

VATC

# Ethics & Professional Responsibility

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Michael Kennedy, Bar Counsel  
June 8, 2022



# Outline

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- Update on proposed rule changes.
- Review the 7 Cs of Legal Ethics.
- Scams.
- Dual representation.
- Escrow Agent.
- Other.



# Proposed Rule on Malpractice Insurance

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- Vermont lawyers are not required to carry malpractice insurance.
- Vermont lawyers are not required to disclose to their clients whether or how much malpractice insurance they carry.
- Assistance panel case from 2019.



# Proposed Rule on Malpractice Insurance

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1. Require lawyers to carry malpractice insurance.
2. New Hampshire model.
3. Massachusetts model.
4. Maintain status quo.



# Mandatory Malpractice

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- Oregon & Idaho.



# New Hampshire Model

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- Rule 1.3 of the NH Rules of Professional Conduct.
- At outset of the representation, lawyers who do not carry at least \$100K/\$300K must inform client.
- Client must acknowledge notification in writing.
- If coverage lapses or falls below limits, must notify clients and have them acknowledge notification in writing.
- 7 states.



# Massachusetts Model

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- Lawyers disclose insurance status on license renewal form.
- Board of Bar Overseers makes status publicly available on its website.
- 17 states.



## Random Other

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- Illinois. Lawyers without coverage must take additional 4 hours of specialized CLE each reporting period.
- Montana: Lawyers without coverage can't participate in bar's lawyer referral program.



# Vermont Survey

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- The committee surveyed the Vermont bar.
- 269 responses.



# Are you covered?

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- Yes: 80%
- No: 20%



# Should lawyers without be required to disclose?

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- Yes: 76%
- No: 24%



# Should lawyers be required to carry?

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- Yes: 63 %
- No: 27 %



# Blog Post – More Info

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- Blog post.
- General Comments
- What are the reasons not to require coverage?
- What are the reasons not to require disclosure?



# Committee Recommends Massachusetts Model

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- Lawyers on active status must disclose on license renewal.
- Exempt: government lawyers.
- Exempt: in-house counsel.
- Court Administrator's Office will make status public.
- Won't become public until 2<sup>nd</sup> year of license renewals



# Committee Recommends Massachusetts Model

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- PRB and VBA Board approve.
- Court has published proposal for comment.
- Comments due June 20, 2022.
- Email [michael.kennedy@vermont.gov](mailto:michael.kennedy@vermont.gov)



# Rule Changes

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- Proposed Amendments to the Vermont Rules of Professional Conduct.
- [Blog post and video outlining the changes.](#)



## V.R.Pr.C. 1.2

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- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, and the client gives informed consent, confirmed in writing. A lawyer who has not entered a limited appearance but who provides assistance in drafting pleadings shall advise the client to comply with any rules of the tribunal regarding participation by a lawyer in support of a pro se litigant.



## V.R.Pr.C. 1.6

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A lawyer may disclose otherwise confidential information:

(5) to detect and resolve conflicts of interest arising from the lawyer's change or potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.



## V.R.Pr.C. 1.6

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- (d) A lawyer shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client.
- Reporter's note & tech competence:



## Reporter's Note

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Subdivision (d) is added to reflect that the modern practice of law includes possession of information related to the representation of client in many forms, including information that is stored electronically or digitally. A lawyer is under a duty to act competently to safeguard client information, no matter its format.



# Trust Accounts

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- (1) only a lawyer admitted to practice law in Vermont, or a person under the direct supervision of the lawyer, shall be an authorized signatory on the account or be authorized to make transfers from the account;



# Trust Accounts

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- (2) records of deposits shall be sufficiently detailed to identify each item;
- (3) withdrawals shall be made only by authorized electronic transfer or by check payable to a named payee and not to cash.



## Rule 4.4(b)

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- (b) A lawyer who receives a ~~document~~ information relating to the representation of the lawyer's client and knows or reasonably should know that the ~~document~~ information was inadvertently sent shall promptly notify the sender.



