you suspect a problem!

You may fax, e-mail or call with any ethics questions. Callers may remain anonymous if they desire.

You may also call Kevin Cuddy, Chair, Bar Ethics Committee at 907-263-8410, or an experienced lawyer in your practice area to discuss an ethics question.

## Formal Opinions On the Internet:

All the Alaska Bar Formal Ethics Opinions are available on our website -- **https://alaskabar.org/ethics-discipline/adopted-ethics-opinions-chronological/**

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**IN THE SUPREME COURT OF THE STATE OF ALASKA**

**ORDER NO. 1378**

Amending Section 3 of Alaska Bar Rule 5 concerning the attorney's oath.

IT IS ORDERED:

Section 3 of Alaska Bar Rule 5 is amended to read as follows:

Section 3. Upon receiving certification of the eligibility of an applicant the Supreme Court may enter an order admitting the applicant as an attorney at law in all the courts of the state and to membership in the Alaska Bar Association. Each applicant ordered admitted to the practice of law shall take the following oath before any state or federal judicial officer:

**I do affirm:**

I will support the Constitution of the United States and the Constitution of the State of Alaska;

I will adhere to the Rules of Professional Conduct in my dealings with clients, judicial officers, attorneys, and all other persons;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any proceedings that I believe are taken in bad faith or any defense that I do not believe is honestly debatable under the law of the land;

I will be truthful and honorable in the causes entrusted to me, and will never seek to mislead the judge or jury by an artifice or false statement of fact or law;

I will maintain the confidences and preserve inviolate the secrets of my client, and will not accept compensation in connection with my client's business except from my client or with my client's knowledge or approval;

I will be candid, fair, and courteous before the court and with other attorneys, and will advance no fact prejudicial to the honor or reputation of a party or witness, unless I am required to do so in order to obtain justice for my client;

I will uphold the honor and maintain the dignity of the profession, and will strive to improve both the law and the administration of justice.

A certificate of admission shall thereupon be issued to the applicant by the clerk of the court.

DATED: December 16, 1999

EFFECTIVE DATE: December 16, 1999

Chief Justice Matthews

Justice Eastaugh

Justice Fabe

Justice Bryner

Justice Carpeneti

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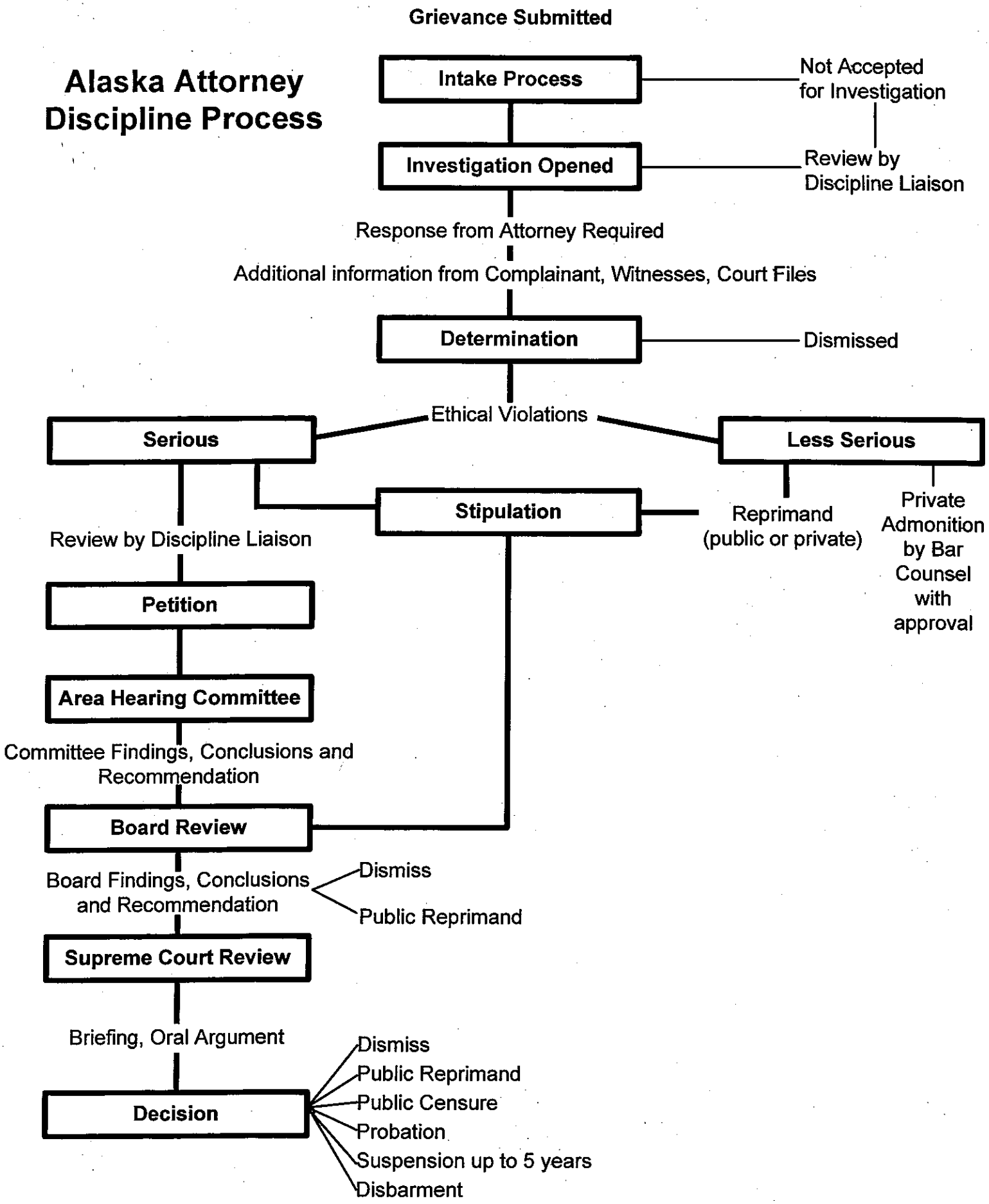
# Alaska Attorney Discipline Process



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# ATTORNEY DISCIPLINE PROCEDURES
**Alaska Bar Association**

## Introduction

1. This is an overview of the policies and procedures followed by the Alaska Bar Association in attorney discipline matters. The Alaska Bar Rules referenced in this summary may be found under "Alaska Bar Rules, Part II, Rules of Disciplinary Enforcement," in *Alaska Rules of Court* published by Tower Publishing and in *Alaska Court Rules--State* published by the Thomson West. They are also linked on the Bar's website listed below.

## Grievances

2. Under Bar Rule 22(a), grievances against attorneys must be in writing, signed, and verified by the complainant and contain a clear statement of the details of each act of alleged misconduct, including the time and place of each. The grievance must contain allegations that warrant investigation. Bar counsel may also initiate an investigation of misconduct that comes to the Bar's attention in the absence of a specific grievance. Bar Rule 11(a)(15).

## Intake Review

3. When a grievance is received by the Discipline Section, it is initially reviewed by a legal assistant to determine whether the grievance meets minimum requirements. If it is deficient as written (*e.g.* incomplete, not signed, fails to name an attorney, contains unclear allegations, etc.), the legal assistant returns the actual grievance to the writer and informs the writer of the deficiencies. No further action is taken until a properly prepared grievance is received.

4. If the grievance meets minimum requirements, a file number is assigned and the grievance is reviewed by an assistant bar counsel.

5. The assistant bar counsel sends a "10-Day Intake Letter" to the attorney named in the grievance along with a copy of the grievance. This letter advises the attorney that a grievance has been filed and that the attorney may, no later than 10 days from the date of assistant bar counsel's letter, voluntarily submit a verified response to the grievance to assist counsel in determining whether a grievance should be opened.

6. After the 10-day period or an extension for good cause has expired, assistant bar counsel reviews the grievance and response, if any, provided by the attorney. If assistant bar counsel determines that the

allegations in the grievance do not warrant an investigation, counsel will decline to open an investigation and will notify both the complainant and the attorney. A complainant may file a request for review of this determination within 30 days of the date of bar counsel's letter. The request is then reviewed by the Board Discipline Liaison who may affirm bar counsel's decision not to accept the grievance for investigation or may direct that an investigation be opened as to one or more of the allegations in the grievance. Bar Rule 22(a). The Discipline Liaison is a member of the Board appointed to provide guidance and assistance to bar counsel and staff in implementing Board policy and to review requests for formal proceedings. Bar Rule 10(f).

7. If, on the other hand, allegations that warrant an investigation are present, assistant bar counsel will accept the grievance for investigation. Bar Rule 22(a). Alternatively, a matter may be referred to mediation. Bar Rule 13(a).

## Mediation

8. Bar counsel may, with the consent of the attorney and the client or other person involved in a dispute, refer the matter to a mediation panel consisting of individuals qualified under guidelines set by the Board. Bar Rule 13(a) & (b). Matters likely to result in disbarment, suspension, or probation or that involve dishonesty or material misrepresentation may not be referred to mediation. Bar Rule 13(a).

9. A mediator will have the power to mediate disputes and to end a mediation if he or she determines that further efforts would be unwarranted or the matter is inappropriate for mediation. Bar Rule 13(c). A mediator may refer the attorney to a lawyer's assistance program. *Id*. Proceedings are informal and confidential and the mediator does not have the authority to subpoena or to impose a resolution upon the parties. Bar Rule 13(d). If a resolution is reached, the mediator will prepare a written agreement for signature by the parties that will be enforceable as any other civil contract. Bar Rule 13(e).

10. The mediator will prepare a written report to bar counsel containing a summary of the dispute, the contentions of the parties, any agreements that may have been reached, and any matters in which agreement was not reached. Bar Rule 13(f). An attorney has a duty to confer expeditiously with the mediator and the other parties to the mediation and to cooperate in good faith with the mediator to resolve the dispute. Bar Rule 13(g).

## Investigation

11. When a grievance is accepted for investigation, assistant bar counsel sends a letter to both the complainant and the respondent attorney. The complainant is advised that the matter has been accepted for investigation (sometimes only as to certain allegations) and given further information about the discipline process including the requirement of confidentiality under Bar Rule 22(b). The respondent is advised that he or she must file a verified response to the allegations accepted for investigation within 20 days of the date of service of the Bar Association's letter under Bar Rule 22(a). Failure to answer a grievance within the time required or within extensions that may be granted by assistant bar counsel is a separate basis for discipline under Bar Rule 15(a)(4).

12. When the respondent's verified answer to the grievance is received, it is reviewed by assistant bar counsel, and a copy of the verified answer is generally sent to the complainant for further verified comment. If the complainant submits a verified comment, assistant bar counsel may request a further verified reply from the respondent.

13. During the investigation, assistant bar counsel may request the production of documents from the complainant and respondent and may also conduct depositions. Bar Rule 24(a). As necessary, court files are reviewed and witnesses are contacted.

## Determination

14. Once assistant bar counsel has completed the investigation, he or she must determine whether an ethical violation has occurred, and, if so, determine a recommended disposition. These determinations are reviewed by bar counsel who then decides whether the recommended disposition of the grievance is appropriate.

## Dismissal

15. If there is no probable cause to believe that a violation has occurred [Bar Rule 22(c)], or if there is a lack of clear and convincing evidence that a violation has occurred [standard of proof under Bar Rule 22(e)], or if the conduct complained of does not constitute grounds for discipline, assistant bar counsel will dismiss the grievance and advise the complainant of this action in a letter explaining the Bar Association's reasoning. Bar Rule 11(c).

16. The complainant may appeal this decision. In that event, the file is reviewed by a member of an Area Hearing Division from a roster maintained by the Executive Director. Hearing divisions consist of attorneys and public members appointed by the Chief Justice of the Supreme Court from lists submitted by the Board. Bar Rule 12. The division member may affirm or reverse the decision to dismiss or request that further investigation be conducted. Bar Rule 25(c).

## Ethical Violations

17. If there is sufficient evidence of an ethical violation, assistant bar counsel, in consultation with bar counsel, must decide what level of sanction should be sought.

## Written Private Admonition

18. Generally, minor or isolated instances of misconduct are resolved by written private admonition by assistant bar counsel, the lowest level of discipline. Bar Rule 22(d). A request for admonition must be reviewed and approved by an area division member. Bar Rule 22(d). The admonition letter is directed to the respondent and carefully explains the basis for the Bar's findings of misconduct. The admonition may also require that the respondent fulfill specified conditions, *e.g.*, institute calendaring systems, pass the Multistate Professional Responsibility Exam, have financial accounts reviewed by an accountant, *etc*. Bar Rule 16(d). The letter becomes a permanent record of discipline imposed on the respondent and, in the event of future formal proceedings, may be used in those proceedings in deciding the severity of sanction to be imposed.

19. The respondent may decline to accept the admonition. In that case, the admonition will be vacated and assistant bar counsel may proceed with formal public proceedings. Bar Rule 22(d). If the admonition is accepted, the complainant is advised of the basis for the admonition but the complainant does not, as a matter of policy, receive a copy of the admonition itself.

## Reprimand

20. The next level of disposition is reprimand by the Disciplinary Board. The Disciplinary Board is the Board of Governors of the Bar Association when it considers grievance and disability matters. Bar Rule 10(a). The Board consists of nine lawyers elected by the membership of the Bar Association and three public members appointed by the governor of Alaska. Alaska Integrated Bar Act, AS 08.08.010 *et seq*.

21. Reprimand may be imposed either by stipulation between assistant bar counsel and the respondent or following the formal hearing process described below. Generally, reprimand is imposed in cases in which: (1) the respondent has been previously admonished; (2) there is a series of less serious violations; or (3) the conduct is of a nature that the respondent should receive the criticism of the entire Board rather than bar counsel.

## Petition for Formal Hearing

22. Serious violations or a continuing course of ethical misconduct are referred to the formal hearing process. Following investigation and consultation with bar counsel, assistant bar counsel obtains permission from the Board Discipline Liaison to file a petition for formal hearing

against the respondent with the Bar's Executive Director. Bar Rules 10(f) and 25(d).

23. The petition is much like a complaint in a civil case or an indictment in a criminal case, although disciplinary proceedings are *sui generis* and neither civil nor criminal. Once the petition is filed, all proceedings are open to the public. Bar Rule 21(a). The Executive Director maintains a file on the matter that is available for public review, similar to court files maintained by the court clerk's office. Bar Rule 21(d).

24. The respondent must answer a formal petition. Bar Rule 22(e). Failure to answer a petition is itself grounds for discipline. Bar Rule 15(a)(4).

## Area Hearing Committee

25. The matter is then referred to an area hearing committee designated by the Executive Director in the judicial district where either the attorney maintained an office or in which the misconduct occurred. Bar Rule 9(d).

26. The proceeding is similar to a trial in civil or criminal courts. The respondent is entitled to representation by counsel at his or her expense, to examine and cross-examine witnesses, to present evidence, to have subpoenas issued, and to make a peremptory challenge or challenges for cause concerning the composition of the hearing panel. Bar Rule 22(f).

27. Bar counsel has the burden of proving the misconduct alleged by clear and convincing evidence. Bar Rule 22(e). Following the hearing, the committee deliberates and issues written findings of fact, conclusions of law, and a recommendation for disciplinary sanction. Bar Rule 22(l). The committee may recommend dismissal of the case, reprimand by the Disciplinary Board, or public censure, probation, suspension for up to five years or disbarment by the Supreme Court. Bar Rule 16.

## Disciplinary Board

28. The hearing committee's report and the record of proceedings are then forwarded to the Disciplinary Board. Either bar counsel or the respondent may appeal. Bar Rule 25(f). The Board has the authority to enter those findings, conclusions, and recommendations it finds are justified from the record. The Board may resolve a case by dismissing the matter or issuing a reprimand to the respondent. It may also forward the matter to the Supreme Court with a recommendation for a higher level of discipline. Bar Rule 22(n).

