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Quality of Life/Ethics Track – Session 4

Breaking Up is Hard to Do

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About the Presenters...

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CLIENT RELATIONS AND COMMUNICATION:

Navigating the Attorney-Client Relationship – From Engagement Letters to Fee Disputes, to Client Communication, Terminating Representation and Everything in Between

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I. Picking the Right Clients

A. Client Selection – Best Practices

1. The most important decision you'll make.

2. "No." is a complete sentence!

   a. is <u>client</u> right for you?

   b. is <u>matter</u> right for you? (Are goals achievable? Same for you and client.)

   c. is <u>time</u> right for you?

   d. is <u>consideration</u> right for you?

3. OK to take the "long shot" who needs legal help if <u>you</u> decide that's how you want to spend your time.

4. First-starting-out lawyers fear saying "No." Beware the loss-leader (accent on "Loss"). Some experienced lawyers fear saying "No," too.

5. Have telephone number at the referral service ready (or names of lawyers to whom you'd refer).

6. Be "choosy." You make (or break) your reputation with each client.

B. Client Selection is a Good Risk Management Tool

1. Temptations and pressures, especially for solos, to take almost every client who walks in the door.

2. "No" is a complete sentence! Sometimes, you have to turn down a case or client that you believe is not a good fit for you or your practice.
3. Dabbling is risky!

    a. You may be tempted to take a case outside of your focus areas, but that can often lead to trouble – and maybe a malpractice claim eventually if you don't handle the case properly.
    b. Are you really suited for the case the new client is bringing you?
    c. Do you know enough about it to serve your client well?

4. Young lawyers in particular, want to help every client. But if you try to help every client, you may end up sinking your own practice.

5. A high number of malpractice claims are directly related to dabbling.

    a. More than 60% of claims involve lawyers who practice less than 20% of the time in that area that is the subject of the claim.
    b. Conversely, lawyers who practice almost exclusively in one area of law account for less than 7% of claims.
    c. The lesson – don't be afraid to refer a case if you do not have the required expertise.

C. Be selective – even when you really want the new business.

1. Periodically review your selection process.

2. Lawyers sometimes take a case before they know all the facts or have elicited as much information from the client as is necessary – jumping in without all the facts is very risky, and often a big mistake!

3. Even after you have accepted a case, continue to evaluate it. Too many lawyers develop blinders about their cases.

4. Be careful about being an advocate immediately in the first meeting and instantly believing in the case without stepping back to realistically review the strengths and weaknesses – sometimes you'll discover you don't have as good a case as you first thought.

5. Be wary of clients who want to negotiate fees!

D. Warning Signs – indications you may be better off declining to take the case.

1. You are not the first lawyer the potential client has come to. It may be an indication that this client will never be satisfied no matter who is representing them.

2. If the potential client has unreasonable expectations, there could be trouble ahead. Every case sounds the best it will ever be when the lawyer and the potential client first meet.

   a. You only hear the client's side and what the client wants you to know.
   b. Only later, after you take the case and begin investigating all of the facts do you learn the downside.

3. Do not over-promise! It sets sometimes unrealistically high expectations, which often can never be met.

4. The potential client does not want to listen, claims to know everything, or attributes all their problems to others.

II. Give Your Practice an Annual Check-Up

A. Client Intake

1. Incomplete or inaccurate information on firm's client intake form can result in claims.

2. Client intake decisions/information.

- Screen clients carefully and ask yourself - is this a claim outside of the scope of my practice? (The best-ever medical malpractice claim may not be an appropriate case for a sole practitioner or a lawyer who can't afford to "bankroll" the case.)

- Has the client visited with other attorneys before contacting me?

- Is the client listening to my advice or is she reasonable with regard to her expectations?

- Does the client and/or client's family appear to be difficult to work with?

- How did this client come to your office? (Referrals that are flattering may also represent a difficult case or clients to work with).

3. Inadequate or incomplete retainer/engagement/fee letter.

4. Failure to identify conflicts of interest and get appropriate waiver.

5. Failure to send closing letter and have your client sign an accurate itemized settlement statement for litigation matters.

