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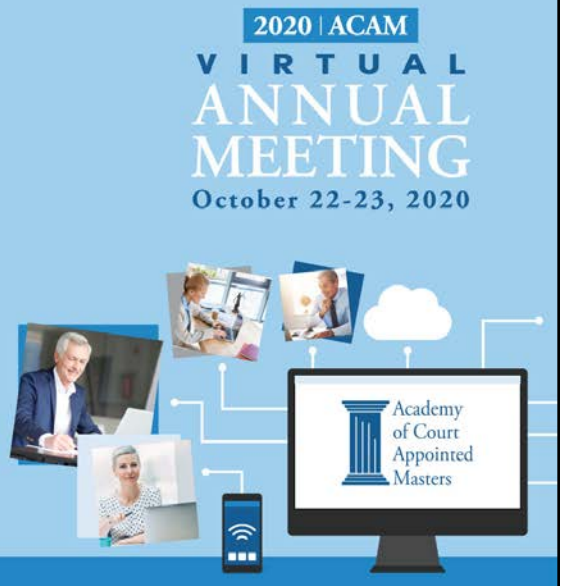
Ethics for Special Masters:

What Are the Problems and the Rules?



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Panelists

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Marla N. Greenstein
Alaska Commission on Judicial Conduct—Anchorage, Alaska

Merril Hirsh, FCIArb
HirshADR PLLC – Washington, D.C.

Megan E. Jones
Hausfeld—San Francisco, California

Deborah E. Greenspan
Blank Rome, LLP—Washington, DC

MODERATOR
Randi Ilyse Roth, Esq.
Complex Settlements, PC—St. Paul, Minnesota

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What are the problems?

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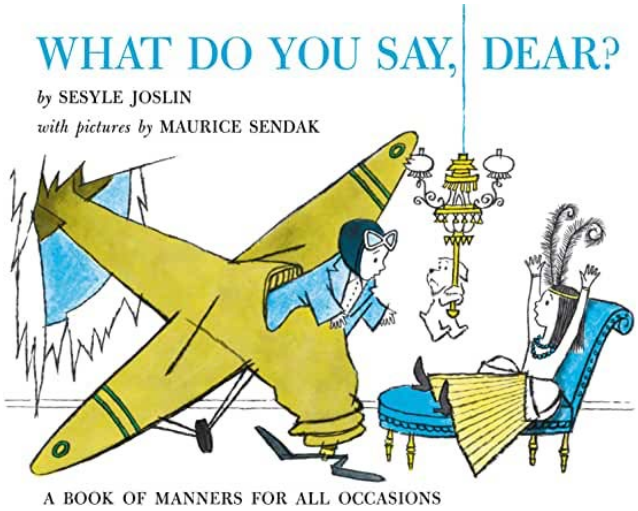

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"What do you do, dear?"

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- Maurice Sendak and Sesyle Joslin's children's books, "What do you say, dear?" and "What do you do, dear?" posit all kinds of wildly challenging situations:
  - You are picking flowers outside the castle, and suddenly a fierce dragon appears and blows smoke at you, but then a brave knight gallops up and cuts off the dragon's head
  - You meet someone walking the other way on a tightrope
  - You're sitting in the library reading a book and a lassoo lands around your neck
- This is a lot like being a special master.

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What are the problems, con't. . . .

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- When we ask special masters what problems they've encountered –
  - What ethical quandaries they've found themselves in –
  - Jaws drop.
- This work is not for the faint of heart
  - Multiple, conflicting issues can come at you like trains speeding towards complex collisions . . .
  - Multiple code violations can be just a keystroke away . . .
- What DO we do, dear? What do we SAY dear? What are the rules?

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What are the rules?

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- Not so easy to know . . .
- Rules from many sources . . .
  - Code of Judicial Conduct
  - Model Code of Professional Responsibility
  - More
- Some beginning road maps in your materials – the ethics chapter from the current ACAM bench book.
- Shortly, Merril will tell us about work of ABA committee that is trying to sort this out . . .
- And then we'll talk about real-world problems . . .

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Agenda for our hour together:

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- 12:20: Overview of ABA Work.
  Merril will brief us on the work of the ABA committee(s) that are sorting out what rules apply
- 12:25: Judicial Ethics
  Marla will help us see these issues through the lens of the Code of Judicial Conduct
- 12:40: Lawyers Code of Professional Responsibility
  Merril will help us see these issues through the lens of the Model Rules of Professional Responsibility
- 12:55: Panel Discussion of Real-World Ethics Problems
  We'll discuss real-world problems. Please put yours in the chat box!
- 13:10: Invitation to Join in Our Work
  Merril will explain how you might join the ABA committee that is working on ethics rules.

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One clue . . .