## Supreme Court

29. Attorney discipline is a matter of original jurisdiction in the Supreme Court. Bar Rule 9(c). Thus, the Court considers all discipline

cases in which a recommendation is made for public censure or higher sanctions. Bar Rule 22(r). Only the Court may issue these sanctions. Bar Rule 16(a). A respondent may appeal and bar counsel may file a petition for hearing regarding a finding, conclusion, or recommendation of the Disciplinary Board in such cases. Bar Rule 25(g)-(h). Normally, briefs are submitted by both sides and the Court hears oral argument before issuing its decision.

30. The Court may issue its decision in the form of an order, a memorandum opinion and judgment, or a published opinion. Notice of public discipline is sent by the Bar Association to the courts, the attorney general, the National Lawyer Regulatory Data Bank, and other jurisdictions in which the respondent is admitted. Bar Rule 28(h). The Bar also publishes notices of all public discipline in newspapers designated in the rule. Bar Rule 28(g).

## Stipulated Discipline

31. A disciplinary matter may also be presented to the Disciplinary Board and the Supreme Court by stipulation. In that instance, assistant bar counsel and the respondent agree on a statement of facts describing the attorney's misconduct and the level of sanction that should be imposed. The stipulation is subject to acceptance by both the Disciplinary Board and the Supreme Court for those sanctions at the Court's level. Bar Rule 22(h).

## Criminal Conviction/Interim Suspension

32. An attorney convicted of a felony or a serious crime as defined in Bar Rule 26(b) is immediately suspended by the Supreme Court pending final disciplinary proceedings. The case is presented to an Area Hearing Committee and the Board under the same procedures as other disciplinary matters except that the sole issue to be determined is the sanction to be recommended to the Court. Bar Rule 26(f).

33. An attorney may also be placed on interim suspension on a showing by bar counsel of conduct by the attorney that constitutes a substantial threat of irreparable harm to his or her clients or prospective clients or where there is a showing that the attorney's conduct is causing great harm to the public by a continuing course of misconduct. Bar Rule 26(d).

## Reciprocal Discipline

34. A member of the Alaska Bar Association who is disciplined by another jurisdiction will be subject to the imposition of identical discipline in Alaska under Bar Rule 27. This rule provides the respondent and bar counsel with an opportunity to inform the Supreme Court of any reason why the imposition of identical discipline in Alaska would be unwarranted. Bar Rule 27(a) and (d).

## Reinstatement

35. A disbarred or suspended attorney may seek reinstatement from the Supreme Court under Bar Rule 29. Generally, a request for reinstatement is filed prior to the expiration of the term of suspension. Bar Rule 29(b). However, a disbarred attorney may not be reinstated until at least five years from the effective date of the disbarment. Bar Rule 29(b)(5). If a disbarred or suspended attorney is denied reinstatement by the Court, the attorney must wait two years before applying for reinstatement again. *Id.*

36. Generally, a respondent suspended for two years or less is entitled to automatic reinstatement unless an opposition is filed by bar counsel. Bar Rule 29(c) and (d). Respondents suspended for more than two years must appear at reinstatement proceedings before an Area Hearing Committee and the Disciplinary Board. The Board then makes a recommendation to the Court which makes a final determination on whether the attorney should be reinstated. Bar Rule 29(c).

## Disciplinary Records

37. Permanent statistical records are maintained by the Bar Association. Bar Rule 11(d) and 32(c). Case files that have resulted in the imposition of discipline are permanently maintained although they may be destroyed five years after an attorney's death. Bar Rule 32(a). Case files that have been dismissed are maintained for five years and then destroyed. Bar Rule 32(b). Grievances that are not accepted for investigation are also maintained for five years and then destroyed.

38. A person inquiring about an attorney's disciplinary history will be informed of any public discipline imposed or public matters pending; however, cases that have been not been accepted for investigation, dismissed following investigation, or have resulted in private discipline are confidential unless the attorney involved waives confidentiality, the Supreme Court orders disclosure, or one of several limited exceptions to Bar Rule 21 applies.

## Disability/Trustee Counsel

39. In addition to the disciplinary process discussed above, Part II of the Bar Rules contains procedures for dealing with attorneys who have become disabled (Bar Rule 30) and for appointing trustee counsel to assist the clients and to inventory the practice of an attorney who has died, become unavailable, or transferred to disability inactive status. Bar Rule 31.

## Further Information

40. Please contact Bar Counsel or the Executive Director of the Bar Association if you have any questions concerning the operation of these rules:


Mailing Address:

Alaska Bar Association
P.O. Box 100279
Anchorage, AK 99510

Street Address:

Alaska Bar Association
840 K Street, Suite 100
Anchorage, AK 99501

Phone (907) 272-7469
FAX (907) 272-2932

Web Site: http://www.alaskabar.org
E-mail: info@alaskabar.org



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# *Attorney Discipline Procedures*

*Alaska Bar Association*

*"What to do--what not to do"*

## *What is a "grievance"?*

*A verified, written complaint about a lawyer's conduct alleging facts that warrant investigation.*

## *Who can file a grievance?*

- *Clients*
- *Opposing counsel or parties*
- *Judicial officers*
- *Bar counsel*
- *Anyone else with knowledge of the conduct in question*

## *What does the Bar do?*

- *Checks that the grievance is signed, verified, and contains allegations that warrant investigation.*
- *Advises the complainant the grievance has been received.*
- *Asks the lawyer for a voluntary response.*

## *What should I do?*

- *Review the appropriate file and send in a response.*
- *Attach copies of documents that will help the Bar understand the situation.*

## *What shouldn't I do?*

- *Don't file a one-line denial of the allegations.*
- *Don't attack the complainant and ignore the issues.*
- *Don't put aside the grievance and hope it will disappear.*

## *What does the Bar do then?*

- *Reviews the grievance and the response, if any, and decides whether to investigate or refer to mediation.*
- *If the allegations don't warrant investigation, the grievance is declined.*

## *What happens in an investigation?*

- *You are required to respond.*
- *If you don't, the charges are deemed admitted.*
- *The Bar reviews files, obtains documents, and interviews witnesses.*

## *What happens next?*

- *The Bar may dismiss the grievance subject to appeal.*
- *The Bar may seek private discipline for minor misconduct by admonition or stipulation.*
- *The Bar may seek public discipline for serious misconduct by stipulation or by filing formal charges.*

## *What is considered "minor"?*

- *Simple neglect of a client matter.*
- *Failing to communicate with a client.*
- *Communicating with a represented party without permission.*
- *Inappropriate language in a pleading or letter.*
- *Minor conflicts of interest.*

## *Types of private discipline*

- *A written private admonition by bar counsel after review and approval.*
- *A reprimand by the Disciplinary Board.*

## *What happens in "serious" cases?*

- *The Bar and the lawyer may enter a stipulation for discipline, subject to approval, specifying the misconduct and the sanction that should be issued.*
- *The Bar may file formal charges and go through a three step hearing process.*

## *Types of public discipline*

- *Public reprimand by the Disciplinary Board.*
- *Censure, Probation, Suspension, or Disbarment by the Supreme Court after recommendation by the Disciplinary Board.*

## *What are some examples?*

- *Public reprimand by the Disciplinary Board:*
  - *harassing an unrepresented person.*
  - *multiple instances of neglect.*
  - *unauthorized disclosure of client confidences.*
  - *prior admonition for the same conduct.*

- *Censure by the Supreme Court:*
  - *failure to respond to grievances.*
  - *sexual relationship with a client and using another client to deceive an opposing party.*
  - *threatening to disclose client confidences.*

- *Probation by the Supreme Court:*
  - *neglect cases where the lawyer appears able to continue practice with proper supervision. Lawyer pays for supervisor and supervisor makes regular reports on the lawyer's progress.*

- *Suspension by the Supreme Court:*
  - *notarizing a document with a dead man's signature actually signed by his wife.*
  - *creating a false notice to a client to defend a lawyer against a malpractice claim.*
  - *conviction of a criminal offense such as shoplifting or misapplication of client property.*

- *Disbarment by the Supreme Court:*
  - *creating a false judgment, forging signatures on a judgment, converting bankruptcy trustee funds to pay the client a "recovery".*
  - *filing false pleadings and forging a client's name to a settlement check.*
  - *conviction of felony such as accessory after the fact to 1st degree murder, first degree theft, assault on a police officer.*

## *Can the Bar take emergency action?*

- *The Supreme Court will interimly suspend the license of a lawyer convicted of a felony or serious crime.*
- *The Supreme Court may interimly suspend a lawyer whose conduct threatens irreparable harm or who is causing great harm.*

## *What if a lawyer is disciplined in another state?*

- *A Bar member disciplined in another jurisdiction is subject to identical discipline in Alaska.*
- *In most cases, identical discipline has been imposed by the Supreme Court.*

## *Can a lawyer be reinstated?*

- *A lawyer suspended for two years or less may be automatically reinstated if no objection is filed by bar counsel.*
- *A lawyer suspended for more than two years must go through a three step hearing process.*

- *Disbarred lawyers must wait five years before applying and must go through a three step hearing process.*
- *If reinstatement is denied, the lawyer must wait at least two years before reapplying.*

## *What if a lawyer is disabled?*

- *The Bar may request a transfer to disability status if a lawyer:*
  - *is judicially declared incompetent,*
  - *is involuntarily committed to an institution, or*
  - *declares that the lawyer is unable to defend the lawyer's interests.*

- *the Bar may request a hearing or enter a joint motion to show that the lawyer is unable to practice because of mental or physical infirmity or illness or addiction to controlled substances.*
- *Reinstatement is possible after a three step hearing process.*

## *What happens if a solo lawyer dies or abandons a practice?*

- *A Trustee Counsel is appointed by the Superior Court to notify clients, conduct an inventory, and to assist in file transfers.*
- *A 60 day "stay order" is entered so that affected clients may find other counsel.*

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# Alaska Bar Association
# Links to Rules

Please go to these links to access the most up-to-date copy of:

Alaska Bar Rules, Part II: Rules of Disciplinary Enforcement:
https://public.courts.alaska.gov/web/rules/docs/bar.pdf

Alaska Rules of Professional Conduct:
https://public.courts.alaska.gov/web/rules/docs/prof.pdf

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## RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

## COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a writing or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A writing or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer

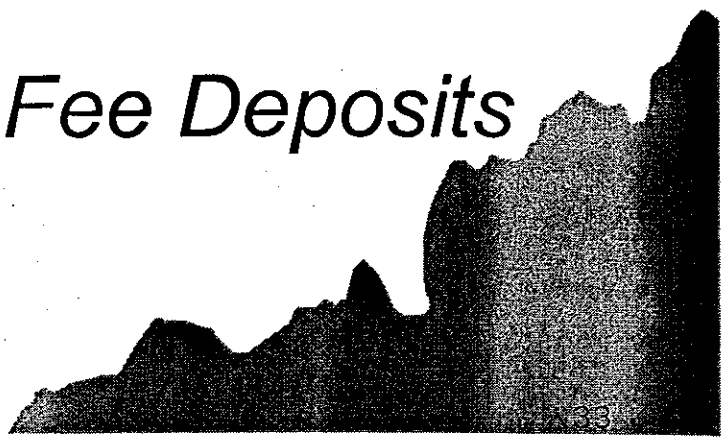
knows or reasonably should know that such a writing or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the writing or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a writing or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "writing or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. *See* Rule 9.1(t). Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a writing or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a writing or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. *See* Rules 1.2 and 1.4.

# Top 5 Ethics Issues

## What Do You Do?

- *Communication with Represented Parties*
- *Rights of Third Parties to Client Funds Held by Lawyer*
- *Copying and Returning Client Files*
- *Inadvertent Disclosure of Confidential Information*
- *"Nonrefundable" Fee Deposits*



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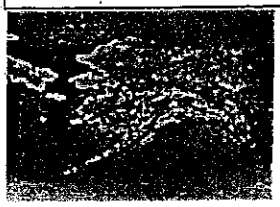

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**Ethics Opinion No. 86-4**
**Attorney's Duty when Dispute Arises Concerning the Rights of Third Parties to Client Funds in the Possession of Attorney, and Vacating Opinion No. 80-1 in Part.**

The Committee has been asked about, or has been involved in, several situations recently involving disputes concerning the rights of third parties to client funds in the hands of the client's attorney. All the situations faced by the Committee have dealt with disputes between the client and a third party over entitlement to the funds. Disputes could also arise, however, between two third parties. These situations involve potentially grave ethical, legal, and practical consequences for the attorney, as illustrated by some of the situations in which the Committee has been involved.

The Committee has recently been asked about, or involved, in the following four situations:

(1) The client suffered significant personal injury in an accident, was treated at a hospital, and incurred substantial medical expenses. The client paid the hospital for only a portion of the amount due on discharge. The client gave the hospital a specific assignment, on a standard hospital form, assigning client's proceeds from settlement or judgment to the hospital in the amount of the balance due.

Thereafter, the client retained the attorney to represent the client's interests in litigation as against possible responsible defendants. Settlement was reached after approximately one year of litigation. Settlement terms included payment of three installments of settlement funds over a two-year period. On specific written instruction from client, attorney disbursed the first two installments of settlement proceeds belonging to client to other assignees. Thereafter, the hospital notified the attorney of the existence of the signed assignment form. Attorney then contacted client to inquire of client as to how proceeds were to be distributed, advising client as to client's liability for unpaid hospital bills. The client specifically instructed the attorney to pay the final settlement proceeds directly to the client, and not to pay the hospital bill, notwithstanding the specific assignment.

(2) Client changed attorneys in the middle of a proceeding. The client apparently agreed to an attorney's lien to secure compensation to the first attorney, and the first attorney filed a claim of lien in the court file in accord with AS 34.35.430. The second attorney subsequently settled the client's case. The client requested payment of the full amount of the settlement proceeds from the second attorney. The second attorney turned over the funds to the client, in accord with the client's request. Litigation brought, by the first attorney against the second attorney for failure to recognize the attorney's lien is presently pending.

(3) An attorney representing a tort defendant had retained money in his trust account for the purpose of funding a settlement with the plaintiff. Settlement negotiations had taken place, and draft settlement agreements had been prepared. At this point, the client was arrested on a felony charge in another jurisdiction, and requested that his attorney send him the funds which were intended to fund the settlement, so that the client could retain counsel to defend himself against the criminal charge. The attorney sent the funds to the client in accord with the client's request, so that the client could retain counsel. Subsequently, a dispute arose as to whether or not there was a settlement, and whether the funds should have been retained by the attorney in trust to fund the settlement rather than returned to the client. This matter became the subject of an extended investigation by the Alaska Bar Association.

(4) Attorney represents client in a personal injury action. Prior to settlement, client assigned a portion of the settlement proceeds to a third party as down payment on a house. The attorney has a letter of assignment in his file. The client has left Alaska, is in default on his house payments, and foreclosure is likely. The client may have a cause of action against the seller arising out of the transaction. The personal injury case has settled, and attorney is holding the proceeds of the settlement. The client has instructed the attorney to ignore the assignment and pay all funds to the client. If the attorney recognizes the assignment, client will receive nothing.

The foregoing are actual situations presently existing, and illustrate the problems in this area and the need for careful consideration by an attorney when faced with competing demands for funds in the attorney's possession. Generally, the entitlement to these funds is determined as a matter of law, rather than as a matter of ethics. The ethical question is whether or not the attorney must follow the direction given by the client as to the disbursal of funds. The purpose of this opinion is to provide some guidance to the attorney faced with this type of problem.

