

Rules of Engagement: Best Practices for Government Lawyers



Local Government Attorneys' Institute
Friday, November 17, 2023

D. Nichole Davis, Esq.






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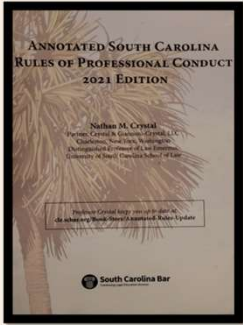
Establishing Your Rules of Engagement Is KEY

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RULES OF ENGAGEMENT(ROE)	
ITEM	DESCRIPTION
1	Rigidly enforce the Rules of Engagement devised and disseminated by higher
2	Leaders will take steps necessary & appropriate for unit's self-defense
3	Use minimum force necessary to control the situation and accomplish the mission
4	Individuals apply common sense
5	Minimize risk to innocent civilians without endangering the mission
6	Train to specific ROE using vignettes and dilemmas



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LAWYER'S OATH

I do solemnly swear (or affirm) that:

I am this qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will govern, govern and defend the Constitution of this State and of its several States.

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

To my clients, I pledge faithfulness, competence, diligence, good judgment and prompt communication;

In opposing parties and their counsel, I pledge fairness, integrity and civility, not only to court but also in all written and oral communications;

I will not practice or maintain any sort of proceeding which appears to me to violate the maintenance and delivery of those duties to be honestly and lawfully under the law of the land, but this obligation shall not prevent me from advising a person engaged in such conduct;

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with that honor and the principles of professional conduct, and will never seek to mislead an opposing party by the judge or jury by a false statement of fact or law;

I will respect and preserve the confidentiality of my client, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

I will maintain the integrity of the legal system and advance no fee prejudicial to the honor or reputation of a party or attorney, unless required by the strictness of the cause with which I am charged;

I will assist the administration or organized by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice;

(So help me God)

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“The best laid plans of mice and men often go awry.”

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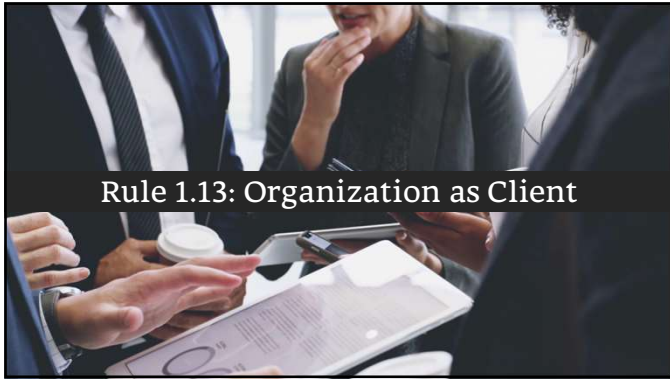
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Rule 1.0: Terminology

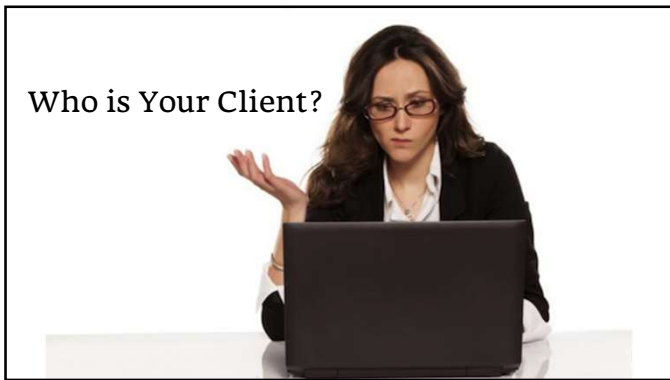
1.0(e) - "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association, or in a legal services organization; lawyers employed **in the legal department** of a corporation, **government**, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association.

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Pursuant to 1.13(a):

(a) A lawyer employed or retained by an organization **represents the organization** acting through its duly authorized constituents.

