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SUPREME COURT  
OF GUAM

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**IN THE SUPREME COURT OF GUAM**

**RE: ) PROMULGATION ORDER NO.: 04-002**  
**AMENDMENTS TO THE )**  
**GUAM RULES OF )**  
**PROFESSIONAL CONDUCT )**

On September 29, 2003, the matter of amendments to the Guam Rules of Professional Conduct came before the Supreme Court for action.

Prior to that, in June of 2002, the Guam Bar Ethics Committee was tasked with reviewing the 2002 American Bar Association Model Rules of Professional Conduct for adoption by the Supreme Court of Guam. The Ethics Committee solicited comments from the membership of the Guam Bar Association and received one response. On February 12, 2003, the Ethics Committee submitted its report recommending that the Supreme Court adopt the model rules without changes.

In October of 2002, the Subcommittee on Multijurisdictional Practice was formed to review the recommendations of the 2002 ABA Commission on Multijurisdictional Practice on rules which address the growing needs of clients for legal assistance in business transactions in multiple jurisdiction due to the globalization of business and finance. The Subcommittee solicited comments from the membership of the Guam Bar Association and received no responses. On February 18, 2003, the Subcommittee submitted its report recommending the adoption of the ABA Model Rule on the Multijurisdictional Practice of Law (Rule 5.5 of the Model Rules of Professional Conduct), and the ABA Model Rule on Disciplinary Authority; Choice of Law (Rule 8.5 of the Model Rules of Professional Conduct).

Upon the recommendation of the Guam Bar Ethics Committee and the Subcommittee on Multijurisdictional Practice, and under the authority granted by the Organic Act of Guam at 48 U.S.C. § 1424-1(c) and by 7 GCA § 9101, on September 29, 2003, the Supreme Court adopted the

1 2002 ABA Model Rules of Professional Conduct and Model Rules 5.5 and 8.5.

2 These new rules are attached hereto, marked Exhibit "A" and incorporated herein by  
3 reference. The new rules were effective as of the date of adoption on September 29, 2003.

4 **SO ORDERED**, this 11th day of February, 2004.

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8 BENJAMIN J.F. CRUZ  
Justice Pro Tempore<sup>1</sup>

  
FRANCES TYDINGCO-GATEWOOD  
Associate Justice

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F. PHILIP CARBULLIDO  
Chief Justice

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<sup>1</sup> Retired Chief Justice Benjamin J.F. Cruz was appointed Justice Pro Tempore for this matter on August 26, 2003. Subsequent to the September 29, 2003 action of the panel, Justice Cruz became ineligible to sit as a Justice Pro Tempore.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

#### **RULE 1.1: COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

#### **RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(e) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

### **RULE 1.3: DILIGENCE**

A lawyer shall act with reasonable diligence and promptness in representing a client.

### **RULE 1.4: COMMUNICATION**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### **RULE 1.5: FEES**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(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; and
- (8) whether the fee is fixed or contingent.

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

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

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.

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

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

#### **RULE 1.6: CONFIDENTIALITY OF INFORMATION**

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

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (4) to comply with other law or a court order.

#### **RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

### **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) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) 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.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

### **RULE 1.16: DECLINING OR TERMINATING REPRESENTATION**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (e), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

Annotated  
Model Rules of  
Professional  
Conduct

*Sixth Edition*



Center for Professional Responsibility  
American Bar Association

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## CLIENT-LAWYER RELATIONSHIP

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### Rule 1.3

#### *Diligence*

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter

on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

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## ANNOTATION

### NATURE OF DUTY

Rule 1.3 embodies the lawyer's basic duty to perform the work for which the lawyer was engaged, within a reasonable time, and, according to Comment [1], "with commitment and dedication to the interests of the client . . ." How diligently a lawyer performs his or her job not only affects the rights of the client, it also, according to Comment [3], reflects upon the integrity of the lawyer: "Even when the client's interests are not affected in substance, . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

As a practical matter, violations of Rule 1.3's duty of diligence typically accompany violations of other ethics rules, most frequently Rule 1.1 (Competence), Rule 1.4 (Communication), Rule 1.15 (Safekeeping Property), Rule 3.2 (Expediting Litigation), Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), and Rule 5.3 (Responsibilities regarding Nonlawyer Assistants). In most cases, a lawyer's lack of diligence results from violation of another ethical rule (for example, missing a statute of limitations due to a lack of competence) or leads to another ethical violation (for example, missing a statute of limitations leading to failure to communicate this to the client). Nevertheless, a lawyer's ethical obligations under Rule 1.3 are separate and distinct from those of other ethics rules.

