

Henry Dane

Subject:

FW: Ethics and Residential Conveyancing Sections Webinar on April 11th: "Complying with the BBO's Title Insurance Premium Disclosure Advisory"



Ethics and Residential Conveyancing Sections Webinar on April 11th

Complying with the BBO's Title Insurance Premium Disclosure Advisory

Please join the REBA Ethics and Residential Conveyancing Sections for a webinar program at 12 noon on Tuesday, April 11th. Ethics Section Co-chair [Henry J. Dane](#), of Dane, Brady & Haydon, LLP, and UPL Committee Co-chair [Conrad J. Bletzer Jr.](#), of Bletzer & Bletzer, will present.

In response to a recent high-profile case involving a REBA member, the BBO's Office of the Bar Counsel issued a memorandum stating that providing title insurance in connection with a real estate closing is subject to Rule 1.8(a) of the Mass. Rules of Professional Conduct. Join Henry and Conrad as they explore practical implications of this innovative interpretation of the Rule, and offer suggestions and text options regarding appropriate disclosures in client engagement letters.

This webcast program, open to all REBA members, is from 12 to 1 pm on Tuesday, April 11, 2023.

To register, RSVP to Nicole Cohen at cohen@reba.net.

REBA WEBINAR
APRIL 11, 2023

COMPLYING WITH THE BBO'S TITLE INSURANCE
PREMIUM DISCLOSURE ADVISORY

Conrad J. Bletzer, Jr. & Henry J. Dane

LIST OF MATERIALS

1. Memorandum: "Important Notice on Title Insurance Disclosures," Henry J. Dane, April 9, 2023
2. "The Cost of Doing Business (With a Client)," Robert M. Danizewski, Assistant Bar Counsel (undated)
3. Rule 1.8(a), Mass. Rules of Professional Conduct
4. Rules 1.8 (a) and 5.7 (annotated), Annotated Model Rules of Professional Conduct, 9th ed. (2019), American Bar Association
5. Board of Bar Overseers, Admonition 23-01
6. Model "Notice of Availability of Owner's Title Insurance (hjd 4/9/23)
7. Model initial client letter for purchase with mortgage (hjd 4/9/23)

IMPORTANT NOTICE ON TITLE INSURANCE DISCLOSURES

In a recent, but undated Memorandum from the Office of Bar Counsel, it was proposed that providing title insurance in connection with a real estate closing is subject to Rule 1.8(a) of the Mass. Rules of Professional Conduct. The practical implications of this innovative interpretation of the Rule are that:

1. The terms of the transaction must be fully disclosed in an understandable manner to the client in writing;
2. the client must be advised in writing sufficiently in advance of the closing of the desirability of seeking the advice of independent counsel and given a reasonable opportunity to do so; and
3. the client must give "informed consent" in writing to the "essential terms of the transaction" and the lawyer's role "including whether the lawyer is representing the client in the transaction." In the view of Bar Counsel, the "essential terms of the transaction" include disclosure of the portion of the title premium received by the attorney.

The March 7 issue of "BBO Sign Posts" warns that:

Whether it's the sale of title insurance or any other business transaction with a client, lawyers who fail to comply with the disclosure and consent provisions of Mass.R.Prof.C 1.8(a) risk disciplinary action. . . . Among other things, Rule 1.8 requires that the terms of the transaction be objectively fair and reasonable, that lawyers make full disclosure of the terms in writing, that they advise the client of the desirability of seeking independent counsel, and that they obtain the client's informed consent in writing.

In a recent Admonition issued to a member of the Association, Bar Counsel said that the attorney

did make certain disclosure to her clients . . . with regard to the sale of title insurance. For example, the closing Disclosure indicated that she and [the title insurance company] were jointly receiving the fee for a title insurance product. Additionally, she obtained her clients' written consent as to the advisability of seeking 'independent advice' with respect to title insurance. However, these disclosures were not fully compliant with Rule 1.8, including, because they did not clearly and fully set forth the essential terms of the transaction in writing; they did not explain in writing the lawyer's role in the transaction; and they did not mention specifically the advisability of seeking independent *legal* advice.

While REBA and its Ethics Section do not agree with the novel interpretation of the Rule which is contrary to well-established practice in Massachusetts, it appears that this issue has been adopted by Bar Counsel as an enforcement priority, we advise our members to take reasonable efforts to comply.