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Competent representation requires the **legal knowledge, skill, thoroughness and preparation** reasonably necessary for the representation.




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Rule 1.2: Scope of Authority

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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.**

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ANNUAL REPORT OF LAWYER DISCIPLINE IN SOUTH CAROLINA
2022-2023

Alleged Misconduct

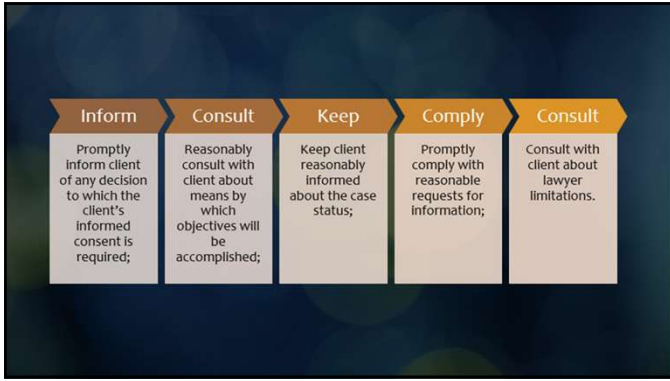
Dishonesty/Deceit/Misrepresentation	22.07%	Less than 1%
Neglect/Lack of Diligence	16.78%	Advertising Conduct
Inadequate Communication	16.36%	Bar Admissions/Disciplinary Matter
Legal Issues only	9.42%	Criminal Conduct
Lack of Competence	4.55%	Discovery Abuse
Civility	3.22%	Domestic Conduct
Unknown	2.81%	Ex Parte Communication
Trust Account Conduct	2.64%	Failure to Pay Fee Dispute
Other Litigation Misconduct	2.64%	Probate Conduct
Fees	2.64%	Real Estate Conduct
Scope of Representation	2.56%	Sexual Conduct (Noncriminal)
Conflict of Interest	1.98%	Supervision
Failure to Deliver Client File	1.82%	Unauthorized Practice
Declining/Terminating Representation	1.40%	
Confidentiality	1.40%	
Failure to Pay Third Party	1.32%	
Other Conduct	1.32%	

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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.

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What Communication is Protected?

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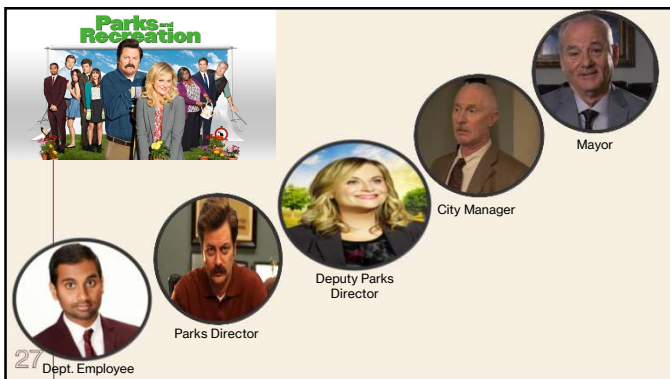
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(a) A lawyer shall not reveal information **relating to the representation of a client** unless the client gives **informed consent**, the disclosure is **impliedly authorized** in order to carry out the representation or **the disclosure is permitted**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

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HOWEVER

There is an emergency exception.

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If the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation **whether or not Rule 1.6 permits such disclosure**, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

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Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

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Rule 4.2: Communication with Person Represented by Counsel



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Rule 4.3: Dealing with Unrepresented Person

I have a Constitutional right to represent myself.

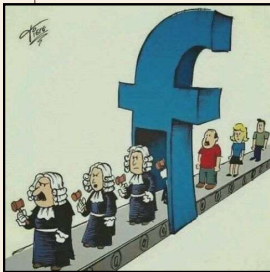


And I have a Constitutional duty to advise you that exercising that right makes you an idiot.



