

NEW PROFESSIONALISM AND LAWYER DISCIPLINE RULES ADOPTED

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On September 5, 2007, Arizona Supreme Court Chief Justice Ruth V. McGregor signed an order amending several Supreme Court rules. Those amendments affect the way law is practiced in Arizona, and all attorneys admitted in the state should be aware of them.

The amended rules, which become effective January 1, 2008, include:

- a definition for “unprofessional conduct”;
- a revision of the criteria used by lawyers when determining whether to use an IOLTA account;
- an extension of the State Bar’s jurisdiction to include certain conduct occurring during the admission process; and
- authority for the Disciplinary Commission to give hearing officers additional time to hear cases designated as complex.

LAWYER CONDUCT

The path to the new rules began on November 29, 2005, when the State Bar filed a Rule 28 petition. In it, the Bar asked the Supreme Court to adopt a rule that would define “unprofessional conduct” and subject lawyers to discipline for engaging in such conduct. The Court declined to adopt the recommendations made by the Bar, but it offered two alternative definitions of unprofessional conduct. The Court accepted public comment on those alternatives, and on September 5 of this year, the Court adopted Rule 31(a)2.E., which defines “unprofessional conduct” as “substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer’s Creed of Professionalism of the State Bar of Arizona” (for the complete text of the oath and the creed, see pages 32 and 34).

In conjunction with the adoption of a definition of “unprofessional conduct,” the Court modified Supreme Court Rule 41(g). In that rule, the Court replaced the requirement that lawyers “abstain from all offensive personality” with a requirement that lawyers “avoid engaging in unprofessional conduct.”

Therefore, beginning January 1, 2008, “unprofessional conduct” will become a ground for imposing lawyer discipline.

The Oath of Admission to the Bar and the Creed of Professionalism of the State Bar provide more guidance to lawyers about how they are expected to conduct themselves than the “offensive personality” provision of the current rule.



What is meant by a “substantial” violation of the oath or creed will need to be addressed by the Court in future discipline cases. Although discipline could be imposed for substantial or repeated violations of the oath or creed, lawyers should strive to act with the highest level of professionalism at all times.

IOLTA ACCOUNTS

The Court also modified Supreme Court Rule 44, which currently states that lawyers must “maintain a pooled interest-bearing or dividend-earning trust account for deposit of client funds where the interest or dividends reasonably expected to be earned thereon are nominal in amount.”

Following the lead of the United States Supreme Court in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the Court adopted a rule that will require the use of a pooled trust account “unless the funds are expected to earn net income for the client in excess of the costs incurred to secure such income.” The amended rule

changes the criteria that lawyers must use when determining whether client funds should be placed into a trust account that earns interest payable to the client or to the Arizona Foundation for Legal Services & Education.

The current rule requires lawyers, when deciding what type of trust account should be used, to consider the following criteria: (1) the amount of interest or dividends that would reasonably be expected to be earned during the period the funds are deposited or invested; (2) the cost of establishing and administering the account, including the cost of the lawyer’s services; and (3) the capability of the financial institution or investment company to calculate and pay interest or dividends to individual clients.

The amended rule, however, requires lawyers to consider the following criteria:

- (1) the amount of the funds to be deposited;
- (2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
- (3) the rates of interest or yield at financial institutions where the funds are to be deposited;
- (4) the cost of establishing and administering a separate non-IOLTA account for the client’s benefit, including service charges, the costs of the lawyer’s services, and the costs of preparing any tax reports required for income accruing to the client’s benefit;
- (5) the capability of financial institutions to calculate and pay income to individual clients; and
- (6) any other circumstances that affect the ability of the client’s funds to earn a net return for the client.



