

ETHICS – Double Jeopardy! : Ethics Update 2017

Rules and Authorities Referenced

Billing Issues:

“Billing judgment” is the “winnowing [of] hours actually expended down to the hours that should reasonably be expended” when preparing a bill or fee request. *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1250 (10th Cir. 1998). Courts require it. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *In re NRF*, 294 P.3d 879, 883-84 (Wyo. 2013).

Unlicensed Practice of Law and Multi-Jurisdictional Practice Issues:

Probably ok to provide solely advice about another state’s laws even though not admitted:

ABA Model Rule 5.5. Restatement (Third) of Law Governing Lawyers, section 3, comment e (2000). Pennsylvania LEO 90-32 (3/2/90).

Practicing Across State Lines: ABA Model Rule 5.5; Restatement (Third) of Law Governing Lawyers, section 3, Illus. 5 (2000); New Jersey UPL Op. 49 (10/13/12).

In-House Lawyers Practicing in States Where Not Licensed: ABA Model Rule 5.5 (d) (1); N.Y. Comp. Codes R. & Regs. Tit. 22, pt. 522.4.

Conflicts Issues:

Hot Potato Conflict Doctrine: Cannot drop a client "like a hot potato," in order to take on a more lucrative assignment from another client against the "dropped" client: *Markham Concepts, Inc. v. Hasbro, Inc.*, 2016 WL 3976632 (D.R.I. July 22, 2016); *Western Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV 11-3473 CBM (Manx) (C.D. Cal. Feb. 13, 2015) (firm dropped client when conflict raised).

“Thrust Upon” Exception: *In re Sandahl*, 980 F.2d 1118 (7th Cir. 1992); *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491 (11th Cir. 1989); *Microsoft Corp. v. Commonwealth Scientific & Industrial Research Org.*, 2007 U.S. Dist. LEXIS 91550 (E.D. Tex. Dec. 13, 2007) (one-off application of exception).

Client Insurer Insuring Adversary: California RPC 3-310 (C) (3) that it is not a conflict when an attorney pursues an action against a party whose insurance company turns out to be a client of the attorney or his/her firm, but written notice should be given.

Tripartite Relationship: *Nationwide Mutual Fire Ins. Co. v. Bourlon*, 617 S.E.2d 40 (N.C. App. 2005); *Hansen v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 176057 (D. Nev. Dec. 12, 2012);

Doublevision Entm't, LLC v. Escrow Servs., Inc., 2015 WL 370111 (N.D. Cal. Jan. 28, 2015). ABA Model Rule 1.6.

Client Business Transactions: Rule 1.8 (a) ABA Model Rules of Professional Conduct; *McMahon v. Eke-Nweke*, No. 06-CV-5762 (E.D.N.Y.).

ATTORNEY-CLIENT CONFIDENTIALITY: Duty of Confidentiality is different than the attorney client privilege: *Mine Safety Appliances Co. v. North River Ins. Co.*, 73 F. Supp. 3d 544 (W.D. Pa. 2014); *A v. B*, 726 A.2d 924 (N.J. 1999); Comments 30 and 31 to ABA Model Rule 1.7; *Zador Corporation, N.V. v. Kwan*, 37 Cal. Rptr. 2d 754 (Cal. App. Ct. 1995).

ATTORNEY BLOGGING (Advertising and Positional Conflicts): NY Eth. Op. 848, CA Proposed Formal Opinion Interim 12-0006. ABA Model Rule 1.6; *J.M.J. v. L.A.M.*, 791 N.W.2d 573 (Minn. Ct. App. 2010).