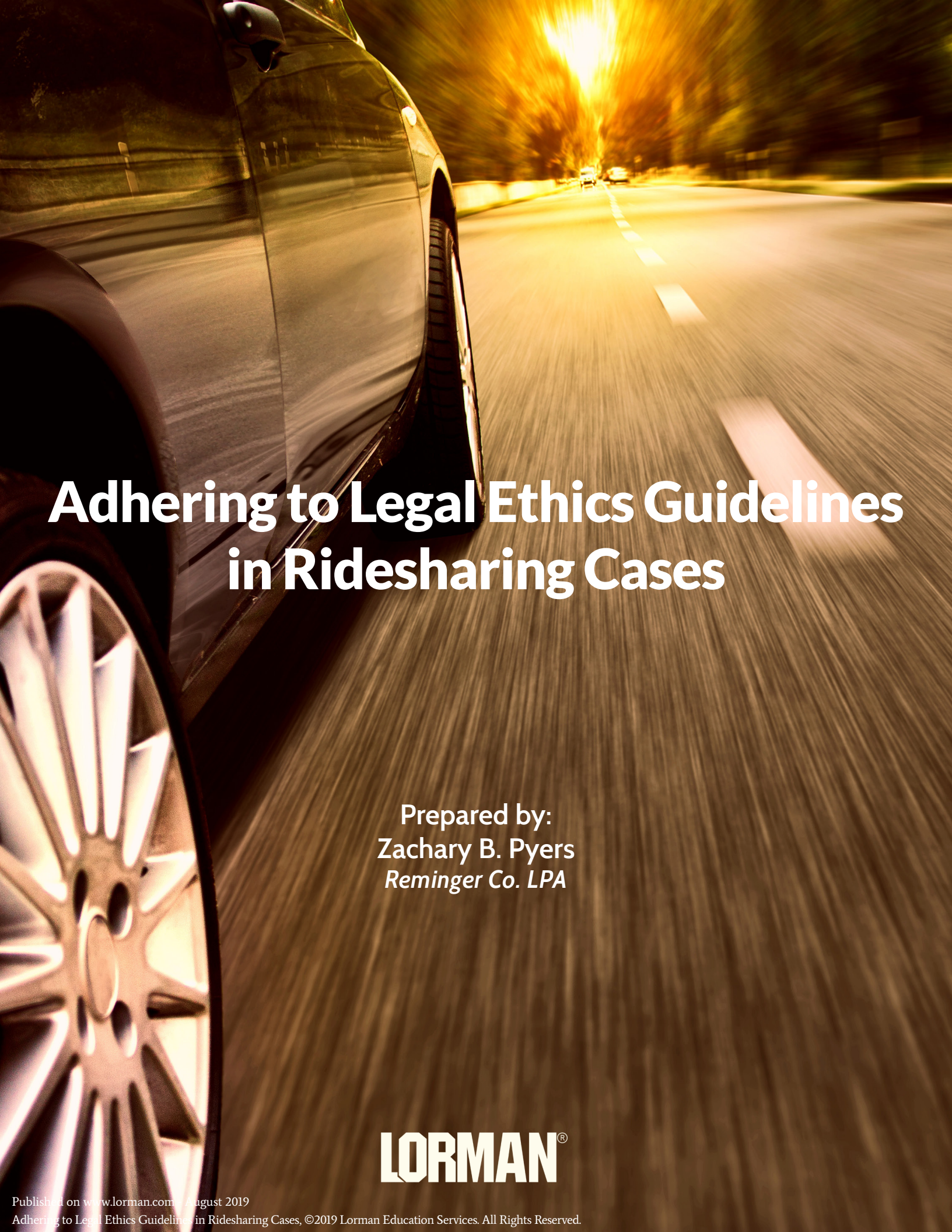

Adhering to Legal Ethics Guidelines in Ridesharing Cases

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Adhering to Legal Ethics Guidelines in Ridesharing Cases

I. Introduction

Ethical responsibilities must take the highest priority when practicing law. Prior to writing any winning arguments in motions or briefs, conducting depositions, or delivering any blistering cross-examinations, attorneys must make sure their actions comport with all relevant ethical obligations to both their clients and the profession generally. While there are few, if any, ethical rules that are truly unique to the practice of law in ridesharing cases, there are also no exceptions that are unique to ridesharing cases. The same rules apply to ridesharing cases that apply in any other context. This paper will address some of the ethical rules that are of primary importance, including the duty of competence, preserving confidentiality, and protecting against conflicts of interest to ensure the duty of loyalty can always be met. Additionally, this paper will briefly explore some of the other ethical restrictions that lawyers face, which concern the use of ridesharing services.