Although the duty to represent clients diligently may seem obvious and self-explanatory, actual performance can fall prey to a myriad of distractions and to simple negligence:

For the most part, lawyers fully comprehend their obligations. Lawyers know that they must competently and diligently represent their clients. They know that they must keep their clients informed. Lawyers know that there are countless other obligations that they must meet. Nevertheless, lawyers violate these

# CLIENT-LAWYER RELATIONSHIP

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## Rule 1.4

### *Communication*

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

#### *Communicating with Client*

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions

the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

### *Explaining Matters*

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

### *Withholding Information*

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

## COMMENT

### *Reasonableness of Fee and Expenses*

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

### *Basis or Rate of Fee*

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

### *Terms of Payment*

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

### *Prohibited Contingent Fees*

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

### *Division of Fee*

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

### *Disputes over Fees*

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

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### ANNOTATION

#### *Subsection (a): Reasonable Fees and Expenses*

Model Rule 1.5(a) as initially promulgated in 1983 affirmatively required that a lawyer's fee be "reasonable." The current phrasing, prohibiting "unreasonable" fees, harks back to the predecessor Model Code. It was restored in 2002 on the theory that the affirmative phrasing had been making it "harder than necessary to impose discipline for excessive fees." American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, at 91 (2006) (rephrasing not intended as substantive change); see also *Restatement (Third) of the Law Governing Lawyers* § 34 (2000) (prohibiting lawyer from charging fee "larger than is reasonable under the circumstances"). See generally Chin & Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases*, 41 B.C. L. Rev. 1 (1999) (finding total of two cases imposing discipline based solely upon size of fee and concluding that "virtually all" applications of Rule 1.5(a) also involve dishonesty or misconduct; authors propose disclosure standard instead); Parekh & Pelkofer, *Lawyers, Ethics, and Fees: Getting Paid Under Model Rule 1.5*, 16 Geo. J. Legal Ethics 767 (2003).

The 2002 amendment also prohibits unreasonable expenses. See American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, at 91 (2006).

For a survey of state rules that differ significantly from the 2002 version of Model Rule 1.5, see the chapter entitled "Fees: Amount of Fee" in *ABA/BNA Lawyers' Manual on Professional Conduct*, pp. 41:301 *et seq.*

### MULTIFACTORIAL

Subsection (a) lists eight factors that may be considered in determining the reasonableness of a fee. Comment [1] emphasizes that these factors "are not exclusive. Nor will each factor be relevant in each instance." For discussion of other possible factors, see *In re Estate of Johnson*, 119 P.3d 425 (Alaska 2005) (in estate context, trial court may also consider size of estate, because lawyer's exposure to liability depends in part upon amounts involved); *Shaffer v. Superior Court*, 39 Cal. Rptr. 2d 506 (Ct. App. 1995)

**UNREASONABLE FEES****• Fees for Doing Nothing**

It is by definition unreasonable to charge for work not done. *In re Cleaver-Bascombe*, 892 A.2d 396 (D.C. 2006) (submission of false Criminal Justice Act voucher for work not actually performed by counsel appointed for indigent criminal defendant violates Rule 1.5(a) regardless of whether lawyer actually collects on voucher); *In re Ifill*, 878 A.2d 465 (D.C. 2005) (lawyer charged \$10,000 to pursue frivolous claims and then did not pursue them); *In re Schneider*, 710 N.E.2d 178 (Ind. 1999) (collection lawyer's bills for time spent drafting letter explaining lawyer's collection practices and for generating demand letter to collect lawyer's disputed fee were unreasonable; lawyer never actually contacted client's debtor); *Attorney Grievance Comm'n of Md. v. Guida*, 891 A.2d 1085 (Md. 2006) (\$750 fixed fee to represent client in adoption proceeding would have been reasonable had lawyer performed services); *In re O'Brien*, 29 P.3d 1044 (N.M. 2001) (lawyer charged \$5,000 fee without work product to justify it; "any fee is excessive when absolutely no services are provided"); *In re McKechnie*, 708 N.W.2d 310 (N.D. 2006) (failure to commence federal Civil Rights Act action or refund unearned portion of \$2,500 up-front payment); *State ex rel. Okla. Bar Ass'n v. Sheridan*, 84 P.3d 710 (Okla. 2003) (\$750 fee violated Rule 1.5; lawyer could produce no tangible evidence of any work).

