

MOST COMMON ETHICS VIOLATIONS FOR SOLO PRACTITIONERS AND BEST PRACTICES TO AVOID THEM



MOST COMMON ETHICS VIOLATIONS

(All references are to the Ohio Rules of Professional Conduct)

- RULE 1.1: COMPETENCE [A lawyer shall provide competent representation to a client]
- RULE 1.3: DILIGENCE [A lawyer shall act with *reasonable* diligence and promptness in representing a client]

MOST COMMON ETHICS VIOLATIONS

(CON'T)

- RULE 1.4: COMMUNICATION [A lawyer shall do all of the following: (1) promptly inform the client of any decision or circumstances with respect to which the client's *informed consent* 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) comply as soon as possible with *reasonable* requests for information from the client]

MOST COMMON ETHICS VIOLATIONS (CON'T)

- RULE 1.5: FEES AND EXPENSES [A lawyer shall not make an agreement for, charge or collect an *illegal* or clearly excessive fee]

MOST COMMON ETHICS VIOLATIONS (CON'T)

- RULE 1.6: CONFIDENTIALITY OF INFORMATION
[A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by division (b) or required by division (d) of this rule]

MOST COMMON ETHICS VIOLATIONS (CON'T)

- RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS [A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies: (1) the representation of that client will be directly adverse to another current client; (2) there is a *substantial* risk that the lawyer's ability to consider, recommend or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests]

MOST COMMON ETHICS VIOLATIONS

(CON'T)

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY** [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 interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account" or with a clearly identifiable fiduciary title]

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS

The American Bar Association Center for Professional Responsibility recommends that lawyers in solo practices or small firms implement the following to reduce the risk of facing disciplinary proceedings (not listed in any particular order of importance)¹:

1. Implement Strong Law Office Management Procedures

- In addition to ensuring your ability to meet your clients' needs, a good law office management system is essential for avoiding disciplinary charges.
- System basics should include a diary and docketing system to keep track of filing deadlines, court hearings and statute of limitation dates.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS

(CON'T)

- Set up a tickler system for file review and make sure you do that at regular intervals.
- Make sure you have the technological resources and support staff to meet the demands of your practice.
- Get in the habit of documenting everything and implement a follow-up procedure to update the information on client matters on a regular basis.
- Establish a system for responding to telephone calls and emails in a timely manner. Setting aside a particular time of day to respond to messages within a 24-hour window as a matter of practice can be helpful and reassures clients that you are being attentive to their matter.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

- Create a good billing system. Keep detailed and contemporaneous records of time spent on client matters, even if you are charging a flat fee.
- Send billing statements on a timely basis. If the fees start to escalate beyond what the client expected or agreed to, promptly discuss the situation with the client so the client can decide how to proceed.
- Be prepared to review your fees and make a refund if it could be considered unreasonable.
- Become familiar with the factors outlined in Rule 1.5 that describes reasonableness standards for all fees.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

2. Intake is Critical

- Learn when to accept a potential client's matter and when to reject it.
- The ability to discern whether a potential client will turn into a "problem client" is an important skill to develop.
- Remember, you are not required to accept every potential client's case.
- At the initial interview, learn how to evaluate clients' needs, assess their goals and expectations, and most importantly, determine whether you are competent to handle the matter as required by the rules of professional conduct.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

- Undertaking too many diverse matters requires you to learn many areas of law, and can leave you feeling not only overwhelmed, but also may offer little opportunity to develop an expertise that you can market.
- Do not be embarrassed to tell a potential client that you do not have sufficient expertise in a particular area of law. You can always, with the client's consent, refer the matter to a more experienced lawyer or consult with that lawyer to assist you with the representation.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

- Pay attention to red flags. If a potential client asks that you do something dishonest or makes you uncomfortable with demands, remember your ethical obligations.
- If you learn during the initial meeting that the potential client had four prior lawyers and was dissatisfied with each of them, think long and hard about taking the case.
- Set clear expectations for the representation at the onset of the client-lawyer relationship. Use a written fee agreement or engagement letter that clearly sets forth the scope of the relationship. While not required in every situation, written fee agreements stating, at a minimum the nature of the legal services to be provided, the lawyer's responsibilities, the client's responsibilities and the fees and costs to be charged can help rebut allegations of wrongdoing to the disciplinary agency.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