It is the opinion of the Committee that if a dispute arises concerning the rights of third parties to the client's funds, the attorney must segregate the amount in dispute until the dispute is resolved. If it is impossible to resolve the dispute amicably, then the attorney may pay the funds into the court, and request that the court determine the legal entitlement to the funds.

DR 9-102(B)(4), provides:

> A lawyer shall promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Model Rule of Professional Conduct 1.15 provides:

> Rule 1.15 Safekeeping Property
>
> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by lawyer until the dispute is resolved.

The Comment to Model Rule 1.15 provides, in part:

> Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.
>
> The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

The operative factor under both the Code and Model Rules is that the client be "entitled to the funds." Neither the Code nor Model Rules, however, provide any guidelines an attorney use to determine whether or not a client is entitled receive funds or property in the attorney's possession. The American Bar Association has addressed the issue of when a client is entitled to funds or properties under DR 9-102(B)(4). The ABA has suggested that when there is a conflict between an attorney and a client about who is entitled to funds in an attorney's possession, and when this conflict is not quickly and amicably resolved, an attorney may properly file an action for the adjudication of the rights of all claimants. (ABA Informal Opinion 137 August 10, 1976).

Judicial resolutions of these disputes is sometimes necessary. If the attorney is legally incorrect in disbursing funds in accord with the client's request, the attorney may end up paying twice. For example, an attorney may be liable for conversion when the attorney disburses funds to a client with the knowledge of the existence of a lien on the funds. (e.g. *Unigard Insurance Co. v. Tremont*, 37 Conn. Super. 596, 430 A.2d 30 (1981); *In Re Cassidy*, 89 Ill. 2d 145, 432 N.E.2d 274 (1982))

A related issue is the lawyer's duty to third-party creditors of client regarding client's funds. This issue has not directly been addressed by the ABA Code or the ABA Model Rules. The cases and ethics opinions on this issue, usually involving outstanding medical expenses, have varied. For instance, Alaska Opinion 80-1 (1980) held

that an attorney did not violate any ethical obligation by forwarding funds received to the client knowing that the client had outstanding medical bills. A slightly different position was taken in Delaware Opinion 1981-3 (Apr. 21, 1981), which held that an attorney should try to persuade the client to pay medical expenses, but may not force the client to do so. A third position was adopted in South Carolina Opinion 81-14 (1981). Under this Opinion, an attorney should request permission from the client to pay outstanding medical expenses. Furthermore, if the client refuses permission, the attorney will hold the funds for a short designated period of time without disbursal. *See also In Re Cassidy*, 89 Ill.2d 145, 432 N.E.2d 274 (1982) (not improper for lawyer to delay disbursement of funds to client when lawyer reasonably believed client's creditors had superior claim to funds).

The Greater Cleveland Bar Association has recently issued an opinion in a case in which a woman had hired an attorney to draft a prenuptial agreement for her, dealing with her real property. The agreement was signed, and the parties were married. Subsequently, the husband retained the attorney to prepare a deed to convey to the wife a 1/2 interest in his residential real property, the marital home. The deed was executed, witnessed, and notarized. The husband subsequently called and instructed the attorney not to record the deed until given further instructions. Fifteen months later, the husband demanded that the attorney give him the deed. The attorney was unable to contact the wife, and anticipated litigation from the wife if he turned the deed over to the husband. In this situation, the Greater Cleveland Bar Association indicated that the attorney's course becomes a mandatory one of disclosure, notice, and hopefully consent by both husband and wife to the disposition of the deed. If consent is not possible, then agreed upon arbitration or judicial intervention must be obtained. (Greater Cleveland Bar Association Professional Ethics Committee, Opinion 85-2, December 13, 1985, reported in ABA/BNA Lawyers Manual and Professional Conduct, January 8, 1986, at page 1121)

With respect to situation (1), involving the hospital bills, the Committee has been asked the following questions:

Query A: Has hospital established sufficient grounds to enforce a lien for payment pursuant to AS 34.35.450-34.35.480?

Query B: Should attorney pay the hospital bill pursuant to assignment or subscribe to the wishes of the client and forward final settlement proceeds to client directly?

Query C: Is attorney personally liable to either hospital or client for opting to pay one, and not the other?

Query D: Is written instruction from client directing direct payment to client sufficient to protect attorney from personal liability under the statute?

Whether or not a lien for payment has been established is a question of law, upon which the Committee cannot issue an opinion. If the attorney unilaterally makes an incorrect decision to pay either the hospital or the client, the attorney may very well be held personally liable for failure to pay the other. Written instruction from the client will probably not absolve the attorney from liability for failure to recognize a valid lien or assignment.

If there were no dispute as to the client's "entitlement" to the funds, the attorney would be ethically obligated to pay the funds to the client upon demand. If there is a dispute over whether or not the client is "entitled" to the funds, then it is necessary that the dispute be resolved.

The question of whether a client is "entitled" to funds in the possession of an attorney is most often a question of law, which will often require findings to be made which are based on disputed facts. If the attorney has any doubt as to whether the client is entitled to the funds, or the attorney reasonably anticipates potential personal liability in a situation where there is a dispute over the client's funds, then the attorney should ascertain if the dispute can be resolved amicably between the claimants to the funds. If the claimants cannot agree, then the attorney may seek judicial resolution of the dispute.

The same reasoning applies to situation (4), except that the legal question deals with failure to recognize a valid assignment only, without the additional problem of possible failure to recognize a statutory lien. The attorney here should also first ascertain whether the dispute can be amicably resolved between the conflicting claimants. Failing that, then the attorney may seek judicial resolution of the dispute.

Based on the foregoing, that portion of Alaska Ethics Opinion No. 80-1 which deals with the ethical responsibility of an attorney to pay known medical bills (Question 1 and its answer) is vacated.

Adopted by the Alaska Bar Association Ethics Committee this 4th day of November, 1986.

Approved by the Board of Governors on November 7, 1986.

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**Ethics Opinion No. 87-1**
**(later modified by 2009-1)**
**Appropriate Use of Non-Refundable Fee Deposits for Retainers and Necessary Disclosure to Client.**

The committee has been asked to provide guidelines to attorneys on the appropriate use of non-refundable fee deposit or retainer agreements and what necessary disclosures must be made to clients. This opinion only addresses non-refundable fee retainers charged by an attorney in a specific matter, rather than general retainers charged by an attorney to make him or herself available over a period of time to consult with a client on general legal matters. The committee determines that non-refundable fee deposit or fee agreements are only acceptable under the limitations outlined in this opinion.

Historically, retainers were taken by attorneys as an engagement fee, separately from the fee for actual services rendered. The purpose for this engagement fee was to pay the attorney to take the case and make him or herself available to the client, thereby causing the attorney to refuse other employment and to be precluded from representing the opposing side. The reasonableness of this retainer was based on a number of factors: 1) the ability and reputation of the attorney, 2) the extent of the demand for his or her services, 3) the probability of the retainer's interfering with his professional relations with others who might become his or her clients, and 4) the magnitude of the business for which the attorney was retained. *Blair v. Columbian Fireproofing Company*, 77 N.E. 762 (Mass. 1906). Over time, the American Bar Association has come to view retainers as closely related to fees for services actually performed. Canon 44 of the Canons for Professional Ethics, adopted by the American Bar Association in 1908, stated that "upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned." The Code of Professional Responsibility currently in effect does not specifically address the issue of legal retainers, but does prohibit the charging of excessive fees. The Code stresses the necessity of fully explaining to prospective clients the structure and rationale of any fee arrangements that are contemplated. *See* Canon 2, Ethical Consideration 2-17, 2-19, and DR 2-106(A) (1974). In 1967, the American Bar Association Committee on Ethics and Professional Responsibility issued Informal Opinion 998 in response to an inquiry about a proposed procedure for a law firm to request non-refundable retainers which might or might not be applied against the hourly fee. The committee expressed strong disapproval of the proposed procedure. It observed that a retainer is "an advance payment in connection with fees and not a payment unrelated to fees" and stated that it would be improper for a lawyer to require a client to agree that a lawyer should keep the retainer "under all circumstance and regardless of services performed."

The commentary to Rule 1.5 of the proposed Model Rules of Professional Conduct indicates "a lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d)." The commentary does not make clear whether it is disapproving non-refundable retainers, or only disapproving the retention of a retainer when the attorney withdraws from representation of the client.

In current practice, non-refundable retainers are generally deposits against which a certain number of hours are charged. Hours in excess of the stated amount are generally charged against the client at a stated rate. Occasionally, non-refundable retainers are flat fees which are kept whether or not the matter is taken to completion by the attorney.

Alaska fee arbitration decisions have addressed the question of non-refundable retainers. In FA 86-31 and FA 83-22, the arbitration committees held that non-refundable retainers could not be assessed when the lawyer had failed to make clear to the client his or her intent to keep the retainer notwithstanding any events that would terminate the attorney-client relationship prior to providing a certain number of hours of service. In FA 81-7, the fee committee found that a non-refundable $5,000 retainer in a domestic case was unconscionable. In that case, the form contract provided that a client would pay a non-refundable retainer of $5,000 to secure a divorce. The contract also stated that the client would be required to pay $850 for every day of trial, plus trial costs and expenses. The contract provided that in the event the client terminated the attorneys' services, the fee paid to the attorneys would be deemed earned, and no part would be returned. The contract stated that if the attorney terminated the contract, the attorney would return the portion of the fee that exceeded the services rendered by the attorney valued on the basis of $125 per hour. The committee found that because of the stress of the domestic dispute, as well as other crises in the client's life, that she did not understand the fee to be non-refundable. Very little work was performed by the attorney firm before the client requested it to dismiss the pending litigation because she had reconciled with her husband. The committee found that use of a $5,000 non-refundable retainer and employment contract of an attorney in a divorce case is unconscionable. The committee found that it would be unfair and excessive as that term is used in DR 2-106. The committee noted that clients in divorce cases are notorious for changing their minds on whether they want to go through with the divorce. Thus, a non-refundable retainer takes advantage of a weakness that clients have in divorce cases.

> Although a small non-refundable retainer perhaps could be justified, the non-refundable amount of $5,000 was simply too much to "retain a firm." This provision creates the likelihood that substantial amounts of the client's money could be forfeited to the attorney without regard for the amount or value of attorney services performed. The committee is also concerned that the amount of the retainer might unduly influence the client's decision

regarding whether to attempt reconciliation since the forfeiture of the retainer would result.

This Committee finds that a non-refundable retainer may be charged to a client if the nature of the retainer as non-refundable is fully and clearly explained to the client, orally and in the written fee agreement, and if the fee is not excessive, considering the factors of DR 2-106:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

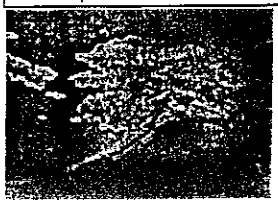
(8) Whether the fee is fixed or contingent.

As noted by the fee committee in FA 81-7, the amount of the retainer should not be so great to unduly influence a client to pursue litigation contrary to public policy or the best interests of the client.

In making a disclosure to the client of the nature of the retainer, the attorney must take into consideration the state of mind of the client and the ability of the client to understand the fee arrangement. The attorney must give examples of the kinds of circumstances under which the fee would not be returned, although the legal matter had not been pursued to completion. Special care needs to be taken in a divorce case or the like to make sure that the attorney is not taking advantage of the circumstances of the client in those kinds of matters, nor creating a negative incentive to reconciliation or amicable settlement.

The attorney must refund the non-earned portion of a non-refundable retainer if the attorney withdraws from representation of the client. The attorney must also refund a portion of the non-refundable retainer if, at the cessation of representation, the retainer would be excessive under the circumstances of the particular matter.

Adopted by the Board of Governors on September 3, 1987.



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**ALASKA BAR ASSOCIATION**
**Ethics Opinion No. 88-3**

RE: Communication with Former Employees of Corporations Represented by Counsel

The committee has been asked whether it is a violation of the disciplinary rules for an attorney to speak with the former employees of a corporate opponent party. The committee is advised that the attorney wishes to question these former employees regarding the subject matter of the pending litigation since the former employees dealt closely with the transaction which gives rise to the existing law suit against their prior corporate employer.

It is the opinion of this committee that an attorney representing an opposing party in a law suit against a corporation may contact former employees of the corporation, including former members of the corporation's control group, who dealt with the subject matter of the litigation without permission of corporate counsel. It should be noted that counsel may still be prohibited from direct communication with a former employee if that person is individually represented with regard to the pending matter. Further, the questioning attorney may not inquire into privileged attorney-client communications. The interrogating attorney may not listen while the former employee tries to reveal privileged communications voluntarily. The existence of any privileged matter among the former employee and the corporate employer's counsel can only be waived by the corporation who possess this privilege.

A lawyer may communicate with a former employee of an adverse party if the former employee is not represented by counsel. If the lawyer must directly communicate with an unrepresented person, the lawyer should not provide advice, though he may suggest that the third party seek a lawyer. See, Committee on Ethics of the Maryland State Bar Assoc., Opinion No. 86-13 (08/30/85), citing: DR7-104(A)(1); EC7-18. An important element of whether the employee is equivalent to a "party," and thereby prohibiting inquiring counsel from questioning without opposing counsel present, is whether the employee has the power to commit the corporate employer. The scope of the rule allows interviews with all employees concerning their knowledge of factual matters outside the scope of their employment and interviews of former employees since they are no longer part of the corporate entity. See, Committee on Professional Ethics of the Assoc. of the Bar of the City of New York, Opinion No. 80-46 (undated), citing: DR1-102(A)(2)(4), 7-104(A)(1), EC7-17, EC7-20, ABA Informal Opinion 1410.

Most authorities have restricted their scope of protection for corporate parties to those managerial or other employees whose actions and statements can bind or be imputed to the corporation. See, Alaska Bar Assoc. Ethics Opinion No. 84-11 (11/09/84), citing: DR7-104(A)(1); Canon 9; ABA Rule 3.4(f) and 4.2. This same reasoning would exclude former employees from the scope of the rule's protection, even if those employees were formerly part of the corporate control group. Direct communication with former "control" employees does not deprive the corporation of legal counsel, since former employees no longer can act or speak on behalf of the corporation. See, Illinois State Bar Assoc. Cmte. on Professional Responsibility, Opinion No. 85-12 (04/04/86). The distinction between a mere bystander witness and a managerial employee who is the later ego of the corporation rest on their authority to commit the organization to a position concerning the scope of their employment. The difference between bystander and non-bystander witnesses does not apply to an organization's former employees. After leaving the organization's employment, a former employee cannot bind the organization under the law. Therefore, an attorney does not violate DR7-104(A)(1) by communication directly with the organization's former employees about the substantive dispute without the prior consent of the organization's counsel. See, Colorado Bar Assoc. Cmte., Opinion No. 69 Rev. (06/20/87).

In summary, direct communication with former control group or managerial employees may result in eliciting information adverse to the corporation. However, this no more deprives the corporation of the benefit of counsel than does direct communication with any potential bystander witness. Former officers or employees have no authority to commit the organization since such prior employees can no longer be the alter ego of the corporation.

Adopted by the Alaska Bar Association Ethics Committee on May 18, 1988.

Approved by the Board of Governors on June 7, 1988.

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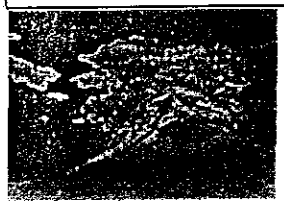

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**Ethics Opinion No. 91-1**
**Communication with Former Employees of Corporation Represented by Counsel**

**(Reconsideration of 88-3).**

The Committee has been asked to re-evaluate Opinion No. 88-3 regarding communications with former employees of a corporation represented by counsel. The Committee expressed the view in that opinion that "an attorney representing an opposing party in a lawsuit against a corporation may contact former employees of the corporation, including former members of the corporation's control group, who dealt with the subject matter of the litigation without permission of corporate counsel." The opinion was qualified to the extent that counsel could not contact the former employee if that person was individually represented with regard to the pending matter, and further, the questioning attorney could not inquire into privileged attorney-client communications with the former employee. Otherwise, the attorney was free to "communicate with a former employee of an adverse party if the former employee is not represented by counsel."

