PROGRAM MATERIALS
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Common Ethics Mistakes Lawyers Make with Clients and How to Avoid Them

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www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

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Joseph A. Corsmeier, Esquire
2999 Alt. 19, Suite A
Palm Harbor, Florida 34683
Office: (727) 799-1688
jcorsmeier@jac-law.com

Avoiding Common Ethics Mistakes Lawyers Make with Clients

- Client Intake
- Conflicts of Interest
- Client Confidentiality
- Ethics and Social Media
- Supervising Non-Lawyers and Ethics Rules
- Managing Client Files/Matters
- Records Management and File Closing
- Withdrawal/Termination of Representation
- Nonengagement/Disengagement Letters
- Fees and Fee Agreements
- Trust Accounting

Client Intake: Preliminary Steps

Use a client intake form – make sure you know who all the parties are and how the client was referred to your office.

Run a conflicts check prior to the potential client's appointment or before you begin your consultation.

If you charge a consultation fee, make sure the client is aware of it before the consultation begins.

Non-lawyer employees are permitted to conduct initial client interview but the practice is discouraged and limited to gathering factual information.

Client Intake: Screening Clients

Screen potential clients for potential conflict of interest at the beginning of the representation:

Was client previously represented? If so, who and why did representation end?

Watch out for unreasonable expectations and/or failure to listen.

Thoroughly explain parameters of the representation from the inception - set ground rules.

Do NOT guarantee results.

If there is contact with a potential client and no representation results from the contact, send non-engagement letter; state the general type of matter and that no representation exists; explain declination does not mean they have no case; encourage client consult with other attorneys; advise generally of any potential statute of limitations and/or any other deadlines that might affect client's rights.

Client Intake: Screening Clients

- Conflict screening continued:
- Conduct conflict of interest checks as an existing matter develops and new parties are added, or if there is a new matter for an existing client, or if a matter undertaken for an affiliate of an existing client.
- If a matter is undertaken for new entity of an existing client, the entity name should be submitted for a conflict check.
- Rule 4-1.9 prohibits representing a new client against a former client in the **same or substantially related matter** in which the new client's interests are **materially adverse to the former client's interests**.

Conflicts of Interest

- Rule 4-1.7 addresses the requirements for representation of multiple clients in a single matter.
- To be valid, waivers of conflict of interest must be after full disclosure and “informed consent” in writing
- Preamble to Chapter 4 of Bar Rules:
- "Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

Conflicts of Interest

- Avoid business transactions with clients (including loans) or acquiring an interest adverse to the client. (See Rule 4-1.8).
- This is a conflict of interest and is prohibited unless strict requirements are met.

Conflicts of Interest

- RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS
- (a) Business Transactions With or Acquiring Interest Adverse to Client. 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, except a lien granted by law to secure a lawyer's fee or expenses, 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 that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Conflicts of Interest

- RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS
- (b) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.
- (c) Gifts to Lawyer or Lawyer's Family. A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

Conflicts of Interest

- RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS
- (d) Acquiring Literary or Media Rights. 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.
- (e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Conflicts of Interest

- RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS
- (f) Compensation by Third Party. A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client gives informed consent;
- (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 4-1.6.
- (g) Settlement of Claims for Multiple Clients. A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of 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. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Conflicts of Interest

- RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS
- (h) Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- (i) Acquiring Proprietary Interest in Cause of Action. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
- (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee.

Conflicts of Interest

- RULE 4-1.8 Comment
- Business transactions between client and lawyer
- 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. The requirements of subdivision (a) must be met even when the transaction is not closely related to the subject matter of the representation.
- The rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions the lawyer has no advantage in dealing with the client, and the restrictions in subdivision (a) are unnecessary and impracticable. Likewise, subdivision (a) does not prohibit a lawyer from acquiring or asserting a lien granted by law to secure the lawyer’s fee or expenses.

Conflicts of Interest

- Rule 4-1.13 Organization as Client
- (a) Representation of Organization. **A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.**
- (b) Violations by Officers or Employees of Organization. If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, **the lawyer shall proceed as is reasonably necessary in the best interest of the organization**.