3. Client and Third Party Funds and Property Are Sacrosanct

- There are few guarantees in life, but rest assured that if you use client funds for your own personal or business purposes you will face disciplinary sanctions.
- Become familiar with the trust accounting rules set forth in Rule 1.15.
- Implement an appropriate technology-based bookkeeping system to manage your client fund accounts.
- While you can delegate the bookkeeping responsibilities to support staff for your client fund, as the lawyer you are responsible for supervising that staff and making sure that the account is not being mishandled.
- Schedule a time every month to review your bank records.
- Do not allow a third party to have access to your client trust account for use as a “pass through” or for any purpose other than what is intended.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

4. Communicate, Communicate, Communicate

- Lawyers have a two-part affirmative duty under the Rules of Professional Conduct; you must keep the client reasonably informed about the client's matter and you must promptly comply with reasonable requests from the client for information.
- Establish good communication habits early in your practice.
- Be sure to explain matters to your clients so they can understand what is happening with their cases and are able to make informed decisions.
- Share the good news with your clients; always give them bad news promptly.
- Be careful not to give you clients false hope or promise to do something that is impossible to achieve.
- Send your client regular updates as the case progresses via monthly letters or monthly billing invoices. Sufficiently detailed billing statements apprise your clients of the work you are doing and allow them to evaluate the reasonableness of your fees.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

5. Be Diligent

- Neglect of client matters usually goes hand-in-hand with lack of communication as formal disciplinary charges.
- If a dispute arises between you and your client over the payment of fees or litigation strategy or you cannot continue with the representation for any reason, make sure that your actions comport with Rule 1.16 and where appropriate, the rules of the tribunal.
- Take steps to document that the representation has ended. It is unwise simply to stop working on a client's matter without doing what is necessary to protect the client's interest and your law license.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

6. Be Honest

- Lawyer's have a duty of absolute candor and should always be truthful when dealing with clients, adversaries and the court.
- Take appropriate action if you have knowledge that you client has made a material misrepresentation, whether in court or a deposition. If you are not sure what to do, seek advice.
- Lawyers can be sanctioned for misrepresenting the facts or law in written documents or statements in court; inflating their time on billing records; exaggerating their credentials in advertisements; using subterfuge or pretext to access information that is restricted or confidential; and lying to clients or opposing counsel.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

- You can face disciplinary charges for engaging in dishonest conduct outside the practice of law.
- For example, false statements or fraudulent conduct in personal matters, such as your own divorce or bankruptcy case; material misrepresentations in government documents or lying to law enforcement authorities can become a disciplinary issue.
- If convicted of breaking the law, in addition to criminal penalties, you will likely face disciplinary sanctions.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

7. Honor Client Confidences

- A lawyer has a fiduciary duty not to disclose any information about a client or prospective client, unless that individual consents or an exception is allowed within the relevant rules.
- Become familiar with the rules of professional conduct governing confidentiality and refer to them often.
- Bear in mind, your confidentiality obligations may be breached if you “talk shop” at the local pub, on an elevator or on your Facebook page or other social media.
- Disciplinary consequences may result if you blog or tweet about a particular client matter, even if using pseudonyms.
- You also are responsible for safeguarding client confidences when dealing with third-party vendors, whether outsourcing or utilizing an off-site network, to store client information. You must take reasonable steps to ensure that the third-party vendor will not make unauthorized disclosures of client information.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

8. The Internet is Not a Safe Haven

- E-mail communications with clients should be encrypted; electronic communications with opposing counsel should be carefully reviewed before sending. Do not short-cut the formality of these communications.
- If you are away from the office know and understand the risks of communicating with your client (and your client communicating with you) from a hotel or public wi-fi connection.
- Review the relevant rules of professional conduct and ethics opinions that address the issues concerning lawyer websites, postings and social networking. See Rules 1.1 (Competence), Rule 1.6 (Confidentiality of Information), Rule 1.18 (Duties to Prospective Client), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistants), Rule 7.1 (Communications Concerning a Lawyer's Services), Rule 7.2 (Advertising and Recommendation of Professional Employment) and Rule 7.3 (Solicitation of Clients).