The opinion of the Committee, as expressed in Opinion No. 88-3, is hereby reaffirmed. Nevertheless, because there are some isolated court opinions supporting a contrary conclusion, the Committee believes it appropriate to discuss the rationale behind its opinion and underlying rule, and distinguish its conclusion from that reached by others considering the issue.

DR 7-104(A)(1) prohibits a lawyer from communicating on the subject of his representation with "a party" he knows to be represented by another attorney, without that attorney's consent, or unless authorized by law. The purpose of that rule is to prevent lawyers from deliberately dodging adversary counsel to reach - and exploit -that party, thereby obviating the effectiveness of retained counsel. By doing so, the rule minimizes the likelihood that clients will make improvident settlements, ill-advised disclosures and unwarranted concessions against which counsel would advise. *Niesig v. Team I*, 559 N.Y.S.2d 493 (1990).

The issue is whether former employees of a corporate party are also to be considered as "parties" under this rule. Since corporate parties act only through natural persons, it is obvious that some of the current employees must be classified as parties, or the corporation would be deprived of any protection under the rule. Consistent with that reasoning, certain categories of employees, whether described as the "control group," or those employees whose acts or omissions are binding on the corporation, are considered to be "parties" to litigation involving the corporation.

Frequently confusion occurs in the application of DR 7-104(A)(1) because the attorney-client privilege is injected into the analysis. This tends to expand the application of the prohibition because the confidential nature of a communication is not lost by termination of the representation or resolution of the matter for which representation was sought. Rather, the privilege continues and the confidence may not be breached without consent of the client unless otherwise required by law. But the privilege *does not immunize the underlying factual information*, it only protects the communication between the attorney and client. Opinion No. 88-3 recognizes the continuing nature of that privilege.

Once it is recognized that the attorney-client privilege does not require extension of the "party" definition to include former employees, the question is whether the rationale for the attorney-client privilege would otherwise present a basis for extending the prohibition of DR 7-104(A)(1) to former employees. The Committee does not find any compelling reason for that extension.

That is not to say that a former employee could not provide information that would be damaging to the corporation. Such information would be prejudicial, however, whether it is disclosed informally or only after more expensive and perhaps formal procedures are utilized by the party seeking such information. We do not believe that artificial barriers to the informal development of such information would promote any policy or objective that would outweigh the expeditious and less expensive resolution of disputes that may result from use of the informal discovery. Because the corporation has unique access to the information available from its documents and employees, and the best opportunity to gather information from its employees, the Committee does not believe any burden is imposed on corporate parties by its interpretation of the rule.

The Committee is aware of cases which interpret Rule 4.2 of the Model Rules of Professional Conduct to prohibit ex parte contacts with former managerial employees of an organization. *See Sperber v Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, No. 82 CIV 7428 (S.D.N.Y. Nov. 21, 1983) (vacated and withdrawn); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987). *See also* Miller &

Calfo, "Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?" 42 Bus. Law. 1053 (August 1987); Comment, "Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest" 82 Nw. U. L. Rev. 1274.

Rule 4.2 (endnote 1) is the counterpart to DR 7-104 (A)(1). The Comment to the Rule states, *inter alia*, the following language:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, *and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability* or whose statement may constitute an admission on the part of the organization.

(Emphasis added.)

In *Sperber, supra*, the court interpreted the language in the comment to include former employees:

> The phrase preceding the second category of the Comment, "any other person," is plainly broad enough to cover certain former employees, and there is nothing explicitly limiting the Comment's application to current employees. Also, in this case [the former employees] were the individuals who made and carried out the decision to discharge Sperber. It is their actions and motives as officers of the organization at the time which are the subject of plaintiff's claims of discrimination and which plaintiff will seek to impute to the defendant organization in order to hold it civilly liable to plaintiff. It would appear, therefore, that the conversations with [the former employees] fall into the protection of Rule 4.2 (as interpreted by the second paragraph of the Comment).

A majority of the Committee does not agree with the reasoning of the *Sperber* court, and it should be noted that the opinion has been vacated and withdrawn, though for reasons which may be unrelated to the court's analysis of this policy objectives of the rule are not advanced by preventing an attorney from discussing *factual* issues with a former employee even if those facts may impute liability to the organization. Presumably those facts will not vary depending on whether the organization's counsel does or does not consent to the interview. There is no indication that DR 7-104(A)(1) was intended to protect organizations from the efficient and unimpaired development of facts relating to the matter in dispute, and the Committee declines to stretch the rule's premise is order to reach that result.

Approved by the Alaska Bar Association Ethics Committee on January 3, 1991.
Adopted by the Board of Governors on January 18, 1991.

**Endnote #1:**
The Board of Governors for the Alaska Bar Association have approved a version of the Model Rules of Professional Conduct, and they are presently pending before the Alaska Supreme Court for adoption. The version adopted by the Board has retained the language of Rule 4.2, as well as the comment interpreted by the Sperber court.

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**Ethics Opinion No. 92-3**
**Clarification of Ethics Opinion 86-4 Regarding Attorney's Duty when Dispute Arises Concerning the Rights of Third Parties to Client Funds in the Possession of Attorney.**

A number of questions have arisen regarding the scope of Opinion 86-4, and the circumstances under which an attorney may be held responsible for failing to honor a claim by a third party against client funds in the possession of the attorney.

It is the opinion of the Committee that: (1) In order to trigger an obligation on the part of the attorney to pay a creditor's claim, in contravention of a client's instructions, the creditor's claim must be a valid assignment on its face or statutory lien which has been brought to the attorney's attention (endnote 1) (2) If a client instructs an attorney to ignore or disregard a valid assignment or statutory lien, the attorney should advise the client that absent an explanation (e.g., a written release, or some other form of written waiver by the lienor or assignee) the attorney will withhold the disputed funds, and, absent some amicable resolution, the funds will be deposited into court where the dispute can be decided by the judge.

**A. What Third Party Claims Must be Honored?**

This is another way of asking the question when is the attorney obligated to deliver to the client funds "which the client is *entitled* to receive." *See* DR 9-102(B)(4) (emphasis added). The Committee believes that when a client executes a valid assignment from settlement proceeds, or there exists a perfected statutory lien against settlement proceeds, it creates a presumption that the client is not "entitled" to those funds. *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102 (Idaho App. 1983); *Herzog v. Riace*, 594 A.2d 1106 (Me. 1991).

There may be other claims unrelated to the subject matter of the representation; for instance child support, alimony, restitution for criminal conduct and so on. "However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party." *See* Comment to Model Rule 1.15. (endnote 2) A client is capable of and responsible for payment of his or her own obligations. Unless the claim in question has been reduced to a valid assignment or perfected lien, a creditor has no more special "entitlement" to those funds than does the client. The creditor in that situation has other remedies, such as prejudgment attachment. *See* Alaska R. Civ. P. 89. However, where a settlement includes or references *specific* allocation for a lien claimed by a third party, the amount designated for satisfaction of the lien must be utilized for that purpose. *In re Burns*, 679 P.2d 510 (Ariz. 1984).

**B. When Does a Dispute Arise Over the Client's Entitlement to His or Her Funds, and How Should those Disputes be Resolved**

In the view of the Committee, if a client instructs an attorney to disregard the terms of a valid assignment or statutory lien, the attorney should promptly inform the client that the attorney is obligated to withhold and segregate those funds in question. Unless the client and the creditor are able to amicably resolve their differences, or unless the client provides the attorney with some verification that the lienor or assignee have waived their interest in those funds, the attorney will be required to deposit the funds into court for disposition by the judge. Given the fact that both sides will incur expense and delay in the event this step is taken, it would be appropriate to encourage the client and the creditor to resolve their differences promptly and amicably.

**C. The Attorney Should be Careful not to Induce Reliance on the Part of the Third Party Creditor**

Any number of questions may arise regarding a client's "entitlement" to funds being held by the attorney. The Committee believes that care should be taken to dispel any confusion which might arise regarding the attorney's obligations under these circumstances.

If, for instance, an attorney receives a letter from a medical provider to the effect that he or she is owed money for services provided to the client relating to the subject matter in question, that does not, in the Committee's view, create a presumption that the client is not entitled to receive the funds in question at his or her request. *However*, the Committee believes that the attorney in that instance should respond to the letter and convey to the medical provider the fact that this is a matter between the client and the medical provider. The medical provider should be on notice that the attorney will not be assuming the responsibility for payment of the client's bills relating to the subject matter in question; that is the client's responsibility.

The Committee believes it is inappropriate for the attorney to remain silent after having received notice of such a potential claim. While the attorney may believe that his or her silence in the face of receiving such notice is or may be interpreted as a constructive denial of the creditor's position, it is just as likely that the third party creditor may view that silence as implicit or tacit acceptance of the third party claim.

The situation is ripe for confusion, and the Committee believes the attorney should take the affirmative step of responding to these claims by shifting the burden back where it belongs, namely on the third party creditor and the client.

In conclusion, the Committee believes that an attorney is not ethically obligated to arbitrate claims between creditors and his or her client. With respect to third party creditors who have not received an assignment from the client, or who have not perfected a statutory lien, and assuming the attorney has followed the recommendations outlined in Section C above and informed the creditor that the claim should be taken up directly with the client, the attorney should be free to follow the client's instructions with respect to return of client property. Even though the attorney may be aware of a potential problem in this regard, the Committee does not believe this vitiates the client's "entitlement" to return of his or her property, pursuant to DR 9-102 (B)(4).

If a client instructs an attorney to disregard the terms of a valid assignment or statutory lien, the attorney should promptly take the appropriate steps to segregate those funds in question, and to inform the client that, absent a resolution which is satisfactory to all parties concerned, the attorney will be obliged to deposit the funds into court for disposition by the judge.

Approved by the Alaska Bar Association Ethics Committee on April 2, 1992.

Adopted by the Board of Governors on June 1, 1992.

**Endnotes:**

1. (**E. Op. No. 92-3**) However, practitioners should be aware that under some tax lien statutes, the statutory filing requirements provide the element of notice. See 26 U.S.C. § 6321.
2. The Model Rules of Professional Conduct have been approved by the Alaska Board of Governors and are currently pending before the Alaska Supreme Court.

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**Ethics Opinion No. 94-1**
**Attorney Communication with the Managing Board of a Government Agency, Regarding Pending Litigation, Without the Consent of Counsel Representing the Agency.**

The Committee has been requested to give an opinion as to whether it is proper for an attorney who represents a party in litigation against a government agency to make a presentation to the managing board of the agency regarding the clients' settlement position, without the consent of the attorney representing the agency. Under the facts presented to the committee, the attorney's desire to make the presentation is based on a belief that settlement offers made on behalf of the claimant have not been adequately communicated to the board by its attorney. (endnote 1)

It is the opinion of the Committee that the communication would violate of Rule 4.2 of the Alaska Rules of Professional Conduct.

> Rule 4.2 provides as follows:
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person he knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. (endnote 2)

The preliminary issue is whether the managing board of the government agency is encompassed within the term "party" as used in Rule 4.2. Persons who might be considered to be the "party" in the context of communications with governmental representatives were addressed in Alaska Bar Association Ethics Opinion 71-1, in which the Committee advised that:

> (A)ttorneys may ethically communicate with employees of a governmental entity, so long as that communication is not made with employees of the entity who may reasonably be thought of as representing the entity in matters relating to the matter in controversy, and as long as the lawyer reveals to the employee his identity and representation and the connection between the representation and the communication.

In the context of private corporations, officers have uniformly been thought of as representing the entity in the controversy. Thus, for example, in ABA Formal Opinion 1410 (1978), it was held that officers and employees of a corporation should be considered parties, for purposes of DR 7-104(A)(1), if those officers and employees could commit the corporation by virtue of their authority. *See, Illinois State Bar Association Committee on Professional Responsibility*, Op. 85-12 (April 4, 1986) (includes top management persons with the responsibility of making any final decisions); *South Carolina Bar Ethics Advisory Committee*, Op. 86-10 (June 16, 1986) (board members of homeowners association are encompassed by term "parties" in a dispute with the association). If the board to which the presentation has the ability to commit the agency or otherwise exercise control over decisions regarding litigation, it must be considered to be a "party" within the meaning of Rule 4.2.

The next issue is whether the right of the people to petition their government under the first amendment to the United States Constitution and Article I, section 6 of the Alaska Constitution, or any provisions of law that require governing bodies to provide an opportunity for public participation in meetings, compel an exception under Rule 4.2 whereby counsel is "authorized by law" to communicate with the governing body without the consent of its counsel. In that regard, the Comment to Rule 4.2 provides:

> This rule does not prohibit communication with a *party* or an employee or agent of a *party*, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private *party*, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Also, *parties* to a matter may communicate directly with each other and a lawyer having independent justification for communication with the other *party* is permitted to do so. *Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.* [Emphasis added.]

Unfortunately, this Comment addresses communications by both the "party" and the "lawyer," thereby tending to blur the distinction between the two with regard to permitted communications. Rule 4.2 does not regulate the conduct of a party who is not an attorney. With regard to attorneys, it is the Committee's opinion that the Comment interprets Rule 4.2 to authorize direct contact regarding a matter in controversy with a government officer or agency, without consent from the agency's attorney, when the contacting attorney is a "party" to the controversy, and is not acting in a representative capacity. Thus, where the attorney is a "party," there is no limitation on his or her first amendment rights.

However, it is the Committee's opinion that Rule 4.2 and the interpreting Comment do not authorize an attorney to advocate a clients' position relating to pending litigation directly to the governing officer or body of a public agency without the consent of the opposing counsel.

There are few interpretations or discussions of the "authorized by law" exception to Rule 4.2, and the available analyses do not clearly distinguish between rights of a "party" and the permissible scope of attorney representation. One commentator, for example, confuses these issues and concludes that prohibiting a lawyer for a private party in litigation with the government from conducting *ex parte* interviews with "relevant governmental officials" would permit the government agency's lawyer to veto discussions between "private parties and government official." 2 G. Hazard & W. Hodes, *The Law of Lawyering* §4.2:109 (2d ed. 1991). The limited available commentary also does not adequately address different policies that should be considered depending on whether the communications in question involve pending litigation, or the role of the government official to whom the communications are directed, i.e. is this the decision maker? (endnote 3)

The principal issue faced by the Committee is whether the reasons for the general prohibition against attorney communications with a represented party regarding the subject of representation are sufficient to support the limitation on exercise of the right to petition one's government that may result from enforcement of the Rule to prohibit communications by an attorney representing a party with governmental decision makers concerning pending litigation.

Many policy reasons have been advanced in support of the prohibition against attorney communication with a represented adverse party. These include preventing an attorney from taking unfair advantage of a represented party by application of the attorney's superior knowledge and skill [*Complaint of Korea Shipping Corp.*, 621 F.Supp. 164, 167 (D. Alaska 1985)]; avoidance of disputes regarding conversations which could force an attorney to become a witness; protecting a client from making inadvertent disclosures of privileged information or from being subjected to unjust pressures; helping settle disputes by channeling them through dispassionate experts; preventing situations giving rise to the conflict between the lawyer's duty to advance a client's interests and the duty not to overreach an unprotected party; and providing parties with a rule that most of them would choose to follow in any event. Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 Pennsylvania Law Review 683, 686-87 (1978-79).

