



## **ETHICAL CHALLENGES FOR THE PERSONAL INJURY PRACTITIONER**

**By: Daniel G. Tobben**

### **INTRODUCTION**

Both Plaintiffs' attorneys and Defendants' attorneys face the potential of significant legal ethics issues arising in their practices. In Missouri, resolution of those issues is primarily governed by Rule 4 of the Supreme Court Rules. The best advice I can give you in the ethics area is to carefully review Rule 4, whenever you are confronted by an issue, which you recognize as posing ethical dilemmas. In order to increase the probability that you will recognize those issues, an annual reading of Rule 4 is recommended.

There are several other very valuable sources of information, which should be considered and consulted when ethics issues are encountered. The Missouri Bar website has significant practice resources relating to different aspects of legal ethics. Go to [www.mobar.com](http://www.mobar.com) and in the left column, click on "Lawyers" This will lead you to a page labeled "Lawyer Resources," which contains a section called "Practice Resources." Practice Resources contains a "clickable listing," which leads to an abundance of valuable information regarding topics such as: fee agreements, fee dispute program information and rules, informal advisory opinions, risk management information, and information about the Office of Chief Disciplinary Counsel (OCDC). This wealth of legal ethics information is just several clicks away from your internet icon.

The Legal Ethics Counsel for Missouri is Sara Rittman, at 217 East McCarty, Jefferson City, MO 65101. Her phone number is (573) 638-2263, and she can be reached at [sararittman@mo-legal-ethics.org](mailto:sararittman@mo-legal-ethics.org). The legal ethics counsel has been separated from OCDC, so that advice or opinions can be obtained from an office that is separated from the group that pursues bar discipline against attorneys alleged to have significantly violated the Code of Professional Responsibility. Informal advice can be obtained as well as formal or informal written opinions, if necessary. See Rule 5.30 for the procedures and criteria for written opinions.

Another excellent resource for practical legal ethics information is the Risk Management consultant for your legal malpractice carrier. (You are insured, aren't you?) The Bar Plan Mutual Insurance Company insures more law firms than any other malpractice insurer in Missouri. Chris Stiegemeier heads their risk management department. If you are a Bar Plan insured, contacting Chris about an issue before there is a serious problem is a very wise idea. If you are insured by a different malpractice carrier, that carrier will almost certainly also have someone to assist you, when you are confronted with ethical or potential legal malpractice issues. If the issue has developed to the point that a claim is possible, the risk manager, or the attorneys in the claims department, can give you advice which may eliminate or minimize the potential claim. If the ethics questions are commingled with legal malpractice questions, you may wish to consult Mallen & Smith's excellent five volume treatise, Legal Malpractice, Fifth Edition.<sup>1</sup>

I would also encourage everyone to occasionally take a look at the Oath of Admissions, which each attorney took when they were "sworn in." The Oath, which is probably hanging in your office, contains the shorthand and quintessential summary of the ethical rules and the aspirations of the legal profession. A copy of the current Oath of Admissions and previous Oath of Admissions are both provided as attachments at the end of this chapter.

The specific topics, which will be primarily considered in these materials, are conflicts of interest, fee setting arrangements, and client contacts.

## A. CONFLICTS OF INTEREST

Though the concept of conflict of interest impacts a number of the sections and the comments to Rule 4, the primary provisions are embodied at 4-1.7 through 4-1.9.

The dangers in suing a client or former client are probably understood by most practitioners. However, the rule barring suits against clients is not absolute. If the lawyer reasonably believes that the representation of one client will not adversely affect the relationship with the other client; and each client consents after meaningful consultation, even some direct conflicts can be waived. If an attempt is made to waive a conflict of interest, there should be a clear writing demonstrating that the possible adverse effects on the client and the attorney-client relationship have been explained in detail, and the writing should also demonstrate that the clients' consent is given knowingly and with true understanding. However, waivers are often difficult to sustain, if challenged. Defenses to waiver include: failure to inform the client of the exact conflict or the nature and extent of the conflict; failure to notify the client in a timely manner; and failure to advise clients of their right to obtain separate counsel to advise them regarding the conflict. Also, some conflicts are not waivable. See 4-1.8 (c)(d)(e) and (h). Others are waived only within narrowly prescribed limits. See 4-1.8 (a), (b), (f), (g), (i), and (j).