We therefore suggest that you provide your clients with a disclosure along the following lines at the earliest opportunity in the progress of any transaction, whether it be an engagement letter or a letter of initial contact in which you inform the client of the basic transaction information (this can be cut and pasted into your own document):

SAMPLE TITLE INSURANCE DISCLOSURE

Date: _____ 2023

As part of your real estate transaction, if there is a lender you will be required to pay the premium cost of a title insurance policy which insures the lender against losses it may incur as a result of title problems that may affect its ability to realize on its collateral in the event of default. This policy insures only the lender in the amount of the mortgage until the loan is paid off, usually as a result of a refinance or sale of the property. This policy provides you with no benefits but makes it possible for the lender to sell your loan on the secondary market. You may also be offered the opportunity to obtain an Owners policy of title insurance, which will insure you as owner of the property against covered title issues that may arise at any time for as long as you own the property. This policy will normally be in the amount of the purchase price in the event of a purchase, or in the amount of the appraised value of the property in the event of a refinance. Because the potential duration of the Owners policy is longer than the life of the loan, and the higher amount of coverage, there is an additional premium cost for the Owners' policy, but, if there is a loan which is closed at the same time, you will receive a credit for the premium payable on the policy insuring the lender.

In addition to being the settlement agent for the transaction, we are an agent for the title insurance company providing the policies of title insurance, and for title and administrative services that we provide in connection with both the required and optional title insurance policies we receive, as a commission, an amount equal to 70 to 80% of the premium. The actual amount of the premiums (including our commission) will be stated in your Settlement Statement or CD. You are advised that the portion of the premium received by us as agent does not affect to cost to you. If you have any questions with regard to the foregoing, you are advised to seek independent legal advice from an attorney of your choice. In addition, please be advised that, if this transaction involves a mortgage

loan on the property, our client, with regard to the mortgage transaction is the lender and not the buyer.

Please sign and date below to acknowledge you understand and agree to the foregoing.

Buyer/Borrower #1

Buyer/Borrower #2

The Cost of Doing Business (With a Client)

By Robert M. Daniszewski
Assistant Bar Counsel

Trust is a hallmark of a healthy attorney-client relationship. A lawyer earns a client's trust by demonstrating competence and diligence, engaging in regular communications, protecting confidential information, and otherwise meeting or exceeding the standards of the profession as set forth in the Rules of Professional Conduct. Although a client may (or may not) tolerate a lawyer's occasional imperfections, no one who strives to be a good lawyer can afford to jeopardize a client's trust by allowing competing interests to interfere with the loyalty and independence of judgment that a healthy attorney-client relationship requires.

One means by which a competing interest can affect the attorney-client relationship is when a lawyer undertakes to engage in some form of business or commercial transaction with a client. The risks posed by superimposing a business relationship on top of an existing client relationship are obvious: When a lawyer and client enter into a business or commercial transaction, they become, actually or potentially, opposing parties, whether that means buyer and seller, borrower and lender, or co-participants in a joint venture who at some point may assert claims against each other relating to how the enterprise is funded, managed, or conducted. At the very least, the existence of such an overlapping business relationship between the lawyer and client requires a degree of mental compartmentalization for both parties. But even where there's no ambiguity as to when the lawyer is putting on or taking off the "lawyer hat," ancillary business relationships can still be destabilizing to the attorney-client relationship by making it more difficult for the client to perceive the lawyer as a completely loyal and disinterested protector of the client's interests.

Because of the risks inherent to engaging in a business transaction with a client, the Massachusetts Rules of Professional Conduct (like the ABA Model Rules on which they're based) only permit such transactions to proceed if certain strict conditions are met. Specifically, Mass. R. Prof. C. 1.8(a) prohibits a lawyer from entering into a business transaction with a client, or knowingly acquiring an ownership or other pecuniary interest adverse to a client, unless:

- (1) the transaction and terms are objectively fair and reasonable and are fully disclosed in a writing that can be reasonably understood;
- (2) the client is advised in writing to seek the advice of independent counsel in regard to the transaction; and
- (3) the client gives written consent to the terms of the transaction, having been duly informed of the lawyer's role in it, including whether the lawyer is purporting to represent the client in the transaction itself.¹