**• Fees for Doing Very Little**

Charging a lot for doing very little, as opposed to nothing, is also likely to violate Rule 1.5(a). *See, e.g., Budget Rent-A-Car Sys., Inc. v. Consol. Equity LLC*, 428 F.3d 717 (7th Cir. 2005) (appellee's lawyer filed petition seeking \$4,626 to produce four-page jurisdictional memo citing five cases and \$4,354 to prepare sanctions motions and statement of fees and costs: "[i]t is inconceivable that this is the going market price for such exiguous submissions"; request "so exorbitant as to constitute an abuse of the process of the court asked to make the award"); *In re Calahan*, 930 So. 2d 916 (La. 2006) (unreasonable to charge \$12,500, or 40 percent of recovery, to write one-page demand letter to another lawyer who charged client excessive legal fee); *Attorney Grievance Comm'n of Md. v. Monfried*, 794 A.2d 92 (Md. 2002) (hearing judge's failure to find violation of Rule 1.5 was clear error; lawyer received flat fee of \$1,000 to represent client in parole revocation but did nothing beyond making few phone calls to get hearing date scheduled); *Commonwealth v. Ennis*, 808 N.E.2d 783 (Mass. 2004) (unreasonable for defense counsel to claim sixty-four hours for short response to interlocutory appeal of suppression order in which he repeated his arguments from motion to suppress); *In re Wyllie*, 19 P.3d 338 (Or. 2001) (lawyer violated DR 2-106(A) ban on excessive fees by charging \$1,850 and collecting \$750 after agreeing to work for hourly fee of \$150, working for two and one-half hours, and charging additional \$50 for missed appointment); *cf. In re Brothers*, 70 P.3d 940 (Wash. 2003) (lawyer normally charged \$50 to prepare quitclaim deeds but took fee based upon one-third of value of property transferred, or \$36,663, instead).

- ***Doing Very Little, and Doing It Badly***

In assessing a fee's reasonableness, what is ultimately at issue is "the reasonable value of the services rendered and value received by the client." *Regions Bank v. Automax USA, L.L.C.*, 858 So. 2d 593 (La. Ct. App. 2003); see *People v. Woodford*, 81 P.3d 370 (Colo. O.P.D.J. 2003) (though \$2,500 fee may be reasonable for preparation of trust, when documents did not address client's objectives, and work was incompetent and completely lacked value of any kind to client, fee was excessive); *In re McCann*, 894 A.2d 1087 (Del. 2005) (charging \$25,249 for taking more than fifteen years to complete work on estate was unreasonable, as was charging \$25,000 for work on different estate in which lawyer failed to file inventory or accounting and was removed as personal representative by court); *Idaho State Bar v. Frazier*, 28 P.3d 363 (Idaho 2001) (lawyer charged more than \$100,000 for mismanaging estate he said he could resolve for \$5,500, and which another lawyer had to close); *In re Sinnott*, 845 A.2d 373 (Vt. 2004) (lawyer charged for representing client negotiating debt with credit card company even though client ended up doing negotiating himself).