These concerns are most obvious in situations involving verbal communication in the absence of opposing counsel where a strong risk exists that a lawyer may elicit damaging statements from, or conclude an ill-advised settlement with, a represented party who is effectively deprived of advice of counsel. In other situations, such as written communications, the concerns are less apparent, but those communications are nevertheless prohibited. *See*, ABA Ethics Opinion 1348 (August 19, 1975) (sending copies of settlement offers to a represented adversary is improper). Many of the concerns would seem to be diminished in the context of a presentation to a government agency, particularly if that presentation is made in a public meeting.

Perhaps the best statement of the policy behind Rule 4.2, however, and one which encompasses all of the other reasons for the rule, is that it is designed to permit an attorney to function adequately in his or her proper role and to prevent the opposing counsel from impeding performance as the legal representative of the client. *E.g.*, *Obeles v. State Bar*, 108 Cal. Rptr. 359, 510 P.2d 719, 722-23 (1973). An attorney is not entitled to directly communicate his or her version of the applicable facts and law to an adverse party represented by counsel. That party has retained counsel based on a determination that skilled assistance is necessary to evaluate the facts and applicable law, to develop the strengths of the client's position, and to permit the client to avoid direct demands and communications from the opponent. Direct communications by opposing counsel with a represented adverse party usually would be made only for the purpose of by-passing the party's counsel in the hope of obtaining an advantage or opportunity that would not otherwise be available or to advocate a position that was not persuasive when presented through the party's counsel. The direct communication may distort the strengths or fairness of the communicating party's position and overstate the risks to the other party, thereby serving to undermine the adverse party's confidence in his or her attorney and perhaps create beliefs, fears or impressions that cannot later be corrected by that party's counsel. Those concerns clearly apply in the context of a presentation to a government agency.

The committee believes the first amendment right of a citizen to petition the government does not "authorize" attorneys to directly communicate with the governing body of an agency on the citizen's behalf regarding a matter in litigation. This position is supported by *Walters v. National Assoc. of Radiation Survivors*, 574 U.S. 337, 105 S.Ct. 3180 (1985). *Walters* involved first amendment challenges, based on free speech and right to petition, to a federal statute which limits to $10 the fee that may be paid to an attorney or agent who represents a veteran seeking benefits for service connected death or disability. In upholding the validity of the statute, the court determined the statutory claim process provided claimants with an opportunity to make a meaningful presentation and that significant governmental interests favored limitations on speech. The

governmental interests that were found to out-weigh the first amendment rights were the desire to keep proceedings non-adversarial, because there were few complex cases, and a policy against veterans sharing their awards.

Similarly, many other agency proceedings are relatively simple in nature and intended to be suitable for lay presentation of issues. Any argument that an attorney is necessary to communicate complex issues regarding pending litigation invokes the countervailing policies set forth above. Rule 4.2 clearly does not restrict the "party's" right to petition its government by personally appearing before the governing body, and the lawyer is not prohibited from suggesting such an appearance.

Additional support for the limited impairment of the right to petition government is found in *In re Vollintine*, 673 P.2d 755, 757 (Alaska 1983). That case approved a restraint imposed by the Code of Professional Responsibility on the first amendment right of free speech. The attorney in that case was disciplined for authoring correspondence containing intemperate and harassing statements regarding government employees involved in resolving his client's allotment claim. In rejecting a claim that the attorney's freedom of speech rights outweighed the restrictions created by the Code of Professional Responsibility, the court quoted from the concurring opinion of *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376 (1959), where Justice Stewart said:

> [A] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

The Committee is of the opinion that the phrase "authorized by law" does not apply to all laws of general application permitting communications. Rather, to be effective as an exemption from Rule 4.2, a provision of law authorizing direct attorney contact with a represented government agency must specifically allow the communication, except in those circumstances such as communications during hearings or during the conduct of discovery where the authority, if not clearly expressed, can be implied. (endnote 4) Laws requiring agencies to permit public participation or comment in meetings do not require or specifically authorize the type of communication in question.

Although various rules might be imposed to deal with differing aspects and means of communication with the governing body of an agency regarding pending litigation, or the results of such communications, the enforceability of a rule and the likelihood of voluntary compliance are best insured by a uniform rule that is easily applied. There are no significant policies supporting an attorney's right to communicate on behalf of a client, regarding pending litigation, directly with a represented party and, therefore, unless such communications are specifically authorized by law or consented to by counsel for the other party, they are prohibited, even when opposing counsel is present or available. (endnote 5)

Several related aspects of this issue deserve brief discussion. It is obvious that the governing body of an agency can direct its attorney to consent to a request for appearance transmitted through the attorney for the agency, or it might direct its attorney to invite opposing counsel to appear before the body if that course of action appears appropriate. Rule 4.2 obligates an attorney to abide by a request or direction of that nature from the client.

The party may also, consistent with the right to petition government, solicit the governing body or its members to request a presentation by the party's attorney. However, the attorney may not solicit an invitation to appear before the body to discuss pending litigation, nor may the attorney suggest that course of action to the client. If an attorney receives an unsolicited invitation to appear before the governing body of an agency to discuss pending litigation, the attorney may make the presentation, but he is obligated to give the attorney representing the agency reasonable prior notice of the invitation or request, and provide the agency attorney with copies of any materials provided to the board.

**Summary**

In summary, it is the opinion of this committee that:

1. A party is not prohibited by Rule 4.2 from communicating with a decision making body of a government agency regarding pending litigation, without consent of the attorney for the body, whether or not the party is represented by counsel.

2. An attorney who is a party to litigation has the same rights as any other party, including the right to communicate as set forth in paragraph 1 above.

3. An attorney representing a party may not communicate regarding litigation pending against a government

agency or officer directly with a government official or body having decision making authority concerning that litigation, without the consent of the attorney representing the official or governing body. (endnote 6)

4. If an attorney representing a party in litigation with a government agency is requested by its governing body or other person having decision making authority to meet and discuss the matter in litigation, the attorney may attend the requested meeting, but the attorney must give reasonable notice of the invitation to the attorney representing the agency, and provide such attorney with a copy of any material to be presented to the agency body or official.

Approved by the Alaska Bar Association Ethics Committee on December 2, 1993.

Adopted by the Board of Governors on January 7, 1994

**Endnotes:**

1. The obligation to communicate serious settlement offers is set forth in Rule 1.4 and the related Comments. The issue is not otherwise dealt with in this opinion.
2. Rule 4.2 is substantially identical to its predecessor, DR 7-104(A)(1), and some of the authorities discussed in this opinion relate to interpretations of that disciplinary rule.
3. Where the government official to whom the communication is directed does not have the ultimate authority to determine the course of pending litigation, and is not a member of a body vested with that authority, the Committee agrees with those opinions holding that an attorney should give notice to the government's counsel prior to communication with the government official and that any submissions made to the government official should be given to such counsel.
4. See "Communication with Adverse Party: Worker's Compensation Carrier Contacting Claimant," Oregon Opinion 437 (September 1981), permitting oral communications only when "required by the statute" and directing other "authorized communications" be in writing with a copy to counsel representing the claimant.
5. Texas similarly interpreted Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct, which is specifically applicable to communications about the subject of representation to an ". . . entity of government the lawyer knows to be represented by another lawyer regarding that subject . . .," as prohibiting a telephone conversation with an individual city counsel member expressing disapproval of the city's settlement offer in negotiations for settlement of litigation against the city. It does not appear that the "authorized by law" exception to the Rule had any effect on the decision. State Bar of Texas, Professional Ethics Committee Opinion 474 (Texas June 20, 1991).
6. This opinion does not prohibit an attorney representing a party from communicating with the Alaska State Legislature or any committee thereof regarding a matter in litigation, without the consent of the Attorney General's Office or special counsel for the legislature, so long as neither the legislature nor the legislative body is a party to the litigation.

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**Ethics Opinion No. 95-6**
**Attorney's Right to Withhold a Client's File Unless the Client Pays for Copying Files.**

The Committee has been asked to give an opinion as to whether it is proper for an attorney to refuse to return a client's file unless the client pays the copying charges.

It is the opinion of the Committee that the client's files may not be withheld if prejudice would result to the client.

It is fundamental to the attorney-client relationship that the lawyer must disclose to the client the basis on which the client is to be billed for both professional time and any other charges, including photocopy expenses. This disclosure should be made at the outset of the representation. [Rule 1.5(b).] Unless the lawyer's fee agreement specifically sets forth the understanding of the parties regarding copy charges, the lawyer may not charge the client for copying the file.

The circumstance in which this question will arise is typically when the relationship between lawyer and client has ended. In that event, the interests of lawyer and client may be diverging. The client may be dissatisfied with the lawyer's work and may have discharged him or her, and be seeking new counsel. The lawyer who has been discharged, rightly or wrongly, may feel threatened and may not have been paid. Under these circumstances, the client's interests must be paramount.

Pursuant to Rule 1.15, the lawyer has an obligation to hold property of a client separately. Such property must be identified and appropriately safeguarded. Further, the client's property must be promptly returned upon request. It is the Committee's opinion that the client's original files are the property of the client. Accordingly, a lawyer must make available to his or her client all papers and property to which the client is entitled, and may not make receipt of them contingent upon payment for copying. *See* Pa. Ethics Op. 89-76 (1989) (files of client).

A lawyer may not charge the client for making a copy of the original documents for his or her own purposes. There are circumstances in which the lawyer who has been discharged may wish to retain copies of all or some part of the client's file. A lawyer may not charge for the duplication costs of a client's file if the duplication is to protect the attorney from a malpractice or related claim or to provide forms for a research bank. In those instances, the copies are made not for the client's benefit, but for the lawyer's. The Committee believes it is improper to charge the client for such costs. *See* Philadelphia Bar Ops. 80-32, 86-154(111386)-(1984) (ABA/BNA *Lawyer's Manual On Professional Conduct* § 901:7510 at 50(1984)); Virginia Bar Op. 1171 (21389) (1989) (BNA Manual § 90 1:8749 at 25 (1989)).

Further, Rule 1.16(d) governs the lawyer's obligations to the client upon termination of the representation:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the 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 that has not been earned. *The lawyer may retain papers relating to the client to the extent permitted by other law.*

Alaska R. Professional Conduct 1.16(d) (emphasis added).

The comment to the model rules provides insight as well:

> **Assisting the Client Upon Withdrawal**
>
> Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Thus, a lawyer must surrender the client's papers and other property unless the lawyer is permitted by law to retain the papers as a matter of law.

Alaska law provides for a statutory attorney's lien. AS 34.35.430 provides:

> **Attorney's Lien.** (a) An attorney has a lien for compensation, whether specifically agreed upon or implied, as provided in this section.
>
> (1) First, upon the papers of the clients that have come into the possession of the attorney in the course of the professional employment;

In *Miller v. Paul*, 615 P.2d 615 (Alaska 1980), the Alaska Supreme Court shed some light on the balancing required between the attorney's right to compensation and the client's need for the file. The facts were as follows. Attorney Miller was retained by Mary Paul to represent her in the probate of her husband's estate and in prosecuting a wrongful death action. A written fee agreement was executed providing for a contingent fee for services in the wrongful death claim. Apparently due to a possible conflict of interest on Miller's part, Mary Paul terminated Miller's services. Miller then submitted a billing for his services rendered. Miller filed a notice of attorney's lien covering both a retaining lien on papers in his possession and a charging lien on any recovery ultimately received by Paul. Paul substituted counsel, McMurtray, who moved for an order requiring Miller to turn over the files to him. The superior court granted the motion, indicating that Miller was adequately protected by the charging lien. 615 P.2d at 617.

> Paul contends that Miller's statutory and contractual liens must give way to an attorney's ethical duty not to prejudice a client's case by withholding access to relevant materials in the attorney's possession. Attorneys must conform to high ethical standards regardless of whether statutory rights permit contrary conduct. . . [A] question is presented as to whether ethical considerations require that a lawyer return the client's files. Paul had the right under the contract to fire her attorney without cause. An attorney should have the right to some protection, assuring payment of reasonable fees earned. A balancing of those interests is required in determining what security should be required for relinquishment of the attorney's retaining lien.
>
> If the client does not initiate the withdrawal, or if there is just cause for the client to discharge the attorney, ethical considerations mandate return of the files. Even where the client terminates the relationship without just cause, the court must consider the value of the files to the client's case in determining the adequacy of the security to be requested. Economic duress may not be utilized to prevent a client from exercising the right to terminate the relationship with the attorney.

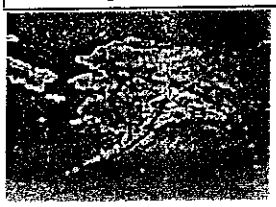
*Id.* at 619-20.

The Committee recognizes that an attorney's right to assert a lien to secure payment of his or her right to a professional fee is primarily a question of law. While the court in *Miller* was not specifically concerned with copying charges, the considerations appear to be the same. The lawyer who has not been paid for his or her services is entitled to assert a lien against the file. However, the lawyer's interest in getting paid must be subordinate to the rights of the client. A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case.

In summary, the question of whether it is proper for a lawyer to refuse to return a client's file unless the client pays for the copying charges is fraught with potential conflicts. The circumstances in which this question will arise are typically when the relationship between the lawyer and client has ended. In that event, the interests of lawyer and client may be diverging. Regardless of the reason for the lawyer's discharge, the client's interests must be paramount. If the lawyer's fee agreement, expressly provides the client will pay copying charges, the Committee believes it is acceptable for the client to be charged for copying the file if it is to benefit the client's interests. However, the client should not be charged for photocopying the client's file if duplication is for the lawyer's benefit rather than the client's. Assuming the law permits a lawyer to assert a lien for fees, care must be taken to assure that imposition of the lien will not prejudice important rights or interests of the client. The client's interests must always be paramount.

Approved by the Alaska Bar Association Ethics Committee on September 7, 1995.

Adopted by the Board of Governors on October 20, 1995.



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**Ethics Opinion No. 95-7**
**Communication with a Represented Party by an Attorney Acting Pro Se.**

The Committee was asked to decide whether an attorney litigant who is acting pro se may properly communicate about the matter in litigation directly with a represented party without the consent of opposing counsel. The question was posed by family law practitioners who occasionally deal with attorneys who are, for example, handling their own divorce or child custody proceedings. The issue is raised, for example, where an unrepresented attorney who is party to a divorce proceeding communicates directly with his or her represented spouse about the divorce, without the consent of opposing counsel.

It is the opinion of the Committee that such an unauthorized, direct communication with a represented party would violate Alaska Rule of Professional Conduct 4.2, notwithstanding that the communicating attorney is a party to the litigation. Under the broad parameters of the rule, such unauthorized communication would also be improper if the matter were not in litigation.

Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party or 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 by law to do so. (endnote 1)

This rule prohibits certain kinds of unauthorized communications with a party or person who is represented by another lawyer. The rule specifically bars communications directed to another lawyer's client that concern the subject matter of the other lawyer's attorney-client relationship, unless the other lawyer consents or the communications are otherwise authorized by law.

At issue is whether Rule 4.2 prohibits such unauthorized communications by an attorney who is acting on his or her own behalf, rather than representing a client. In effect, we consider whether the general rule must yield when the communicating attorney is an interested party. This straightforward issue has produced conflicting rulings in state courts elsewhere. *Compare Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994) (applying Rule 4.2 to an attorney representing himself in litigation against his ex-wife) *and In re Segall*, 509 N.E.2d 988 (Ill. 1987) (ruling that an attorney who is a party to litigation represents himself in communications with other parties and thus is subject to the rule) *with Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075 (Conn. 1990) (ruling the communications of an attorney litigant who is not representing a client are not governed by Rule 4.2).