Conflicts of Interest

- Rule 4-1.13 Organization as Client
- (b) continued
- In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
- **(1) asking reconsideration of the matter**;
- **(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and**
- **(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.**

Conflicts of Interest

- Rule 4-1.13 Organization as Client
- (c) Resignation as Counsel for Organization. If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.
- (d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, **a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.**
- (e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Client Confidentiality

- 4-1.6 Confidentiality of Information
- 4-1.6(a) prohibits a lawyer from revealing information “relating to representation of a client” except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.
- 4-1.6(b) requires disclosure of confidential information to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another.
- This mandatory disclosure is different from the crime-fraud exception to privilege in that it requires the threat of substantial injury or death to require that the information be revealed.
- Permissive exceptions in Bar Rule 4-1.6(c) include responding to Bar complaint, legal malpractice claim, or criminal allegation against lawyer).

Client Confidentiality

- 4-1.6 Confidentiality of Information
- (e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.
- Applies to responses to Bar complaints.

Client Confidentiality

- Rule 4-1.6 Confidentiality of Information
- Comment to Rule 4-1.6 states that a “fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.”
- Absent an exception, confidential information remains confidential and cannot be disclosed during and after the representation, and even after the client dies.
- The lawyer should not reveal confidential information if it will injure the client’s interests (absent an exception or legal requirement), and confidences should only be disclosed pursuant to exception or to advance client’s interests.
- A violation of the Bar rule may result in disciplinary sanctions.

Confidentiality and E-Filing

- *In the Matter of: John A. Goudge*, No. 1024426, Commission No. 2012PR00085.
- Associate at Chicago law firm was responsible for contract cases from USDOJ to represent US in debt collection cases involving student loans.
- Under lawyer's supervision and direction, non-lawyer assistant prepared complaints and exhibits and non-lawyer assistants filed complaints and exhibits with the Ill. N. U.S. District Court for the Northern District of Illinois' CM/ECF (e-filing) system.
- CM/ECF requires box be checked stating that filings are in compliance Fed. Civil Proc. Rules and personal identifying information was redacted; however, confidential information was not redacted and became available to public and viewable on court's website.
- Lawyer admitted failure to make reasonable efforts to supervise non-lawyer, expressed remorse, and received reprimand.

Ethics and Social Media

- A lawyer cannot attempt to gain access to non-public social media content by using subterfuge, dishonesty, deception, pretext, false pretenses, or an alias.
- Ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) conclude that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to get around a social media users' privacy settings to reach non-public information.
- Ethics opinions by the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), among others, conclude that lawyers must affirmatively disclose their reasons for communicating with the third party.

Ethics and Social Media

- Florida Bar Advisory Opinion 14-1 (approved June 25, 2015)
- Facebook privacy settings
- "A personal injury lawyer may advise a client pre-litigation to change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved."
- This advisory opinion is consistent with NYC Lawyers Association Ethics Opinion 745 (2013) which states that a lawyer may advise client to use highest level of privacy setting on the client's social media pages and may advise client to remove information from social media page prior to litigation, regardless of its relevance to a reasonably foreseeable proceeding, as long as removal does not violate substantive law regarding preservation and/or spoliation of evidence.

Ethics and Social Media

- Facebook “friends”
- A lawyer cannot attempt to gain access to non-public social media content by using subterfuge, dishonesty, deception, pretext, false pretenses, or an alias.
- Ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) conclude that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to get around a social media users’ privacy settings to reach non-public information.
- Ethics opinions by the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), among others, conclude that lawyers must affirmatively disclose their reasons for communicating with the third party.
- *In the recent case of John J. Robertelli v. The New Jersey Office of Attorney Ethics (A-62-14) (075584)* (New Jersey Supreme Court 4/19/16), the NJ Supreme Court ruled that attorneys could be prosecuted for disciplinary rule violations for improperly accessing an opposing party’s Facebook page.