Conflict issues may also arise in connection with multiple representations. I'll give you some auto claim examples, since they are probably most easily understood and are frequently encountered. When the driver and three passenger relatives come to your office, it is certainly tempting to "sign up" all of them as clients. However, careful thought should be given to the possibility of a conflict existing at that time, or developing in the future. The most obvious danger is that the driver of the vehicle may be deemed to have been a contributing cause of the injuries, which were sustained by the passengers. In these days of mandatory insurance, it is often difficult to rationalize a refusal to pursue that additional source of funds as well as the insurance carrier for the primary tortfeasor.

Even when conflicting liability evidence does not appear from a reading of the police report or the initial description of the matter when the clients call to schedule an appointment, evidence of a conflict may develop as the attorney is learning more about the case from the clients. It also may arise when discovery is propounded, or depositions are taken. In those regards, see Informal Advisory Opinion 20000213:

QUESTION: Attorney represents Driver 1 and two passengers in a personal injury suit against Driver 2. Driver 2 has filed a counterclaim against Driver 1. Attorney has informed all three clients that information has developed that indicated that Driver 1 was at fault. The clients that were passengers would, in that event, have a personal injury claim against Driver 1. All three clients believe that Driver 2 was at fault and want Attorney to continue to represent all three in their claim against Driver 2 without making a claim against Driver 1. Question 1. May Driver 1 and passengers waive any claim of conflict of interest and request that Attorney continue to represent all three in the action against Driver 2 and direct attorney not to file an action against Driver 1? Question 2. If the passenger clients wish to proceed in the pending action against Driver 1, may the clients, upon full disclosure, waive any potential claim of conflict of interest to allow Attorney to continue to represent (a) passengers in their claim against Driver 2; (b) passengers in their claim against Driver 1; and (c) passengers and Driver 1 in their claim against Driver 2? Question 3. Is it mandatory for the clients to have independent legal advice regarding their respective rights in this regard, or may they rely on Attorney to advise them, which includes advising them of their right to consult other counsel?

ANSWER: Question 1. Yes, if Attorney fully discloses the conflict and the effect of the clients' decision. Question 2. The answers to this question are based on the information that Attorney would make full disclosure and obtain waivers of any conflicts. Attorney may represent the passengers in their claim against Driver 2, if they are suing Driver 1, regardless of whether Attorney is representing them against Driver 1. However, Attorney cannot represent them against Driver 1, and represent Driver 1 in claims against Driver 2. If some other attorney represents them in their claim against Driver 1, it might be possible to represent the passengers and Driver 1 against Driver 2, depending on the issues that arise. Joint representation of the passengers and Driver 1 against Driver 2 is not advisable if the passengers are suing Driver 1. Question 3. Attorney should advise the clients that they may consult independent counsel. If they decline to do so, Attorney should fully advise them. If Attorney believes that any conflicting interests would interfere with Attorney's ability to fully advise them, Attorney must withdraw from the representation.

The authorization for contingent fees as an exception to the general rule forbidding a lawyer acquiring an interest in litigation is found in Rule 4-1.8(j)(2). The ability of a lawyer to advance or pay costs is found in Rule 1-1.8(e)(1) and (2). But a lawyer may not otherwise finance the litigation or make a loan to the client. Rule 4-1.8(e).

The possible conflicts issue concerning multiple representation is presented to defense counsel on occasion, though not as dramatically. Can the same attorney defend a negligent and allegedly impaired driver of a vehicle at the same time he is defending someone, who allegedly was negligent in entrusting the vehicle to that driver? It depends on the facts, but the possibility of conflict seems reasonably apparent.

A frequently recurring conflict of interest issue from the defense perspective is that which may arise when the lawyer is defending an individual or corporation, but is being paid by an insurer. In most cases, this does not present any conflict. However, "when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure special counsel's professional independence." See Comment to Rule 4-1.7 "Interest of Person Paying for Lawyer's Services."