- ***Doing Way Too Much***

Fees for excessive lawyering violate Rule 1.5(a). See *In re Comstock*, 664 N.E.2d 1165 (Ind. 1996) (after receiving \$7,500 retainer, lawyer billed client for traveling to and from unnecessarily distant law libraries, making brief telephone calls, and reading letter terminating representation); *In re Estate of Langland*, Nos. 255287, 256134, 258476, 2006 WL 1752261 (Mich. Ct. App. June 27, 2006) (probate court did not err in awarding attorneys' fees as sanction against lawyer who failed to distinguish "preserving a record for appellate review from merely beating a dead horse," unnecessarily incurring exorbitant fee through repeated objections and demands for evidentiary hearings); *In re Coffey's Case*, 880 A.2d 403 (N.H. 2005) (both estimated fee of \$30,000 and actual fee of \$64,242.89 charged to prosecute appeal from probate proceedings were clearly excessive when lawyer billed 225 hours to write brief and 85 hours to prepare oral argument; lawyer was already familiar with case, there was no transcript to review, and typical appeal would require between 30 and 75 hours); see also *In re Dorothy*, 605 N.W.2d 493 (S.D. 2000) (lawyer attempted to charge almost \$60,000 and did charge more than \$47,000 for uncomplicated child custody and support representation; overly extensive briefing cost clients several thousand dollars and was of little or no value; when client ran out of gas while traveling to meet with lawyer, lawyer offered to drive to deliver gas and then charged client \$100 per hour to do so).

- ***Doing Remedial Work***

Lawyers are expected to provide competent representation (see Model Rule 1.1) and therefore may not charge clients for time necessitated by their own inexperience. See, e.g., *Heavener v. Meyers*, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (claim for fees for more than five hundred hours unreasonable in straightforward Fourth Amendment excessive-force claim; nineteen hours for research on Eleventh Amendment defense indicative of excessive billing due to counsel's inexperience; forty-nine invoice entries for "discussion" with co-counsel constituted "prime example of fee-padding" in case that did not require joint effort on specific tasks); *In re Poseidon Pools of Am., Inc.*, 180

B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); *In re Disciplinary Action against Hellerud*, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of \$5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law"); *In re Guardianship of Hallauer*, 723 P.2d 1161 (Wash. Ct. App. 1986) ("no reason or excuse for charging a client . . . for one's own inefficiencies").

• ***Too Many Lawyers Working on Matter***

Participation by too many lawyers is another form of overlawyering that can result in a violation of Rule 1.5(a). See *Carr v. Fort Morgan Sch. Dist.*, 4 F. Supp. 2d 998 (D. Colo. 1998) (reducing fee request when lawyers "engaged in constant collaboration, discussion and review of work of one by the other," including conferences about even mundane matters; reasoning that "[i]f the attorneys possess the skill required to charge the rates they are charging for their legal services, which this Court has determined they do, such constant collaboration, review, preparation and consultation is not necessary"); *Richmont Capital Partners I, L.P. v. J.R. Invs. Corp.*, No. CIV.A. 20281, 2004 WL 1152295 (Del. Ch. May 20, 2004) (rejecting amount requested; three lawyers worked total of 59 hours to answer complaints and prepare motions for admissions pro hac vice, and four lawyers worked total of 223 hours drafting responses to motions to dismiss that raised no novel issues of law or fact).

• ***Charging "Lawyer Rates" for Nonlawyer Work***

A lawyer may not bill nonlawyer services at lawyer rates, no matter who performs those services. See *In re Green*, 11 P.3d 1078 (Colo. 2000) (charging lawyer's hourly rate for faxing documents, calling court clerk's office, and delivering documents to opposing counsel unreasonable as matter of law; such services generally performed by non-lawyers, and lawyer's professional skill and knowledge add no value to them); *Comm. on Prof'l Ethics & Conduct of Iowa State Bar v. Zimmerman*, 465 N.W.2d 288 (Iowa 1991) (lawyer charged full hourly rate for attending ward's birthday party and discussing ward's toiletry needs); *Goeldner v. Miss. Bar*, 891 So. 2d 130 (Miss. 2004) (unreasonable to bill law clerk's services at \$175 per hour right after he graduated from law school; "[u]ntil admittance to the bar, a person with a J.D. is no more than a 'law clerk'"); *Cincinnati Bar Ass'n v. Alsfelder*, 816 N.E.2d 218 (Ohio 2004) (one-year stayed suspension on condition of \$30,000 restitution by lawyer who charged "attorney's time" to unsophisticated client whom he befriended with advice about "anything and everything" in client's life, including boyfriends, vehicles, and restaurants; "[the lawyer] attempted to charge for his counsel in the manner that a therapist might, overlooking that an attorney, unless a qualified therapist, may no more engage in that profession than a therapist may practice law without a license").

