ETHICS POTLUCK TOPICS FOR LITIGATION ATTORNEYS

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Competence, Diligence and Professional Integrity

Rule 1.1: Competence

- 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: Diligence

- A lawyer shall act with reasonable diligence and promptness in representing a client

Competence, Diligence and Professional Integrity

<u>The Golden Rule</u>

THE CLIENT IS THE BOSS

Model Rule 1.2

<u>Rule #2</u>: Never forget the Golden Rule

Competence, Diligence and Professional Integrity

- *What's it mean to be the boss?* See PCR 1.2:
  - Client controls the objectives of the representation
  - Lawyer shall consult client on the means to be used to pursue the objective
  - Lawyer impliedly authorized to act

Rule 1.4 Communications

RULE HAS TWO ASPECTS:

- Temporal: Be prompt (prior to taking action)
  - Bad news doesn't get better with age

- Substantive: Give the client sufficient information to participate intelligently in decision-making

- Gear toward client's sophistication

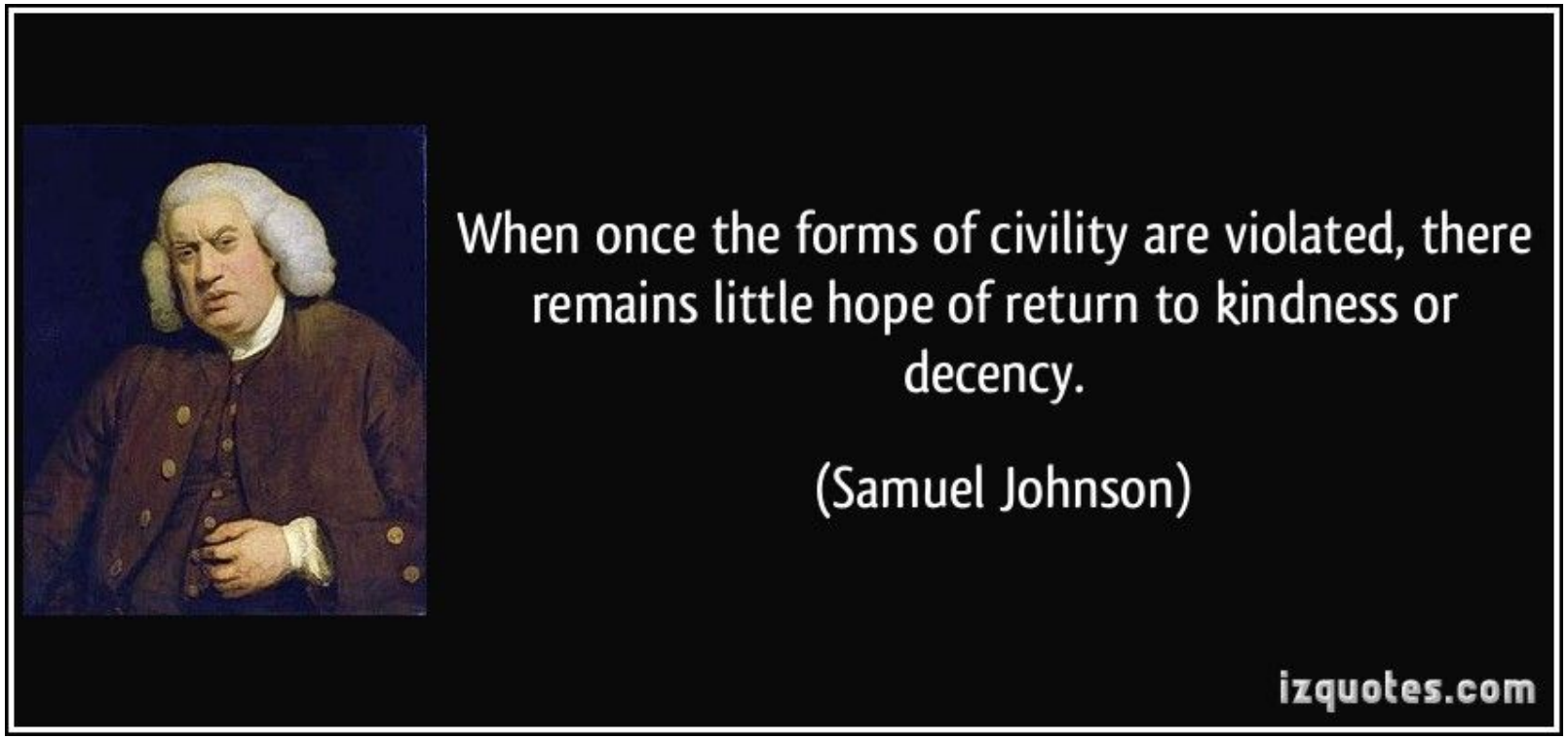
BUT Always meet client's expectations; some expect more communication than others

Best Practices

1) Return client calls and messages within 24 hours **OR** Acknowledge the call promptly.

2) Send your client drafts of significant documents one week before they must be filed with a court or government agency or shared with a third-party.





Communications with Difficult Clients

Unreasonable Client Demands

- Incumbent on lawyers to explain benefits of civility (which often include a lower legal bill)

- Knowing when to say enough is enough

Civility

- **Core of Professionalism**

- **What is civility?**
  - Broad word. Exhibit good behavior for the good of a community or profession. Code of decency that characterizes a civilized society

- **Misconceptions**, it is not:
  - An agreement
  - The absence of criticism
  - Liking a person
  - Good manners

Civility

- **Civil Conduct is a Condition of Lawyer Licensing**
  - Fitness and Character Examinations
  - Requirement of Law License
  - Preamble to Rules of Professional Conduct

- **Lawyer is Officer of Legal System AND Public Citizen**
  - In client dealings, court dealing, and in personal life lawyers must show respect for the legal system in his/her role as advisor, negotiator, evaluator, etc. (Preamble of Prof. Rules of Conduct)

  - Resolve conflict while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system (Preamble of Prof. Rules of Conduct)

Civility

There has always been a tension between being a zealous advocate and civility

CAN YOU SAY “NO” TO A CLIENT?

WHAT ARE THE CONSEQUENCES OF SAYING “NO” TO A CLIENT?

Rules of Zealous Advocacy

- Rule 1.2 Rules of Professional Conduct, Cmt. 1
- Rule 1.3 Rules of Professional Conduct, Cmt. 1
- A lawyer is not just a “hired gun”.
- A lawyer can refuse a client’s demands to act uncivilly or to engage in sharp and unethical practices with other parties in the case or matter.

Civility

- **Problems with Declining Civility in the Legal Profession**
  - Justifications for actions – “everyone is doing it”
  - No one proposing solutions or adhering to solutions
    - ***Sedona Conference*** – Judges/Attorneys join together for civility

- **Benefits of Civility**
  - Right thing to do!
  - Higher personal and professional rewards
  - Job satisfaction
  - Less likely to suffer from mental illness and substance abuse
  - Judges do not like it
  - Ruin your reputation
  - Client dissatisfaction and bad client reviews

Civility

- **Bad Behavior/Bad Consequences**
  - What happens to uncivil lawyers?
    - Rule 8.3 Reporting Lawyers
  - What rules do you violate, or could you be reported under?
    - Rules 8.4 (catch all) & 8.4(g) (discrimination/bias)
    - Potentially Rules 1.2, 1.3, 1.4, 3.2, 3.3, 3.4, 4.1 and several others

Oath of Attorneys

“I shall . . . abstain from offensive personality. . .”

Jurisdictional Movement Toward Civility

- **Movement Toward Systemic Solutions to Incivility**
  - Different jurisdictions addressing in pledges, rules, and oaths.

- E.g. South Carolina amended pledge/oath to include:
  - “to opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”

Knowing What You Are Up Against: Helpful Hints of How to Deal with Opposing Counsel

- Check your own biases and stereotypes at the door
- If the opposing party gets to you, they win.
- Smile, or better yet, ignore them – Do not engage
- Always fight up, never fight down
- Have compassion
- Believe in professionalism karma
- Keep communication open, TALK to opposing counsel

Knowing What You Are Up Against:
Helpful Hints of How to Deal with Opposing Counsel

- Outsmart – Stay ahead – Beat them in a round or two
- Prepare – Prepare – Prepare. Know your opposing Counsel – research (reputation and case history). Research online.
- All communications be placed in writing (*see next slide*)
- Kill them with kindness – respect your opposing counsel
- Play the waiting game – wait until opposing counsel civil
- Know and Follow the Rules
- Check your own attitude routinely

Document Bad Behavior and Dirty Tactics

- For example, if a lawyer does not provide a requested document after agreeing to do so, he/she writes: "I have called you five times. You have not had the courtesy to return my call, and I still have not received those documents.“

- For late night faxes, notify opposing counsel that he/she will not succumb to the tactic: "In court yesterday you said you would fax to me the following documents. You did so at 11:44 p.m. Certainly you must have known that I would not be working at that hour and would have no reasonable opportunity to review them.“

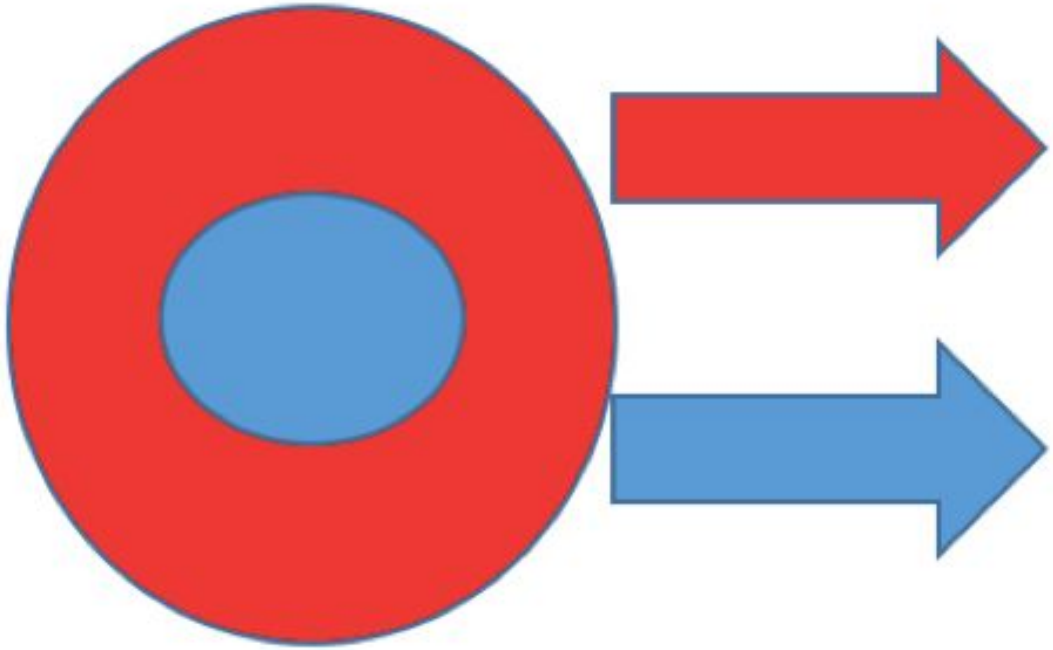
- Write memos to his/her files whenever suspect trouble. "It can be as basic as saying 'I spoke to attorney x and told him that I will not accept his 5:00 p.m. fax notices and that if he does it again I will ask for sanctions,'"

- "I want to memorialize it for me. If it never happens again, fine. But if it does, I know."

Confidentiality

Rule 1.6:

A lawyer shall not reveal client
information unless the client gives
informed consent or the disclosure is impliedly authorized.



Confidentiality

Attorney-client privilege

Key Confidentiality Concepts

- A lawyer's duty of confidentiality is far broader than the attorney-client privilege (*In re Hultquist,* 961 N.E.2d 999)
- There is no exception for "public information"



- Be careful with social media. ABA Op. 480 (03/06/18)
- The duty includes competence in preserving confidences
- Duty of competence (Rule 1.1) includes staying current on the benefits and risks associated with relevant technology"

Confidentiality

In negotiations, there is no duty to disclose affirmative facts to the other party.

IPCR 4.1, Comment 1



Confidentiality

Lawyers **may** disclose to prevent a fraud that is reasonably certain to result in substantial economic injury, and in furtherance of which the client used or is using the lawyer's services.

IPCR 1.6 (b)



Confidentiality Exceptions

In event of fraud:

Lawyer may disclose to prevent substantial injury

Lawyer shall not assist or further client's fraud.

IPCR 1.2 (d); IPCR 1.6, Comment 7



5 Tips for Protecting Your Attorney Client Privilege



Keep discussions with your attorney private.



Do not discuss any details of your case on social media



Do not blog about anything that may involve your case



Do not use your work email to correspond with your attorney



Do not use your work computer to email about your case

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Avoiding UPL: Prof. Rule of Conduct 5.5

- Generally must be admitted in jurisdiction to practice law.

- Exceptions:
  - Lawyer admitted in another jurisdiction practicing in state on “temporary basis”;
  - Lawyer admitted in another state providing non-trial services to lawyer’s employer;
  - *Pro Hac Vice* Admission
  - Services authorized to provide by federal law or other law of the jurisdiction

- **BUT WATCH OUT FOR**
  - CANNOT represent others;
  - CANNOT assist another in “unauthorized practice of law”

Prof. Rule of Conduct 5.5

Paralegals MUST be cautioned to be mindful and not go beyond limits of their authority – It is not just lawyers



Defining “Legal Advice”

Legal Advice: Professional Advice provided by a lawyer

Blurry: Only a lawyer may give legal advice, whereas a non-lawyer (paralegal) may recite legal information.

Illegal: It is generally illegal for a non-lawyer or unlicensed attorney to offer legal advice or otherwise represent someone other than himself/herself in a court of law.

Defining “Legal Advice”

- Advice from friends and family – NOT legal advice

- Trust legal advice forms an agreement between an attorney and his/her client based on particular legal matter the client is experiencing
  - Requires legal knowledge, skill, education and judgment
  - Applies to specific law to particular set of circumstances
  - Affects someone’s legal rights and responsibilities
  - Creates rights and responsibilities of advice-giver



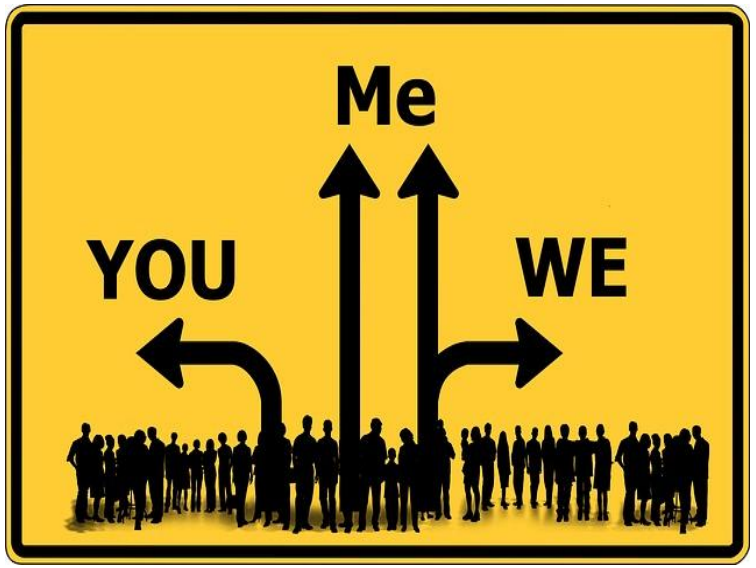
Introduction: Conflicts of Interest

- Rules appear deceptively simple.
- In difficult situations, seek independent, professional advice from another lawyer.

Conflicts of Interest

Rule 1.7(a)

A lawyer's representation creates a conflict of interest if:



Conflicts of Interest

Rule 1.7(a)

1. The representation of a client will be ***directly adverse*** to another current client; **or**

Conflicts of Interest

Rule 1.7(a)

2. There is a substantial risk that the lawyer's ability to counsel the client will be ***materially limited*** by responsibilities to another client.

Duties to Former Clients

Rule 1.9:

- Is the new matter the same or ***substantially related*** to the matter handled for the former client?

- If so, seek consent, which must be ***informed consent***, confirmed in writing.

What is substantially related?

Two overarching purposes of conflicts rules:

- Upholds clients' reasonable expectations of a lawyer's loyalty
- Protects client confidences; reassures confidences not used against the client

Imputation Within a Law Firm

Rule 1.10:

- Lawyers within a firm treated as one.
- Limited exception for lawyers who change law firms who may be screened in some circumstances. PCR 1.9(b), (c) & 1.10 (b), (c)
- Screening is not a silver bullet, but can mitigate risk

Conflicts of Interest

Remember who the client is.



(Hint: It is not always the one paying the bill.)

Direct Adversity to a Client

- Some conflicts not “consentable,” so don’t ask for consent
- Adversity in transactions less troublesome than litigation, yet care must be taken

Keys to Consent

- Must be informed and written; both are your responsibility
- Advise client in writing to seek independent counsel
- May need both client's consent to disclose information to the other sufficient to obtain informed consent

Material Limitations on the Representation

- Conflicts arise in absence of direct adversity when lawyer's own interests are at stake

- Use foresight to address any necessary limitations on the scope of the engagement upfront in the engagement letter

Joint Representation

- Common representation parties on the same side of a deal is permissible
- BUT, situation may be rife with potential conflicts

Conflicts: Representation of Multiple Parties in a Transaction

What is the informed consent?

1) Explain material risks of, and reasonably available alternatives to, the proposed course of conduct.
2) Explain possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."
3) Confirm in writing.

IPCR 1.7 cmt. 18; IPCR 1.7(b)(4)

Joint Representation: Limiting Risk

- Document informed consent in a joint engagement letter
- Spell out the advantages (e.g., presenting common front, reduced expenses, etc.)
- Identify risks and disadvantages (e.g., no secrets between joint clients, risk may have to withdraw if severe conflict arises)

Prior Work Conflicts

- PCR 1.7(b): involve a “significant risk” of a material limitation from lawyer’s own interests

- Threat or claim against lawyer in an ongoing matter



Questions?