¹ As the comments to Rule 1.8(a) note, if it is expected that the lawyer will actually be representing the client in the transaction, there is an even greater risk that it will impair the attorney-client relationship. In this regard, it should be noted that, even if the lawyer complies with the requirements of 1.8(a) in embarking on a

The first requirement – that the transaction be fair and reasonable to the client – is clearly intended to prevent the lawyer from taking advantage of the client in the business relationship. By virtue of this provision, a lawyer is not at liberty to negotiate the best deal available from the client, as would generally be the case in an arm’s-length business setting. This restriction is important because a client may assume that the lawyer is being fair and reasonable in negotiating the terms of the arrangement *because of* the trust that formed as a result of the attorney-client relationship. Rule 1.8(a)(1) essentially prohibits lawyers from leveraging that trust in order to sweeten an ancillary business deal. This provision also makes it less likely that the client will, in the future, come to believe that the terms of the transaction unfairly favored the lawyer, which could also damage the attorney-client relationship.

The second and third requirements of Rule 1.8(a) – whereby the lawyer must prompt the client to seek independent legal advice on the transaction and memorialize and secure the client’s written consent to terms of the deal – combine to ensure that lawyers do not enter into business or commercial transactions with a client impulsively or as a matter of routine. Rather, these provisions are clearly meant to call both parties’ attention to the fact that business dealings between a lawyer and client represent a departure from the norm and must be approached cautiously, if at all.²

Although Rule 1.8(a) does not define the term “business transaction,” the comments give examples of transactions that are within the ambit of the rule. Among those mentioned in the comments are loans between lawyers and clients. Lawyers who have borrowed money from clients without complying with the requirements of Rule 1.8(a) have received discipline ranging from admonitions to lengthy suspensions. A major factor in determining the appropriate sanction within that range has been whether the terms of the transaction were fundamentally fair to the client. Compare AD 09-09, 25 Mass. Att’y Disc. R. 668 (2009) (lawyer received private discipline for borrowing \$5,000 from client without complying with Rule 1.8(a)’s disclosure and consent requirements or advising client to seek independent counsel, but on terms that were otherwise not unfair); with Matter of Ferris, 9 Mass. Att’y. Disc. R. 110 (1993) (three-year suspension for lawyer who induced trustee clients to loan him \$50,000 on terms that were unfavorable to trust).

The comments to Rule 1.8 also clarify that a lawyer’s purchase of property from a client falls within the scope of the rule. Mass. R. Prof. C. 1.8, Comment [1]. The case of Matter of Duggan, 22 Mass. Att’y Disc. R. 305 (2006), serves as good illustration of how such a purchase transaction can infect and derail a simultaneous legal representation. In Duggan, a lawyer

business relationship with a client, the transaction may nevertheless be prohibited as a conflict under Rule 1.7(a)(2) for which the lawyer cannot reasonably request a waiver under Rule 1.7(b)(1). In other words, Rule 1.8(a) does not supersede or provide a safe harbor from Rule 1.7.

² The comments to Rule 1.8(a) make clear that these requirements do not apply to business transactions with a client that are, in fact, in the ordinary course of the client’s business, such as where a lawyer for a fast food franchise buys a sandwich and fries from the restaurant like any other customer. See Mass. R. Prof. C. 1.8(a), Comment [1]. Lawyers are thus free to engage in ordinary consumer transactions with entities that *happen to be* clients, both because there is no real risk of overreaching in those situations and because it would be impracticable for lawyer to comply with the requirements of Rule 1.8(a) in those situations. *Id.*

representing a couple facing foreclosure engaged in a purchase and lease-back arrangement with them that was never fully reduced to writing or independently reviewed by separate counsel. Moreover, the lawyer imposed terms that, as a practical matter, the clients would only be able to meet through resolution of their related problems with the IRS and the Massachusetts DOR, which the lawyer was also purporting to handle. This presented a conflict insofar as the lawyer had a personal financial stake in the outcome of representation. As it happened, after the lawyer purchased the clients' house at foreclosure, the couple balked at his rent demands, prompting him to commence eviction proceedings. Unsurprisingly, the couple successfully sued the lawyer for his various breaches of duty in this fiasco. Based on his violations of Rule 1.8(a) and his impermissible conflicts of interest under Rule 1.7, the lawyer received a six-month suspension.