In *Sandstrom*, the Supreme Court of Wyoming rejected a pro se attorney litigant's argument "that, because he was a party to the action, he had an absolute right to contact the wife, who was the opposing party." 880 P.2d at 108. The Court considered both the *Segall* and *Pinsky* rulings cited above. The Court rejected the Supreme Court of Connecticut's ruling in *Pinsky*, stating:

> The Illinois Supreme Court reached the opposite conclusion and held: "An attorney who is himself a party to the litigation represents himself when he contacts an opposing party." *In Re Segall*, 509 N.E.2d 988, 990 (1987).
>
> We agree with the Illinois Supreme Court's rationale. The rule is designed to protect litigants represented by counsel from direct contacts by opposing counsel. A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation.
>
> 509 N.E.2d at 990.

*Sandstrom*, 880 P.2d at 108-09.

In the Committee's opinion, the Wyoming and Illinois courts have adopted the better rule. (endnote 2) Both Courts and the Committee construe Rule 4.2 to apply to pro se attorney litigants notwithstanding their status

as parties. This resolution is indicated by examining the purposes of Rule 4.2. The Committee recently summarized the rule's policy bases as including:

> preventing an attorney from taking unfair advantage of a represented party by application of the attorney's superior knowledge and skill [*Complaint of Korea Shipping Corp.*, 621 F.Supp. 164, 167 (D. Alaska 1985)]; avoidance of disputes regarding conversations which could force an attorney to become a witness; protecting a client from making inadvertent disclosures of privileged information or from being subjected to unjust pressures; helping settle disputes by channeling them through dispassionate experts; preventing situations giving rise to the conflict between the lawyer's duty to advance a client's interests and the duty not to overreach an unprotected party; and providing parties with a rule that most of them would choose to follow in any event. Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 Pennsylvania Law Review 683, 686-87 (1978-79).

Alaska Bar Association Ethics Opinion 94-1. *See also*, 2. G. Hazard & W. Hodes, *The Law of Lawyering* § 4.2:101 (2d ed. 1991). We further noted the rule's additional purpose of protecting the other party's attorney-client relationship, and preventing one attorney from impairing opposing counsel's performance. Ethics Opinion 94-1, *citing Obeles v. State Bar*, 108 Cal. Rptr. 359, 510 P.2d 719, 722-23 (1973).

In light of these reasons, Rule 4.2 can be seen to protect the interests of the communicating attorney and his or her client, the opposing party, and the opposing counsel. (endnote 3) The rule protects the communicating attorney (who may be acting on his or her own behalf, or on behalf of a client) from potential conflicts of interest and ethical dilemmas. The rule protects the opposing party from overreaching by a skilled or knowledgeable lawyer. (Realistically, of course, the opposing party may be more highly skilled or knowledgeable than the communicating attorney. It is equally plausible that the other party is an attorney. Even so, these possibilities do not eliminate the prophylactic value of Rule 4.2.)

The rule also protects both the opposing party and opposing counsel from the risk of inadvertent disclosures of confidential or privileged information, and from interference with their attorney-client relationship. And by prohibiting only *unauthorized* communications, the rule guards against such interference without unduly burdening the communicating attorney. That is, attorneys who want to communicate with represented parties may freely seek authorization to do so from opposing counsel. (endnote 4)

On balance, in the Committee's view, these reasons also support applying Rule 4.2 to attorneys acting on their own behalf. The communicating attorney's status as a party does not diminish the interests of opposing parties and opposing counsel. To the contrary, the need to protect opposing parties from undue pressure and overreaching is stronger when the communicating lawyer is an interested party.

To be sure, the Comment to the rule observes that "parties to a matter may communicate directly with each other and a lawyer having independent justification for communication with the other party is permitted to do so." This Comment applies generally. But in the special situation where the communicating party is a lawyer acting as such on his or her own behalf, different concerns govern. In the Committee's opinion, in such circumstances the communicating attorney's personal interest in communicating directly with an opposing party without the opposing counsel's consent cannot override the interests of the opposing party and his or her counsel. (endnote 5)

Approved by the Alaska Bar Association Ethics Committee on September 7, 1995.

Adopted by the Board of Governors on October 20, 1995.

1. Rule 4.2 is substantially identical to its predecessor, DR 7-104(A)(I), and some of the authorities discussed in this opinion relate to that disciplinary rule.
2. *See also*, *In re Mettler*, 748 P.2d 1010, 1010-11 n. 2 (Or. 1988) (indicating that Oregon has amended DR 7-104(A)(I), effective June 1, 1986, by adding the sentence: "This prohibition includes a lawyer representing the lawyer's own interests.")
3. Of course, the rules are also generally intended to safeguard the courts and society's interests in the legal system.
4. Under the rules, a lawyer representing a client should "inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party." Rule 1.4, Comment.
5. Ethics Opinion 94-1 addresses the application of Rule 4.2 to attorney communications with government agencies. In discussing this Comment in that context, we stated:

   > With regard to attorneys, it is the committee's opinion that the Comment interprets Rule 4.2 to authorize direct contact regarding a matter in controversy with a government officer or agency, without consent from the agency's attorney, when the contacting attorney is a "party" *to the controversy, and is not acting in a representative capacity.*

Opinion 94-1 (emphasis added). The Committee draws the same distinction here, interpreting Rule 4.2 to bar unauthorized communications by party-attorneys only when they are acting as attorneys in a pro se or other representative capacity. (In other words, in the Committee's opinion, an attorney who retains independent counsel and who does not act as an attorney in a given matter would not be subject to Rule 4.2 with respect to communications concerning that matter.)

In the final summary of Opinion 94-1, we also stated that "An attorney who is a party to litigation has the same rights as any other party. . . . " To the extent that this remark is inconsistent with the present Opinion, it is hereby revoked. An attorney who acts as an attorney and who is a party to litigation remains subject to the ethical constraints applicable to all attorneys acting as such.

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## Ethics Opinion No. 98-2
## Communication by Electronic Mail.

Electronic mail (e-mail) is fast becoming the accepted and preferred method for attorneys to communicate with their clients, and vice versa. It has the obvious advantages of speed, efficiency and cost to commend its application, and it will likely follow the path of the fax machine and soon become an everyday mainstream business tool. Its rapid rise in currency raises a number of thorny ethical issues, (endnote 1) but the Committee has chosen to address probably the most fundamental concern: Is it ethical for an attorney to use e-mail as a means of communicating with a client when such communications may involve the disclosure of client confidences, privileged communications or work-product?

In the Committee's view, a lawyer may ethically communicate with a client on all topics using electronic mail. However, an attorney should use good judgment and discretion with respect to the sensitivity and confidentiality of electronic messages to the client and, in turn, the client should be advised, and cautioned, that the confidentiality of unencrypted e-mail is not assured. Given the increasing availability of reasonably priced encryption software, (endnote 2) attorneys are encouraged to use such safeguards when communicating particularly sensitive or confidential matters by e-mail, *i.e.*, a communication that the attorney would hesitate to communicate by phone or by fax.

### Discussion

The lawyer's duty to preserve confidences is codified in Alaska Rules of Professional Conduct 1.6. The duty extends not only to confidential communications, but to "information relating to representation of a client."

While e-mail has many advantages, increased security from interception is not one of them. However, by the same token, e-mail in its various forms (endnote 3) is no less secure than the telephone or a fax transmission. Virtually any of these communications can be intercepted, if that is the intent. The Electronic Communications Privacy Act (as amended) makes it a crime to intercept communications made over phone lines, wireless communications, or the Internet, including e-mail, while in transit, when stored, or after receipt. *See* 18 U.S.C. § 2510 *et. seq.* The Act also provides that "[n]o otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4). Accordingly, interception will not, in most cases, result in a waiver of the attorney-client privilege. This is in accord with the prevailing view, though the answer in each specific case may depend, at least in part, on the circumstances of whether the disclosure is viewed as "intentional" or "inadvertent." *See Shubert v. Metrophone, Inc.*, 898 F.2d 401 (3rd Cir. 1990). *See also* ABA Formal Ethics Ops. 92-368 and 94-382.

The Committee's view generally comports with the majority of jurisdictions that have considered this issue. *See* Arizona Advisory Op. 97-04 (lawyers may want to have e-mail encrypted with a password known only to the lawyer and the client but lawyers may still communicate with existing clients via e-mail about confidential matters); South Carolina Advisory Bar Op. 97-08 (finding a reasonable expectation of privacy when sending confidential information through electronic mail; the use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6); Vermont Op. 97-5 (a lawyer may communicate with a client by e-mail, including the Internet, without encryption); Illinois State Bar Assoc. Op. 93-12 (lawyer does not violate Rule 1.6 by communicating with a client using electronic mail services, including the Internet, without encryption).

The only dissonant view has been expressed by the Iowa Bar, which suggests that, without encryption, confidential communications should not be sent by e-mail absent an express waiver by the client. *See* Iowa Advisory Op. 95-30.

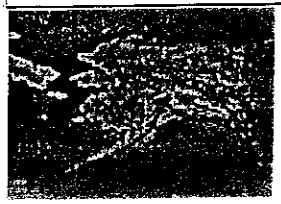
In conclusion, an attorney is free to communicate using e-mail on any matters with a client that the attorney would otherwise feel free to discuss over the telephone or via fax transmission. The expectation of privacy is no less, and these communications are protected by law. While it is not necessary to seek specific client consent to the use of unencrypted e-mail, clients should nonetheless be advised, and cautioned, that the communications are not absolutely secure. The Committee recognizes that there may be circumstances involving an extraordinary sensitive matter that might require enhanced security measures, like encryption. Attorneys should take those precautions when the communication is of such a nature that normal means of communication would be deemed inadequate.

Approved by the Alaska Bar Association Ethics Committee on January 8, 1998.

Adopted by the Board of Governors on January 16, 1998.

**Endnotes:**

1. *See generally*, ABA/BNA Lawyers' Manual on Professional Conduct Practice Guide Dealing with Electronic Communication, under the heading "Confidentiality," No. 170; ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, March 6, 1996, an article by Joan C. Rogers, Staff Editor, entitled "Ethics Malpractice Concerns Closed E-Mail, On-Line Advice"; the ethics article entitled "The Perils of Office Tech" by Joanne Pitulia, Assistant Ethics Counsel, in the October 1991 issue of the "ABA Journal"; "Confidentiality and Privilege in High- Tech Communications" by David Hricick appearing in the February 1997 issue of the "Professional Lawyer"; the 1996 Symposium issue of the "Professional Lawyer" comprised of papers presented at the 22nd National Conference on Professional Responsibility, which took place in Chicago. Several articles dealing with the subject matter are printed in the Symposium issue including "High Tech Ethics and Malpractice Issues," "Spinning an Ethical Web: Rules of Lawyer Marketing in the Computer Age," and "Can the Decrepit Encrypt: Do we Need the Cone of Silence, or is "Pretty Good" Good Enough?"
2. Encrypted e-mail has been electronically locked to prevent anyone but the intended recipient from reading it, using a "lock and key" technology. Simply stated, such messages are "locked" by the sender, making them unreadable except by the intended recipient, who has a "key" in the form of an electronic password to decode the message.
3. Speaking generally, electronic mail is a message sent from one user's computer to another user's computer via a host computer on a network, or via a private or local area network (i.e., a network wholly owned by one company or person which is available only to those persons employed by the owner or to whom the owner has granted legal access). In addition, there are commercial electronic mail services (America OnLine, CompuServe), or messages may be sent via the Internet, or by any combination of these methods.



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**ALASKA BAR ASSOCIATION**
**ETHICS OPINION 2003-3**

**Documents to be Included in File Returned to Client on Termination of Services**

The Committee has been asked the following question: A client decides to discharge his lawyer and asks the lawyer to provide a copy of the lawyer's file so that the client can take the file to a new lawyer. The lawyer's file contains original documents from the client, copies of pleadings and correspondence, investigator's reports, notes of the lawyer's conversations with opposing counsel, witnesses, and experts, sample pleadings from other cases, and notes by the lawyer regarding the lawyer's impression of the client and the client's often contentious communications with the lawyer. Must the lawyer provide a copy of everything in the file to the client?

**Discussion**

Rule 1.16(d) governs the lawyer's obligations to the client upon termination of the 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

ALASKA R. PROFESSIONAL CONDUCT 1.16(d) (emphasis added). The comment to the model rule provides:

**Assisting the Client Upon Withdrawal**

> Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Alaska law provides for a statutory attorney's lien. See AS 34.35.430. Thus, a lawyer who has not been paid for his or her services may be entitled to assert a lien against the file. However, discussed in Ethics Opinion No. 95-6, the lawyer's interest in getting paid must be subordinate to the rights of the client. This opinion does not offer further elaboration upon the retention of papers as security. Rather, this opinion addresses the question of what items to return to the client when a transfer occurs unhampered by considerations of retaining liens.

The Committee concludes that the attorney must presumptively accord the client access to the entire file unless substantial grounds exist to refuse. Thus, addressing the items referenced in the question presented, in most instances the lawyer is required to accord access to original documents from the client, copies of pleadings and correspondence, investigator's reports, and notes of conversations with opposing counsel, witnesses and experts.

There are instances, however, where the physical file maintained by the lawyer will include documents which the lawyer need not disclose. For instance, a lawyer should not be required to disclose documents violating a duty of nondisclosure owed to a third party, or otherwise imposed by law. If the lawyer wrote a memorandum in Case A that dealt with a particular issue of law that was also germane to Case B, it would not be uncommon for the lawyer to place a copy of that memorandum in the Case B file. Since the memorandum was not prepared in whole or in part for the client in Case B, that client has no right to receive that document. Indeed, the lawyer might well be violating a duty of confidentiality or secrecy owed to the client in Case A if the memorandum were surrendered to the client in Case B.

Additionally, access may be denied to documents intended for internal law office review and use. This might include, for example, preliminary impressions of the legal or factual issues presented in the representation, that are recorded primarily for the purpose of giving internal direction to staff. Access might also be denied to notes relating to the lawyer's impression of the client. These documents may be withheld unless to do so would

significantly prejudice the client.

The Committee declines to join a minority of legal ethics authorities distinguishing between the "end product" of an attorney's services and the attorney's "work product" leading to the creation of those end product documents(1). "End product," under the minority view, includes such items as pleadings actually filed in an action, correspondence sent or received by the attorney, or other papers exposed to public light by the attorney to further the client's interest. The attorney's "work product," to which the client is not entitled access under the minority view, includes all preliminary documents used by the attorney to reach the end result, such as internal legal memoranda and preliminary drafts of pleadings and legal instruments. As to these and similar documents, the minority view is that the client is only entitled to access to the extent of a demonstrated need in order to understand the end product documents, with the burden of justification on the client.

The Committee finds in accordance with a majority of other ethics authorities that affording the client presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions, represents the sounder view (2). As a general proposition, unless there is a strong reason for not producing or providing documents, a former client is to be accorded access to any documents possessed by the lawyer relating to the representation(3).

Approved by the Alaska Bar Association Ethics Committee on May 1, 2003.

Adopted by the Board of Governors on May 6, 2003.

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1. *See, e.g.*, Alabama State Bar, formal Ethics Opn. RO-86-02; Illinois State Bar Assn., Opn. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 [1994].

2. *See, e.g.*, State Bd. Of Cal. Standing Comm. On Professional Responsibility and Conduct, Formal Opn. No. 1992-127; Connecticut Bar Assn. Comm. On Professional Ethics, Opn. No. 94-1; State Bar of Ga., Formal Advisory Opn. No. 87-5; State Bar of Mich. Comm. On Professional and Judicial Ethics, Syllabus CI-926 [1983]; Ohio Sup. Ct. Bd. Of Comm'rs on Grievances and Discipline, Opn. No. 92-8; Oregon State Bar Assn., Formal Opn. No. 1991-125.