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Listen to how the trial court in a terribly important racial desegregation case described ACAM's president, Carlos Gonzalez:

In the Final Order of Dismissal in *Geier v. Bredesen*, USDC M.D. Tennessee, Judge Wiseman wrote about Carlos:

[T]he tremendously important contribution of . . . Carlos Gonzalez . . . Is probably the single most significant factor in bringing about this very great day. He possessed and demonstrated to the parties the integrity and neutrality, the understanding of and sensitivity to the respective positions to be **fully accepted and trusted as an honest broker.** He finishes this job with my great respect and gratitude for a job well done. (Emphasis added.)

This is the goal of all of our work.

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Honest Broker

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Behavior like Carlos'

– visibly adhering

to the ***principles*** of ethics
even when the rules are not crystal clear

– is always a good idea.

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Judicial Ethics
Guidance for Special Masters

Marla Greenstein, Executive Director
Alaska Commission on Judicial Conduct

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Codes Of Judicial Conduct

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- Purpose
- Which Provisions Apply
- Timeframe

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Purpose Of Judicial Conduct Codes

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- Preserve Public Confidence in the Integrity of the Judiciary
- Avoid Actual Impropriety and the Appearance of Impropriety
- Ensure Fairness

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Public Confidence

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- Avoid Personal and Professional Conflicts
- Maintain Professionalism and Competence
- Treat All with Formality and Respect

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Avoid Impropriety and Appearance of Impropriety

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- Separation between official role and personal interests
- Abuse of official title/position
- If part-time: separation of law practice resources from court resources

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Ensure Fairness

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- Disclose any Potential Conflicts or Appearance of Conflicts
- Agreement to Any Ex Parte Communications to Facilitate Settlement
- Treat Disparate Entities Equally (e.g. Pro Se Parties versus Represented)
- Ensure Parties Understand Your Role

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Which Provisions Apply?

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- Ask to be identified in Referral/Appointment Order by appointing Judge
- Share the Applicable Provisions with the Parties
- Most Common:
  - Prohibition on Ex Parte Communications
  - Disclosure and Disqualification
  - Limitations on Outside Activity

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Timeframe

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- Appointment/Referral Order should Specify
- From time of appointment
- Ends with end of appointment
- Conflicts never go away: may be restrictions on related law practice

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Overarching Principles

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- **Promoting Confidence in the Judiciary**
- **Performing all Duties Fairly and Impartially**
- **Ensuring the Right to be Heard**

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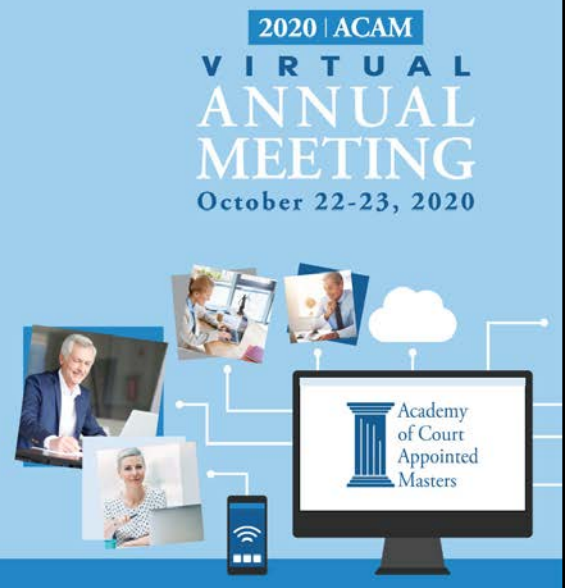
Ethics for Special Masters: What Are the Problems and What Are the Rules?

Rules of Professional Conduct: More Problems than Rules

(But we're hoping to change that!)

Merril Hirsh, HirshADR PLLC



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The $64,000 Question:

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What Rules of Professional Conduct apply when a lawyer serves as a special master?

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The $2.00 Answer … Well …

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You'd think the rules can be divided into three critical categories

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Category One:

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YES!

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Category Two:

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NO!

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Category Three:

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MAYBE SO

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But actually, it is more like…

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- YES, but maybe not
- NO, but maybe so

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Takeaways

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- For now … err on the side of caution – be the honest broker and take seriously the standing on one foot version.
- For going forward, recognize that this requires careful and fresh thought and help inform this process

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"YES" can be that the Rule appears explicitly to contemplate special masters or applies regardless of role

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Rule 2.4 "Lawyer Serving as Third-Party Neutral" applies, well, at least sometimes

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a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

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Applying regardless of role – e.g., Rule 8.4

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It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

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Rule 1.12 "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral" certainly applies …

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(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge ***or other adjudicative officer*** or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

****

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

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Adjudicative Officer

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An "adjudicative officer" includes "such officials as judges pro tempore, referees, ***special masters***, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges." Model Rule 1.12, cmt. 1 (emph. added).