As seen in cases such as Duggan, a Rule 1.8(a) "business transaction" can come about as a direct offshoot of the lawyer's legal representation of the client. However, it should be noted that Rule 1.8(a) does *not* apply to "ordinary fee arrangements between client and lawyer." Those are covered by Rule 1.5.³ Therefore, at least at the time of the initial engagement, it is not incumbent on a lawyer to advise a prospective client to seek independent legal advice on whether to retain the lawyer or on the reasonableness of the lawyer's fees. However, there are situations in which Rule 1.8(a) applies to an agreement concerning a lawyer's own fees. First, to the extent that the legal fee includes, or is to be secured by, an interest in the client's business or other property (not including a cash retainer, of course), the transaction *is* considered a "business transaction" for purposes of Rule 1.8(a). Thus, in Matter of Balliro, 29 Mass. Att'y Disc. R. 11 (2013), a lawyer arranged for and prepared mortgage documents to secure his clients' payment of legal fees without complying with the provisions of Rule 1.8(a). The lawyer also engaged in other misconduct in connection with the transaction, including multiple conflicts of interest, resulting in a stipulated suspension of a year and a day.

The other exception is where a lawyer seeks to *change* the financial terms of the representation that is already underway. That situation is generally regarded as coming within the ambit of Rule 1.8(a) unless the only change in the terms of the representation is an increase in the applicable hourly rate, the increase will only operate prospectively, and the client is given sufficient advance notice of the increase. Cf. Matter of Weisman, 30 Mass. Att'y Disc. R. 440 (2014) (lawyer who renegotiated existing fee agreement on terms later found to be unfair to his organizational client suspended for one year for this and other misconduct). See also Board of Bar Overseers, *Massachusetts Bar Discipline: History, Practice and Procedure*, Ch. 11, at 227-28 and n. 55 (2018).

An entirely separate category of "business transactions" that is expressly within the scope of Rule 1.8(a) is "law-related services." These are defined in Rule 5.7(b) as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

³ Among other things, Rule 1.5 prohibits lawyers from charging clearly excessive fees, requires the use of written fee agreements in most instances, and regulates what must and may be included in a contingent fee agreement.

Whether a lawyer either directly provides law-related services to a client (i.e., under the rubric of the lawyer's representation of the client), or provides the services through an entity controlled by the lawyer (individually or with others), the lawyer must comply with all of the requirements of Rule 1.8(a). Mass. R. Prof. C. 5.7, Comment [5]. In fact, Massachusetts lawyers should generally assume that *all* of the Rules of Professional Conduct apply to the provision of law-related services, even though the rule authorizes lawyers, in certain limited circumstances involving the provision of law-related services by a separate entity, to disclose to the client, explicitly and in writing, that the services are not legal services and that the rules of professional conduct do not apply. However, even where that exception is available with respect to other Rules of Professional Conduct, Rule 1.8(a) will still apply where the client is being referred to a separate entity controlled in whole or in part by the lawyer. See Mass. R. Prof. C. 5.7, Comment [5].

Comment [9] to Rule 5.7 provides a non-exclusive list of activities that constitute law-related services if provided to a client by a lawyer or any entity controlled by a lawyer. They include title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

Real estate conveyancers should take particular note of the inclusion of the sale of title insurance as a law-related service under Rule 5.7. The comments to Rule 1.8 also specifically refer to the sale of title insurance as a law-related service that is within the scope of that rule. See Mass. R. Prof. C. 1.8, Comment [1]. **Therefore, Massachusetts lawyers must comply with the provisions of Rule 1.8(a) in the sale of title insurance, even though Rule 1.8(a) imposes disclosure and consent requirements that go beyond what is currently required under applicable federal or state mortgage regulations.** Accordingly, Massachusetts conveyancers must (a) disclose to the buyer the cost of the policy; (b) advise the clients of the desirability of seeking independent legal advice as to the purchase of the policy; (c) clearly inform the clients of the lawyer's role in the sale of the policy (which presumably includes disclosure of the lawyer's share of the policy commission); *and* (d) secure the clients' written consent to the terms of the transaction.

Moreover, because Rule 1.8(a)(2) requires the lawyer to give the client a *reasonable opportunity* to seek the advice of independent counsel in the transaction, the client needs some advance notice in making an informed decision to purchase title insurance. It is not sufficient to secure the client's written consent to the purchase of owner's title insurance coverage for the first time at or shortly before the closing, by presenting the client with a form to be signed along with the other purchase and mortgage documents. As discussed above, business transactions with a client, of which the sale of title insurance is clear example, cannot be routinized in this fashion. To do so invites discipline. Seller beware.