This concerns the often discussed tri-partite relationship. A lawyer defending a case on behalf of an individual or corporation needs to always remember that ultimately the client, within the scope of the case, is the defendant, and not the insurance carrier. If, for example, there are coverage issues present, counsel for the defendant should not become involved in rendering opinions or doing discovery relating to coverage issues, which could adversely affect the existence or extent of insurance present. Clearly, the presence of insurance or the scope of coverage can significantly impact the ability of a defendant to pay a settlement or judgment and can threaten the financial well-being of the individual or corporation the attorney is defending. Most insurers have a different claims person handle the coverage issue than the claims professional handling the claim itself, and insurers usually retain separate counsel to deal with those coverage issues. It may occasionally be tempting for defense counsel to try to assist an insurer on coverage related matters, arising in connection with the matter being defended. However, this is a temptation which must be avoided, because of both the well-being of the defendant and the ethical obligations of defense counsel. Most insurers recognize the need for defense counsel to be independent and ethical in these regards; and insurers also realize the potential danger of acting in bad faith, if the lines get too blurred or if the lines of propriety are crossed by the insurer or defense counsel concerning conflict of interest issues. The Supreme Court's decision in In re Allstate Insurance Company, 722 S.W.2d 947 (Mo.1987), confirms that in Missouri a defense attorney can represent both the insurer and the insured. In house attorneys at Allstate could be retained by Allstate to defend insured individuals, where there was no question of coverage, and no real danger of excess verdict or any other demonstrable conflict. See dissenting opinion of Judge Rendlen, joined by Judge Billings, and of Special Judge Greene. (Contra see Gardner v. North Carolina State Bar, 341 S.E.2d 517, 316 N.C. 285 (N.C. 1986).

The 1988-1998 Report of the Missouri Department of Insurance notes that 138 malpractice claims were made regarding conflict of interest allegations. Of these, 30 were paid with an average payment of \$319,127.00. As you can see, conflict of interest issues are also a fertile ground for malpractice claims, as well as potential disciplinary complaints. It is perhaps wise to err on the side of avoiding conflicts of interest.

Another valuable and necessary way of minimizing conflict of interest issues is by establishing office systems to check for such problems immediately at the beginning of each new representation. In highly controversial matters or matters of extreme urgency (TRO's), a preliminary check, before even meeting with the client, is suggested. If you aren't in a large firm, a manual system may work. Given the developments of technology and clients' increased expectations for prompt action, even smaller firms may want to consider computerized conflict checking systems. Often, they are included in office management/time and billing packages. Check with your technology consultant or your malpractice carriers' risk manager regarding alternatives, and possible recommendations.

## **B. FEE SETTING ARRANGEMENTS**

Numerous ethical considerations impact the representation of a plaintiff in a personal injury case. Such cases are almost universally handled on a contingent fee basis. Many larger personal injury cases are handled on a split fee referral basis (i.e. wrongful death, medical malpractice, products liability, toxic tort, etc.) Also, many plaintiffs in personal injury cases are poor or middle class, and have trouble paying for the costs associated with the prosecution of a contested personal injury lawsuit. These circumstances give rise to a number of questions.

As we have seen in the previous section regarding conflicts of interest, Section 4-1.8 contains provisions relating to attorney compensation, costs, and contingent fees. However, the primary code section dealing with these is 4-1.5. That provision begins with the phrase "A lawyer's fee shall be reasonable.." Section (c) deals specifically with contingent fees and provides as follows:

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 writing 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. 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.

4-1.5(e) deals with discussions of fee splitting:

A division of 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, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and
- (3) the total fee is reasonable.