II. Competence

As technology has grown increasingly important to everyday life, technology has also become more prominent in the practice of law. In recognition of this growing importance, the American Bar Association's Model Rules of Professional Conduct were amended in 2012 to state that part of a lawyer meeting their duty of competence included staying "abreast of changes in the law and its practice," including being aware of "the benefits and risk associated with relevant technology." [1] While generally this comment is thought to be directed at the technology a lawyer uses in their practice, it can also be applied to a lawyer staying informed regarding the legal issues created by the technology involved in a case. This requirement that attorneys be informed about the technology that can create issues in a given case is particularly relevant in cases that involve emerging technologies, such as ridesharing.

[1] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [8].

It would be easy for someone to make the mistake of assuming that a car accident case involving a ridesharing driver is no more complicated than any other personal injury/motor vehicle accident case involving a commercial driver. However, as a unique technology, ridesharing cases present unique issues that a lawyer must be aware of when working in this field. Being informed regarding the legal issues that are likely to emerge in a case is also a specific duty imposed by the Model Rules.[2] Given that the relationship between a ridesharing coordinator or company and a ridesharing driver is notably different than the relationship between other commercial transportation companies and their drivers, an awareness of these difference and how they can impact a case is likely to be a crucial component of effectively representing a plaintiff injured by a ridesharing driver. Furthermore, attorneys should be aware of the various theories that can be used to pursue recovery from a company associated with a tortfeasing rideshare driver, such as negligent hiring and retention, or liability premised on the company being a common carrier. Conversely, an attorney representing a ridesharing driver or company must also be aware of the variety of issues that can arise so as to not be caught off guard by a novel argument put forward to support a finding of liability.

Furthermore, the discovery phase of a case involving a ridesharing accident is likely to involve unique and new questions of how information must be retrieved and produced from smartphones or from data stored remotely in the "cloud." Understanding what information is created by using ridesharing applications, where that information is stored, what format it is in, and how to obtain or protect this information is essential to effective representation in the discovery phase. Importantly, the responsibility of understanding these largely technological questions is imposed in addition to the more traditional requirements of understanding the legal rules that will govern a dispute. The combination of these burdens may seem daunting given the rapid pace of technological advances; but there are many resources available to attorneys to help them meet their obligations to "stay abreast" of developments.

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[2] *Id* at cmt. [2].

The Model Rules provide a number of specific actions that attorney can take to meet their competence obligation. At the outset, the rules note that even in a "wholly novel field" a lawyer can provide adequate and competent representation through completing "necessary study."[3] Alternatively, when novel issues arise in a case, an attorney can meet their obligation by associating with an attorney who has performed the necessary study and has a reputation of competency in the relevant field.[4] Given that ridesharing moving rapidly from a "disruptive" novelty to a common place fact of life, there are already attorneys who are operating boutique practices that focus solely on ridesharing cases. When in doubt regarding the legal or factual implications of a development in ridesharing case, associating with an attorney who has dedicated their practice to this field could be very useful, or even necessary.

III. Confidentiality

Confidentiality has been called the bed-rock of legal ethics. Despite the centrality and importance this rule, attorneys are sometime less than fastidious in adhering to their responsibilities in this respect. Technology has provided attorneys new outlets to advertise their successes and comment publicly on current legal issues, but these new outlets have sometimes created problems due to attorneys failing to recognize the scope of their duty of confidentiality. When attorneys make comments on legal topics in various online formats, such as blogs, micro blogs, like twitter, or other online statements, it is important that lawyers remain mindful of the command of in Model Rule 1.6, which states that "a lawyer shall not reveal information relating to the representation of a client," unless a there is authorization for the disclosure, or one of the few exceptions applies.[5]

The comments to the Model Rule make it clear the scope of the confidentiality rule is very broad. The comments emphasize that the duty is "fundamental" and applies "not only to matters communicated in confidence by the client but also to all information

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[3] *Id.*
[4] *Id.*
[5] MODEL RULES OF PROF'L CONDUCT R. 1.6.

relating to the representation, whatever its source."[6] Even the identity of a client or former client is protected by this duty.[7] One of the most overlooked parts of the information covered by confidentiality responsibilities is information that is publicly available. Even information that is available in a court's ruling or other public document should not be disclosed absent a client's informed consent.[8]

