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Ethics 101: Maintaining an Ethical Law Practice

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Ethics 101: Maintaining an Ethical Law Practice and Understanding Ethical Issues and Obligations

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Keys to Ethics and Law Office Management

- Competence
- Duties of Subordinate Lawyers
- Supervision of Lawyers and Non-lawyers
- Client Intake
- Conflicts of Interest
- Client Confidentiality
- Managing Client Files/Matters
- File Closing and Records Management
- Ethics Billable Time
- Ethical Fees and Fee Agreements

Competence
Model 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.
- Comment [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Supervising Lawyers and Non-lawyers

- Lawyers are responsible for the actions of both non-lawyers and subordinate lawyers under certain circumstances
- Under agency and principal (*respondeat superior*) doctrine, a supervising lawyer may be responsible/liable for non-lawyer/ subordinate lawyer conduct.

Supervising Lawyers
Model Rule 5.1

- Model Rule 5.1(b)
- A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
- the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;
- 2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action

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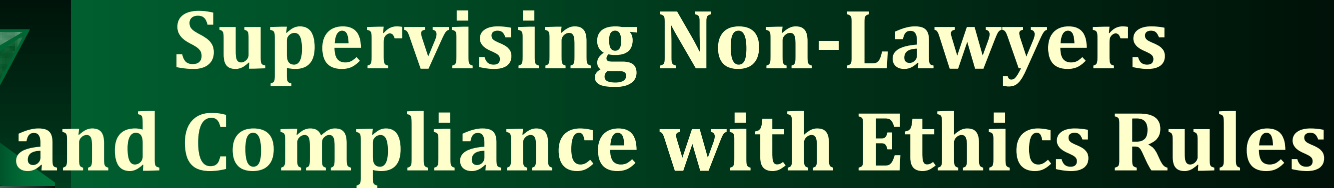
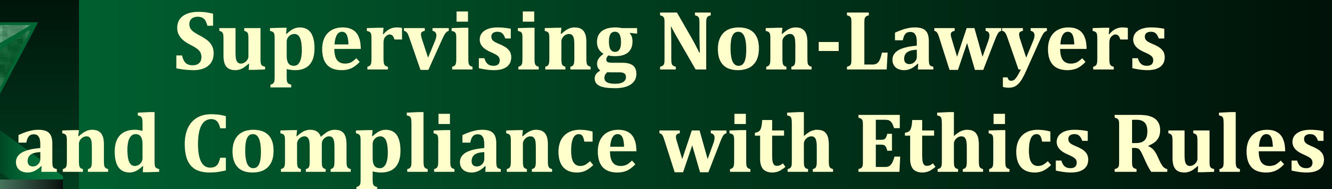
- Model Rule 5.2(a)
- A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

- Model Rule 5.3
- With respect to a nonlawyer employed or retained by or associated with a lawyer:
- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

- Model Rule 5.3(c)
- A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.



- 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 Compliance with 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.

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.

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.

- 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 a 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 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
- "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.”

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

Client Confidentiality

- 1.6 Confidentiality of Information
- 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.
- 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 1.6(c) include responding to Bar complaint, legal malpractice claim, or criminal allegation against lawyer).
- An internet complaint against a lawyer is not an exception and a lawyer is prohibited from providing confidential information in response to such a complaint.

Client Confidentiality

- 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.

- Comment 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.

- *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.

Blogs and Client Confidentiality

- 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)

Blogs and Client Confidentiality

- 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.

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.
- *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.

Ethics and Social Media

- Florida Bar Advisory Opinion 14-1 (approved June 25, 2015) states:
- "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.

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 <u>document your communications</u>.
- 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 Matter 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.”

- Attorney fees must be reasonable and cannot be illegal, prohibited, or clearly excessive (See Rule 4-1.5).
- Appropriate billable time is the 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 your 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.

- Billable time entries should adequately describe how the time is moving the matter forward.
- Too little information: prepare for summary judgment (3.0 hrs).
- Better: review pleadings and case law, and summarize deposition testimony, to prepare motion for summary judgment on liability and causation (3.0 hrs).
- Contemporaneous billing entries can certainly help if there is a later dispute or Bar complaint/malpractice claim).
- Can also be used to establish a factual narrative in the matter.

- 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 certain 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

- Fee agreement should provide for right to withdraw (failure to cooperate, conflict of interest, failure to pay etc.)
- 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.

- Mandatory Arbitration
- Florida Bar Rule 4-1.5(i) requires fee agreement mandatory arbitration provision to be in writing and disclosure must be in specific language of the Bar rule.
- Sue the client for unpaid fees? Be ready for the malpractice counterclaim-suing client foe fees is not prohibited; however, it should be strongly discouraged.

Fees and Fee Agreements
Non-refundable fees

- Florida Bar Ethics Op. 93-2
- 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.
- Minnesota prohibits non-refundable fees.

Types of Fees

- Amended Florida Bar Rule 4-1.5, effective October 1, 2015.
- The amendment also added language to the Comment stating that nonrefundable flat fees and nonrefundable retainers should not be deposited into the lawyer's trust account, but advance fees must be held in trust until earned. The Comment also states that nonrefundable fees can still be excessive.
- The amendment also moves the language in the Comment regarding contingent fees in criminal and domestic relations cases under the heading "Prohibited contingent 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).

File Closing & 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: 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.

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.

Non-engagement/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.).

Non-engagement/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

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.

- 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.

- 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!