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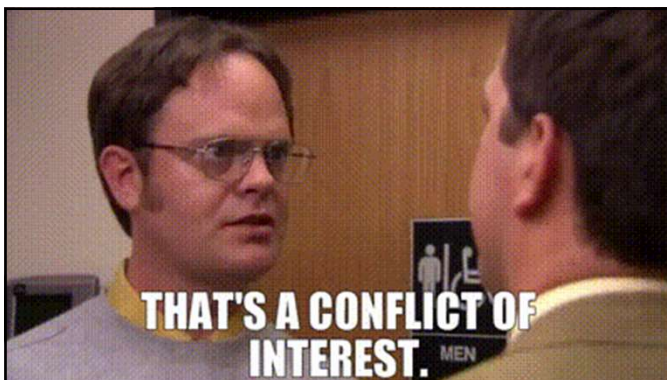
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1.13(g) A lawyer representing an organization **may** also represent any of its directors, officers, employees, members, shareholders or other constituents, **subject to** the provisions of **Rule 1.7.**



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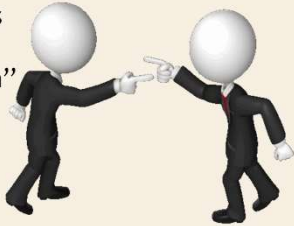


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Rule 1.7: Conflict of Interest - Current Clients

Establishes two types of "concurrent" conflicts

1. "Direct Adversity"
2. "Material Limitation"



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The mechanism for analyzing and pursuing client consent to a concurrent conflict – Rule 1.7(b)

1. Lawyer meets “reasonable belief” threshold;
2. Representation not prohibited by law;
3. Clients are not adverse in the same litigation; **AND**
4. Lawyer obtains clients’ “informed consent”

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Obtaining Informed Consent

1. Should be in writing; and
2. Should include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.

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CAUTION

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict.

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Basic Approach to Conflicts

- Identify the client(s).
- Determine whether a conflict exists.
- If there is a conflict:
 - Do you reasonably believe you can provide competent and diligent representation to each affected client?
 - Is it consentable?
- Has each affected client given informed consent?
- Is it necessary to decline or withdraw from the representation?

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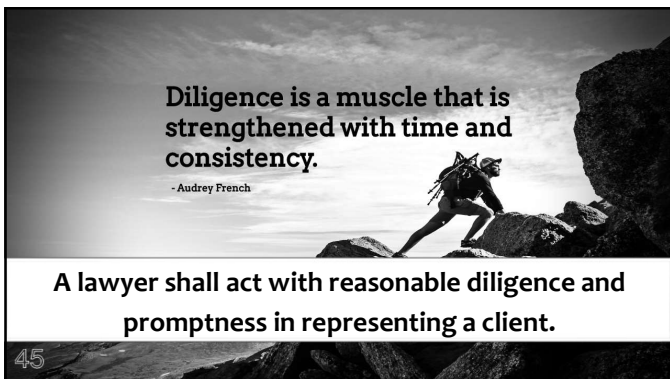
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To prevent neglect of client matters in the event of a practitioner's death or disability, it is the better practice, and the duty of diligence may require, that each lawyer or law firm prepare a plan...

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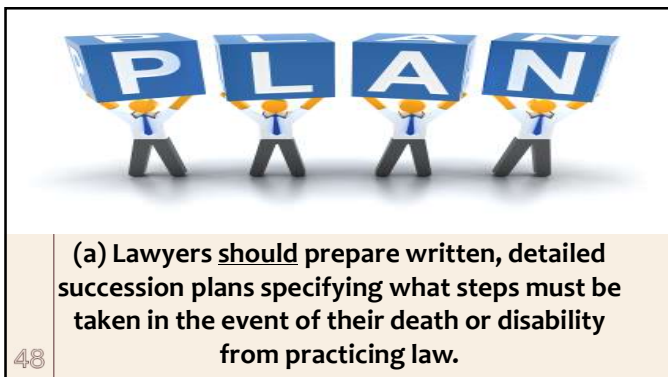
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Rule 1.19: Succession Planning

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(a) Lawyers should prepare written, detailed succession plans specifying what steps must be taken in the event of their death or disability from practicing law.