3. By addressing the ethical requirement to produce documents that are in the attorney's files, this opinion does not create any new duty to retain any particular document.

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**ALASKA BAR ASSOCIATION**
**ETHICS OPINION NO. 2004-1**

**LAWYER'S RIGHT TO WITHHOLD EXPERT REPORTS WHERE THE CLIENT FAILS TO PAY FOR THEM**

The Committee has been asked to give an opinion as to whether it is proper for a lawyer to withhold a copy of an expert or investigator's report if the client has agreed to pay for the report but has failed to do so.

It is the committee's opinion that Ethics Opinion 95-6 controls this issue. The lawyer may not withhold the report if the client would be prejudiced by doing so.

**DISCUSSION**

**A. Prejudice To the Client Is The Determining Factor**

In Ethics Opinion 95-6, the Committee previously opined that a client's files may not be withheld if prejudice would result to the client. "A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case."[1] The previous opinion addressed the propriety of charging a client for copies of his or her file, and the lawyer's right to withhold the file when the client fails to pay the copying charges.

"The lawyer who has not been paid for his or her services is entitled to assert a lien against the file. However, the lawyer's interest in getting paid must be subordinate to the rights of the client. A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case."[2]

Similarly, in Ethics Opinion 2003-3, the Committee concluded that a lawyer must presumptively accord the client access to the entire file upon termination of the representation.[3] As noted in Opinion 2003-3, Rule 1.6(d) governs the lawyer's obligation to the client when representation ends. Upon termination of the representation, a lawyer shall take steps to protect a client's interest, including surrendering papers and property to which the client is entitled.[4]

The considerations addressed in Ethics Opinions 95-6 and 2003-3 are equally applicable to an expert or investigator's report. In the committee's view, expert or investigator's reports present particular illustrations of the general rules noted in the Opinion 95-6 (prejudice to the client is the paramount concern), and 2003-3 (client is entitled to presumptive access to the entire file upon termination of representation). Each situation must be carefully reviewed to determine whether prejudice will result.

The committee envisions certain instances where prejudice to the client may be readily apparent, but other instances where there is little impact. If the matter is in the middle of litigation, the client is likely to have an immediate and paramount need for an expert's report.[5] Similarly, an investigator's report may contain information critical to the client's case.[6] In these examples, prejudice may be readily apparent.

In other situations, withholding the report may inconvenience the client, but is not likely to result in actual prejudice. For example, a personal injury lawyer who consults with a physician to determine whether to pursue a case may be justified in withholding the report if the client fails to pay for it. Similarly, in a real estate transaction, an alternative appraisal may be readily obtained. A probate case may need a duplicate inventory. In each of these examples, it seems again to be readily apparent that prejudice to the client is unlikely. The client may be inconvenienced by having to pay for an alternate report, or valuation, but that inconvenience, or added expense, does not automatically equate to prejudice. In each instance, the lawyer must weigh the possible prejudice to the client against the lawyer's right to reimbursement for the expert's report.

**B. Attorney Work Product Is Problematic**

One variation on the "client's file" deserves additional mention. There are situations where a lawyer engages an expert to assist in preparation of the lawyer's strategic work product. For example, many lawyers prepare demonstrative aids for use at trial. Sometimes, such aids are simple posterboards which can easily be

duplicated. Another lawyer may commission a detailed electronic presentation. Other times, the demonstrative aids may be complex, expensive working models. In some of these instances, the lawyer may have devoted substantial time and money to preparation of the exhibits. Such exhibits are extremely problematic for the lawyer examining ethical questions because they would clearly benefit the client. Whether the absence of such aids would prejudice the client, however, is the test. No bright line rules can be pronounced in these instances. In each instance, the lawyer must look to whether the client will suffer prejudice if essential materials are withheld.

**C. The Lawyer's Obligation To Inform**

The lawyer's attempt to withhold an expert or investigator's report raises an additional issue not addressed in previous opinions. Rule 1.4 governs a lawyer's obligation to communicate with the client:

> "(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable request for information.
>
> (b) A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation . . ."[7]

The comment to the model rule provides additional insight:

> "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with a duty to act in the client's best interest, and the client's overall requirements as to the character of representation. . .
>
> A lawyer may not withhold information to serve the lawyer's own interest or convenience."

The Committee notes there are circumstances in which a lawyer may justifiably delay transmission of information to a client. However, those circumstances are limited to situations where harm may come to the client or someone else.[8]

**D. Conclusion**

In summary, an expert or investigator's report is part of the client's file. Ethics Opinions 95-6 and 2003-3control. A lawyer may not withhold such reports to serve the lawyer's own interest in getting paid or reimbursed for the cost of the report if it will prejudice the client. Whether or not the client has paid for the report, the client's interests must be paramount.[9] The lawyer's right to reimbursement for the expert's fee must give way to the client's needs if the material is essential to the client's case.

Approved by the Alaska Bar Association Ethics Committee on November 6, 2003.

Adopted by the Board of Governors on January 15, 2004.

**Endnotes**

1. Ethics Opinion No. 95-6.(back)
2. Ethics Opinion No. 95-6, emphasis added.(back)
3. Ethics Opinion No. 2003-3.(back)
4. Alaska Rule of Professional Conduct 1.16(d).(back)
5. If the expert's report was prepared by a retained expert for purposes of testimony, it may be subject to mandatory disclosure under the Rules of Civil Procedure, or a court's pretrial order. Failure to make timely disclosure could seriously jeopardize the client's case, or subject the client to potential sanctions.(back)
6. For example, a lawyer may retain an investigator to interview witnesses in a personal injury case. If the interviews turn up information adverse to the client's position, the client may proceed with an imprudent case. Here again, if the matter is in litigation, the client may be faced with disclosures required by applicable discovery rules.(back)
7. Alaska Rule of Professional Conduct 1.4(a) and (b).(back)
8. The example given in the comment allows a lawyer to withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that the disclosure would harm the client. See Alaska Rule of Professional Conduct 1.4, comment, withholding information.(back)
9. In this Opinion, the Committee assumes the expert or investigators report has been prepared with the client's consent, and for the client's benefit.(back)

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**ALASKA BAR ASSOCIATION**
**ETHICS OPINION 2006-1**

# Propriety of a Lawyer, Acting on the Lawyer's Own Behalf Regarding A Matter Not in Litigation, Communicating Directly with Management of a Corporation Or Other Institution that the Lawyer Knows or Should Know is Regularly Represented by Counsel

## Introduction

The Committee was asked about the propriety of a lawyer, acting on his own behalf regarding a matter not in litigation, communicating directly with management of a corporation or other institution that the lawyer knows or should know is regularly represented by counsel.

## Conclusion

For the reasons discussed below, the Committee concludes that such contact is not improper, so long as the attorney has not been advised that he or she should deal only with corporate counsel on that matter.

## Analysis

Lawyers frequently act on their own behalf as consumers and citizens, and they interact with private and public institutions that have counsel on staff or that frequently retain counsel. Each of these situations requires the lawyer to decide whether he or she may contact employees or managers directly to address his concern, or whether the lawyer must contact only the institution's counsel. For example:

- A lawyer has a complaint as a consumer about a product or service received from a local company that the lawyer knows is regularly represented by in-house or retained counsel. May the lawyer address his complaint directly to management of the company, or must the lawyer communicate only with corporate counsel?

- A lawyer, as a newspaper reader, disagrees with the editorial policy of the local newspaper. She knows that the newspaper regularly retains counsel. May she contact the editors to discuss the policy, or must she contact corporate counsel instead?

- A lawyer, as homeowner, has a concern about the municipal government's failure to issue a building permit for which he applied. He knows that the municipality has a legal department. May the lawyer directly deal with the supervisor of the permitting office, or must the lawyer communicate only with the municipality's attorneys?

Alaska Professional Conduct Rule 4.2 prohibits a lawyer, who is representing a client, from communicating about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless specifically authorized by law or by the other lawyer. In applying this rule when a lawyer wants to speak with representatives of a corporation or agency on his or her own behalf, and not on behalf of a client, the lawyer must answer three questions:

(1) Does Rule 4.2 apply in a situation where the attorney's "client" is herself?

The short answer to this question is "yes." In Ethics Opinion 95-7, this Committee concluded that Rule 4.2 applies to a lawyer who is a pro se litigant. In other words, when representing herself, for purposes of Rule 4.2, the lawyer may not act as if she is a "party" who is not bound by the ethical rules that govern lawyers' contact with represented individuals. Rather, even when representing herself, a lawyer is subject to the dictates of Rule 4.2.

(2) What does it mean to "know" that the institution is represented by counsel on a particular matter?

Alaska Professional Conduct Rule 9.1(f) explains that "knowing," for purposes of these rules, "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Knowing that a company or agency has a legal department or ordinarily retains counsel when litigation is likely does not establish that the lawyer knows that company or agency is represented on a particular matter when the lawyer makes his or her first contact on a new issue.

A lawyer knows that the company or agency is represented on a particular matter if the lawyer is told by a representative of the company or agency that the matter has been assigned to a lawyer or referred to the legal department. Once a suit is filed, receipt of an entry of appearance from opposing counsel also clearly indicates that the party is now represented on that matter. In other situations, the lawyer must be guided by the circumstances, and, when in doubt, may ask for clarification. Ethics Opinion No. 98-1 contains further discussion of when a lawyer knows that an insurance company is represented by counsel.

(3) Does the communication concern a "matter" that is "the subject of the representation"?

Knowing that a company or agency is represented by a lawyer on one particular matter does not mean the lawyer knows, or must assume, that the company or agency is represented on a wholly different matter. Thus, the lawyer may continue to speak directly to employees and managers on topics unrelated to the matter on which the institution is known to be represented. The commentary to Rule 4.2 explains: "This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating directly with nonlawyer representatives of the other regarding a separate matter." The same principle applies to a lawyer representing himself in dealing with a government agency or private organization.

In the three examples set forth above, the key question posed in each instance is whether there is a "matter" that is "the subject of the representation." An initial contact to attempt to obtain information or to resolve a conflict informally rarely involves a matter that is known to be the subject of representation. Consequently, lawyers, representing clients or themselves, ordinarily are free to contact institutions that regularly retain counsel in an attempt to obtain information or to resolve a problem informally. These sorts of contacts frequently resolve a potential dispute long before it becomes a "matter" that is "the subject of representation." The above examples are all worded to suggest the inquiry occurs at the early stage of a consumer or citizen complaint. Inquiries directed to employees and managers would be proper in each instance.

**Conclusion**

The line between permitted contacts at the early stage of a potential matter and forbidden contacts after a dispute has sharpened and become a "matter that is the subject of representation" depends on the question discussed in the preceding section: Until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular new matter, the lawyer is not prohibited from dealing directly with representatives of the party. [1]

Approved by the Alaska Bar Association Ethics Committee on December 1, 2005.

Adopted by the Board of Governors on January 27, 2006.

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[1] Once an institution is represented by counsel on a particular matter, the lawyer may still ethically contact some employees or agents of the institution to discuss that matter, while being prohibited from having direct contact on that matter with others. This opinion does not address the sometimes complicated question of distinguishing between the employees of a corporation or agency who are considered representatives of the opposing party who may not be contacted on a matter that is the subject of the representation, and typically lower level employees who are not included within the ethical bar of Rule 4.2. The comment to Rule 4.2 states, "In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization."

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## 17 POINTERS ON AVOIDING FEE ARBITRATIONS

The genesis of a fee arbitration dispute can almost always be traced to diminished communications between the attorney and client. Whether an attorney is successful in proving his/her case at a fee arbitration similarly almost always comes down to a single letter or e-mail – or the lack of a letter or e-mail – toward the end of a case. Fee agreements at the front end of a case can be short or long, but they are rarely the problem. Rather, fee disputes are spawned by events that occur far later, either when a case is about to or has just settled or gone to trial, and it's thus time to settle the final bill. Here are 17 points that were complied by Alaska Bar Association Fee Arbitration Committee Member Gregory Miller that as a fee arbitrator he either keeps seeing that could have been taken to prevent the dispute from occurring in the first place, or steps that if taken during the representation will have the effect of putting the practitioner in a good position to defend his/her bills at the fee arbitration. These are simple and easy things to do, but they are often forgotten in the busy pace of a daily law practice:

1. **If it's not in writing, it didn't happen.** The absolute best way to defend against a client's claims that the lawyer never explained the issue, cost, settlement, etc., is to have it in writing. Avoid conflicting sworn testimony of "He never told me that I might lose..."

2. **In your letters/e-mails, clearly toss the ball back into the other court.** Write "Unless I hear from you I will assume this meets with your approval." This is not "tricky." Rather, it's leaving no room for doubt. This is a very cheap sentence to write, but can be a VERY expensive sentence to leave out.

3. **Appreciate that clients really don't understand what lawyers do.** Explain it to them, preferably in writing and from time-to-time as the case progresses. This can be a long status letter or a three sentence e-mail. Print and save the communication.

4. **Clients often don't really understand how attorneys bill.** Yes, they know it's by the hour or on a contingency basis, but make sure they understand that you will be billing for what you offer: your time in an hourly case, and results in a contingency case. Let them know that you bill for reading a letter, then for sending the client an explanatory e-mail, then for talking with the client, then to respond to the letter. Same with motions, oppositions and replies. They aren't free. Make sure you've told them this, and then that your bills reflect these same billing practices honestly and fairly.

5. **Don't promise that you'll be cheap.** Just the opposite, impress upon your client that litigation and transactional work is very expensive, that a client confronted with litigation should be prepared to make it the most important issue

in his/her life for the next year, that it WILL cost more than the client expects, that even your best guess about the total cost will probably be low because so much depends on what the opposing party does, and that you'd be glad to refer them to a less-expensive attorney if they can't afford you. Do NOT try to impress upon them how cheaply you can work or that the case will end quickly. Lawyers typically underestimate their bills, sometimes by a lot. Clients then might interpret the invoices they receive as "overbilling." Avoid this trap by not selling yourself as a bargain. Also tell your clients that you will send them monthly bills, and that you expect them to not just pay them, but also to read them closely and to call you if they question any entries. Put this into your fee agreement.

**6. Clients NEVER remember saying at the beginning of a case "It's a matter of principle."** When you hear those words, you should be thinking "Frequent status letters." In your letters, call a spade a spade-- "Opposing counsel has offered this settlement, which you have rejected, and while I'm glad to go to trial on your behalf, the cost of trial WILL be far more than the proposed offer." Discuss facts, strategy, merits, and weaknesses in your letters or e-mails, but also fees. Give your clients the information they need to do their own cost-benefit analysis. Here too this can be a ten page letter or a two paragraph e-mail. But if it's not in writing, it didn't happen.

**7. The same advice holds for clients who say "Not a penny for settlement."**

**8. Think about saying "NO."** "No, I can't take your case," or "No, I just can't continue representing you if you can't stay current on your bills." You will never regret a client you declined to represent, but the opposite may not always be true.

**9. Treat your bills as letters to your clients.** They need to tell the client that you've been earning your fee. Remember that Rule of Professional Responsibility 1.5 places the burden upon the lawyer to prove the reasonableness of the time for which he/she has billed. Don't put down "1.0--telephone call." That screams out "milking it." Be more specific: Perhaps "1.0--Lengthy telephone call w/J. Doe re: case facts and defenses..."

**10. Don't bill in .5 increments.** The only thing worse is rounding off to 1.0. A client may never complain about this, but it will fester, it WILL be brought up in a fee arbitration, the arbitrators WILL question such bills, and as the lawyer it will be your burden to defend each entry.

**11. Send out your bills on a regular basis.** Don't stockpile them. A surprising number of clients at fee arbs testify that "I never got bills after the first two months." No bills means no communication, and lack of communication leads to fee arbs.