Even in instances where an attorney knows the information is confidential, sometimes the informality of personal interactions can lead to information that the attorney is duty bound to keep confidential becoming public. One of the most high-profile examples of the ease with which this duty can be forgotten, occurred when one of the most famous writers in the world was unmasked by a legal representative ignoring his duty of keeping client confidences. In 2013, a solicitor in the U.K., Chris Gossage, revealed to a close personal friend that a new crime-mystery novel published by a writer named Robert Galbraith, was actually written by Harry Potter author, J.K. Rowling. A few days later, Gossage's friend spilled the information about the true identity of the author of Cuckoo's Call on Twitter. Within a few days the book had sold out at every bookstore and moved from 4709th to 1st on Amazon's best seller list. While that may sound like a positive outcome, the client, Mrs. Rowling, had her cover blown and was very unhappy about the new scrutiny the book was receiving, which she had tried to avoid by using a *nom de plume*. Ultimately, the solicitor who breached his duty of confidentiality was fined, his firm was required to make a large donation to a charity of Mrs. Rowling's choice, in leu of paying damages, and Mr. Gossage is now an example of how not to treat client confidences.[9]

The moral of the above story is that breaching the duty of confidentiality, even in instances that seem minor, or where there is close relationship between the attorney and the person being given the confidential client information, there is a significant risk of the

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[6] *Id* at [cmts. 2-3].
[7] Comm'n on Ethics and Prof'l Responsibility Formal Op. 41, at 2 (2009).
[8] Comm'n on Ethics and Prof'l Responsibility Formal Op. 480, at 3(2018).
[9] Jon Stock, *JK Rowling unmasked: the lawyer, the wife, her tweet – and a furious author, THE TELEGRAPH* (7:00 am, July 21, 2013), https://www.telegraph.co.uk/culture/books/10192275/JK-Rowling-unmasked-the-lawyer-the-wife-her-tweet-and-a-furious-author.html, (last accessed on April 16, 2018).

client's interest being jeopardized or harmed. Thus, attorneys should treat the obligation to maintain client confidences a primary aspect of their work and ethical obligation to clients.

Furthermore, one of the aspects of the duty of confidentiality that is particularly relevant in the context of ridesharing cases, is that even when the information received in the course of representing a client is interesting and exciting, this information must be kept private, absent approval from the client. While there may be a significant temptation to discuss with peers the novel theory of liability you are pursuing based on the facts of your ridesharing case, or to hint at information you hope to avoid disclosing in discovery, this is the type of information that should always remain confidential to ensure adherence to ethical obligations.

IV. Conflicts of Interest

Lawyers must always consider the risks posed by conflicts of interest and be aware of how the interest of past or current clients could cause tension with the interests of a new client. The regular use of a through conflict check system before taking on a matter can be useful in guarding against conflicts, but such a system, operating alone, is not enough to guarantee that conflicts will not arise.

A conflict of interest arises when there is a substantial risk that a lawyer's ability to represent a client to the best of her abilities will be materially and adversely affected by another interest.[10] While seas of ink have been spilled explaining what a "substantial risk" is and what constitutes being "materially" affected, in determining whether a conflict exists, a common-sense approach will often be a reliable test. Specifically, to determine if a conflict is likely to arise a lawyer should mindfully consider this question: "Because of the presence of an interest, am I likely to do or be tempted to do something different from what a truly independent lawyer – one who did not have this interest –

[10] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2).

would do in the same circumstances?"[11] If the answer to this question is anything other than a confident "no," then there is likely a conflict of interest.

Some conflicts of interest are easy to recognize, such as representing co-defendants who are likely to point the finger at each other as a defense, or even representing two parties that may end up on different sides of a lawsuit. However, some conflicts are subtler but can be just as threatening to an attorney's ability to make independent judgments. For instance, conceivable conflicts of interest could arise through representing traditional transportation companies and representing ridesharing companies simultaneously. While an attorney may be interested in pursuing work related to representing ridesharing companies, if a traditional taxi service is a current or previous client, there is a potential that a conflict could arise due to the tension between these two types of transportation companies. While an attorney or firm may be well suited to address the liability and regulatory issues associated with for-hire driving services, the fact that companies like Uber and local taxi services often engage in heated disputes regarding the regulations of their business means an untenable situation could result from representing both companies. Generally, representing two companies with competing economic interest does not create a conflict.[12] However, a more ethically challenging situation is present where there is strong probability that one company will pursue legal action against the other at some point, which has frequently occurred between taxis services and companies like Uber.[13]

While there is a risk that a conflict could arise from taking on a ridesharing service as a client if a traditional transportation service is a past client, the possibility of a conflict is not an absolute bar to such representation. Proceeding with the representation of both entities while remaining mindful of the potential for a conflict is a necessary