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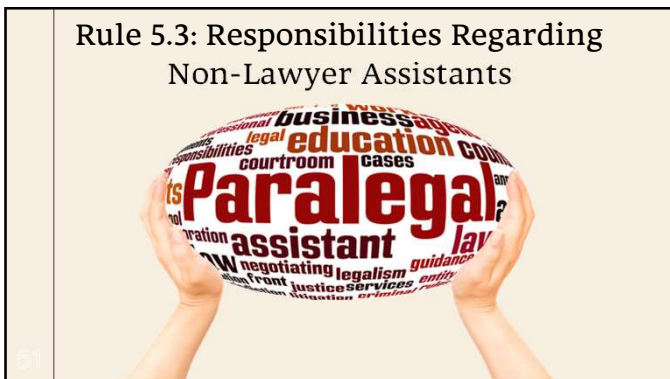
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... A lawyer must give such assistants appropriate **instruction** and **supervision** concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and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

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HANLON'S RAZOR


Never attribute to malice that which is adequately explained by stupidity



Rule 8.3: Reporting Professional Misconduct

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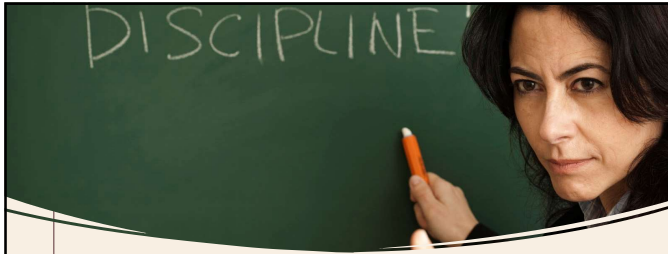
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Rule 8.4: Misconduct

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Rule 7: Grounds for Discipline

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Ethics Advisory Opinions

EAO 23-01: May an attorney include in a fee agreement a provision for payment of the lawyer's hourly rate for the lawyer's fact-witness testimony?

EAO 23-02: If Lawyer allows Associate to work on South Carolina cases as an attorney and even appear in court, would Lawyer be assisting in the unauthorized practice of law?


EAO 23-03: For advertisements of any type when Rule 7.2(d) clearly applies, does the "name" obligation require inclusion of both a first and last name of a responsible lawyer? Would just a surname alone be sufficient for (d) compliance?

EAO 23-04: Since Lawyer represented both Husband and Wife in preparing the previous documents, is it a conflict of interest per Rule 1.9 to prepare the will and power of attorney for Husband with the requested changes?

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QUESTIONS???

COMMENTS???



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Thank You!!

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South Carolina Rules of Professional Conduct

[Rule 1.0](#) – Terminology

[Rule 1.1](#) – Competence

[Rule 1.2](#) – Scope of Authority

[Rule 1.3](#) – Diligence

[Rule 1.4](#) – Communication

[Rule 1.6](#) – Confidentiality

[Rule 1.7](#) – Conflict of Interest

[Rule 1.13](#) – Organization as Client

[Rule 2.1](#) – Advisor

[Rule 4.2](#) – Communication with Person Represented by Counsel

[Rule 4.3](#) – Communication with Unrepresented Person

[Rule 4.5](#) – Threatening Criminal Prosecution

[Rule 5.3](#) – Responsibilities Regarding Non Lawyer Assistants

[Rule 8.3](#) – Reporting Professional Misconduct

[Rule 8.4](#) – Misconduct

Rules for Lawyer Disciplinary Enforcement

[Rule 7](#) – Grounds for Discipline; Sanctions Imposed; Deferred Discipline Agreement.

Ethics Advisory Opinions

[23-01](#) [23-02](#)

[23-03](#) [23-04](#)