**12.** **Save all Thank You cards, notes accompanying flowers, etc.** It's like saving for a rainy day. Such notes can be powerful evidence at a fee arb that the lawyer was doing a good job.

**13.** **Return calls that day.** If you're too busy, perhaps have your secretary call and say "He can't talk today, but he wanted you to know he got your call." Clients deserve return calls, and unreturned calls are remembered.

**14.** **Same advice pertains to e-mails.** Perhaps you're too busy to respond substantively, but at least write --"Got it. Thanks. I'll get back to you on this." And then print out and save the e-mail.

**15.** **If your relationship with your client is showing signs of going south, recommend that your client seek a second opinion.** Do it IN WRITING, and write that you welcome the second attorney's calls. You won't lose a client, but rather gain a better one.

**16.** **If your client complains, turn the complaint over to someone else in your firm.** Do not try to handle it yourself. Solo practitioners may not have this luxury, but perhaps a paralegal can sit in on the next few meetings, or perhaps with your client's permission you can expand your status letters to include the client's sister, etc. (but be careful to not waive the attorney-client privilege by bringing a third party into the communications).

**17.** **If you do find yourself in a fee dispute, try hard to resolve it short of a lawsuit or fee arbitration.** You ought not want to go to a fee arb. It is a formal, quasi-judicial process. It requires your time to prepare and attend. You will probably get bad publicity (even though the process is confidential) just via your client's word-of-mouth. The three members of each arbitration panel will review your bills, correspondence and legal work with a very close eye. The Bar Rules require the written decision of the arbitration panel to include a recommendation as to whether the attorney should be referred to the Bar's Disciplinary Committee. Although referrals are the exception, think about whether you want to run that risk.

In conclusion, remember that (a) fee disputes are virtually always caused by diminished communications between the attorney and client, and (b) as the attorney your success at a fee arbitration may come down to the existence – or lack – of a letter or e-mail showing that you tried your best to explain the legal process or settlement ramifications to your client.

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# FEE ARBITRATION PROCEDURES
**Alaska Bar Association**

## Introduction

1. This is an overview of the policies and procedures followed by the Alaska Bar Association in fee arbitration matters. The Alaska Bar Rules referenced in this summary may be found under "Alaska Bar Rules, Part III, Rules of Attorney Fee Dispute Resolution," in *Alaska Rules of Court* published by Tower Publishing. They are also linked on the Bar's website here: https://alaskabar.org/ethics-discipline/.

## Fee Disputes

2. A client, which includes any person legally responsible to pay fees for the professional services of an attorney, may file a fee arbitration petition contesting the size or reasonableness of an attorney's fee. With limited exceptions, all fee disputes are subject to mandatory arbitration when a client files a fee arbitration petition. Bar Rule 34(b). Those exceptions include: disputes where the client has also sought relief for malpractice; disputes where a fee has already been determined by a statute, court rule, order or decision; and disputes over fees charged more than three years earlier unless a civil action could be maintained over the disputed amount. Bar Rule 34(c)(1)-(4).

## Fee Arbitration Petition

3. The Bar Association's fee arbitration petition is a "fill-in-the-blanks" form which asks the client information about the fee dispute in chronological order. It starts with the date the attorney was hired and continues through a description of the services to be provided, the fees to be charged, bills received, fees paid and so forth. It also asks the client to state the amount of overcharge and the basis for that overcharge. Bar Rule 40(a)(3). A client may then attach documents supporting his or her position and identify witnesses.

4. Of particular importance is the requirement that the client make efforts to resolve the dispute directly with the attorney prior to filing the petition. Bar Rule 40(a)(1). A client must also advise the Bar whether he or she has been sued by the attorney for the fees and identify the case number. Finally, the client agrees to be bound by the decision with the limited review provided in the Administrative Procedures Act and understands that the determination may be reduced to judgment. Bar Rule 40(a)(2). The client must sign the petition. Bar Rule 40(a).

## Intake Review

5. When a fee arbitration petition is received, it is reviewed by the Bar's fee arbitration coordinator. Our coordinator checks the petition to make sure that it is substantially complete. If portions are not completed (e.g., amount in controversy, efforts to resolve dispute prior to filing), our coordinator will return the petition to the client to complete. If the petition indicates that the client has been sued by the attorney, our coordinator will advise the client of the necessity to obtain a stay of the

civil proceedings. The Bar will not proceed with an arbitration if there is an ongoing court proceeding because a decision in the court proceeding would moot the arbitration. Bar Rules 34(c)(3) and 39(b).

6. If complex legal or factual issues are involved, the hearing is reasonably expected to or does exceed eight (8) hours or the amount in dispute is more than $50,000, the matter may be classified by the fee arbitration executive committee to be a "complex arbitration." Bar Rule 34(h). This designation may be made after the petition is filed but before the hearing on the merits of the petition begins unless the parties otherwise agree, and, if made, may require the payment by one or both parties of the reasonable costs of administration and arbitration. *Id.*

## Acceptance

7. Once the petition is substantially complete, it is reviewed by bar counsel who may then accept or reject the petition. Bar Rule 40(a). In practice, the vast majority of petitions are accepted for arbitration, the exceptions being those in which the clients have not responded to requests for further information, in which clients have not obtained stays of civil proceedings, in which clients have filed separate civil cases for fees or for damages for malpractice or professional misconduct, or in which bankruptcy proceedings have deprived the Bar of jurisdiction.

8. The Bar Association will then notify the client and the attorney that the petition has been accepted, include a copy of the accepted petition, and afford both parties a 10-day period in which to settle the matter without action by an arbitrator or panel. Bar Rule 40(c).

## Mediation

9. Mediation under Bar Rule 13 can be requested by the petitioner or the attorney as an alternative. Bar Rule 40(c). If both petitioner and the attorney agree to mediation, the matter is stayed. *Id.* If the matter is resolved by mediation, the file will be closed. If not resolved, the stay will be lifted and the arbitration will proceed. *Id.*

## After 10-Day Period

10. If the matter is not settled or mediation requested, it is set for arbitration. Bar Rule 40(e)(1). Further, the attorney is required to answer each of the allegations in the petition within 20 days of receipt of the notice of acceptance. Supporting documents may be submitted at that time. Bar Rule 40(d).

## Scheduling

11. If the matter is not settled by the parties, our coordinator then commences the often time-consuming task of assigning an arbitrator or arbitrators to the dispute and finding a hearing time suitable to the arbitrator(s) and the parties. Fee disputes of $5000 or less are heard by a single member of the fee dispute resolution division for the appropriate judicial district. Bar Rule 37(c). Amounts in excess of $5000 are heard by three arbitrators: two attorney members and one public member. *Id.*

12. Normally, our coordinator contacts the client, the attorney and the potential arbitrator or panel members to find out when they would be available for a hearing. If the petitioner fails to provide scheduling information within 30 days of bar counsel's written request, the matter is placed on inactive status and the petitioner is notified that the petition is subject to dismissal unless the petitioner responds within 30 days of the notice. Bar Rule 40(e)(2). If the petitioner fails to provide the information, the petition is dismissed without prejudice to re-file subject to the jurisdictional limitations of Bar Rule 34(c). *Id.* Once a time can be determined, our coordinator will prepare a notice of hearing for bar counsel's signature and serve the parties.

## Notice of Hearing

13. A notice of hearing is required at least 20 days prior to the hearing, although in practice more notice is usually provided. The notice contains the names of the arbitrator or arbitrators assigned and advises the parties that they may: (1) be represented by counsel at their expense; (2) present and examine witnesses; (3) cross-examine opposing witnesses; (4) impeach witnesses; (5) present documentary evidence; (6) rebut evidence presented; (7) testify on their own behalf; (8) have subpoenas issued for good cause; (9) request pre-hearing discovery for good cause shown in a written request to the arbitrator or the chair of the panel; (10) make one peremptory challenge per side or challenges for cause; and (11) have the hearing recorded. Bar Rule 40(f). In addition, a standard pre-hearing order sets out requirements for witness lists and exhibits.

## Hearing

14. At the time and place set, the arbitration panel will convene to hear the presentations of the parties. The proceeding is relatively informal in keeping with the goal of providing an alternative to court proceedings. Technical rules of evidence need not be applied and any relevant evidence will be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Bar Rule 40(n).The client normally presents his or her case first with cross-examination, if any, by the attorney. The attorney would then follow with his or her case. Most often, the panel hears testimony from the parties and their witnesses and considers letters, time sheets, billings or other evidence of the work performed by the attorney. Parties may also present affidavits in accordance with Bar Rule 40(k) or participate by phone (normally at their expense) under Bar Rule 40(h).

## Deliberation and Decision

15. After hearing the case, the panel will usually deliberate on a proposed decision either immediately after the proceeding or within a short time. The factors considered in determining the reasonableness of an attorney's fee are set out in Bar Rule 35(a) and Alaska Rule of Professional Conduct 1.5. The panel's findings on the issues and questions submitted as well as its award, if any, are due within 30 days of the close of the hearing (90 days for "complex arbitration"), though reasonable extensions may be granted by bar counsel upon request of the panel. Bar Rule 40(q). The panel provides for payments in installments and may award pre-judgment interest, but not attorney's fees for the arbitration itself. *Id.* These findings must also include a statement whether the matter the panel has heard should be referred to bar counsel for appropriate disciplinary proceedings. *Id.*

## Modification, Confirmation and Appeal

16. After the decision is reached, it is forwarded for review by bar counsel who insures that it meets the Bar Rule requirements. It is then served on the parties. Under Bar Rule 40(s), either party may ask for a modification or correction of the decision if there is an error in computation, a mistake in description, an imperfection in a matter of form not affecting the merits or the decision needs clarification. Bar Rule 40(s). Applications for modifications must be filed within 20 days after delivery of the decision. *Id.* The panel must issue a decision on the application for modification within 30 days after the time for filing an objection. *Id.* Either party may also move the superior court to confirm an award and reduce it to judgment. Bar Rule 40(t). Finally, should a party appeal the decision of the superior court concerning an arbitration award under the provisions of AS 09.43, the party must serve a copy of the notice of appeal upon bar counsel. If a matter is remanded to an arbitrator or panel, the decision on remand will be issued within 30 days after remand or further hearing. Bar Rule 40(u).

## Important Practice Points

17. Anyone in private practice for any length of time is bound to have a fee dispute with a client. How that dispute is resolved generally depends on the relationship the attorney has had with a client. If the attorney has failed to reach a clear understanding with the client about how fees will be charged, sent infrequent or inadequate billings, and generally kept the client "in the dark" about progress in the case, he or she should naturally expect problems when the client gets a large bill "out of the blue."

18. The moral is to avoid an end of the case problem by dealing with the fee issues straight away in the first or second meeting. A written fee agreement is required whenever the fee to be charged exceeds $1,000 or in contingent fee cases. Bar Rules 35(b) and (c). In addition, be aware that Bar Rule 35(b) says that in the absence of a written fee agreement, the attorney must present clear and convincing evidence that the basis or rate of fee exceeded the amount alleged by the client.

19. Bar Rule 35(c) requires contingent fee agreements to be in writing and to state: the method in which the fee is determined including the percentage or percentages to accrue to the attorney in particular circumstances; litigation or other expenses to be deducted from the recovery; and whether those expenses are to be deducted before the contingent fee is calculated. Be mindful as well of the prohibited contingent fee agreements in Bar Rule 35(d): fees contingent on the outcome of a criminal case, and fees in domestic relations matters contingent on the securing of the divorce or upon the amount of alimony, support or property settlement, except an action to collect past due alimony or support payments.

20. Attorneys must also disclose in their written fee agreements if they do not have malpractice insurance coverage of at least $100,000 per claim and $300,000 aggregate amount. ARPC 1.4(c). Further, clients must be separately advised in writing if coverage drops below those amounts or is terminated.

21. If an attorney decides that a lawsuit to collect fees is necessary, he or she must provide the client with a notice of the client's right to arbitrate or request mediation along with the summons. Bar Rule 39(a). The specific text of the notice is set out in the Bar Rule. *Id.* Failure to give the notice is grounds for dismissal of the action.

## Fee Arbitration Records

22. Permanent statistical records are maintained by the Bar Association. Bar Rule 36(d). However, arbitration files will be destroyed five years after they are closed. Bar Rule 36(g). Finally, fee arbitration records, documents, files, proceedings and hearings are confidential unless ordered open by a state superior court. However, summaries without reference to names may be publicized once a proceeding has formally closed, and bar counsel may use arbitration records and decisions for statistical and enforcement purposes, as well as for disciplinary purposes following acceptance of a grievance against the attorney or a referral by a panel. Bar Rule 40(r). Fee arbitration records may also be reviewed by the Alaska Judicial Council in its judicial applicant screening.

## Further Information

23. Please contact our fee arbitration coordinator or bar counsel if you have any questions concerning the operation of these rules:


Mailing Address:

Alaska Bar Association
P.O. Box 100279
Anchorage, AK 99510

Phone (907) 272-7469

Street Address:

Alaska Bar Association
840 K Street, Suite 100
Anchorage, AK 99501

FAX (907) 272-2932



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# FEE ARBITRATION

*"It may not be your fee just yet"*

*Alaska Bar Association*

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## WHAT IS A FEE DISPUTE?

- *A petition for arbitration filed by any person ("client") legally obligated to pay a lawyer's fees or costs*
- *Arbitration is mandatory for a lawyer when filed by the client*

2

## *EXCEPTIONS:*

- *malpractice claims*
- *fees decided by statute, court rule, order or decision*
- *disputes more than 3 years old unless a civil suit could still be brought*

3

## *WHAT HAPPENS NEXT?*

- *Bar staff makes sure that the petition is properly completed*
- *A court stay must be requested if there is a lawsuit over fees*
- *The client and the lawyer are given 10 days to try to settle the dispute*

4

## *ANY ALTERNATIVE TO ARBITRATION?*

- *Both the client and the lawyer may agree to have the dispute mediated*
- *Mediations are informal and confidential*
- *Dispute resolutions are reduced to enforceable written agreements.*

5

## *WHO HEARS THE DISPUTE?*

- *One lawyer arbitrator if dispute $5000 or less*
- *One citizen arbitrator and two lawyer arbitrators if dispute more than $5000*

6

## *HOW IS THE HEARING CONDUCTED?*

- *Informal*
- *Reliable evidence permitted*
- *Direct and cross examination of witnesses by both sides*
- *Submission of relevant documents*

7

## *WHAT STANDARDS ARE USED BY THE PANEL?*

- *"Reasonable fee" criteria in Bar Rule 35*
- *Panel's knowledge of community customs, practices, and generally accepted ranges for fees*

8

## *WHAT CAN THE PANEL DECIDE?*

- *May order a refund of all or part of fees and costs to a client*
- *May find all or part of fees and costs to be reasonable and order payment of remaining amounts.*
- *May refer the dispute to bar counsel if the lawyer's conduct should be investigated*

9

## *WHAT CAN BE DONE WITH A PANEL DECISION?*

- *Either party may move a trial court to confirm the award and reduce it to judgment*
- *Either party may file limited appeal with trial court*
- *Either party may request modification on limited grounds*

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# Alaska Bar Association
# Links to Rules

Please go to these links to access the most up-to-date copy of:

Alaska Bar Rules, Part III: Rules of Attorney Fee Dispute Resolution:
https://public.courts.alaska.gov/web/rules/docs/bar.pdf

Appellate Rules 601-612:
https://public.courts.alaska.gov/web/rules/docs/app.pdf

Uniform Arbitration Act, A.S. 09.43.010 through 09.43.595:
http://www.akleg.gov/basis/statutes.asp#09.43

Bar Rule 13: Mediation Rule:
https://public.courts.alaska.gov/web/rules/docs/bar.pdf

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