III. Client Expectations

A. About 20% of litigation claims involve procrastination by counsel who knows it's a weak claim, but do not want to disappoint their clients.

B. A weak claim gains strength once legal malpractice occurs, if only because the original advocate is not in a good position to explain the claim's weakness: it comes off as self-serving.

C. If you are prosecuting a weak claim, it is vital to level with your client early on in the process and if there is no mutual understanding with regard to the value of the claim or the chances of success as defined by the client, be prepared to say no or turn the client away. Over-inflated expectations need to be handled as follows:

1. Share concerns with your client **in writing** so that your position is documented. This will inform the client of the importance of your concerns, and could save you a claim when the matter is not resolved to your client's "satisfaction."

2. Be realistic early on, and especially before a lawsuit is filed, as these concerns may become your fault if they are first raised on the day of mediation or the day before trial.

3. Share records and reports, along with the defense strategies, with your clients so they are prepared for these types of attacks. Even if you have expressed these concerns in writing to the client and the client understands the risks, you must guard against your own lack of enthusiasm in representation of a "weak" claim.

4. Gather **all** of your client's past medical records so that you can carefully evaluate the case and discuss concerns with client at an early date. Past records often decide the case.

5. Develop a relationship with your clients. Make sure that the dealings you have with your client are not adversarial. This is a relationship in which trust is essential. If it fails on either side, the representation becomes difficult, and perhaps unsustainable.

Explain your fee agreement from the outset and explain costs and

the need to have the client involved in the process, to include the demands that will be placed upon the client, before proceeding. Tell the client what is going to be expected of them and the time frame they are dealing with.

6. Take the time to meet with your client and prepare them for their depositions or trial testimony so they know what to expect.

7. Settlement statements should be in writing, itemized and signed by the client before disbursing any settlement proceeds. Include a disclaimer regarding unknown or unasserted subrogation claims or medical bills as a part of your settlement statement. The client may not have brought all of the medical bills incurred or treatment facilities visited to your attention, and you may not have found them. Be especially careful of medicare matters.

8. Confirm all settlement offers, and decisions following mediation to the client in writing. This will serve as documentation with regard to the negotiation process and protect you from claims that you did not keep the client informed throughout the negotiation process.

9. If you refer your client's case to another attorney or law firm for handling and you expect to be compensated, make sure this is done in writing with your client's consent. The following must be considered whenever you enter into a fee-splitting agreement: Pending contingency fee case must be in writing between the firms and the client. Fee-splitting rule SCR 20:1.5(e), provides (in part) that:

> A division of fee between lawyers who are not in the same firm may be made only if the:
>
> - division is in proportion to the service performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
>
> - client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; and
>
> - total fee is reasonable.
>
> **(See SCR 20:1.5(e))**

You may want to consider keeping hourly billing records on contingency fee cases to be able to justify the reasonableness of the fee charged.

IV. Client Relations Errors *(common thread in majority of malpractice claims)*

A. Communicate at the client's level of understanding.

B. Determine the client's expectations and encourage realistic expectations.

C. Promptly convey all developments to the client, particularly adverse developments, preferably in writing.

D. Show an interest in the client as a person.

E. Be courteous: Return all phone calls promptly; be on time for appointments; and avoid taking telephone calls during office conferences.

F. Provide client with copies of finished work product.

G. Share the decision-making process with the client.

H. Avoid personal or financial involvement with clients.

I. Respect importance of matter to client, including careful guarding of client confidences.

J. Solve more problems than you create

SCR 20:1.4 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 SCR 20:1.0(f), 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 by the client 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.

V. Communication with the client:

A. Candor is critical

1. Rules of Professional Conduct require:

a) Keep client regularly informed

b) Respond to client inquiries in timely manner: If you can't, be sure someone else in your office can;

- Provide client with sufficient information to allow client to make informed decisions **(SCR 20:1.4(b)).**

c) Communication must be clear:

- Non-technical.

- Geared toward each client's individual level of sophistication: Your job to figure out what that is (and to know that if it goes wrong, whatever you did may not be enough).

