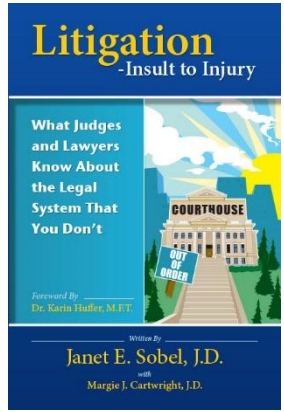
FOUR VERY EXPENSIVE MISTAKES LAWYERS CAN AVOID MAKING

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Litigation – Insult to Injury:
What Judges and Lawyers Know About the Legal System That You Don't

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All four of these expensive mistakes can be avoided by giving focused attention to your duties of care and loyalty.

1. Charging an unreasonable fee.

2. Being cagey, difficult, or disrespectful when responding to your clients' uncomfortable questions.

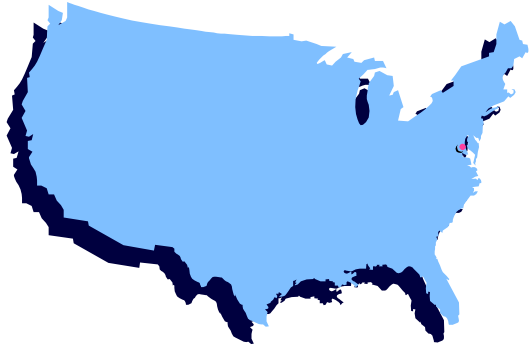
3. Maintaining possession of your clients' original documents when you no longer need to have them.

4. Failing to consider whether insurance is available for your clients' case and how to get it provided.



1. Don't charge an unreasonable fee – in violation of your state bar rules.

49 of the 50 states have
adopted versions of the American Bar
Association Model Rules of Professional Conduct (all but California)



ABA Rule 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an **unreasonable fee** or an **unreasonable amount for expenses**. The **factors to be considered** in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Comments and Considerations:

- California's Rule of Professional Conduct 4-200 mandates a "member shall not enter into an agreement for, charge, or collect an illegal or **unconscionable** fee."
- Both the ABA Model Rule and California's Rule impliedly suggest the lawyer can (meaning should?) evaluate the fee charged once the case is over and its outcome known
- Although lawyers are allowed to negotiate for their advantage, these Rules, and the fiduciary nature of the relationship, are aimed at preventing the lawyer from taking an unfair advantage of the client.
- Unhappy clients can proceed either in an action to recover fees paid (or taken) or by lodging a complaint to the state bar over that attorney.
- Safe practice is to get a second opinion. If in a firm, don't keep the client's expression of unhappiness to yourself.

Cases:

The Florida Bar v John Barley, 831 So. 2d 163 (Fla. 2002)

Lopez et. al. v Munoz, Hockema & Reed, LLP, et. al., 22 S.W. 3d 857 (Tex. 2000)

Charnay v. Cobert (2006) 145 Cal.App.4th 170

Lee v. Hanley (2014) 227 Cal.App.4th 1295

2. Don't be cagey, difficult, or disrespectful when responding to your clients' uncomfortable questions.

- Many clients complain to me that their lawyers got defensive and huffy when the client complained about something; some even fired the client for speaking up.
- Widely understood that defensiveness is a sign of emotional immaturity.
- In the attorney-client relationship, if the client questions the wisdom of something the lawyer is doing, who is the client to ask if not the lawyer?

Irritation towards your clients – that translates into rudeness or short-temperedness or defensiveness – has to be controlled.

- Clients are our Masters and we are their Servants - like it or not.
- They chose you, they trust you, and they have no one but you to look to.
- They are a source of your income – your "customer."
- They are entitled, like every other person, to become upset and no known rule of professional responsibility relieves attorneys from their duties of loyalty, honesty, and care because a client might be rude to them or question them.
- Law Schools don't teach emotional maturity, but it is a key to avoiding claims in the practice of law.

The ABA Model Rule 1.4 on Communications with clients – adopted in some version by all states except California - has no exception for a bad mood.



ABA Model Rule 1.4: Communications
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Good lawyers learn how to (1) answer their clients' questions non-defensively, (2) diffuse emotions (including their own), and (3) address concerns with equanimity.

- Unless you require your clients to take a personality test before you permit them to hire you, you have to deal with all kinds of people.
- Clients hire lawyers when they are under stress, so don't be surprised if they are stressed.
- Clients – especially ordinary people who have never had legal problems before – are confused and lost in a system they don't understand.

Remember: A broken attorney-client relationship is a pain in the neck, disruptive to your practice, and threatening to your compensation. If your client raises serious concerns, learn how to field them with equanimity.

California case: *Rus , Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal.App.4th 656 – your fees could be in jeopardy!

The ABA Model Rules permit the attorney to withdraw from employment only for certain reasons. Beyond those, the attorney may be at risk of discipline or loss of fees under the state's professional rules if the client is in any way prejudiced.

Client-Lawyer Relationship
ABA Model Rule 1.16 Declining Or Terminating Representation

. . . .
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists

3. Return possession of your clients' original documents when you no longer need to have them

Client-Lawyer Relationship

ABA Model Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. **Complete records** of such account funds and other property **shall be kept** by the lawyer and shall be preserved for a period of [five years] after termination of the representation

If someone is going to misplace an original document belonging to the client, let it not be YOU.

Case: *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509.

Considerations:

- Make it part of your practice when closing a file to return original documents to the client – with a cover letter requesting the client's signature acknowledging receipt of the documents.
- Keep a copy of the returned documents along with the original of that acknowledgment in the file, send a copy to the client, and keep an electronic version of that acknowledgment. Better safe than sorry.

4. Failing to consider whether insurance is available for a client's case and how to secure its benefits for your clients

Almost everyone has insurance of some kind.

- If your client has suffered a property or business loss, insurance might provide first party coverage.
- If your client is being sued, insurance might provide a defense. Sometimes a defendant's attorney needs to clarify the need for a defense.
- If your client is suing someone, maybe careful pleading will trigger a cross-complaint that might result in coverage.
- Watch out for pleading in ways that removes coverage (i.e., intentional conduct).
- Don't forget about title policies when it comes to easement disputes.

Considerations:

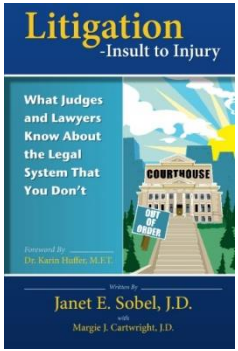
- Every lawyer should understand the basics of first and third party insurance coverage and always ask whether the client might be entitled to benefits under some policy of insurance.
- Lawyers in your community that are known for experience in this field should be consulted (take them out to lunch) except where you are known for such experience.
- Clients by and large do not understand the nature or breadth of coverage that is available under insurance policies.
- All insurance policies require prompt notice, and clients must not be led to delay tendering for those benefits out of ignorance when a lawyer is watching over the case.
- Failing to obtain benefits under a client's policy of insurance can leave you liable to pay for the benefits that were lost through delay.

Case: *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739

Note: The *Jordache* case was about the accrual date for the running of the statute of limitation for lawyer malpractice in terms of when the client suffers "actual injury." Failing to seek insurance coverage for a client was presumed by the court to be malpractice.

If you are not knowledgeable about insurance coverage, get basic understanding and network with attorneys so you can consult and refer when appropriate.

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