

CRIMINAL LAW PRACTICE
A HOTBED of ETHICS COMPLAINTS
PRACTICAL POINTERS TO AVOID COMPLAINTS

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Board of Professional Responsibility

Criminal defendants account for nearly 50% of complaints filed by the 3800 legal consumers who contact the Consumer Assistance Program (CAP) each year. The following practical pointers are taken directly from complaints received. The primary ethical rule involved is given before each section of practical pointers.

Tennessee Supreme Court Rule 8,
Rules of Professional Conduct

RULE 1.4: COMMUNICATION

(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 RPC 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.

- **DON'T** communicate only the morning of court with the client.
DO call or write in advance as to preparation or what to expect at court.
- **DON'T** promise at a hurried court appearance to visit the jail in a few days and then not do so.
DO avoid such a promise if you usually can't keep it. Instead agree to write or call to follow up.
- **DON'T** ignore repeated client letters or calls with questions or ideas for witnesses or a defense.
DO respond in some fashion even if it is necessarily brief and document your communication.
- **DON'T** neglect to inform clients why their court date was continued and of the new court date.
DO inform clients in advance of delay or if delay is intentional or strategic, why so. Remember RPC 1.3 requires diligence.

- **DON'T** allow the client's relatives to have unrealistic expectations to speak with you frequently.
DO make it clear upfront if, when, and how often the client's relatives may contact you.
- **DON'T** give the client the impression that they may call you anytime, anywhere without charge.
DO make it clear that calls to you are not free and that an assistant handles routine questions.
- **DON'T** allow an assistant to be discourteous or agree to call-backs if you won't really call later.
DO train your assistant to answer routine questions accurately and to use good manners.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law

- **DON'T** refuse to file motions requested by clients without consultation and explanation to them.
DO explain why their motion requests are not appropriate, not useful or are premature.
- **DON'T** fail to explain why certain issues will not be in the appeal. Remember Rule 1.4 requires consultation and communication.
DO consult on issues and send the client a copy of your brief, state's brief and your reply.
- **DON'T** fail to consult with the client on issues in a post-conviction petition and any amendment. See also Rule 1.4 Communication.
DO explain why some issues should not be included and copy the client on the amended petition.

- **DON'T** fail to explain why certain witnesses and proof cannot be used at an evidentiary hearing. See also Rule 1.4 Communication.
DO explain your reasons and strategy for how you will conduct the post-conviction hearing.
- **DON'T** fail to consider a proper withdrawal if there is a basic, irreconcilable disagreement on issues.
DO explain why some issues are misguided and the ethical rule prohibiting filing frivolous issues. See also Rule 3.1 Meritorious Claims and Contentions.
- **DON'T** fail to inform clients upfront if your representation is for one court or one charge only.
DO use written contracts so that there is no misunderstanding about the limits of your representation.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in a violation of the Rules of Professional Conduct or other law;**
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or**
- (3) the lawyer is discharged.**

(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 imprudent;**
- (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 unanticipated and substantial financial burden on the lawyer or has been rendered unreasonably difficult by the client;**
- (7) other good cause for withdrawal exists; or**
- (8) the client gives informed consent confirmed in writing to the withdrawal of the lawyer.**

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) A lawyer who is discharged by a client, or withdraws from representation of a client, shall, to the extent reasonably practicable, take steps to protect the client's interests. Depending on the circumstances, protecting the client's interests may include: (1) giving reasonable notice to the client; (2) allowing time for the employment of other counsel; (3) cooperating with any successor counsel engaged by the client; (4) promptly surrendering papers and property to which the client is entitled and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; (5) promptly surrendering any other work product prepared by the lawyer for

the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation; and (6) promptly refunding any advance payment of fees that have not been earned or expenses that have not been incurred.

- **DON'T** fail to give your client copies of most writings on a timely basis. See also Rule 1.4 Communication.
DO document materials provided for when clients claim no discovery or an unreturned file.

- **DON'T** fail to learn what copy and postage costs the Administrative Office of the Courts will reimburse for indigent criminals.
DO factor in the copy and postage costs upfront when setting expense costs for retained clients.

- **DON'T** neglect to withdraw soon enough to avoid prejudice to the client's cause.
DO follow proper notice and withdrawal procedures requiring permission from the judge.

- **DON'T** neglect to follow the rules for retention, storage and disposition of closed files.
DO promptly surrender files to the client upon withdrawal or termination.

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;**
- (8) whether the fee is fixed or contingent;**
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges;**
- and**
- (10) whether the fee agreement is in writing.**

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property division or settlement, unless the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court; or
- (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

(f) A fee that is nonrefundable in whole or in part shall be agreed to in a writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee.