## Rule 5.5 – Comment 22

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Lawyers who are not admitted to the bar of the Vermont Supreme Court may remotely practice the law of the jurisdictions in which they are licensed while physically present in Vermont if they do not hold themselves out as being admitted to the bar of the Vermont Supreme Court or licensed to practice in Vermont, do not advertise or otherwise hold themselves out as having an office in Vermont, and do not provide, offer to provide, or hold themselves out as authorized to provide legal services in Vermont, unless otherwise authorized. Remote practice that satisfies these requirements does not constitute the unauthorized practice of law in Vermont.



## Rule 8.3 – Cmt. 4

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The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question or to a lawyer who has volunteered to help such lawyers through approved Vermont Bar Association committees. Such a situation is governed by the rules applicable to the client-lawyer relationship. A confidential inquiry to bar counsel does not satisfy the duty set out in subdivision (a) or (b).



# Proposed Amendments

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- Email comments to [michael.kennedy@vermont.gov](mailto:michael.kennedy@vermont.gov)
- Comments due June 20, 2022



## Not proposed (yet)

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- Define the file.
- Authorize file destruction after \_\_\_\_ years.
- Relax rule on lateral transfers.



# Pop Quiz

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- Don't get lost in the rules.
- 7 Cs of Legal Ethics
- Each is one word.
- Each begins with the letter "C."



## Question 1

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I don't know if it's the most important, but they made it the very first rule. To me, it means "know your job, do your job."



## Question 2

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This includes setting reasonable client expectations and providing straight-forward legal advice, even if it's advice that the lawyer knows the client will find unpalatable.



## Question 3

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## Question 4





## Question 5

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- This rules related to this duty are not as strict when applied to negotiations with opposing counsel as they are when applied to statements made to a tribunal.



## Question 6

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- This word is not in the Rules. However, the Supreme Court has made clear that a violation of the rule that prohibits it will likely result in public discipline.



## Question 7

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This word is not in the rules. Many lawyers have suggested to me that a lack of it contributes to the stress & anxiety that is associated with the profession.

Recently, other states have addressed the lack of it by charging extremely abusive lawyers with violating the rule that prohibits lawyers from using means that have no substantial purpose other than to embarrass or burden a third person.



# Pop Quiz

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- Answers
- [Blog post & video on the 7 Cs of Legal Ethics](#)



## Question 1

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I don't know if it's the most important, but they made it the very first rule. To me, it means "know your job, do your job."

Competence



## Question 2

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This includes setting reasonable client expectations and providing straight-forward legal advice, even if it's advice the client will find unpalatable.

**COMMUNICATION**



## Question 3 - CONFIDENTIALITY

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## Question 4 - CONFLICTS





## Question 5

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**CANDOR**



## Question 6

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▪ **COMMINGLING**



## Question 7

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CIVILITY



# Trust Account Scams

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# Trust Account Scams

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- Client contacted Lawyer seeking to collect debt from a third party.
- Client provided Lawyer with documentation supporting Client's claim. Lawyer made preliminary investigation and verified the existence and address of third party.
- A few days after Lawyer sent third party a letter introducing himself as Client's representative, third party contacted Lawyer stating that he wished to pay the amount owed to Client without the need for litigation.
- Lawyer subsequently received a cashier's check from third party drawn on an out-of-country bank. The cashier's check was dated prior to third party's earlier conversation with Lawyer.
- Lawyer did no further investigation of third party and did not investigate the authenticity of the foreign bank cashier's check.



# Trust Account Scams

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- Lawyer deposited the check into a trust account. Two days later, Lawyer called the bank and asked if the funds were “available.” The bank responded “yes.”
- Lawyer disbursed funds to the Client and a fee to the firm.
- A week later, Bank notified Lawyer that the check was a fraud.

Did lawyer violate the Rules of Professional Conduct?



# Trust Account Scams

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- Lawyer cashed the check and disbursed funds to the Client.

Did lawyer violate the Rules of Professional Conduct?

YES.

Rules 1.1, 1.3, and 1.15.

North Carolina State Bar Formal Ethics Opinion 2021-2



# Trust Account Scams

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- Rule 1.1
- Rule 1.3
- Rule 1.5
- Competence
- Diligence
- Safeguard Client Property



# NC State Bar Opinion 21-2

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- For at least ten years, lawyers have been warned about being targets of scams such as the one at issue in this inquiry
- State and federal agencies have alerted the public to the existence and persistence of these counterfeit check scams for some time.
- Similarly, state and national bar associations, lawyer regulatory bodies, and malpractice carriers have reported on and alerted lawyers to the reality that such scams often target members of the legal profession.
- The North Carolina State Bar has also published a number of warnings to the legal profession in North Carolina about these scams.
- These publications describe the scenarios associated with the scams and identify the relevant warning signs to assist lawyers in detecting and avoiding such scams.



# NC State Bar Opinion 21-2

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- The scenario described above raises a number of red flags that should alert a lawyer practicing today to the potential for fraud in both the representation and the receipt and disbursement of funds.
- Lawyer's mistaken reliance on the counterfeit check is unexcused. Given the breadth of notice provided to the legal profession on this common scam, Lawyer should have realized that the circumstances surrounding this purported representation required additional investigation.



# NC State Bar Opinion 21-2

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## NC State Bar Opinion 21-2

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- When reasonably identifiable suspicious circumstances are present surrounding the receipt and disbursement of funds, a lawyer should not disburse on provisional credit – even if statutorily authorized to do so – until the lawyer satisfies him or herself that the instrument is authentic and the transaction is legitimate.



# NC State Bar Opinion 21-2

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- Safeguarding entrusted client funds is one of the most important professional responsibilities that a lawyer possesses.



## NC State Bar Opinion 21-2

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- Although Lawyer believed he was disbursing Client's funds from his trust account after depositing the purportedly valid cashier's check, Lawyer actually disbursed funds belonging to his other clients.



## NC State Bar Opinion 21-2

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- By disbursing his other clients' funds from his trust account without their permission and for the benefit of someone other than the client, Lawyer misappropriated entrusted client funds.



# Trust Account Scams

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- In the NC opinion, the particular scam isn't the point.
- The point is that, eventually, after lots of warnings about a particular scam, it's a rules violation to fall for that scam.
- In other words, at some point, the failure to check further is the failure to act reasonably to safeguard client property.
- What other scams have we been warning about?



# NC State Bar Opinion 21-2

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- Does the lawyer have a duty to replace the funds that were improperly disbursed?



# NC State Bar Opinion 21-2

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- Does the lawyer have a duty to replace the funds that were improperly disbursed?
- Yes. Because Lawyer's failure to comply with the Rules of Professional Conduct caused the loss, Lawyer is obligated to replace the funds.



# Conflicts of Interest

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Dual Representation



# Scenario

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Parents wants to sell their home to Child. Parents & Child worked out the details of the transaction without the assistance of counsel. They contact a lawyer to handle the purchase and sale of the home and to represent each of them at the closing.



## Dual Representation – Rule 1.7(a)(1)

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A conflict exists if the representation of one client will be directly adverse to another client.



## Dual Representation – Rule 1.7(a)(2)

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A conflict exists if there is a significant risk that the representation of a client will be materially limited by duties owed to another client.



## Dual Representation – Rule 1.7(b)(1)

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Waivers are okay if it's reasonable for the lawyer to believe that the lawyer will be able to provide competent and diligent representation to each.



## Dual Representation – Rule 1.7, Cmt.1

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“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”



## Dual Representation – Rule 1.7, Cmt. 7

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- “Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation with the informed consent of each client.”