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[11] Ellen Yankiver Sunni, *Conflicts of Interest*, GPSolo Magazine, (Oct/Nov. 2005), https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/conflictsofinterest.html (last visited April 16, 2018).
[12] John K. Villa, *Representing Business Competitors: A Conflict or Not?*, ACCA Docket 20, No. 2 (2002).
[13] See, Gary Hall, *Taxi, Uber Black Drivers block streets in protest of UberX, Lyft*, Center City WPVI (Dec. 17, 2015), http://6abc.com/traffic/taxi-uber-black-drivers-block-streets-protesting-uber-x-lyft/1125009/, (last visted April 16, 2018).

initial step. Furthermore, obtaining the informed consent, in writing, from the parties can guard against any allegations of wrongdoing in the event a conflict arises after representation has begun. Finally, even if the forgoing precautions are taken, if an attorney proceeds with representation of both a traditional and modern transportation company, particularly in a regulatory matter, an acceptance of the fact that the attorney, and/or firm, may ultimately be forced to withdraw if the positions of these client become too antagonistic and knowing when withdrawing is appropriate can serve as a final backstop against potentially ending up the wrong side of the relevant ethical requirements.

V. Financial Assistance to Clients: Paying for Ridesharing

A final ethical issue that lawyers should consider comes from the use of ridesharing apps by attorneys and firms to aid clients with transportation needs. When clients are involved in a vehicle collision that damages their car, or a client suffers an injury that makes it difficult for them to drive, a lawyer may deem it necessary to aid the client in finding a way to attend depositions, hearings, or even medical appointments. However, attorney's must remain mindful of Model Rule of Professional Conduct 1.8(e), which places restrictions on attorney's providing financial assistance to a client in connection with pending litigation.[14]

Given the potential for an attorney to become too personally invested in the outcome of a client's matter if the attorney gives financial assistance to a client, many jurisdictions have been very strict with respect to the application of Rule 1.8(e) or its equivalent. For instance, in *Rubenstein v. Statewide Grievance Commission,* an attorney was reprimanded for the practice of providing clients with bus tokens to be used to attend doctor's appointments.[15] Similarly, an attorney in Maryland received a brief suspension due his decision to advance a relatively small sum of money to a client so that the client could pay for repairs to his vehicle.[16] Also, a North Carolina Ethics Opinion held that

[14] MODEL RULES OF PROF'L CONDUCT R. 1.8(e).
[15] 2003 WL 21499265 (Conn. Super. Ct. 2003).
[16] *Atty. Grievance Comm. of Maryland v. Kandel*, 317 Md. 274, 563 A.2d 387 (1989).

while a lawyer could cover occasional transportation costs, if the client remained ultimately responsible for these costs, a lawyer could not pay for a rental car when the car would be used for daily driving in addition to attending litigation related doctor's appointments.[17]

With the restrictions on providing clients with assistance related to transportation in mind, it is worth considering how the use of Uber, or a similar service, could provide a method of aiding clients with transportation issues related to their legal disputes. At least one commentator has argued that due to Uber's structure, and Uber's claim that they are "everyone's private driver," paying for a client's Uber rides to and from court or doctor's appointments would not violate Model Rule 1.8.[18] Consider that if a firm maintained a relationship with a car service, a client's use of that car service would likely not constitute impermissible financial assistance. Just as paying for a client's parking when visiting a firm's office does not constitute impermissible financial assistance. It could be argued that Uber is being used as "an outsourced law firm car service."[19] Under this reasoning, fees for client Uber trips would be more like typical law-firm operation overhead, like courier services, or office space, than financial assistance to a client. However, given that this is a largely novel question of legal ethics, attorneys planning on using Uber to aid with client transportation may want to seek further guidance from relevant bodies tasked with enforcing ethical rules in their jurisdiction before providing ridesharing trips as an uncompensated benefit to clients.

VI. Conclusion

While ridesharing will present new and novel questions of law, the governing ethical norms that apply in other cases remain in full effect. Attorneys who aim to break new ground by helping to define the legal realities of ridesharing must stay vigilant to ensure that they are meeting their ethical obligations. This is because without the benefit of

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[17] North Carolina Formal Ethics Op. 7 (2001).
[18] *Legal Ethics: Can Law Firms Pay for Their Clients to Uber?*, My Shingle (2016), https://myshingle.com/2016/04/articles/client-relations/legal-ethics-can-law-firms-pay-clients-uber/, (last visited April 16, 2018).
[19] *Id.*

guiding precedent, an attorney could end up on the wrong side of an ethical duty without realizing his actions are cause for concern. However, by staying mindful of competence, confidentiality, and conflict of interest issues, lawyers can put themselves in a good position and minimize the risk of becoming a disciplinary precedent for an avoidable mistake.