- **DON'T** fail to explain what your fee covers and what it does not.
DO use a written contract to make clear both your obligations and the client's.
- **DON'T** underestimate the expenses needed to pursue a case to the end.
DO inform clients upfront that mediator's, investigator's or expert's fees are not included in the attorney's fee.
- **DON'T** leave the impression that the non-client paying the fee can call the shots or interfere.
DO be clear to the fee-payer about who is the client and that your direction is from the client.
- **DON'T** refuse to consider a modest refund toward maintaining good client relations.
DO consider submitting a fee dispute to the local bar association's Fee Dispute Committee for mediation.
- **DON'T** sue the client for unpaid fees if you can avoid it or afford it.
DO bill regularly so that the client does not receive a large bill that was unexpected.
- **DON'T** neglect to contemporaneously document your time, work and expenses.
DO make sure your bill has enough detail that it doesn't look padded with exaggerated time.

- **DON'T** fail to follow the strict requirements for a non-refundable fee.
DO get any non-refundable fee in a signed writing, which is clear about the intent and amount.
- **DON'T** charge a contingency fee in a criminal or domestic case, except for an arrearage.
DO get all contingency fees agreements in writing.
- **DON'T** take a fee in property/labor unless the value and work is established upfront.
DO get any such fee arrangement clearly defined in writing.
- **DON'T** file an attorney's fee lien unless all procedures and notice requirements are met.
DO include the option of a lien in the written fee upfront agreement so the client is forewarned.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless:

- (1) the client gives informed consent;**
- (2) the disclosure is impliedly authorized in order to carry out the representation; or**
- (3) the disclosure is permitted by paragraph (b) or required by paragraph (c).**

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;**
- (2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;**
- (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;**
- (4) to secure legal advice about the lawyer's compliance with these Rules; or**
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.**

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;**
- (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or**
- (3) to comply with RPC 3.3, 4.1, or other law.**

- **DON'T** be careless by talking about a case to other attorneys or friends at social events.
DO keep a reputation for strict adherence to guarding the confidences of clients.
- **DON'T** share client information with their relatives or friends without the client's explicit permission.
DO get your client's written permission before sharing information with others.
- **DON'T** think you can discuss a case so generally that the client's identity can't be guessed by someone.
DO maintain your client's trust by never speaking about the cases of other clients to them.
- **DON'T** have confidential discussions with your client in a crowded courthouse setting.
DO be sure your client feels secure to discuss matters without others overhearing.
- **DON'T** fail to warn clients of potential situations where "loose lips sink ships".
DO tell clients that attorney-client privilege is at risk if a third person is present to hear confidences.
- **DON'T** give clients their files without checking that no other client's materials are included.
DO caution your legal assistant about strictly guarding confidences in every situation, including being overheard in the office or at social occasions.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or**
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;**
- (2) the representation is not prohibited by law;**
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and**
- (4) each affected client gives informed consent, confirmed in writing.**

(c) A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless:

- (1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and**
- (2) each affected client gives informed consent.**

***Comment [35] The potential for conflict of interest in representing multiple defendants in a criminal case or in juvenile delinquency proceedings is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. However, where the lawyer chooses to undertake such a joint representation, paragraph (c) requires that the lawyer demonstrate to the satisfaction of the tribunal that good cause exists to believe that no conflict of interest prohibited by paragraph (b) presently exists or is likely to exist in the future. This showing reflects the same standard currently required by Tennessee Rule of Criminal Procedure 44(c).**

- **DON'T** forget the stringent requirements to represent co-defendants in criminal or juvenile delinquency cases and the strong caution against doing so.
DO get written informed consent from co-defendants and demonstrate to the tribunal there is no current or potential conflict. Also see Comment [35] and TN Rule of Criminal Procedure 44(c).
- **DON'T** forget who your former clients are and their relation to a current case or client.
DO have a system to check for conflicts that does not rely on your memory alone.
- **DON'T** forget that witness cross-examination (current or former client) may create a conflict.
DO remember that a future potential conflict must be considered and found not to be likely to develop.

RULE 1.3: DILIGENCE

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

- **DON'T** continue cases for your convenience or due to your unreasonable failure to be prepared.
DO have fail-proof reminder and calendar systems for your business obligations.
- **DON'T** delay cases when important client objectives or goals are on the line, which is almost always.
DO document to the file and explain to the client why any delay is necessary or desirable.
- **DON'T** give clients unrealistic expectations of fast results if that is unlikely.
DO warn clients upfront about the time frame of a case and delays that may occur.

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.

- **DON'T** take cases in new areas of practice without the time and work required to become quickly competent.
DO access a Mentor attorney, Tenn Sup. Ct. R. 21 Section 4.07(d), sponsored by various law-related organizations throughout the state or consult an experienced attorney willing to help.
- **DON'T** guess if in doubt about your ethical obligations in any situation.
DO often review Tenn. Sup. Ct. R. 8 to maintain ethical competence.

DO CONTACT ETHICS COUNSEL for guidance if in doubt.

Ethics Hotline:

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