**REVIEW FOR REASONABLENESS**• *Review Always Available*

No matter what the client has agreed to, an unreasonable fee subjects the lawyer to disciplinary proceedings. *Attorney Grievance Comm'n of Md. v. Braskey*, 836 A.2d 605 (Md. 2003) (lawyer disbursing \$9,000 of remaining settlement to himself after taking one-fourth of gross settlement proceeds pursuant to contingent fee "went beyond collecting an unreasonable fee" and was "fee gouging," even if client agreed); *In re Sinnott*, 845 A.2d 373 (Vt. 2004) (lawyers cannot charge unreasonable fees even if they can find clients who will pay them). Outside the disciplinary context, however, see *Paul, Weiss, Rifkind, Wharton & Garrison v. Koons*, 780 N.Y.S.2d 710 (Sup. Ct. 2004) (granting summary judgment to law firm seeking \$3.9 million in fees for work in hotly contested custody fight between wealthy artist and politically prominent wife; noting that artist instructed his lawyers to "leave no stone unturned," court declared it would not "police the conduct of wealthy litigants who choose to share their wealth with counsel through extravagant litigation").

• *Investment in Client as Fee*

Comment [4], added in 2002, notes that fees paid in property instead of money "often have the essential qualities of a business transaction with the client," and therefore "may" be subject to the requirements of Rule 1.8(a), which governs lawyer/client business transactions. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, at 93 (2006); see ABA Formal Ethics Op. 00-418 (2000) (lawyer who acquires ownership interest in client in exchange for legal services, either in lieu of cash fee or as investment opportunity, must comply with Rule 1.8(a)); see also *In re Richmond's Case*, 904 A.2d 684 (N.H. 2006) (no inherent conflict between Rule 1.5 and Rule 1.8(a); though Rule 1.5 permits lawyer to accept property as fee, lawyer must still comply with requirements of Rule 1.8(a)). See generally Puri, *Taking Stock of Taking Stock*, 87 Cornell L. Rev. 99 (2001).

Although fee agreements are subject to continued review for reasonableness as circumstances change, the reasonableness of a fee that takes the form of an investment or an interest in the client is looked at prospectively, not retrospectively. See *Bauermeister v. McReynolds*, 571 N.W.2d 79 (Neb. 1997) (\$4 million potential fee not excessive under "lean forward" fee agreement wherein "if successful, everyone profits; if not, then they all lose together"; recovery based upon 5 to 10 percent likelihood of success of private landfill business venture), *modified on denial of reh'g*, 575 N.W.2d 354 (Neb. 1998); N.Y. City Ethics Op. 2000-3 (2000) (determination of whether fee taken as client securities is excessive depends upon value at time agreement reached; though this may create "spectacular windfalls in relation to the compensation that would normally be received on a cash basis," reward stems from investment risk accepted); Pa. Formal Ethics Op. 01-100 (2001) (determination "should be made based on the information available at the time of the transaction and not with the benefit of hindsight"). But see *Holmes v. Loveless*, 94 P.3d 338 (Wash. Ct. App. 2004) (error to continue to enforce thirty-year-old contingent-fee agreement under which law firm to receive indefinitely 5 percent of cash distributions from joint venture—a successful shopping center—in exchange for initial two and one-half years of discounted legal services; discount val-

## CLIENT-LAWYER RELATIONSHIP

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### 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) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) 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.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

#### COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a cur-

rent basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] 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 only 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 and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

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## ANNOTATION

### 2002 AMENDMENTS

Rule 1.15 was amended in 2002 to deal with advance deposits of fees and expenses, and to permit lawyers to add their own funds to a client trust account to cover bank service charges. The "conflicting-claims" provision was reworded to address disputes between "two or more persons (one of whom may be the lawyer)" rather than disputes

between the lawyer and "another person." The amended Comment adds a reference to the property of prospective clients. *See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, at 340-43 (2006).

#### GENERAL APPLICATION

Rule 1.15 imposes obligations of safekeeping, accounting, and delivery when a lawyer comes into possession of someone else's money or property. *See, e.g., Idaho State Bar v. Frazier*, 28 P.3d 363 (Idaho 2001) (lawyer disciplined for allowing estate jewelry to be stolen from lawyer's briefcase); *Attorney Grievance Comm'n v. Sullivan*, 801 A.2d 1077 (Md. 2002) (lawyer acting as personal representative for estate disbarred for misappropriating estate funds); *In re Satta*, 626 N.Y.S.2d 100 (App. Div. 1995) (lawyer suspended for commingling personal funds with client funds, failing to keep appropriate records, writing checks to cash, and making cash withdrawals from escrow account using automated teller machine).