Blogs and Client Confidentiality

- Lawyer Blogs and responses to “internet complaints”
- Illinois Supreme Court suspended assistant public defender from practice for 60 days for, inter alia, blogging about clients and implying in at least one such post that a client may have committed perjury. *In re Peshek*, M.R. 23794 (Ill. SC May 18, 2010).
- Georgia Supreme Court imposed reprimand on lawyer who violated attorney/client confidentiality in response to negative reviews that a client had made on internet “consumer Internet pages”. *In the Matter of Margrett A. Skinner*, Case No. S14Y0661 (Ga. Supreme Court 5/19/14) .
- Virginia Supreme Court held that Virginia State Bar could not prohibit lawyer from posting non-privileged information about clients and former clients without clients’ consent where (1) information related to closed cases and (2) information was publicly available from court records. Lawyer was free, like any other citizen, to disclose what actually transpired in courtroom. *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013).
- New York State Bar Association Ethics Opinion 1032 (October 30, 2014) states that lawyers cannot reveal client confidences solely to respond to former client’s criticism on lawyer-rating website.

Blogs and Client Confidentiality

- Lawyer blogs
- Florida lawyer received public reprimand for posting derogatory comments about a Judge on an internet blog.
- "(Lawyer) referred to (judge) throughout the internet posting as an 'EVIL UNFAIR WITCH' or 'EUW.'
- Lawyer improperly questioned judge's qualifications by stating that judge was "seemingly mentally ill."
- Lawyer remarked that judge had an "ugly, condescending attitude."
- Lawyer impugned judge's integrity by stating "she is clearly unfit for her position and knows not what it means to be a neutral arbiter" and "there's nothing honorable about that malcontent."
- Referee found statements "not only unfairly undermined public confidence in the administration of justice, but…were prejudicial to the proper administration of justice." *The Florida Bar v. Conway*, 996 So.2d 213 (Fla. 2008)

Supervising Non-Lawyers and Ethics Rules

- Take steps to ensure that non-lawyer staff maintain client confidentiality as required by the Attorney pursuant to the Rules.
- Do not permit non-lawyer staff to negotiate settlements.
- Do not permit non-lawyer staff to discuss and/or interpret the terms of the fee agreement with the client or prospective client.
- Ensure non-lawyer staff explain to the client that he/she cannot provide a legal opinion or provide legal advice.
- Both attorneys and non-lawyer staff should explain to a prospective witness that you are not disinterested in the matter.

Supervising Non-Lawyers and Ethics Rules

- TFB Ethics Ops. 71-39 and 86-4 - non-lawyer employees can be listed on firm letterhead and business cards if non-lawyer status disclosed.
- TFB Ethics Op. 87-11- non-lawyer employees prohibited from signing lawyer's name to pleadings or other court documents.
- TFB Ethics Op. 74-35- non-lawyer employees prohibited from engaging in settlement negotiations with adjusters.
- TFB Ethics Op. 76-33 and 76-38 - lawyers prohibited from including non-lawyer employees in overhead and also billing for the same services.
- TFB Ethics Op. 02-01 - non-lawyer employee bonuses based solely on number of hours worked is prohibited but may be used as a factor to decide if bonus will be paid and amount.

Client Matters and File Management

- Create a file organization system: Checklists for managing case deadlines; pleadings index; communication records/logs; time entries/billing logs; discovery; research; misc.
- Maintain your calendar; Utilize To Do lists and a tickle system for deadlines for completion of file tasks; consider case management software options.
- Communicate with client, promptly respond to telephone calls/e-mails etc. and document your communications.
- Be careful what you say in an e-mails! Do not assume that it will remain confidential.
- Relay settlement offers in writing and whenever possible get your client's authority to settle in writing.

Client Matters and File Management

- Copy client with all relevant documents related to representation and provide periodic updates.
- Conduct periodic file reviews to maintain progression of the files.
- Cannot overstate the importance of documenting all of your activities on your files.
- Comment to Rule 4-1.3 (Diligence): “A lawyer's workload must be controlled so that each matter can be handled competently….Perhaps no professional shortcoming is more widely resented than procrastination.”

Fees and Fee Agreements

- Fee agreements and engagement letters.
- Should have written fee agreement or engagement letter for every client/matter (or master fee agreement/engagement letter)
- Specifically identify the client(s).
- Delineate and limit the parameters/scope of representation
- Confirm responsibility for costs/expenses and frequency of billing
- Should provide for lawyer's right to withdraw under appropriate circumstances (see Bar Rule 4-1.16).
- Written fee agreement is required if fee is contingent and set/flat/non-refundable fee must be confirmed in writing.