The comment to Rule 4-1.5, relating to division of fees, provides as follows:

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

The Missouri Appellate Courts have dealt with fee related issues that have arisen in the last three or four years. Within a matter of months in 1999, two cases were decided by the Missouri Appellate Courts. In Risjord v. Lewis, 987 S.W.2d 403 (Mo. App.W.D. 1999), claimant John Rousseau was injured as a result of an exploding tire rim. A court appointed his wife, Janice, as guardian of her husband's estate. Lewis did not have a contract with clients when he contacted Risjord to act as lead counsel. The contract between the three parties stipulated that Lewis was to assist with the case and advance expenses. Lewis would also share forty percent of any contingent fee. Lewis failed to assist with any part of the case beyond the initial investigative work. He also failed to advance any expenses. The client removed Lewis as attorney and Risjord later settled the case. Risjord brought a declaratory judgment action.

The court held that Lewis was not entitled to any of Risjord's fee from the settlement. The court noted that a division of fees is only proper based on a division of service or responsibility. Id. at 405. "Merely recommending another lawyer or referring a case to another lawyer, and failing to do anything further in the handling of the case cannot be construed as performing service or discharging responsibility in the case." Id. (internal quotations omitted). The court recommended that if Lewis wanted a share of the fee, he should have performed a share of the work. Id. at 406. Regarding Lewis's removal, the court emphasized that a client's right to discharge an attorney is greater than an attorney's right to a fee split. Id. (Emphasis added.)

Given the referring attorney's failure initially to obtain a written contract, and his failure to perform under the eventual fee contract, the result in Risjord is not surprising. Some practitioners may, however, have been surprised by the decision of the Eastern District in Londoff v. Vuylsteke, 996 S.W.2d 553 (Mo.App.E.D. 1999).

The underlying lawsuit was an action for wrongful death. Londoff's contract with clients provided for a forty percent fee of any settlement. It also provided that Londoff could associate additional counsel at no cost. Londoff referred the clients to Vuylsteke. Londoff testified that he only spent a few hours researching the case and talked to Vuylsteke about his investigation. Vuylsteke and another attorney later settled the case. Londoff initiated this suit to recover his fee.

The court, relying on Risjord, first noted that fee division agreements between attorneys are only acceptable when they are based on a division of services or responsibility. Id. at 557. Merely recommending or referring a client to another attorney and doing nothing else in furtherance of the case does not meet this requirement. Id. The services or responsibility referred to by the court and in the rule "must relate to an actual participation in or handling of the case." Id. Furthermore, Rule 4-1.5(e) requires a written agreement with the client. Londoff also failed to satisfy this requirement. Id. at 558.

It will be interesting to hear the comments of plaintiffs' attorneys on this topic, but I suspect that there are a significant number of referral attorneys, who do not do much after the referral other than talk to the client infrequently, and perhaps review correspondence and key pleadings filed by trial counsel.

Note also the requirement of Rule 4-1.5(e), discussing a written agreement with the client, where each lawyer assumes joint responsibility for their representation.

Other authorities advising or regulating lawyer ethics have taken different positions on this matter. The ABA issued an opinion in 1985, indicating that substantial services did not need to be performed by the referring lawyer. That opinion focused more on the joint responsibility for the representation in the sense of assuming financial responsibility, if malpractice were committed and the client was damaged. Illinois seems to follow this line of thought.

There is also a proposed draft revision to ABA Model Rule 1.5, indicating that assuming joint responsibility for the representation requires each lawyer to assume civil liability for any malpractice of the other in the matter. The comments and explanations to the proposed changes contain the following statement: "The present language implying that the referring attorney is to look over the other's shoulder is wrong as a matter of law and practice."

This may be a matter that is undergoing reconsideration or change at the national level; but in Missouri at this time, the referring attorney had better be involved in a material way in the representation. This is both for reasons of compliance with the rules of ethics and in order to protect and preserve the referral fee.

Since the split fee referrals typically involve cases of serious injury or death, the malpractice exposure may be significant. The 1988-1998 report of the Missouri Department of Insurance indicates that during that time frame there were 34 claims based upon referral to another professional. Fortunately for the plaintiffs' bar, only six of those resulted in payments, but the average payment was \$550,792.00. (Do you have enough malpractice insurance?)