Regardless of practice area, Massachusetts lawyers would be well advised to exercise extreme caution with respect to any arguable "business transaction" with a client. Even if the lawyer can avoid running afoul of Rule 1.8(a), and the transaction does not give rise to an impermissible conflict of interest under Rule 1.7, an ancillary business relationship may

nevertheless cause friction in the attorney-client relationship and erode the client's trust and confidence in the lawyer.

As in all matters, bar counsel encourages Massachusetts lawyers to contact our Ethical Helpline to obtain direct, personal guidance on interpreting and applying the Rules of Professional Conduct to any ethical dilemma that may arise. The Helpline is open on Mondays, Wednesdays, and Fridays from 2:00 to 4:00 p.m. Please call us at 617-728-8750.

immediate basis and whether the situation involves creating or terminating a relationship between the parties.

A particularly important factor in determining the appropriate representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be determined that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer to disclose to the other client confidential information relevant to common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use confidential information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that confidential information will be shared and that the lawyer will withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and thus that the clients may be required to assume greater responsibility for decisions than when each client is independently represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the joint representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client. As to lawyers representing governmental entities, see Scope [4].

[35] 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. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise

the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person, unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not, for his own personal benefit or the benefit of any person closely related to the lawyer, solicit any substantial gift from a client, including a testamentary gift, or prepare for a client an instrument giving the lawyer or a person closely related to the lawyer any substantial gift, including a testamentary gift, unless the lawyer or other recipient of the gift is closely related to the client. For purposes of this Rule, a person is "closely related" to another person if related to such other person as sibling, spouse, child, grandchild, parent, or grandparent, or as the spouse of any such person.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

The Supreme Judicial Court order dated June 10, 2020, provided: "When a non-profit organization that provides free legal and other services to indigent clients has received

Ninth Edition

Annotated Model Rules of Professional Conduct

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*Center for Professional Responsibility
American Bar Association*

www.americanbar.org

CLIENT-LAWYER RELATIONSHIP

Rule 1.8

Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
- (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

COMMENT

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for

example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently repre-

with principal as or on behalf of adverse party in transaction connected with agency relationship).

As explained in Comment [1], Rule 1.8(a) does not apply to ordinary client-lawyer fee arrangements, which are governed by Rule 1.5, or to standard commercial transactions between a lawyer and client “for products or services that the client generally markets to others.” It does apply, however, to lawyers who sell their clients goods or services related to the practice of law, such as title insurance or investment services, even if the transaction is not closely related to the subject matter of the representation. See *In re Spencer*, 330 P.3d 538 (Or. 2014) (lawyer acted as real estate broker for bankruptcy client).

If Rule 1.8(a) applies, paragraph (a)(1) requires that the transaction be objectively fair and reasonable to the client. See *In re Miller*, 66 P.3d 1069 (Wash. 2003) (rejecting “sophisticated client” defense); ABA Formal Ethics Op. 00-416 (2000) (lawyer may purchase accounts receivable from client and pursue collection for lawyer’s benefit as long as transaction fair and reasonable to client and Rule 1.8 conditions met). Paragraph (a)(1) also requires that the terms of the transaction be fully disclosed in a manner reasonably understandable to the client. See *Fla. Bar v. Ticktin*, 14 So. 3d 928 (Fla. 2009) (press release stating lawyer would assume management of indicted client’s business not sufficient disclosure). Paragraph (a)(2) requires that the client be advised in writing of the desirability of seeking the advice of independent counsel and be given a reasonable opportunity to do so; the fact that a client is independently represented in a transaction will be relevant in determining whether the transaction was fair and reasonable. Paragraph (a)(3) requires informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction. See *In re Trewin*, 684 N.W.2d 121 (Wis. 2004) (clients’ signatures on loan documents not sufficient consent).