## Dual Representation – Rule 1.7, Cmt. 8

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- “A conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”



## Dual Representation – Rule 1.7, Cmt. 28

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- More likely to be waivable if clients' interests are generally aligned and, but for small differences, lawyer is seeking to establish or adjust relationship in a way that is amicable and mutually advantageous.
- However . . .



## Dual Representation – Rule 1.7, Cmt. 32

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- When seeking to adjust relationship between clients amicably and in mutually advantageous manner, lawyer must make clear to both that lawyer's role is not that of partisanship & loyalty normally associated with attorney-client relationship.



## Dual Representation – Rule 1.7, Cmt. 21 & 29

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- Consent can be revoked at any time, for any reason.
- Once revoked, lawyer likely must withdraw from representing the other.



## Dual Representation – Rule 1.7, Cmt. 30

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- Very important to assess impact on attorney-client privilege.
- Prevailing rule is that privilege does not attach to communications with commonly represented clients.
- Therefore, privilege not available in subsequent controversy/litigation.



## Dual Representation – Rule 1.7, Cmt. 31

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- Cannot agree to request by one commonly represented client to keep information from the other.



# Scenario

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Parents wants to sell their home to Child. Parents & Child worked out the details of the transaction without the assistance of counsel. They contact a lawyer to handle the purchase and sale of the home and to represent each of them at the closing.



## Illinois Opinion 2017-04

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The circumstances in which a lawyer can represent Parents and Child are extremely rare.



## Illinois Opinion 2017-04

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- Beyond doubt that lawyer can't represent both if they've not yet negotiated final terms.
- "The lawyer's obligations and loyalties [would be] so divided that the lawyer could not reasonably believe that the lawyer could provide adequate representation to both parties."



## Illinois Opinion 2017-04

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“Even if the parties agree on the terms of the sale, and have already executed the sales contract, we believe that it is highly unlikely that a lawyer could properly represent both the buyer and seller in concluding the transaction. Issues often arise after the parties have executed the contract and prior to closing that would require the lawyer to give unqualified advice to his or her client.”



## Illinois Opinion 2017-04

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"We decline to consider under what circumstances the representation of the buyer and seller might be proper even with informed consent. Whether the lawyer can adequately represent both the buyer and the seller will depend on the facts of that transaction."

But the scenario speaks for itself in its simplicity.



## Dual Representation

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- VBA Advisory Opinion 2001-02
- In some circumstances and with appropriate waivers, okay to represent both lender & borrower in same transaction.
- However, the committee went out of its way to state that it “continues to believe that it is not appropriate to represent a seller and buyer in a real estate transaction.”



## Dual Representation

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### Ohio Advisory Opinion 2020-10

“While transactional clients may share a common goal and there may be some tentative agreement as to certain terms of the transaction, additional material terms that may not have been addressed before negotiations began may result in disagreements that would place a jointly retained lawyer in the impossible situation of negotiating for each client while maintaining a duty of loyalty to both.”



# Safeguarding Funds

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Attorney vs. Escrow Agent



# Safeguarding Funds

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## Attorney

- Funds to which more than one person assert interests must remain in trust until the dispute is resolved.
- Must promptly deliver to person to whom funds belong.
- Cannot resolve dispute on own or at client's direction.

## Escrow Agent

- Neutral.
- Funds held until both parties to a transaction have satisfied their obligations.
- Owes fiduciary duty to all parties to agreement.



# Safeguarding Funds

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Colorado Bar Association Opinion 140: Ethical Issues When a Lawyer  
Serves as an Escrow Agent

*Adopted March 2020*



## Colorado Opinion 140

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1. Remember: arrangement creates to duties to all parties in addition to existing duties to client.
2. So, okay to act as escrow agent in matter in which represent one of the parties, as long as doing so doesn't create conflict of interest.



## Colorado Opinion 140

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Conflict likely arises if:

1. Parties dispute their rights to escrowed funds.
2. A party asserts a lien on the escrowed funds.