- A primary area of claims is plaintiff's personal injury representation; an area with few claims is insurance defense.

- Recognize relative sophistication of clients, e.g., insurance company has an understanding of costs and risks; ability to convey and receive technical information; feeling of control during lawsuit; ability to envision life after the lawsuit in a realistic manner.

- Communication needs to be documented:

1. Letter of engagement outlining scope of representation and fee agreement;

2. Advice regarding risks and unanticipated costs;

3. Advice regarding alternative approaches;

4. Status reports: even if it's "nothing has occurred;"

5. Instructions to client or from client, particularly if instructions run counter to your advice. Do an "IAY" letter: "I advised you …"

- Communication includes good listening skills:
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6. Conversational techniques;

7. Providing client with an opportunity to speak and think, to establish client's level of sophistication and understanding;

8. Elicit information: ask questions.

- Keep all communications professional.

- E-mail is convenient; follow up phone calls; never underestimate the power of a face-to-face meeting.

- Don't avoid answering a phone call—even if you haven't completed the work you are doing for the client.

B. Conflicts **(See SCR 20:1.7 above)**

1. Learn to recognize them! This task needs constant attending. Things change during a representation, so doing a conflict search at the beginning is not enough.
2. Have and use system (before you get confidential information). Everyone in the office has to "sign on" to this.

3. Advise clients and obtain <u>signed</u> waivers, when appropriate.

C. Letters

1. Engagement

   Who client is/goals and expectations/scope of retainer: what you will—and sometimes—will not do/timing/fees and costs/client's responsibilities/how best to communicate. (Most clients don't know what to expect; the ones who "think" they do are even a greater threat.)

2. Non-engagement. (Some people just call you, without even saying who they are. Consider for e-mails, too.)

Just say not representing/give no opinion on merits/recommend they immediately contact other lawyer/return documents, if any/do not opine on statute of limitations/say thank you (if applicable).

3. Disengagement

   a. For a matter you looked at and considered handling.

   b. See #2 and best to refrain from commenting on merits/ advise as to time constraints generally, not specific statute of limitations advice/return any documents/thanks for the opportunity.

4. Termination of Representation

   Thanks/closing file/returning papers/file retention message: ask for your copies now/follow up and who's doing what.

5. Conflict Letters.

   Advise as to benefits/problems/duties/signatures.

VI. Suing For Fees (**SCR 20:1.5 Fees)**

To sue or not to sue—is it worth it?

1. Avoiding a malpractice claim

   - 11% of malpractice claims are a result of a fee dispute

2. Analysis <u>before</u> you sue for fees

   - Was the client pleased with the outcome of the underlying representation?
   - Are you critical of your own performance?
   - Has an uninvolved attorney assessed your representation for possible areas of criticism?
   - Is the amount at stake worth the risk of a claim? Even after taxes?
   - Is there any alternative to a lawsuit for unpaid fees? (Fee Arbitration Program?)
   - Would a judgment be collectible?
   - How will your malpractice carrier view such a claim?

VII. Breaking Up – How To Withdraw From an Attorney-Client Relationship

A. Terminating a client representation is often prudent and sometimes necessary

1. Do they return your calls?
2. Are they paying your bills?
3. Are they demanding more than you can give them?

B. Whether to continue an attorney-client relationship is usually (but not always) up to you.

1. When the client fails to pay
2. If communication is irretrievably broken
3. If the lawyer and client cannot agree on a course of action in a matter, or the client wants the lawyer to take action that the lawyer finds unacceptable
4. When the client has used the lawyer's services to perpetrate a crime or fraud

C. Circumstances that require a lawyer to withdraw

1. When a client discharges you
2. When representation will result in a violation of the Supreme Court Rules of Professional Conduct
3. Conflicts of interest that were not previously discovered
4. Client is asking you to engage in illegal or unethical conduct
5. When a lawyer's physical or mental health inhibits their ability to represent the client

D. Withdrawing from a case in litigation likely needs court permission

1. When confronted with a motion to withdraw, the court will judge whether the withdrawal will have a materially adverse effect on the client's interests.
2. A judge may deny a motion for withdrawal. Why?
    a) It may be close to the trial date
    b) A critical deadline may be nearing
3. While it is not common, a lawyer can, in some instances, be forced to continue representing a client even if the client has fired the lawyer, or even if the client isn't paying, or is simply uncooperative.