Issues can also arise concerning the successive representation of a party, pursuant to a contingent fee arrangement. Often, these matters are resolved quickly and informally because the first attorney does not want his ex-client to become too angry and possibly file a bar discipline complaint over whatever led to the termination of representation. The 1998 Report of the Office of Chief Disciplinary Counsel showed that there were 208 bar complaints relating to the declining or terminating of representation. This was the fourth highest category of complaints. However, if the dollars are large enough, or the relationships are adversarial enough, these matters can lead to litigation.

In Kuczvara v. Continental Baking Company, 24 S.W.3d 712 (Mo.App.E.D. 1999), Gerritzen, and then Price, represented Kuczvara in a workers' compensation case. Both attorneys separately contracted with Kuczvara for contingency fees. Price negotiated a settlement for Kuczvara, which Kuczvara did not accept. Kuczvara terminated his relationship with both attorneys and both attorneys filed liens for their fees. Gerritzen appealed the order of the Labor and Industrial Relations Commission, which modified his award of attorney's fees.

An attorney's recovery under an attorney-client fee agreement is not proper when the attorney fails to complete the terms of a contingent fee agreement. Id. at 715. If the attorney-client relationship is terminated before the completion of a contingent fee contract, the attorney's only theory of recovery is in quantum meruit for benefits conferred to the client. Id. (Emphasis added.) The court held that the evidence did not support part of the Commission's award of attorney's fees to Price. Id. Although Gerritzen could show exactly how much time he spent on the case, Price failed to do the same. Since Price's representation ended before the completion of the contingency fee agreement, the only recovery available to him was in quantum meruit. Thus, the court reversed and remanded with instructions to modify Gerritzen's award of attorney's fees. Id. at 716.

It is important to remember that Rule 4-1.5 begins with "A lawyer's fee shall be reasonable" and ends with 4-1.5(e)(3) "the total fee is reasonable. This is, of course, the guiding principle governing fees. However, in the contingent fee arena, what does this really mean? Is it possible that on a slam dunk, quickly settled case, worth six or seven figures, that a 15% contingent fee is too high? It is also possible in a bitterly contested case with disputed liability and damages, involving a need to clarify or change existing case law, that a 50% fee might be extremely reasonable?

There is a lot of interesting philosophizing that could be done about these questions. However, the rubber meets the road when either a client subsequently objects to the fee, or the matter requires court approval and a judge must review and approve the fee. Many large cases involve wrongful death, minors, or people who have been injured so severely that they are now held to be incompetent and therefore court approval is required.

Some judges seem to view all fee agreements as reasonable, if there is not any serious complaint from the client. Other judges will review the fee agreements and independently determine what is reasonable. Giving advance thought to this issue and preparing evidence or argument regarding the propriety of the fee may help plaintiff's counsel convince a reluctant judge, if the settlement must be approved. Attorneys should always be mindful, however, of the ethical requirement that the fee must be reasonable.

The problems faced by defense counsel concerning fees are less complicated than those faced by plaintiffs' counsel, but they are very real. Some defense counsel are part of captive law firms and are really employees of the insurance carriers. *In re Allstate, supra*, holds that there is no ethical problem in this relationship, in and of itself. However, house counsel needs to be very careful due to the issues or problems that may arise, if a conflict is asserted. Since they are employees of the insurance company, the insurer is incurring some level of increased risk concerning bad faith, failure to settle within limits, and conflict of interest, if the actions of house counsel are deemed inappropriate and unethical.

Outside counsel are almost always paid by the hour, perhaps the most straightforward of all fee arrangements. However, as insurance companies have been more proactive in managing cases and in establishing billing guidelines, defense counsel may be confronted with questions as to whether the insurer is refusing to authorize that degree of work, which needs to be done to effectively represent the client. In my experience, these issues can almost always be talked through and resolved satisfactorily, so that the legitimate needs of the defendant client are met. If this cannot be done, an ethical dilemma is presented. Informal advisory opinion 980124, provides as follows:

QUESTION: Attorney has received a set of litigation and billing guidelines from an insurance client. Is Attorney allowed to limit services to an insured to those for which the insurance company tells Attorney the will pay? May Attorney agree to such litigation and billing guidelines absent the insured's consent?

