UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	**Case No: 03-2006 (EGS)**
v.	)	
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

EXHIBIT 28

For Lawyers
For the Public
Inside the Bar
fastcase Smarter legal research.

Rule 1.8—Conflict of Interest: 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 to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client gives informed consent in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. 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.

(c) 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.

(d) While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:

(1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and

(2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.

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

(1) The client gives informed consent after consultation;

(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.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for 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 after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(g) A lawyer shall not:

(1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) Settle a claim or potential claim for malpractice arising

out of the lawyer's past conduct with unrepresented client of former client unless that person is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable opportunity to do so in connection therewith.

(h) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon informed consent by the client after consultation regarding the relationship.

(i) A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

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

Comment

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 the 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 the requirements of this rule must be met when the lawyer accepts an interest in the client's business or other non-monetary 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 and services that the client generally markets to others; for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility 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] The client's consent need not be an actual or electronic signature but must be in written or electronic form and show the client's assent to the terms communicated by the lawyer, *e.g.,* a return electronic mail. 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, where appropriate, should explain that the client may wish to seek the advice of independent counsel.

[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 adversely affected 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. For the definition of "informed consent," *see* Rule 1.0(e). 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] The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client, as paragraph (a)(1) requires.

[5] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should be advised by the lawyer to obtain the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[6] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will adversely affect the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[7] This rule does not prevent a lawyer from entering into a contingent fee arrangement with a client in a civil case, if the arrangement satisfies all the requirements of Rule 1.5(c).

Literary Rights

[8] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures that might otherwise be taken in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5.

Paying Certain Litigation Costs and Client Expenses

[9] Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this court in 1980 in an amendment to DR 5-103(B) that eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the result

of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client that are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to "bid" for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8 (d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The rule merely permits such payments to be made without requiring reimbursement by the client.

Person Paying for Lawyer's Services

[10] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. In some circumstances, such as the relationship among insured, insurer, and defense counsel, substantive law regarding the role of the third-party payer may affect the applicability of this rule. Paragraph (e) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. *See also* Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another). The requirements of Rule 1.8(e)(1) do not apply to lawyers appointed to represent indigent criminal defendants whose fees are paid under the Criminal Justice Act or any similar statute or rule.

[11] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(b)(4), a conflict of interest exists if there is a significant risk that the lawyer's representation will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7, the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under Rule 1.7(a).

Aggregate Settlements

[12] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or *nolo contendere* plea in a criminal case. The rule stated in paragraph (f) of this rule is a corollary of both Rules 1.7 and 1.2(a), and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[13] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen. Rule 1.8(g) does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, to the extent that such an agreement is valid and enforceable and the client is fully informed of the scope and effect of the agreement. Nor does the rule prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[14] Agreements settling a claim or potential claim for malpractice arising out of the lawyer's past conduct are not prohibited by Rule 1.8(g). Nevertheless, in view of the danger that the lawyer will take unfair advantage of an unrepresented client or a former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel. Settlement of a potential claim most often will occur in the context of the resolution of an actual dispute between the attorney and the client, whether concerning the claim itself or a dispute concerning fees. The rule does not authorize the lawyer to solicit a blanket release from the client as a routine incident of the conclusion of the legal representation.

[15] Paragraph (h) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. Pursuant to the provisions of Rule 1.8(j), the disqualification stated in paragraph (h) is personal and is not imputed to members of firms with whom the lawyers are associated. Since each of the related lawyers is subject to paragraph (h), the effect is to require the informed consent of all materially affected clients. Romantic relationships between lawyers may create conflicts of interest under Rule 1.7(b)(4), likewise requiring informed consent of all materially affected clients.

[16] The substantive law of the District of Columbia has long permitted lawyers to assert and enforce liens against the

property of clients. *See, e.g., Redevelopment Land Agency v. Dowdey,* 618 A.2d 153, 159-60 (D.C. 1992), and cases cited therein. Whether a lawyer has a lien on money or property belonging to a client is generally a matter of substantive law as to which the ethics rules take no position. Exceptions to what the common law might otherwise permit are made with respect to contingent fees and retaining liens. See, respectively, Rule 1.5(c) and Rule 1.8(i).

[17] Rule 1.16(d) requires a lawyer to surrender papers and property to which the client is entitled when representation of the client terminates. Paragraph (i) of this rule states a narrow exception to 1.16(d): a lawyer may retain anything the law permits – including property – except for files. As to files, a lawyer may retain only the lawyer's own work product, and then only if the client has not paid for the work. However, if the client has paid for the work product, the client is entitled to receive it, even if the client has not previously seen or received a copy of the work product. Furthermore, the lawyer may not retain the work product for which the client has not paid, if the client has become unable to pay or if withholding the work product might irreparably harm the client's interest.

[18] Under Rule 1.16(d), for example, a lawyer would be required to return all papers received from a client, such as birth certificates, wills, tax returns, or "green cards." Rule 1.8(i) does not permit retention of such papers to secure payment of any fee due. Only the lawyer's own work product – results of factual investigations, legal research and analysis, and similar materials generated by the lawyer's own effort – could be retained. (The term "work product" as used in paragraph (i) is limited to materials falling within the "work product doctrine," but includes any material generated by the lawyer that would be protected under that doctrine whether or not created in connection with pending or anticipated litigation.) And a lawyer could not withhold all the work product merely because a portion of the lawyer's fees had not been paid.

[19] There are situations in which withholding the work product would not be permissible because of irreparable harm to the client. The possibility of involuntary incarceration or criminal conviction constitutes one category of irreparable harm. The realistic possibility that a client might irretrievably lose a significant right or become subject to a significant liability because of the withholding of the work product constitutes another category of irreparable harm. On the other hand, the mere fact that the client might have to pay another lawyer to replicate the work product does not, standing alone, constitute irreparable harm. These examples are merely indicative of the meaning of the term "irreparable harm," and are not exhaustive.

Attribution of Prohibitions

[20] Under paragraph (j), a prohibition of conduct by an individual lawyer in paragraphs (a) through (g) and (i) applies also to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (h) is personal and is not applied to associated lawyers.

Sexual Relationships with Clients

[21] Concerns about personal relationships, including sexual relationships, between lawyers and clients are addressed in Comments [37]-[39] to Rule 1.7.

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