

# Ethical Concerns for General Practitioners

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# Agenda

- Update on the Bona Fide Office Rule
- Record Retention Requirements
- Supervision of Non-Attorney Staff
- Retainer Agreements

# The Virtual Law Office

- The *Bona Fide Office Rule* 1:21-1(a)(1)
- Required “brick and mortar” office
- Supposedly to promote accessibility and responsiveness

- Amended in 2013
- “Brick and mortar” office no longer required, *but*
- Specific accessibility/responsiveness requirements

An attorney need not maintain a fixed physical location for the practice of law, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice . . .

. . . an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice . . . , where mail or hand-deliveries may be made and promptly received, and where process may be served . . .

The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(1).

**An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.**



## RPC 1.4

**(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.**

**(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.**

# Record Retention

*RPC 1:15(a)*: “Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.”

# Record Retention

Rule 1:21-6(c)(1)(I): “copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.”

# Record Retention

ACPE Op. 692 (2001) and Op. Supplement (2002):

Must retain file for seven years after closing, absent written consent of client to destroy

Open questions about what constitutes “client property”

# Client Property

- Wills
- Trust Agreements
- Deeds
- Executed Contracts
- Corporate By-Laws and Minutes
- Personalty with Intrinsic Value

- Client property must be “returned, or retained and maintained indefinitely.”
- After seven years, must examine file for “client property” and take “reasonable steps” to return it (e.g., writing to last known address and waiting a reasonable period)

- Medical records, x-rays, expert reports, deposition transcripts and interrogatory answers usually do not constitute “property of the client,” unless some foreseeable client need for them in the future.
- Requires case by case determination of foreseeable client need for records

# Criminal Files

**“Absent an express agreement, a lawyer should not discard or destroy files relating to criminal matters while the client is alive.”**



## Files of Minors

“Where the matter involves a minor, materials in the file may affect the client’s rights well beyond the seven-year retention period. . . . Thus, a lawyer may need to retain file records relating to the representation of a minor until the minor reaches majority and thereafter until the statute of limitation runs.”

- Construes RPC 1.3 (“diligence and promptness”) to require sole practitioners to make arrangements for disposition of client files in the event of death or retirement.
- “This is an obligation which all law firms and sole practitioners must prepare for now.”

# Manner of Destruction

- Ongoing duty to preserve confidentiality
- “*Simply placing the files in the trash will not suffice.*”

# Duties of Firm vs. Departing Attorney

- Clients engage firms, not individual members/associates
- When an attorney retires from a firm, the firm has the retention obligations under Op. 692

# Electronic File Storage

## ACPE Op. 701

*OK*, as long as:

- “Enforceable obligation to preserve confidentiality and security”
- “Use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data.”

# Responsibility for Non-Attorney Staff

RPC 5.3 (a): “[E]very lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.”

*Official Comment:* “A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.”

# Signing Correspondence

ACPE Op. 720: Non-attorney staff may sign “routine, non-substantive correspondence, but “must include the name of the responsible attorney as the person to whom questions or comments should be directed” and “must also reflect the identity and non-attorney status of the paralegal.”



# Retainer Agreements

## RPC 1.5(b)

When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

## Rule 5:3-5(a)

Except where no fee is to be charged, every agreement for legal services to be rendered in a civil family action shall be in writing signed by the attorney and the client, and an executed copy of the agreement shall be delivered to the client.

## Rule 1:21-7(g)

Where the amount of the contingent fee is limited by the provisions of paragraph (c) of this rule, the contingent fee arrangement shall be in writing, signed both by the attorney and the client, and a signed duplicate shall be given to the client. . . .

# Types of Retainers

- General Retainers
- Special Retainers: Security Retainers/Advance Fee Retainers

# General Retainers

- Assure the lawyer's availability for a period of time, a specific case or particular legal matter
- Not dependent on services rendered
- Deemed earned when paid

# Special Retainers

- Security Retainers – intended to secure payment for future services
- Advance Fee Retainers – flat fee for performance of future services

## RPC 1.5(a)

A lawyer's fee shall be reasonable. . . .

## ACPE Op. 644 (1990)

“[I]n New Jersey the disposition of retainer fees may properly be the subject of fair and informed agreement between the parties to that relationship. Accordingly, we hold that *it is not unethical per se for an attorney to charge a nonrefundable retainer*, provided that such a fee arrangement is fair and reasonable under the circumstances of the particular representation.”



# DeGraaf v. Fusco (1995)

- Client's mother paid criminal defense lawyer \$15,000 retainer “so her son would not go to prison.”
- Client never actually charged, and confiscated weapons were returned, with little to no involvement by lawyer

- Ten days from payment of retainer until end of representation
- Jury trial on mother's suit to recover the \$15,000 retainer
- Jury finds no cause, mother appeals

“Although a nonrefundable retainer is not unethical per se, it is always subject to the overriding precept that any fee arrangement must be reasonable and fair to the client. Clearly, the unused portion of even a nonrefundable retainer should be returned if contravening events should render it unconscionable for the attorney to keep it.”

- App. Div. clearly skeptical of reasonableness of this particular fee arrangement based on subsequent events
- Also, bad facts (e.g., no retainer letter), *but*
- Remands for new trial with proper jury instructions

# Cohen v. Radio-Electronics Officers Union (1996)

- Retainer agreement negotiated between lawyer and sophisticated client to be available for fixed annual fee of \$100,000, plus hourly billing for time in excess of 1000 hours.
- Automatically renewable annually unless terminated, six months notice required for termination

- Client gave attorney only three days notice of termination
- Attorney sues for \$100,000 for the following year based on lack of notice, and \$75,000 in anticipated future fees

“A retainer agreement may not prevent a client from discharging a lawyer. Neither directly nor indirectly may the agreement restrict a client's right to representation by a lawyer of the client's choice.”

“*With a sophisticated client, however, a* retainer agreement may provide that the client agrees to compensate the lawyer if the client terminates the relationship, so long as provision does not chill the client's right of termination.”



“In an era of increasing concern about the cost of legal services, it would be counterproductive to preclude clients from bargaining for a reduction in fees in exchange for a reasonable limitation on the right to discharge a lawyer. . . . [A] retainer agreement setting a reasonable fee may take into account the costs of the lawyer's availability and the opportunities that the lawyer forgoes.”

- Held: six month notice period an unconscionable burden on the client's right to terminate counsel, *but*
- Stops short of blanket ban on non-refundable retainers/Reforms the agreement to compensate for one month

**Thank You!**

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