COMMON SITUATIONS

Loans involving lawyers and clients are among the most common situations in which Rule 1.8(a) applies. See, e.g., *Calvert v. Mayberry*, No. 16SC413, 2019 WL 1510451 (Colo. Apr. 8, 2019) (rebuttable presumption that Rule 1.8(a) violation renders contract void as against public policy); *In re Torre*, 127 A.3d 690 (N.J. 2015) (lawyer solicited unsecured loan from long-time client); *In re Crary*, 638 N.W.2d 23 (N.D. 2002) (lawyer took loans from elderly client and sold her annuities with undisclosed commissions). Also typical are sales and investment transactions that unfairly favor the lawyer or in which the lawyer fails to provide adequate disclosure. See, e.g., *In re Davis*, 740 N.E.2d 855 (Ind. 2001) (lawyer persuaded client to invest settlement funds in lawyer’s business); *In re Lupo*, 851 N.E.2d 404 (Mass. 2006) (lawyer bought real estate from elderly aunt for substantially less than fair market value).

Rule 1.8(a) also applies to the use of client funds for a lawyer’s own purposes. See, e.g., *In re Viehe*, 762 A.2d 542 (D.C. 2000) (lawyer entrusted with blank checks for real estate purchase wrote checks for personal use); *In re Letellier*, 742 So. 2d 544 (La. 1999) (lawyer with power of attorney for elderly client loaned client funds to lawyer’s corporation); *In re Severson*, 860 N.W.2d 658 (Minn. 2015) (lawyer used client

LAW FIRMS AND ASSOCIATIONS

Rule 5.7

Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Definitional Cross-References

"Knows" See Rule 1.0(f)

"Reasonable" See Rule 1.0(h)

State Rules Comparison

<http://ambar.org/MRPCStateCharts>

ANNOTATION

GENERAL PROVISIONS

Rule 5.7 deals with the ethical obligations of lawyers providing "law-related," as opposed to "legal," services. The provision of law-related services by a lawyer can create confusion insofar as recipients of these services, who are business customers, might reasonably assume that the relationship between them and the lawyer is a lawyer-client relationship with its attendant ethical protections. See Cmt. [1]. The lawyer, on the other hand, might assume that because the services provided are not "legal services," she does not owe business customers the same ethical duties she would owe law clients. Rule 5.7 places the burden upon the lawyer to make clear to the business customer that the protections of a lawyer-client relationship do not

Board of Bar Overseers
Case No.: **ADMONITION NO. 23-01**
BBO File No.:
Parties:
Date:

CLASSIFICATIONS:

Failure to Communicate Adequately with Client [Mass. R. Prof. C. 1.4(b)]
No Written Fee Arrangement [Mass. R. Prof. C. 1.5(b)(1)]

SUMMARY:

The respondent was an associate at a law firm that specialized in real estate conveyancing. In the spring of 2020, she undertook to serve as buyer's counsel and closing attorney for a client's purchase of a house. At the time the respondent undertook the representation, she orally informed the client that she would be charging \$500 for the representation but did not present the client with a fee agreement or other writing setting forth the scope and financial terms of the representation. The respondent also failed to inform the client that the firm would only represent him if he agreed to purchase owner's title insurance.

Nine days before the closing date, the client began expressing concern over the cost of owner's title insurance coverage. Noting that such coverage was expressly "optional," the client advised the respondent that he did not wish to purchase it. However, the respondent then informed the client that, without the inclusion of an owner's policy, her firm would be unable to represent him in the transaction. The respondent informed the client that, due to the recent shutdown of Massachusetts courthouses due to the Covid 19 pandemic, her firm could not examine the probate files of certain prior owners of the property in order to certify that good title had passed from those estates to successor owners. Therefore, out of concern for its own potential liability given its inability to certify title, the firm was unwilling to proceed with the transaction unless the client was otherwise protected through the purchase of title insurance.

Not wishing to change counsel, which might have necessitated an extension of the closing date, the client reluctantly agreed to purchase the owner's coverage. The closing took place on schedule and without further incident.

By failing to provide the client with a fee agreement or other writing setting forth the scope of the representation and the financial terms thereof at the commencement of the representation or within a reasonable time thereafter, the respondent violated Mass. R. Prof. C. 1.5(b)(1). By failing to disclose and explain to the client in a timely manner her firm's unwillingness to represent the client if he elected not to purchase owner's title insurance coverage, the respondent violated Mass. R. Prof. C. 1.4(b).

The respondent was admitted to the bar in 2013 and has no prior record of discipline. The respondent received an admonition for her misconduct conditioned upon her agreement to refund to the client the net cost of the owner's title insurance coverage.