By its own terms, Rule 1.15 comes into play only when the lawyer's possession of another's property is in connection with the representation of a client. *See Model Rule 1.15, cmt. [5]* (suggesting Rule 1.15 applies only in context of lawyers rendering legal services); *American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, at 343 (2006). The authorities, however, sometimes elide this requirement in applying the Rule. *See People v. Rishel*, 50 P.3d 938 (Colo. O.P.D.J. 2002) (lawyer who belonged to group that pooled funds to purchase baseball tickets violated Rule 1.15 by misusing funds); *In re McCann*, 894 A.2d 1087 (Del. Super. Ct. 2005) (lawyer disciplined under Rule 1.15 for failing to pay firm payroll taxes); *Ariz. Ethics Op. 04-03* (2004) (lawyer who received funds from former client's sale of home cannot withdraw unpaid fees from those funds because he did not represent former client in home sale; Rule nevertheless applies and requires former client's instructions for disbursement).

#### *Subsection (a): Identifying and Safeguarding Property of Others*

##### ANTICOMMINGLING RULE

Rule 1.15(a) requires a lawyer to keep the property of others separate from the lawyer's own property. *See, e.g., In re Thomas*, 740 A.2d 538 (D.C. 1999) (lawyer deposited personal funds into client escrow account); *In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000) (lawyer appointed as guardian for individual and representative payee for individual's Social Security and Supplemental Security Income checks failed to keep guardianship funds separate from her own); *In re Baxter*, 940 P.2d 37 (Kan. 1997) (lawyer deposited settlement check into firm's business account and used funds for business expenses before mistake discovered); *In re Johnson*, 827 N.E.2d 206 (Mass. 2005) (lawyer deposited settlement checks into his firm's operating account); *In re DiPippo*, 765 A.2d 1219 (R.I. 2001) (lawyer failed to deposit settlement proceeds in trust account); *see also Conn. Ethics Op. 04-04* (2004) (lawyers who deposited personal funds in trust accounts to qualify for preferred-subscriber status for bank's stock violated Rule); *cf. Cal. Ethics Op. 2005-169* (2005) (linking operating account to client trust

account to cover inadvertent overdrafts in trust account permissible because accounts remain separate).

The prohibition against commingling ensures that a lawyer's creditors will not be able to attach clients' property. See *In re Anonymous*, 698 N.E.2d 808 (Ind. 1998) (commingling of lawyer and client funds would subject clients' funds to "unacceptable risks," such as attachment by creditors, or intended or unintended misappropriation by lawyer); *In re Glorioso*, 819 So. 2d 320 (La. 2002) (by commingling, lawyer put clients' funds at risk of being seized by Internal Revenue Service to satisfy lawyer's tax liability).

At the same time, the prohibition also prevents lawyers from shielding personal assets from their own creditors by hiding funds in client trust accounts. See *In re Lund*, 19 P.3d 110 (Kan. 2001) (lawyer claimed trust account held only client funds in effort to avoid garnishment by his ex-wife to satisfy outstanding judgment); *In re Tidball*, 503 N.W.2d 850 (S.D. 1993) (commingling and using bank drafts to avoid garnishment by lawyer's personal creditors is clear violation of Rule 1.15(a)); see also *In re Betancourt*, 661 N.Y.S.2d 208 (App. Div. 1997) (lawyer placed personal funds into his lawyer escrow account to shield them from creditor).