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

- Any internet marketing you create must be truthful and not misleading. Be careful that the legal information you post on your website is accurate. Do not forget that the information you post on the internet is accessible world wide and that you may need to identify the jurisdictional limitations of your law license.
- Be careful not to create inadvertently a client-lawyer relationship when communicating with a prospective client who accesses your firm's website. Post clear disclaimers and discourage the flow of information if you do not intend to create relationship.
- Be careful about the information you post on your social networking pages. Posting photos which contradict prior statements made in court may result in a disciplinary inquiry.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

- Using pretext to access an opposing party's Facebook page may be considered deceptive.
- Do not accept confidential emails or an adversary's confidential social networking page from your client or any third party.
- You may be charged with violating the rules of professional conduct if you knowingly do so through the acts of another.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

9. Conflicts of Interest Are Real

- The law of conflicts is complex. Read the applicable conflicts rules carefully and learn to recognize when a conflict occurs.
- Some (but not all) conflicts may be waived by the client. Such waivers are valid only if the client is provided with all of the information necessary to give an informed consent and has an opportunity to consult with independent counsel.
- Establish a good conflicts of interest check system to incorporate in processing a potential client matter.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

- If you encounter a conflict of interest as a result of representing two clients, keep in mind that it may not be appropriate simply to choose one client over another by severing the relationship with the less lucrative client. Consider that the wisest course may be for you to consult with an ethics expert.
- You must also recognize when your personal interests conflict with those of the client. These situations can arise when a lawyer enters into a business transaction with a client for purposes other than providing legal services.
- It is almost never a good idea to continue representing a non-relative client if the client wishes to give you a substantial gift or if you enter into a personal, romantic relationship with the client.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

10. Be Civil and Professional

- Zealous advocacy must occur within the bounds of the rules of professional conduct and should be civil and professional.
- Consider approaching each matter with the following in mind; respect, resolution, reconciliation and rationality.
- Remember that you are an officer of the court. Zealous advocacy does not require abusive, overly aggressive or sharp tactics. If you employ such methods, you lose your credibility with judges, juries and opponents and may face disciplinary or other sanctions.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

- Do not send letters threatening bodily harm, using profanity or demeaning slurs.
- Never get physical during a disagreement, whether in court or during a deposition.
- Do not allow resentment and anger to build as you deal with client demands, pressing deadlines, combative opposing counsel or an unsympathetic judge.
- Endeavor to achieve balance in your life by creating appropriate outlets for stress and taking time away from your law practice to be with family and friends.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS

(CON'T)

- Remember that your law license does not give you carte blanche to right every wrong with a legal action. You have a duty to use the law only for legitimate purposes and not simply to harass or intimidate others.
- Do not blindly follow your client's edicts, especially if the client is asking you to take action that will cause you to compromise your professional and ethical obligations.
- Strive always to conduct yourself in a manner that engenders respect for the law and the profession.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

11. Take the Time to Think It Through

- The practice of law will present many circumstances which will require a critical analysis of your ethical duties.
- Some lawyers just act impulsively; others take the view that their course of conduct is “just this one time” and no one will find out. Adopt these approaches and you likely will receive a disciplinary complaint.
- If you are uncertain about a course of action, seek advice.
- Pay attention to red flags.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS

(CON'T)

- All lawyers make mistakes. If you do, do not compound your error.
- If your mistake affects your client, your disclosure to the client must be consistent with the rules of professional conduct. Your disclosure must be truthful.
- Do not panic and exacerbate the mistake either by trying to cover it up, ignoring it or lying about it.
- Do not ask the client not to pursue a disciplinary complaint against. This can be grounds for a separate disciplinary charge.

BEST PRACTICES TO AVOID ETHICAL VIOLATIONS (CON'T)

12. Stay Current

- You have an obligation to keep abreast of the law. This means more than attending the obligatory CLE classes.
- Seek out advice from experienced lawyers. Choose a lawyer with unquestionable integrity who you may wish to emulate and who is willing to share practice tips with you.
- Do not isolate yourself. Do not overlook the availability of other solo practitioners willing to mentor or offer advice.
- Interact with colleagues with whom you can share experiences.

Source:

Gronkiewicz, Theresa (2013), Twelve Tips to Help You Avoid Disciplinary Proceedings, retrieved from https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/12_tips_avoid_disciplinary_proceedings_scpd_2013.authcheckdam.pdf