ANSWER: Attorney may only agree to have Attorney's representation limited in the manner proposed, if the client consents. Under Rules 4-1.8(f) and 4-1.4, Attorney must inform the insured of the limitations in a manner such that the insured will understand the extent of the limitations and the implications of the limitations on the representation. If the insured does not consent, Attorney may not represent the insured subject to the limitations.

Usually, insureds are very happy that the cost of their defense is being paid for by their insurance carrier. It is part of what the insured contracted for in their policy of insurance. As you are no doubt aware, there are cases where parties sue their insurance companies to compel the insurance company to defend them in pending litigation. Costs of defense in complex cases can be extremely large, even if the defendant eventually prevails. However, informal opinion number 970132, raises an interesting question:

QUESTION: Does Rule 4-1.8(f)(1) require Attorney to obtain a client's consent before representing that client for a fee, when the client's legal fees are being paid for by someone other than the client such as an insurance company? Is written consent from the insured/client required under Rule 4-1.8(f)(1)?

ANSWER: Rule 4-1.8(f) does apply to the insurance defense situation. This is a situation involving third party payment and also multiple representation. It is necessary for the insured to consent to the third party payment as well as any other conditions or limitations imposed on the representation. The rules do not require that this consent be in writing, but it is recommended.

As previously set forth, almost all insureds are very happy to have defense counsel provided for them at the insurer's cost, but one can envision circumstances in which the issues raised in informal opinion 970132 are real rather than theoretical. This issue does sometimes arise especially in the defense of business entities and the defense of professionals.

The issue of outside auditors reviewing attorneys fees bills on behalf of insurance carriers has been a hot topic for a number of years. Please see informal opinion 980188 in these regards. I have never personally encountered any significant problems in these regards; but on an industry-wide basis, apparently insurers feel that some defense firms have done unnecessary work or perhaps churned hours to compensate for artificially low rates.

Though the issues affecting defense counsel are not as blatant as those affecting plaintiffs' attorneys in personal injury cases, they nevertheless present significant dilemmas.

In doing research for this seminar, I became aware of a non-personal injury case that was somewhat frightening. In United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1<sup>st</sup> Cir. 1997), the relevant issue concerned a demand by the IRS to review attorney bills and work product to determine whether the school qualified for tax-exempt status. As requested by the Department of Defense, MIT had provided billing statements to an auditing agency for review. The Court agreed that the disclosure of the information to the outside auditor constituted a waiver of both the attorney-client and work product privileges. The MIT case involves the client, MIT, voluntarily waiving the privilege. That case did not decide whether "unauthorized action by a lawyer" could be a basis for the waiver of the privilege. However, none of us envies the lawyer who arguably waived a privilege and gave the IRS access to attorney-client information.

Given the MIT holding and the Rules of Professional Conduct combined with informal opinions, defense counsel should be very careful in agreeing to disclose information to outside auditing agents, without the explicit consent of the client.

Though the problems confronted by plaintiffs' attorneys and defense attorneys in the personal injury arena concerning fees are quite different, both are significantly impacted by the ethical rules and the comments and pertinent case law.

## **C. CLIENT CONTACTS**

The topic of client contacts is so broad that it is impossible to meaningfully discuss within the confines of these materials. Therefore, an overview approach will be used, with more detail provided regarding several items of more specific interest.

Especially for the plaintiffs' bar, getting clients to come in the door is a big part of the practice. When I started practicing in 1974, lawyers did not have large yellow page ads, TV commercials, or radio announcements. The concept of advertising within the profession has certainly changed. The requirements for media advertising are set forth in Rule 4-7.2. Direct mail can be used, subject to the limitations and guidelines of Rule 4-7.3 (I recently was involved in the defense of a suit against a law firm, where the plaintiff was solicited through direct mail by an attorney seeking to develop a volume practice regarding alleged violations of the Fair Debt Collections Practices Act.)

There are still fairly stringent limitations, however, regarding personal contact by phone or by meeting, where the communication is initiated by the attorney. See Rule 4-7.3(b).