## CONVERSION AND MISAPPROPRIATION

### • *Client Funds*

Misappropriation of client funds usually is an obvious violation of this Rule and is dealt with by severe disciplinary sanction. *People v. Rhodes*, 107 P.3d 1177 (Colo. O.P.D.J. 2005) ("disbarment is almost always the appropriate sanction when a lawyer converts client money entrusted to him by the client"); *In re Fair*, 780 A.2d 1106 (D.C. 2001) (disbarment is presumptive sanction for any intentional misappropriation or conversion); *State ex rel. Okla. Bar Ass'n v. Farrant*, 867 P.2d 1279 (Okla. 1994) ("A finding that the attorney intentionally committed such an act requires imposition of the harshest discipline—disbarment."); see also *In re Kakol*, 494 S.E.2d 340 (Ga. 1998) (lawyer used his lawyer escrow account as personal checking account and wrote checks against insufficient funds; three-year suspension); *Ky. Bar Ass'n v. Sivalls*, 165 S.W.3d 137 (Ky. 2005) (lawyer who forged co-counsel's signature on settlement check and kept proceeds for herself disbarred); *In re Ferrand*, 695 So. 2d 1332 (La. 1997) (lawyer who settled personal injury case without informing client and then converted proceeds disbarred); *Attorney Grievance Comm'n v. Cherry-Mahoi*, 879 A.2d 58 (Md. 2005) (when client advised lawyer that doctor bills for which lawyer was protecting money in trust may have already been paid, lawyer took money for herself rather than paying it to client; lawyer disbarred); *In re Petition for Disciplinary Action against Pierce*, 706 N.W.2d 749 (Minn. 2005) (lawyer who used settlement proceeds for his own private purposes disbarred); *In re Freimark*, 702 A.2d 1286 (N.J. 1997) (pattern of using client trust funds for lawyer's own purposes and replenishing account by invading trust funds of other clients; lawyer disbarred); *In re Disciplinary Action against Rau*, 533 N.W.2d 691 (N.D. 1995) (lawyer who converted settlement check and misled client about status of suit and payment disbarred).

- **Stealing from Firm**

A court may apply Rule 1.15 in addition to Rule 8.4 (Misconduct) to a lawyer who misuses money that belongs to a law firm. *See, e.g., In re Morrell*, 684 A.2d 361 (D.C. 1996) (lawyer misappropriated hundreds of thousands of dollars from client, received compensation from both client and firm for same work, and also received kickback); *In re Christian*, 135 P.3d 1062 (Kan. 2006) (associate converted fees paid to himself on behalf of firm); *Hamilton v. Ky. Bar Ass'n*, 180 S.W.3d 470 (Ky. 2005) (associate who settled contingent-fee case at new firm failed to notify former firm, which originally filed case, and failed to tender former firm's share of fee); *State ex rel. NSBA v. Frederiksen*, 635 N.W.2d 427 (Neb. 2001) (lawyer stole \$15,000 from his firm because he was dissatisfied with his compensation); *In re Reynolds*, 39 P.3d 136 (N.M. 2002) (lawyer deposited more than \$90,000 in firm and client estate funds into separate trust account he opened in his name for his own use); *State ex rel. Okla. Bar Ass'n v. Biggers*, 981 P.2d 803 (Okla. 1999) (lawyer fraudulently concealed and converted funds belonging to firm and clients). Also see the Annotation to Rule 8.4.

- **Administration of Estates and Trusts**

Rule 1.15 also applies to a lawyer's misuse of money when administering estates and trusts. *See, e.g., People v. Schaefer*, 944 P.2d 78 (Colo. 1997) (lawyer who was conservator for client and personal representative of estate failed to account for estate's funds, file accountings on time, close estate on time and distribute assets, and disclose fee to court); *In re Utley*, 698 A.2d 446 (D.C. 1997) (lawyer for estate disbarred for repeatedly taking fees and commissions before receiving court approval and failing to repay duplicate fee despite numerous court requests); *In re Prince*, 494 S.E.2d 337 (Ga. 1998) (lawyer representing administratrix of estate took estate funds for personal use); *In re Clanin*, 619 N.E.2d 269 (Ind. 1993) (lawyer converted estate funds in series of withdrawals over several years); *In re Arbour*, 915 So. 2d 345 (La. 2005) (lawyer suspended for, inter alia, withdrawing \$40,000 in legal fees from probate estate without court approval); *Attorney Grievance Comm'n v. Sullivan*, 801 A.2d 1077 (Md. 2002) (lawyer acting as personal representative for estate disbarred for misappropriating estate funds); *Petition for Disciplinary Action against Madson*, 574 N.W.2d 716 (Minn. 1998) (lawyer acting as personal representative of—and counsel for—father's estate misappropriated funds, did not maintain proper records, and did not close estate promptly); *In re Orsini*, 661 N.Y.S.2d 321 (App. Div. 1997) (lawyer disbarred for converting funds from five estates, failing to reimburse more than \$30,000 from three of those estates, and frequently commingling personal funds with client funds); *State ex rel. Okla. Bar Ass'n v. Besly*, 136 P.3d 590 (Okla. 2006) (lawyer acting as executrix for estate suspended for paying herself legal fees from estate funds without court approval); *In re Brousseau*, 697 A.2d 1079 (R.I. 1997) (lawyer acting as administrator in probate estate withdrew funds for personal use); *In re Disciplinary Proceedings against Konnor*, 694 N.W.2d 376 (Wis. 2005) (lawyer acting as personal representative of estate disciplined for allowing his brother to steal estate checkbook and forge three checks).

• *Safekeeping of Personal Property*

The lawyer is responsible for safekeeping property, whether money or personal property, including documents. *See, e.g., Fla. Bar v. Grosso*, 760 So. 2d 940 (Fla. 2000) (lawyer failed to safeguard and promptly return client's firearms); *In re Rathbun*, 124 P.3d 1 (Kan. 2005) (lawyer disciplined for failing to deliver mail that client entrusted to him for forwarding to estranged husband); *In re Gold*, 693 So. 2d 148 (La. 1997) (after meeting with elderly individual, lawyer declined case but refused to return documents brought for his review, and ignored subpoena served for documents by disciplinary counsel); *In re Disciplinary Action against Becker*, 504 N.W.2d 303 (N.D. 1993) (client's jewelry stolen from lawyer's car); *In re Blackmon*, 629 S.E.2d 369 (S.C. 2006) (lawyer who retained original wills and deeds became incommunicado after testators' deaths); Conn. Ethics Op. 92-21 (1992) (abstract of real estate title search prepared for client was client property and must be given to client upon request); *see also Idaho State Bar v. Frazier*, 28 P.3d 363 (Idaho 2001) (lawyer disciplined for keeping estate jewelry in briefcase underneath desk in office for extended period; several pieces of jewelry stolen from briefcase).

Retaining liens—allowing for the retention of client papers and property until the lawyer is compensated for services rendered—are recognized in some jurisdictions. Retaining liens are discussed in the Annotation to Model Rule 1.16.

**INTENT OR LACK OF HARM IRRELEVANT**

Commingling, misappropriation, and conversion are strict-liability offenses for purposes of Rule 1.15. Intent is not an element of the violation, nor is harm to the client. Restoring the funds before they are missed is not a defense. *In re Thompson*, 991 P.2d 820 (Colo. 1999) (disciplinary rule unlike criminal statute; "the intent to permanently deprive another of property is not an element of knowing misappropriation for lawyer discipline purposes"); *In re Asher*, 772 A.2d 1161 (D.C. 2001) (there is misappropriation under Rule even if lawyer derives no personal benefit; "it is essentially a per se offense"); *In re Anonymous*, 698 N.E.2d 808 (Ind. 1998) (in "determining whether a violation of the 'anti-commingling' rule has occurred, it is irrelevant that the misconduct was not part of a scheme to conceal income, was not the product of selfish or dishonest motives, or that client funds were never in fact at risk"); *In re Yonter*, 930 So. 2d. 956 (La. 2006) ("respondent's belief that he was acting in his clients' best interest in no way excuses his misconduct"); *see also In re Osborne*, 713 A.2d 312 (D.C. 1998) (lawyer disciplined for commingling personal funds with client funds, notwithstanding that bookkeeper kept careful records and no client lost funds due to commingling); *In re Caver*, 632 So. 2d 1157 (La. 1994) (negligent supervision of employees and failure to maintain proper safeguards of client trust account resulted in commingling and conversion); *Attorney Grievance Comm'n v. Whitehead*, 890 A.2d 751 (Md. 2006) (lawyer suspended for withdrawing fees earned as conservator without court approval, even though conduct unintentional and he promptly returned unapproved fees); *In re Roth*, 658 A.2d 1264 (N.J. 1995) (misappropriation includes unauthorized temporary use of client's money for lawyer's own purpose, regardless of lawyer's personal circumstances); *In re Rau*, 533 N.W.2d 691 (N.D. 1995) (mental illness notwithstanding, lawyer who converted settlement check and misled client about status of suit and payment