E. Moving to withdraw when confidential information is the basis for the withdrawal

1. Lawyers need to give the court enough information to make a decision, but what if the information is confidential or may prejudice the client? The lawyer may be in a quandary of having to share with the court enough

to justify the withdrawal, but not too much as to reveal confidential information.

2. If a case is not in suit, withdrawal should be much easier.
3. However, if a Statute of Limitation is about to run or another type of deadline is nearing, the lawyer may be better off filing the suit prior to the deadline, then move to withdraw.

F. Timing of a withdrawal

1. Withdrawal from representation generally requires that a client be provided notice along with a copy of the motion
2. Even when court involvement is not required, proper notice is required
3. The lawyer is required to protect the soon-to-be former client's interests **(SCR 20:1.16(d).**
4. When withdrawing, be aware of confidentiality
5. Communication by phone, remote video or in-person are best. An email or letter can suffice.
6. If done by phone, remote video or in-person, a follow-up letter or email is a good idea. Include relevant deadlines, how the client can obtain his or her file, the fact that the withdrawing lawyer will cooperate with a successor lawyer if the client retains one, and what happens with money still in trust. It should also include final accounting and details regarding a refund, if any.

G. Confidentiality When Withdrawing From an Attorney-Client Relationship

1. Withdrawing lawyers still owe a duty of confidentiality to the client – even when the court requires the lawyer to seek permission and usually requires the lawyer to provide a reason or reasons. **(SCR 20:1.6 Confidentiality)**
2. The duty of confidentiality to the client still exists, so the withdrawing lawyer should not disclose information that would be detrimental to the client's interests.
3. When a client discharges a lawyer, the lawyer must withdraw pursuant to SCR 20:1.16(a)(3), and the lawyer is free to inform the court that the client has fired the lawyer.
4. What if the withdrawal is due to the client's failure to pay the lawyer? Is the lawyer impliedly authorized to make disclosures concerning such reasons?

    - It is not regarded as a breach of the duty of confidentiality if a lawyer provides a general reason, such as a client's failure to pay as agreed, in requesting a court's permission for withdrawal.

- Keep in mind, however, lawyers face discipline for revealing too much information when seeking permission to withdraw. A practical approach is for the lawyer to consider whether it is likely that disclosing certain information would be detrimental to the client's interests and avoid disclosing such information when seeking permission of the court for withdrawal.
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5. Some practical considerations from State Bar Ethics Counsel Tim Pierce when considering what to put in a withdrawal motion: (See *Wisconsin Lawyer* article "Leaving a Client: Confidentiality Upon Withdrawal", July 1, 2011).

   a) Keep the reasons for seeking permission to withdraw as general as possible. Do not put excessive or irrelevant information in the withdrawal motion or any information that is likely to hurt the client or violate attorney-client privilege.

   b) Even if the client is hostile and extremely difficult, a withdrawal motion is not a place to take a "gloves-off" approach. A lawyer who is seeking the court's permission to withdraw still has a client to whom the lawyer owes fiduciary duties. **SCR 20:1.6(c)(4)**

   c) Do not use attachments that contain too much information. Attachments may inadvertently disclose communications between the lawyer and the client, thereby jeopardizing the attorney-client privilege.

   d) Do not use harsh language. Instead of saying that the client is hostile and irrational and accusing the lawyer of misconduct, say that the lawyer-client relationship has deteriorated to such an extent that it is difficult or impossible to provide competent representation.

   e) Rely on the Rules. Cite **SCR 20:1.6 and SCR 20:1.16** to judges who press for information that may be potentially detrimental to the client.

   f) Take protective measures, if necessary. If required to disclose information that may be detrimental to the client, ask the court for permission to disclose in camera. If it is necessary to reveal potentially detrimental information, filing information under seal can be a way to protect the client's interests.