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But "former" sometimes means "current"

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Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

***

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer ***is participating*** personally and substantially as *a judge* ***or other adjudicative officer or as an arbitrator, mediator or other third-party neutral***. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge ***or other adjudicative officer***.

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Rule 1.11, "Special Conflicts of Interest for Former and Current Government Officers and Employees" is "former and current" but …

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(d) Except as law may otherwise expressly permit, a lawyer *currently serving* as a ***public officer*** or employee:

(1) *is subject to* Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b). (Emph. added.).

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Does it apply? Is a special master a "public officer"?

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The answer is absolutely, positively "MAYBE"

Remember … the Comment to Rule 1.12 said that a special master is an "adjudicative officer." So, is that a "public officer"?

- Not if you think that means on the public payroll, of course, unless the special master is…
- Yes, if you think of an adjunct with judicial immunity as being an "officer of the court"

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OK, so what does this mean?

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Well, it means that Rules 1.7 and 1.9 *do* apply ..

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So what does that mean? – Rule 1.7 (former clients)

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

And then Rule 1.9 (former clients)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

And of course Rule 1.10 (imputation)

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(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

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But the biggest problem is yet to come

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The rules that explicitly appear to apply only when lawyers are representing clients, but could be held to apply otherwise … e.g.

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Competence and Diligence

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Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.5:

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Fees – Rule 1.5

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(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: …

(1) the time and labor required, ***the novelty and difficulty of the questions involved***, and the skill requisite to perform the legal service properly;

(2) ***the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;***

* * *

(4) ***the amount involved and the results obtained***;

(5) the time limitations imposed ***by the client*** …;

(6) ***the nature and length of the professional relationship with the client***;

* * *

(8) ***whether the fee is fixed or contingent***.

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Why is this a problem?

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In re Burton, 472 A.2d 831, 837 (D.C. 1984) (disciplinary rules "should apply whenever an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and clients).

In re Speights, 189 A.3d 205 (D.C. 2018) (applying Rule 8.4(d) to a personal representative);

In re Wilson, 953 A.2d 1052 (D.C. 2008) (applying Rule 1.15(a) to a guardian)).

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The Good News

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We're working on trying to sort this out.

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The bad news

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It will take some time.

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In the meantime…

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- Follow the Code of Judicial Conduct
- Err on the side of caution --
  - Do conflict checks
  - Be competent even if the rules might not require it
  - Be diligent even if you might feel forced to be
  - Disclose, disclose, disclose
- Be the honest broker your consumers need you to be.

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Panel Discussion

- We will work from one hypothetical situation
- But also feel free to raise ethical dilemmas in the chat box if you don't see your issue in the hypothetical

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Hypothetical:

The Court appoints a special master to deal with discovery disputes in a hotly-contested, high-profile technical case. The special master and the judge have been close friends since law school. This is the third case in which the judge has appointed the special master and here, as in previous cases, the judge has told the parties of the choice without their input. The appointment order says that the special masters can have *ex parte* discussions with the Court "only on procedural and scheduling issues." The special master then proceeds to resolve some pending motions and to suggest ways the parties can avoid some other disputes.

The parties then suggest that the special master attempt to mediate the dispute, while the special master continues to rule on motions. Neither party wants to meet together. They both want the discussions to take place in caucus. Both ask the special master to report to the court only that they were in settlement discussions and not to report any further about the discussions.

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Hypothetical, con't:

In caucus, the Defense Counsel, knowing of the master's close friendship with the judge, asks the special master to suggest to the Plaintiffs that special master thinks the judge will rule against them on a key motion in order to get the Plaintiffs' settlement number down.

In caucus, Plaintiffs' Counsel confides that if the key motion does not get resolved in their favor quickly, they will be very hard pressed financially to continue the case. They ask the special master to inform Defense Counsel that the special master expects the Court to rule for their clients.

Meanwhile, the judge asks the special master ex parte how the settlement is coming along. The Judge wants to get the special master's assessment of each sides' counsel and to be informed if there is anything the judge could do that would assist the case in settling. The judge also tells the special master privately how the key motion will come out and asks whether it would make sense to hold up the decision pending settlement.

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Issue #1:

- Is there any problem with becoming a mediator while continuing to rule on motions?

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Issue #2:

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- Does the special master's close relationship with the judge or actual knowledge of the judge's intent create any problems in expressing views concerning the merits of the case?

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Issue #3:

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- How should the special master handle the parties' and the judge's requests? Would it make a difference if the appointment order allowed for *ex parte* communications with the Court "on any subject," without limitation?

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Sign up to be part of the Ethics Subcomittee!

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Contact Merril Hirsh – merril@merrilhirsh.com

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