Once the client has come to your door, many issues are presented. The most preliminary and basic is the formation of the attorney-client relationship. Aspects of this relationship are established even before the attorney decides whether or not to take the case. These would include the provisions relating to confidentiality, and potentially, conflict of interest.

Assuming that the client wishes to retain the attorney, and the attorney wishes to represent the client, the scope of the representation and the exact details of the fee agreement are important. As discussed previously, all contingent fee contracts must be in writing. Does your present fee agreement clearly delineate the scope of representation? If an attorney loses a case at trial, does he have a duty to file a Motion for New Trial and Notice of Appeal, or take an appeal? Do the financial terms of representation change, if any of these things occur?

Is the contract clear regarding whether the contingent fee applies to the gross amount of the settlement, or to the net amount of the settlement? What is to be done if recovery is made by a plaintiff, pursuant to a contingent fee arrangement, in a case where part of their recovery relates to subject matters other than money? What understanding exists regarding disposition of file materials at the conclusion of the case?

It should be remembered that the file belongs to the client, and needs to be delivered to the client upon demand. Matter Of Cupples, 952 S.W.2d 226 (Mo. 1997). However, typically attorneys retain files for a period of time. This is a very good risk management practice, given that something new may arise with respect to the case, or because of the remote possibility that the client may make a claim against you for malpractice. I have defended a number of malpractice cases where the attorney no longer had a file, and it certainly makes life more interesting for the defendant attorney and defense counsel, and usually makes the case harder to defend.

If you maintain files electronically, consider what you may need to go through to produce a file to a client. I have never encountered attorneys who had that issue arise, but The Bar Plan Insurance Company indicates that one attorney with a paperless office spent over \$8,000.00 in order to convert an electronic file into materials that could be produced to the client upon the client's demand. Remember all clients are entitled to their file upon demand; not just those clients who assert a malpractice claim.

Now that you have a client and have set up your file, a large number of ethical rules become significant. Perhaps the most basic is the requirement of confidentiality, which is set forth in Rule 4-1.6 and the comments to that Rule. Rule 4-1.6 provides:

- a. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- b. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
  - (2) 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.

The sanctity of the lawyer-client communication is such that the exceptions are very narrow. A good piece of general advice is when in doubt, assert the privilege and err on the side of confidentiality.

The conflict of interest issues were discussed above. If there is a recovery by the plaintiff, then plaintiff's attorneys face the issues presented by 4-1.15 concerning safeguarding of client's property.

Perhaps the most pertinent part of Rule 4 relating to Client Contact is Rule 4-1.4 concerning communication, which provides:

- a. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The report of the Office of Chief Disciplinary Counsel for 1998 shows that the number one category of complaints against attorneys related to communications under Rule 4-1.4. This information should help you practice more ethically, and be more responsive, if for no other reason than to avoid bar complaints. The second highest category of complaints reported was for violation of Rule 4-1.3 relating to diligence.

That file that has been sitting on the back of your credenza for the last six months could be a ticking time bomb for malpractice. However, even if you “have everything under control” and there has been no damage to the client; and maybe you even have a strategic reason to hold off on action, an attorney would be very well served to communicate all of this to the client so that the client is reasonably informed of the status of the matter. This can avoid unnecessary client distress and unnecessary bar complaints.

Also, remember that it is important to maintain a current telephone number and address for a client, and discuss long term absences from the client’s primary residence, such as vacation. Rights of parties may be prejudiced by their inability to respond in a timely manner to their attorneys.

I believe most plaintiffs’ attorneys, and probably most defense attorneys, have had that very unpleasant feeling of being called by the docket clerk and being told that you are assigned out to trial, but then being unable to contact your client.

## **CONCLUSION**

This article dealt with some of the more frequently occurring ethical issues encountered by plaintiffs’ and defense counsel in a personal injury practice. However, it is by no means exhaustive. As stated at the beginning of these materials, periodically review Rule 4 and consult it when you have questions. If that does not solve your problem, contact either Missouri’s Ethics Counsel, your legal malpractice carrier, or contact an attorney who is extremely knowledgeable about these matters.

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