Fees and Fee Agreements

- Appropriate billable time is time that reasonably should be devoted to accomplish a particular task. (See *Florida Bar v. Richardson*).
- No clerical, secretarial, or other non-substantive time should be billed.
- Maintain time/billing entries with an explanation of actions on the file.
- Best practice is to provide clients with a bill with detailed time entries on monthly basis, which reflects the balance of any retainer credit or cost deposit, or balance owed.
- Fee agreement should provide for right to withdraw (see Bar Rule 4-1.16).
- Mandatory and permissive withdrawal-may withdraw due to client's failure to meet financial obligations.
- Executed by the client-have procedures in place to follow up if not timely executed.
- If third party is paying, third party should sign as well disclosing that confidentiality is with client only and lawyer will exercise independent professional judgment on behalf of client.

Types of Fees

- Non-refundable fee retainer is earned upon receipt and placed into operating account (Tip: keep billable hours for Bar complaint if filed).
- Set or flat fee is earned upon receipt and placed into operating account (keep hours).
- Contingency fee agreement (keep hours for quantum meruit and/or Bar complaint).
- Fee agreement with billable hours (must keep billable hours. Tip: send periodic/monthly invoices with detailed billable hours).

Types of Fees

- Florida Bar Ethics Op. 93-2 Nature of fees
- Fees earned upon receipt cannot be placed in the trust account. Nonrefundable fees permissible but are subject to clearly excessive fee analysis.
- Attorney must perform “substantial work”
- Unearned fees and advances for costs must be placed in the trust account
- If part of payment is earned fee and part future costs/expenses, the lawyer must deposit the check into trust account, must withdraw amount of flat/earned fee and leave remainder in trust account

File Closing and Records Management

- Send disengagement or closing letter to client.
- include deadline for right to appeal and need to consult with separate counsel for such, policy for destruction of file, may be a good time to market yourself, advise of availability for future representation of client or someone they know who may need assistance in the future.
- create a procedure for file retention, including physical storage or electronic storage.
- no specific rules on how long to retain a file. In Florida, IOTA account records must be kept for 6 years,
- client confidentiality regarding destruction of files.

Withdrawal/Termination of Representation

- 4-1.16 Withdrawal/termination of representation
- (d) Protection of Client's Interest.
- Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.
- Retaining and charging liens are permitted under the law.

Nonengagement/Disengagement Letters

- Non-Engagement letters
- If there is contact with potential client and no representation results, send non-engagement letter.
- Clearly state general type of matter and that no representation exists-this is attorney's responsibility under Bar rules.
- Advise of any potential statute of limitations and/or any other deadlines that might affect client's rights.

Nonengagement/Disengagement Letters

- General and not overly specific language to negate later claims of reliance.
- State that decision to decline representation does not necessarily mean that they don't have a claim.
- Recommend consultation with another attorney as soon as possible if they wish to pursue any claim.
- Consider informing interested third parties of no representation (adjusters etc.)

Nonengagement/Disengagement Letters

- Send disengagement letter to client at the end of the representation
- Attorney's responsibility to clarify when representation has ended
- May be a good time to advise of availability for future representation of client or someone they know who may need assistance in the future.

IOTA Trust Funds

- A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation.
- Funds held in IOTA trust account must be **nominal and/or short** term.

IOTA Trust Funds

- Must maintain monthly bank statements, records of deposit & withdrawals; client ledgers; cash receipts and disbursement journal with supporting documentation for deposits/withdrawals; reconciliations and comparisons.
- Best practice would be to maintain your IOTA account yourself.
- If you assign the responsibility to another, you are responsible to supervise an oversee that the trust account is being maintained properly.
- Attorneys cannot abdicate, by delegation to the bookkeeper, the ultimate responsibility for trust account maintenance. (*Florida Bar v. Rousso and Roth*).

Final Note

- Thanks for your attention and be careful out there!