NAME OF LAW FIRM

ATTORNEYS AT LAW
ADDRESS

PHONE/FAX/EMAIL

**NOTICE OF AVAILABILITY
OF OWNER'S TITLE INSURANCE**

Date:

To:

Property Address:

A Mortgagee's Policy of Title Insurance insuring the title to the property you are buying or refinancing is being issued to your mortgage lender in the amount of the mortgage loan, but that policy does not provide title insurance coverage to you as the owner of the property.

At the time of the Closing, you have an option of obtaining an ALTA owner's policy of title insurance or an Extended Coverage Protection Owner's Policy of title insurance which provides title insurance coverage to you. The additional cost to you for an Owner's Policy of Title Insurance in the amount of \$ _____ is \$ _____, and the cost for an Extended Coverage Protection Owner's Policy of title insurance in the same amount is \$ _____, if you request it at this time. Depending on the arrangement we have with the particular title insurance company issuing these policies, we receive between 70 and 80% of the premium charged for our services as title agent.

This will confirm that you have been advised to seek, and have been provided with the opportunity to obtain, independent legal advice with regard to the purchase of an Owner's Policy of Title Insurance.

NAME OF LAW FIRM

- I/we do request an Extended Coverage Protection Owner's Policy of Title Insurance.
- I/We do request an Owner's Policy of Title Insurance.
- I/We do not request an Owner's Policy of Title Insurance.

When representing a Mortgage Lender for a Purchase

NAME OF LAW FIRM
ATTORNEYS AT LAW
ADDRESS
PHONE/FAX/EMAIL

DATE, 2023

BORROWER
ADDRESS

Re: Property Address
Mortgage Lender

Dear BORROWER,

Our law firm represents your mortgage lender for the purchase of the property shown above. One of our staff will be in touch with you to obtain any necessary documents or information and to make arrangements for the closing which will take place at our office at ADDRESS. If you have your own attorney for this transaction, please let us know, provide us with their name, telephone and email information, and send them a copy of this letter.

Even if we have worked with you as the purchaser of this property, as, for instance, preparing or reviewing your Purchase and Sale Agreement, our attorney-client relationship for the purposes of the mortgage is with the lender.

We will need the following from you at or before the closing:

1. Picture ID for all persons who will be signing documents at the closing;
2. Social Security number for each borrower;
3. A current insurance binder naming the lender as mortgagee "its successors and assigns as their interests may appear" (ISSATIMA); if you have any questions about this, please have your insurance agent contact us;

Any funds in addition to the net amount of the mortgage should be sent to our IOLTA bank account to arrive no later than noon on the last business day prior to the closing. These funds should be sent only to the following account:

NAME OF BANK
ADDRESS OF BANK;
ABA Routing Number:

Account Name:TITLE OF ACCOUNT
Account No.:

Please note that, for security reasons, we will never give and will not honor wire instructions or changes to those previously given by means of email, and we advise you to do the same.

Any policy of Title insurance required by the lender will be paid for by you as part of your closing costs as stated on your Closing Disclosure. This policy insures only the lender in the event that it suffers a loss on account of a title defect in connection with a foreclosure of the mortgage. You also have the option to obtain such a Policy which provides similar coverage for you as the owner at an additional cost if you so request. You will be informed of the additional premium cost at the time you receive your Closing Disclosure. Depending on the arrangement we have with the particular issuer of the policy, we receive between 70 and 80% of the premium charged for our services as title agent.

You are advised to seek independent legal advice with regard to the advisability and cost of obtaining an Owners' policy of Title Insurance.

Please call or email with any questions.

Yours sincerely,

Your Staff Contact: _____
Telephone: _____
email: _____
OUR FILE NO. cl. _____

BECAUSE OF THE POTENTIAL FOR FRAUD, PLEASE DO NOT HONOR ANY WIRE INSTRUCTIONS SENT TO YOU BY E-MAIL INCLUDING THOSE THAT APPEAR TO COME FROM OUR OFFICE. IF YOU REQUEST THAT ANY FUNDS BE SENT BY WIRE, WE CAN ONLY ACCEPT YOUR INSTRUCTIONS IF GIVEN ON OUR OWN FORM. NEITHER ORIGINAL INSTRUCTIONS NOR ANY CHANGES WILL BE ACCEPTED WHETHER BEFORE OR AFTER THE CLOSING IF DELIVERED BY E-MAIL (EITHER OPEN OR SECURE).