



Ethics and Real Property

ACC CLE

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4 Potential Ethical Snowstorms

- o Competence and Diligence
- o Conflicts of Interest
- o Duty to Disclose
- o Attorney's Fees

Oklahoma Rules of Professional Conduct

- o All rules are from Title 5 Okla. Stat.

A. Duties of Competence and Diligence

- o Rule 1.1

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

How do you determine legal knowledge and skill?

- o Complexity of the matter
- o Specialized nature of the representation
- o Lawyer's general experience in the field
- o Prep and study time the lawyer has to give the matter
- o Is it feasible to refer the matter to an attorney who would be better able to handle it?
- o More often than not, it's competence of a general practitioner

How do you determine legal knowledge and skill?

- o New attorney can be as competent as a practitioner with long career
- o Competence can be provided, even in a field new to the attorney
- o In an emergency, you can aid in areas in which you are unfamiliar, but such representation should be limited
- o Can accept while not having competence, as long as competence can be reasonably acquired

How do you determine thoroughness and preparation?

- o Facts of the matter are important
- o Methods used to obtain competence is important
- o What is at stake?

How do these rules apply when you're not doing the work?

- o Rule 5.1

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

How do these rules apply when you're not doing the work?

- o Rule 5.1

- o (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct

How do these rules apply when you're not doing the work?

- o Rule 5.1

- o (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - o Lawyer orders or, with knowledge of the conduct, ratifies the conduct involved; or
 - o Lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

How do these rules apply when you're not doing the work?

- o Rule 5.3

- o (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

How do these rules apply when you're not doing the work?

- o Rule 5.3

- o (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

How do these rules apply when you're not doing the work?

- o Rule 5.3

- o (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - o Lawyer orders or, with knowledge of the conduct, ratifies the conduct involved; or
 - o Lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

How do these rules apply when you're not doing the work?

- o For purposes of 5.3(a) measures could be annual classes for non-attorneys and assurances that they keep up to date on changing law in the area of practice
- o Also duty to provide basic training to nonlawyers
- o Duty to not disclose private information carries to nonlawyers
- o Limited to conduct, if that of an attorney, subject to the Rules of Professional Conduct

B. Conflicts of Interest

- o Rule 1.7

- o (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:
 - o (1) the representation of one client will be directly adverse to another client, or
 - o (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. Conflicts of Interest

- o Rule 1.7

- o (b) Notwithstanding the existing of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - o (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - o (2) the representation is not prohibited by law;
 - o (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - o (4) each affected client gives informed consent, confirmed in writing.

B. Conflicts of Interest

- o Rule 1.7
 - o Rule 1.8 addresses current conflicts
 - o Rule 1.9 address duty to former clients
 - o Rule 1.18 addresses prospective client conflicts
 - o Rule 1.0(e) and (b) address written consent

B. Conflicts of Interest

- o Rule 1.7
 - o To determine if a conflict exists, the attorney should use reasonable procedures
 - o If a conflict arises after representation has started, the lawyer must normally withdraw, same rules apply
 - o Court approval is possible
 - o Ignorance of the conflict is not a defense
 - o Written consent is revocable under certain circumstances
 - o Applies to all attorneys in your firm (Rule 1.10)

B. Conflicts of Interest

- o *State ex rel. Oklahoma Bar Association v. Williams*, 1995 OK 130
 - o Attorney represented multiple parties in the transaction
 - o Held multiple client's money in escrow
 - o Conflicting demands were made on the money
 - o Paid attorney's fees first, then to long-time client
 - o Violated conflict of interest rule, as well as co-mingling of funds rule

C. Duty to Disclose

- o 60 Okla. Stat Sec. 831-839
 - o Oklahoma Residential Property Condition Disclosure Act (Residential Disclosure Statement can be found at <https://www.ok.gov/OREC/documents/RPCD%20Appendix%20A%20%2811-2015%29.pdf>)
 - o Seller has to provide to buyer a written property disclaimer
 - o One form states you have no knowledge of defects and have never lived in property
 - o Second form lists the defects

C. Duty to Disclose

- o 60 Okla. Stat Sec. 831-839
 - o Oklahoma Real Estate Commission develops rules regarding these disclosures-Upon request
 - o Must be provided whether a licensed real estate agent is involved or not
 - o If no agent is involved, then upon request
 - o Best practices is to provide so as to start the clock on any statutes of limitations issue
 - o “As soon as practical” but no later than offer to purchase
 - o Recovery is actual damages involved in the cost of fixing the defects

C. Duty to Disclose

- o 60 Okla. Stat Sec. 831-839
 - o Exceptions
 - o Transfers pursuant to court order
 - o Transfers as a result of the default in mortgage payment
 - o Transfers by a non-occupant fiduciary
 - o Transfers from one co-owner to another (or others)
 - o Transfer to spouse
 - o Transfer as a result of dissolution of marriage
 - o Transfers as a result of merger
 - o Transfers or exchanges to or from governments
 - o Transfers of newly constructed dwellings

C. Duty to Disclose

- o *Shapiro v. Sutherland*, 64 Cal.App.4th 1534
 - o Noisy neighbors
 - o Attorney had a duty to advise client (seller) to provide the disclosure
 - o Attorney cannot provide the disclosure independently, due to the Client/Attorney confidentiality owed to the seller
 - o Exceptions: knowledge of intent to commit a crime; necessary to defend against client's claims; or required by court order

C. Duty to Disclose

- o 60 Okla. Stat Sec. 831-839
 - o Attorney must make disclosure under Rule 4.1 to avoid assisting in a fraud or crime, unless permitted by Rule 1.6

D. Attorney's Fees

- o Rule 1.5

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

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

D. Attorney's Fees

- o Rule 1.5

- o (a) cont'd

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

- o (3) the fee customarily charged in the locality for similar legal services

- o (4) the amount involved and results obtained

- o (5) the time limitations imposed by the client or circumstances

D. Attorney's Fees

- o Rule 1.5
 - o (a) cont'd
 - o (6) nature and length of the professional relationship with the client
 - o (7) experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - o (8) whether the fee is fixed or contingent.

D. Attorney's Fees

- o Rule 1.5

- o (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 expenses shall also be communicated to the client.

D. Attorney's Fees

- o Rule 1.5

- o (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 (domestic relations matter or criminal case or other law). A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined...upon conclusion of the matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, recovery, and method of determination of payment.

D. Attorney's Fees

- o Rule 1.5

- o (e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - o (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - o (2) the client agrees to the arrangement and the agreement is confirmed in writing; and
 - o (3) the total fee is reasonable.

D. Attorney's Fees

- o Rule 1.5
 - o Burk factors are not exclusive
 - o Expenses must also be reasonable
 - o May require up-front payment, but required to refund the remainder
 - o There are certain types of representation that require disputes to be mediated or arbitrated
 - o If acting as an attorney and a separate business relationship, such must be disclosed to client and you are still subject to Rule 1.5

D. Attorney's Fees

- o Rule 1.5

- o *State ex rel. Oklahoma Bar Association v. Halley*, 1989 OK 138

- o The Court found that an attorney who had a financial relationship with a title company had a duty to disclose that relationship to clients.

- o He was referring clients to one title company, of which he was an owner.

- o While these relationships are common, there is a duty to disclose the relationship and the benefits of such relationship.