

Session 4
Abiding by the Rules of the Games [Legal Ethics Session]

Wednesday, July 14, 2021
1:20pm – 2:20pm CT

The panelists will discuss the Model Rules of Professional Conduct as they apply to several default servicing legal representation issues, including (1) ethical considerations in a flat fee arrangement; (2) fiduciary duties as they apply to the attorney client relationship and acting as a trustee; (3) ethical issues surrounding firm and file transfers; (4) how to manage conflicts of interest when faced with representing multiple lienholders on the same property; and (5) issues surrounding identification and responsibilities of substance abuse amongst attorneys.

Billing and Ethical Considerations in Flat Fee Arrangements

- ABA [Model Rule 1.5](#)
 - [Official Comments](#)
 - Noteworthy state variations
- “Reasonableness” of flat fee arrangement
- Application to attorney withdrawals or discharges
- Are written retainer agreements required?
- Billing/Collecting flat fees
 - When is the flat fee earned?
 - Retainers
 - Milestone billing

Trustee Jurisdictions: The Relationship Between State Law Fiduciary Duties and the Attorney/Client Relationship

- Distinction between the attorney-client fiduciary relationship and the fiduciary duties owed by a Trustee
 - Duties of fairness and impartiality
 - Duties defined by the governing instrument
- [ABA Model Rule 5.7](#)
- Conflicts of interest
- Protecting the attorney-client privilege

Transferring Files from One Firm to Another: Ethical Considerations

- Responsibilities of a Lawyer Seeking to Terminate Representation
- Sale of Law Practice
- Accepting Transfer Files & Managing Transfers
 - What Constitutes the Client’s “File”
 - Initial Triage
 - Communications & Other Considerations

All content, presentations, handouts, emails, website content, mobile app content, etc. provided by USFN in its publications, in connection with USFN events and otherwise (“Content”) is for educational purposes only, and should not be considered legal advice or a legal opinion. Every matter is different and poses a unique set of facts and circumstances. Legal advice can only be provided after analysis of all the facts and circumstances of a particular matter. In addition, all Content is current only through the date it is provided, and may change after that date due to changes in the law, custom, industry standards or best practices. We suggest that you consult with your USFN local counsel if you wish to retain a firm to provide legal advice on a particular issue or matter. Please do not hesitate to contact USFN for contact information for our firms for that purpose.

Conflicts of Interest – Representing 1st and 2nd Lien Holders

- What are conflicts of interest – definition
- Types of conflicts:
 - Deeds of Trusts/Mortgages recorded out of order
 - Prior Deeds of Trust/Mortgages not paid in full or released
 - HELOC's
- What do the Rules of Ethics say?
 - [Model Rule 1.7](#)
- How do client contracts handle conflicts in their contracts?
- Process requirements for handling potential/actual conflicts of interest
 - Waivers

Ethics and Substance Abuse

- Is it really a problem?
 - Overall 20.6% of attorneys as opposed to highly educated population at large suffer from some sort of alcohol excess drinking, including over twice as many lawyers verses doctors
 - Studies show attorneys suffer from symptoms of depression, anxiety, and stress at a significant rate(See Krill, Johnson, Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 Journal of Addiction medicine, 46 (2016))
- Symptoms:
 - Changes in sleep patters
 - Sad or more quiet than normal
 - Weight loss/gain
 - Decreased ability to concentrate
 - Decreased energy
 - Isolation
 - Irritability
 - Potential physical symptoms such as headaches, stomach issues, etc.
 - Specific attorney symptoms:
 - Unreturned phone calls
 - Unopened mail
 - Late for appearances, meetings, etc.
 - Increased sick days
- Ethical Rules
 - [Model Rule 1.1](#) – Duty to provide competent representation
 - [Model Rule 1.3](#) – Duty to act with diligence and promptness
 - [Model Rule 1.16](#) – Duty to decline or terminate representation/material impairment
 - [Model Rule 5.1](#) Supervising lawyer also responsible if:
 - Know of the conduct
 - Fails to take remedial action
 - See [Formal Opinion 03-429](#) requiring close scrutiny once an impairment becomes known

All content, presentations, handouts, emails, website content, mobile app content, etc. provided by USFN in its publications, in connection with USFN events and otherwise ("Content") is for educational purposes only, and should not be considered legal advice or a legal opinion. Every matter is different and poses a unique set of facts and circumstances. Legal advice can only be provided after analysis of all the facts and circumstances of a particular matter. In addition, all Content is current only through the date it is provided, and may change after that date due to changes in the law, custom, industry standards or best practices. We suggest that you consult with your USFN local counsel if you wish to retain a firm to provide legal advice on a particular issue or matter. Please do not hesitate to contact USFN for contact information for our firms for that purpose.

- [Model Rule 8.3](#) – Reporting is required if:
 - Attorney knows another has violated the rules, AND
 - Violation raises a “substantial question” as to the attorney’s fitness
 - See [Formal Opinion 03-431](#) which provides assistance of what rises to the level of “substantial questions” as to an attorney’s fitness
- Should have a policy addressing the topic

All content, presentations, handouts, emails, website content, mobile app content, etc. provided by USFN in its publications, in connection with USFN events and otherwise (“Content”) is for educational purposes only, and should not be considered legal advice or a legal opinion. Every matter is different and poses a unique set of facts and circumstances. Legal advice can only be provided after analysis of all the facts and circumstances of a particular matter. In addition, all Content is current only through the date it is provided, and may change after that date due to changes in the law, custom, industry standards or best practices. We suggest that you consult with your USFN local counsel if you wish to retain a firm to provide legal advice on a particular issue or matter. Please do not hesitate to contact USFN for contact information for our firms for that purpose.