THE OATH OF ADMISSION TO THE BAR

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Arizona;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding that shall appear to me to be without merit or to be unjust; I will not assert any defense except such as I honestly believe to be debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor; I will never seek to mislead the judge or jury by any misstatement or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client; I will accept no compensation in connection with my client’s business except from my client or with my client’s knowledge and approval;

I will abstain from all offensive conduct; I will not advance any fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, nor will I delay any person’s cause for greed or malice;

I will at all times faithfully and diligently adhere to the rules of professional responsibility and a lawyer’s creed of professionalism of the State Bar of Arizona.

ADMISSIONS RULE

Another rule amended by the Court will give the State Bar jurisdiction to investigate and prosecute lawyers for making “any false statement or misrepresentation” while “an applicant for admission to the practice of law which is not discovered until after the applicant is admitted.” Under that rule, false statements and misrepresentations may serve as an independent ground for the imposition of discipline and as an aggravating factor in any disciplinary proceeding based on other conduct.

The sanction for making a false statement or misrepresentation during the application process can include revocation of the member’s admission to the State Bar.

COMPLEX CASE DESIGNATION

Finally, the Court also adopted a rule that will permit the chair of the Disciplinary Commission to designate a lawyer discipline case as a “complex case.” A “complex case” is defined as one that cannot, in the interests of justice, be heard within 150 days of the filing of the formal complaint by the State Bar. A motion to designate a case as complex may be filed by either the State Bar or the respondent-lawyer.

The criteria for determining whether a case

should be designated as complex include:

- (1) the number of counts in the formal complaint;
- (2) the existence of difficult or novel legal issues that will be time-consuming to resolve;
- (3) the presence in the case of inherently complex legal issues;
- (4) the number of witnesses and the amount of documentary evidence to be presented;

- (5) whether the case would benefit from assignment to a hearing officer who has acquired a substantial body of knowledge in a specific area of law that is involved;
- (6) whether there are factors justifying the expeditious resolution of an otherwise complex dispute; and
- (7) whether there are any other factors that, in the interests of justice, warrant designating the case as complex. **§**

LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZONA



PREAMBLE

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, I will comply with the letter and spirit of the disciplinary standards applicable to all lawyers and I will conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, tribunals and the general public.

representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with effective and honorable representation.

B. With respect to opposing parties and their counsel:

I will be courteous and civil, both in oral and in written communication;

I will not knowingly make statements of fact or of law that are untrue;

A. With respect to my client:

I will be loyal and committed to my client's cause, but I will not permit that loyalty and commitment to interfere with my ability to provide my client with objective and independent advice;

I will endeavor to achieve my client's lawful objectives in business transactions and in litigation as expeditiously and economically as possible;

In appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes;

I will advise my client against pursuing litigation (or any other course of action) that is without merit and I will not engage in tactics that are intended to delay the resolution of the matter or to harass or drain the financial resources of the opposing party;

I will advise my client that civility and courtesy are not to be equated with weakness;

While I must abide by my client's decision concerning the objectives of the

In litigation proceedings, I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

I will not utilize litigation or any other course of conduct to harass the opposing party;

I will not engage in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

I will not utilize delay tactics;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and not be rude or disrespectful;

I will not serve motions and pleadings on the other party or the party's counsel at such a time or in such a manner as will unfairly limit the other party's

opportunity to respond;

In business transactions I will not quarrel over matters of form or style but will concentrate on matters of substance and content;

I will identify clearly, for other counsel or parties, all changes that I have made in documents submitted to me for review.

C. With respect to the courts and other tribunals:

I will be an honorable advocate on behalf of my client, recognizing, as an officer of the court, that unprofessional conduct is detrimental to the proper functioning of our system of justice;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel and, if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set – or, if that is not feasible, immediately after such dates have been set – I will

attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences and depositions;

I will at all times be candid with the tribunal.

D. With respect to the public and to our system of justice:

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will keep current in the areas in which I practice and, when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

As a member of a self regulating profession, I will be mindful of my obligations under the Rules of Professional Conduct to report violations of those Rules;

I will be mindful of the need to protect the integrity of the legal profession and will be so guided when considering methods and contents of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement or administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance.