RELATIONSHIPS ARE COMPLICATED:

ATTORNEY-CLIENT



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INTRODUCTION TO ETHICS



ATTORNEY OATH/RULES DEMAND PROFESSIONALISM





RULE 22 – ATTORNEY OATH

"I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; **I will abstain from offensive personality** and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God."

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. . .

[7] . . . a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal professional and to exemplify the legal profession's ideals of public service.

[13] Lawyers play a vital role in the preservation of society.



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AGENDA

Your Relationship With Clients:

- **Taking Client Directions**
- **Keeping Clients Informed**
- **Confidentiality**
- **Setting/Collecting Your Fee**
- **Withdrawal/Firing the Client**

WORKING WITH CLIENTS

Golden Rules for developing a successful practice:

Rules #1: The client is the boss.

Rules #2: Never forget Rule #1.



ALLOCATION OF RESPONSIBILITY BETWEEN LAWYER & CLIENT

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**



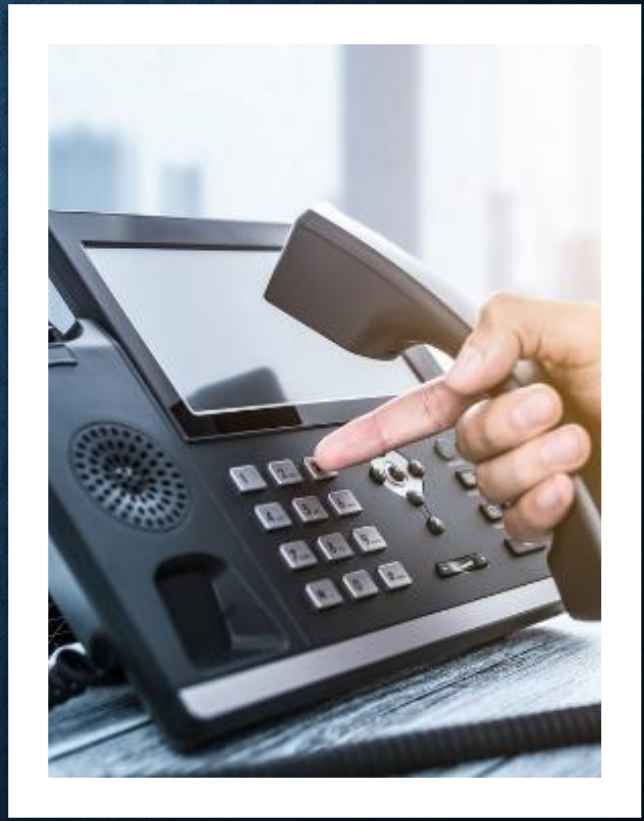
ETHICAL BASELINE: PCR 1.4

- Temporal: Be prompt (prior to taking action)
- Substantive: Give the client sufficient information to participate intelligently in decision-making
- Gear toward client's sophistication

BEST PRACTICES

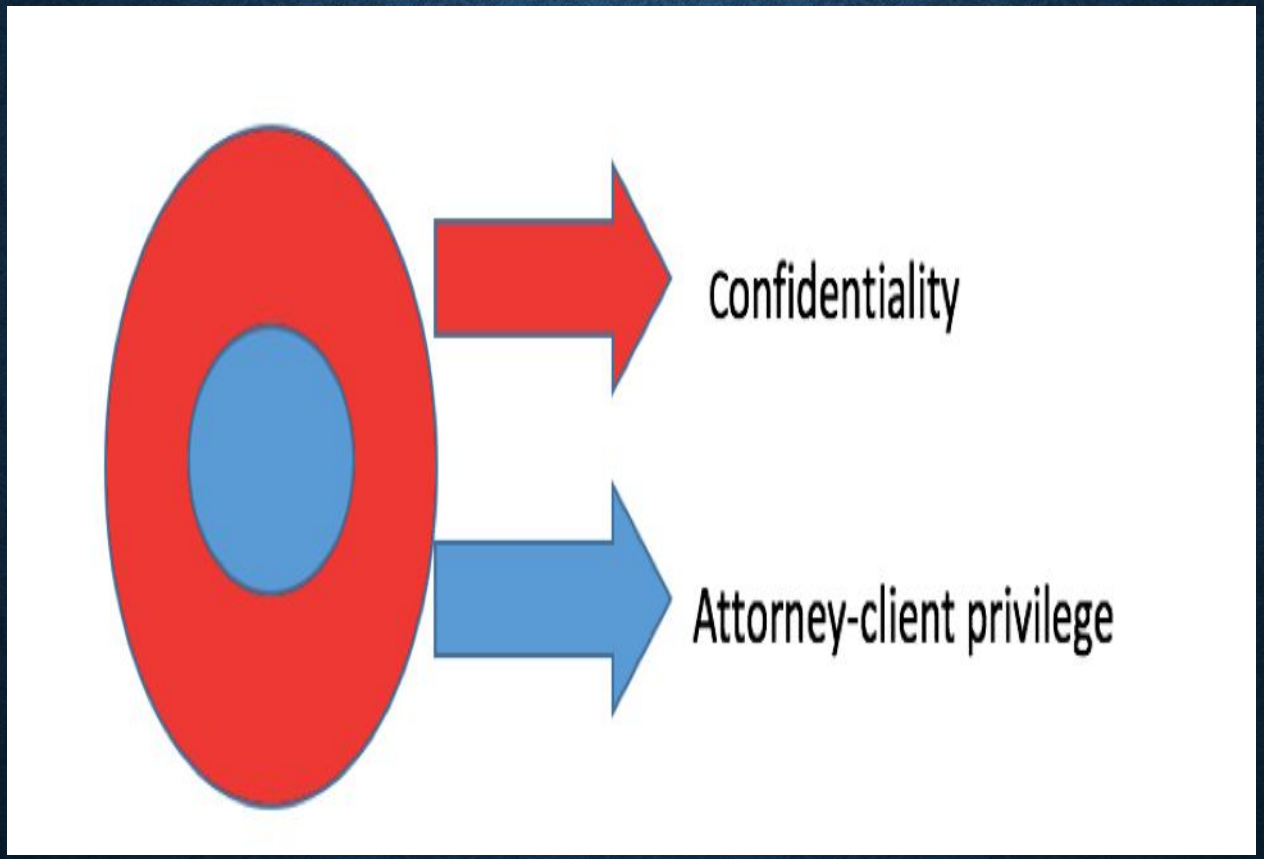
1) Return client calls and messages within 24 hours **OR** acknowledge the call promptly.

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.



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 EXCEPTIONS

In event of fraud/crime:

- Lawyer may disclose to prevent substantial injury
- Lawyer shall not assist or further client's fraud.
- Other exceptions under Rule 1.6(b)



IPCR 1.2 (d); IPCR 1.6, Comment 7

BURIED BODIES

Robert Francis Garrow attacked the four campers in July 1973, stabbing Philip Domblewski to death while the other three escaped and summoned help. After a massive 12-day manhunt, Garrow was captured. Immediately after his arrest, Garrow requested that Frank Armani, a general practice lawyer in Syracuse, New York, who had represented Garrow in previous minor matters, represent him in the pending murder charge. The court named Armani and Francis Belge, another local lawyer, as Garrow's appointed counsel.

During the pretrial preparation, Garrow admitted to his attorneys that he had murdered Domblewski. He also admitted to other crimes, including abducting, raping, and murdering two females in separate incidents: 16-year-old Alicia Hauck and 20-year-old Susan Petz. Garrow described the locations where he had dumped their bodies. His description was so specific that Belge was able to locate the remains of both women and photograph the sites.

Armani and Belge told no one of Garrow's confession. The female victims were considered missing persons and police suspected Garrow of murdering them. Petz's distraught father confronted Armani at his office, asking whether Armani had any information about his daughter. As a result of this incident, Armani refused multiple attempts by Hauck's father to meet with him.

Garrow's lawyers were faced with the dilemma of upholding their ethical duty to preserve information told them by their client. They had information that would enable the families of the slain girls to know for certain the fate of their daughters and to properly bury the bodies. Armani also came to the painful realization that he was acquainted with the father of one of the victims and that she had been the classmate of Armani's daughter.

The lawyers kept their secret and Garrow's case proceeded to trial many months later. Under direct questioning, Garrow confessed to Domblewski's murder, as well as the murders of the two missing women. He also confessed to multiple rapes and abductions throughout upstate New York. The day after Garrow's testimony, Armani and Belge acknowledged publicly that they had known all along about the murders and the locations of the bodies of the two women

The attorneys became the target of widespread public outrage, including vandalism and death threats, and were forced to relocate their families to protect their safety. The lawyers insisted their duty of confidentiality bound them to protect the information disclosed by their client. The legal community was largely supportive of Armani and Belge, but the public at large widely distrusted lawyers in a post-Watergate world and did not see things the same way. Both men lost longtime friendships and saw their law practices wither and fail. They were both investigated by a grand jury and Belge was ultimately indicted, as he had been alone when he found one of the bodies. Belge admitted to moving the remains to better photograph them and was charged with failing to report a dead body and failing to provide it with a decent burial. Those charges were later dismissed by a trial court judge, who praised Belge for his commitment to his ethical duty as an attorney.

People v. Belge, 372 N.Y.S.2d 798 (1975).

The family of one of the victims filed an ethics complaint against the lawyers with the state bar. Four years later, the Committee on Professional Ethics of the New York State Bar Association dismissed the complaint, stating in its opinion that to encourage full disclosure of all potentially relevant facts to his lawyer, a client must have the assurance of confidentiality, "a requirement embodied by law in the attorney-client privilege," even if those facts may reveal the commission of prior crimes. A client who withholds information from his lawyer "runs a substantial risk of not being according to his full legal rights."

Opinion 479 (1978).

WAIVING CONFIDENTIALITY (EVEN INADVERTENTLY)



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LOSING RIGHT TO CONFIDENTIALITY



Speaking in a Public Place



Jailhouse Conversations on the Telephone



Inviting Others to the Meeting



Sharing Conversation With Others Later

EXAMPLE

Benny Wilson is charged with possession of stolen merchandise. The day after discussing the case with his lawyer, Benny discusses it with a neighbor. As long as Benny does not say something to his neighbor like, "Here's what I told my lawyer yesterday…," the attorney-client communications remain confidential.

Of course, Benny's conversation with the neighbor is not confidential, and the prosecutor can properly ask the neighbor to testify about what Benny told him.

CONFIDENTIALITY IN CLIENT FILES

(CURRENT/CLOSED FILES)



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CLIENT FILES

The duty of confidentiality continues so long as the lawyer possesses confidential client information.

It extends beyond the end of the representation and beyond the death of the client.

Accordingly, a lawyer must take reasonable steps for the future safekeeping of client files, including files in closed matters, or the systematic destruction of nonessential closed files.

A lawyer must also take reasonably appropriate steps to provide for return, destruction, or continued safekeeping of client files in the event of the lawyer's retirement, ill health, death, discipline, or other interruption of the lawyer's practice

ATTORNEY CLIENT PRIVILEGE



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FORMING THE ATTORNEY-CLIENT RELATIONSHIP

- Attorney has expressly acknowledged representation of the client.
- Express acknowledgment may be demonstrated by an engagement letter, a fee contract, or even an oral agreement as to the scope of the representation.
- An attorney-client relationship may also be expressly acknowledged by the "appearance" of the attorney on behalf of the client, including filing pleadings in court for the client, drafting documents on behalf of the client, or appearing in court as the representative of a litigant.
- Unfortunately, it is not always so clear when an attorney-client relationship exists.

ATTORNEY-CLIENT PRIVILEGE

It has been defined:

(1) Where legal advice of any kind is sought

(2) from a professional legal adviser in his [or her] capacity as such,

(3) the communications relating to that purpose,

(4) made in confidence

(5) by the client,

(6) are at his [or her] instance permanently protected

(7) from disclosure by [the client] or by the legal adviser,

(8) except the protection be waived.

EXAMPLE

Suppose Sally Smith contacted David Jones, an attorney, by telephone. During the conversation, Smith explained to Jones that she is involved in a dispute with the Internal Revenue Service concerning a tax savings arrangement devised for certain business objectives. She discloses important facts and highly sensitive information during the conversation, then asks Jones for his legal opinion.

Is the content of this conversation privileged?

ANSWER

Answer: It depends, without more, a confidential relationship likely does not exist unless there is some history of former representation

The relationship cannot exist unilaterally in the mind of the potential client absent a "reasonable belief" that the attorney-client relationship exists. The implied relationship may be evidenced by several factors, including, but not limited to, the circumstances of the conversation, the payment of fees to an attorney, the degree of sophistication of the would-be client, the request for and receipt of legal advice, and the history of legal representation between the alleged client and the practitioner. While this list of factors is illustrative, none of these factors, standing alone, will affirmatively establish the existence of an attorney-client relationship

EXAMPLE

Heidi Hemp is charged with possession of illegal drugs. At the request of Heidi's mother, attorney Joe Lawless talks with Heidi in jail and offers to represent her. Heidi decides not to hire Lawless and, instead, retains Bill Mucho as her lawyer after she bails out. At trial, the prosecutor calls Lawless as a witness and asks him to reveal what Heidi told him in their jail conversation. Lawless cannot testify.

Lawless spoke to Heidi in his capacity as an attorney, so their conversation is confidential even though Heidi decided to hire a different attorney.

CLIENTS' RIGHT TO WAIVE PRIVILEGE



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WAIVER OF PRIVILEGE

- The client holds the ultimate authority to assert it or waive it.

- The issue of waiver arises most commonly when a communication is witnessed by a third party or where the client does not intend the communication to be confidential.

- The mere presence of a third party will likely prevent the creation of the attorney-client privilege.

EXAMPLE

Heidi tells her lawyer that certain drugs belonged to her, and she bought them for the first time during a period of great stress in her life, just after she lost her job. Heidi authorizes her lawyer to reveal this information to the D.A. (district attorney), hoping to achieve a favorable plea bargain.

However, the D.A. refuses to reduce the charges, and the case goes to trial. Cross-Examining Heidi, the D.A. asks, "Isn't it true that you admitted to your lawyer that the drugs were yours?" This is probably not a proper question. Heidi authorized her lawyer to reveal her confidential statement to the D.A.

But a statement made for the purpose of plea bargaining is also generally confidential, so the D.A. cannot refer to it at trial.

THIRD PARTIES
ATTORNEY- CLIENT PRIVILEGE

- **General Rule:** Allowing a third party to be present for lawyer-client conversation, the privilege is waived. **There is no privilege when communicating with a third-party.**

- **Meaning/Harsh Result**: Other side can force the third party to reveal the contents of the conversation.

- Having the client authorize disclosure to third party does not save the privilege either!

ANY EXCEPTIONS?

EXCEPTION

Aid the Cause – Person will further the client's legal representation and are "essential", "necessary" and "highly useful" (i.e. investigator, lawyer's staff, interpreter)

TEST FOR PRIVILEGE TO REMAIN INTACT

(1) whether the communication were intended to remain secret;

and

(2) the precise role of the third party.

EXAMPLE

Soon after her arrest, Heidi speaks to her mother in jail. Heidi's case goes to trial, and the prosecutor calls Heidi's mother as a witness and asks her to reveal what Heidi told her. Heidi's mother would likely have to answer questions under oath about what Heidi said to her.

Most states have not created privileges for conversations between parents and children.

EXAMPLE:

Parents of witness who faced criminal charges sat in on conversations with the lawyer and provided advice and guidance to their son (minor child). The parents hired and paid for the lawyer.

Defeat the Privilege?

Lincoln Lawyer (the movie) Scenario:

What if Adult Child?

EXAMPLE:

Defendant charged with second degree murder. During a prior divorce case, the defendant brought her daughter to a meeting with her family law attorney. Could the family law lawyer be called to testify at the murder trial on the substance of the communications when the daughter was present? Was the daughter essential?

EXAMPLE:

Civil Case: Daughter was present for lawyer-client conferences. The daughter was there for her mother's conversations with her mother's attorneys. The mother was elderly and dealing with litigation related to traumatic event. Daughter chose the law firm, transported mother to meetings, and put her at ease by communication with her lawyers. Daughter also had relevant information and could aid her mother's memory.

Privilege Defeated?

FEES! RULE 1.5

Fees Must Be Reasonable!

Look to Rule 1.5 for guidance/factors on reasonableness

Does NOT have to be in writing unless stated in Rule 1.5 otherwise (e.g., contingent fee agreements)

CONTINGENCY FEE AGREEMENTS

Ethical Requirements (PCR 1.5)

1) Must be in writing, signed by client, and clearly describe the method for dividing any recovery and paying expenses

2) Must provide client a written statement upon recovery showing how proceeds divided





COMMUNICATING WITH CLIENTS ABOUT FEES

Best Practices: engagement terms and fee statements should be clear

- Have a written engagement letter or fee agreement in ***all*** matters (see sample)
- Specify who the client is and who it is not
- Specify what you are hired to do (and not do)
- Send monthly invoices *promptly*

ALTERNATIVE FEE AGREEMENTS

Best Practices

1) Define in writing the scope of work in matters involving flat fees
2) What related services, if any, are not included (e.g., limited engagement to collect unpaid child support)
3) Document client's informed consent to limitations on the scope of the representation



KEY: Flat fee does not lower your standard of care.

TIPS ON MITIGATING RISK (AND PROVIDING GOOD CLIENT SERVICE)

Monitor	Proactively monitor collection; use retainers
Document	Document important advice – a short email is usually sufficient
Provide	Provide drafts for review
Scope	Document your scope of engagement
Don't oversell	Don't oversell what you can accomplish
Be Clear	Be clear about the cost of service

TERMINATING REPRESENTATION OF A CLIENT

When is a lawyer required to stop representation of a client?

To avoid a violation of the Rules (e.g., would involve the lawyer in a crime/fraud)

Lawyer is impaired

Lawyer is discharged



WHEN YOU MAY "FIRE" THE CLIENT

Anytime you can do so without "material adverse effect" on the client's interests

Client persists on a course lawyer reasonably believes is criminal or fraudulent

Use of lawyer's services to perpetuate a crime or fraud

Client insists on action that is repugnant to lawyer

Client fails to fulfill its obligations to counsel

Representation will cause lawyer to suffer unreasonable financial burden or has been rendered unreasonably difficult by the client

Other "good cause"

HOW TO MAKE A PROFESSIONAL EXIT

Avoid

Take steps to avoid prejudice to the client

Facilitate

Facilitate a transition with client's new lawyer, including prompt delivery of files

Send

Send client advance notice of withdrawal in pending litigation (see sample forms)



QUESTIONS/COMMENTS?

THANK YOU!

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