

Legal Ethics For Plaintiff Attorneys

Louisiana Trial Lawyers Association

Robert E. Kleinpeter

and

Elizabeth A. Alston

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Legal Ethics I

The minimum standards of appropriate conduct within the legal profession, involving the duties that its members owe one another, their clients, and the courts. Also termed *etiquette of the profession*.

Legal Ethics II

“In one sense, the term ‘legal ethics’ refers narrowly to the system of professional regulations governing the conduct of lawyers. In a broader sense, however, legal ethics is simply a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion. From this broader perspective, legal ethics cuts more deeply than legal regulation: it concerns the fundamentals of our moral lives as lawyers.” Deborah L. Rhode & David Luban, *Legal Ethics* 3 (1992)

Why Plaintiff Attorneys Get in Trouble

- Often find themselves so overworked that they miss deadlines or fail to communicate with clients.
- Sometimes experience money worries and violate ethical rules by “borrowing” from their clients’ trust accounts.
- Do not have enough support staff to manage correspondence or back them up when they are involved in a trial, become ill, or take a vacation.
- Frequently, in contrast to large firm attorneys, do not cooperate with ODC investigations of alleged misconduct or have the resources to employ a defense attorney.
- Often, even when they cooperate, do not have documentation to defend themselves against the allegations.

Is There Bias Against Plaintiff Attorneys?

- The numbers and percentages of disciplinary prosecutions are commensurate with the numbers and percentages of investigations opened against solo practitioners and small firm practitioners, as compared to large firm attorneys.
- It is the number of complaints filed against solo practitioners and small firm practitioners that is disproportionate to the general attorney population in the three sizes of law firms.
- There is no institutional bias against solo practitioners and small firm attorneys.

Sample of Disciplinary Cases Prosecuted and Completed

<u>Law Firm Size</u>	<u>Number of Attorneys</u>	<u>Percentage of Total</u>
1	163	78.37%
2-10	40	19.23%
<u>11+</u>	<u>5</u>	<u>2.40%</u>
Total	208	100.00%

Sharing Legal Fees I

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

- (1) The client agrees in writing to the representation by all of the lawyers involved and is advised in writing as to the share of the fee that each lawyer will receive;
- (2) The total fee is reasonable; and
- (3) Each lawyer renders meaningful legal services for the client in the matter.

New Rule 1.5(e)

Sharing Legal Fees II

The client must be ADVISED IN WRITING of the SHARE OF THE FEE that each lawyer will receive. The client does NOT have to approve or agree in writing to the fee division, and the information may be conveyed to the client at any time before the payment of the fee. For example, it can be contained in the settlement disbursement sheet.

Sharing Legal Fees III

Each lawyer must render “meaningful” legal services for the client in the matter to share in the fee. “Meaningful” probably means less than “substantial,” but more than “case brokering” or a mere referral.

No Aggregate Settlement Without Each Client's Consent

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client, or a court approves a settlement in a certified class action. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

New Rule 1.8(g)

No Pre-Settlement Power of Attorney

A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement.

New Rule 1.8(k)

Distributing Funds Involving Third Persons

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.

Rule 1.15(d) (in pertinent part)

Problem Areas Involving Third Persons

- Medicare Liens
- Health insurance reimbursement or subrogation
- Healthcare provider bill for services

Distributing Funds In Which Someone Claims An Interest

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 1.15(e)

Lawyer Must Pay Litigation Costs

The Office of Disciplinary Counsel of the Louisiana Attorney Disciplinary Board takes the further position that a lawyer must pay costs associated with litigation, although not necessarily out of the proceeds of a settlement. Litigation costs include, for example, court reporter's fees, expert's fees, and filing fees.

Rule 1.15 Caveat

Termination

Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

New Rule 1.16(d) (in pertinent part)

Candor Toward the Tribunal I

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . .

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter. . .

New Rule 3.3 (in pertinent part)

Candor Toward the Tribunal II

- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

New Rule 3.3 (in pertinent part)

Communication with Person Represented by Counsel I

In representing a client, a lawyer shall not communicate about the subject of the representation with:

- (a) a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

New Rule 4.2

Communication with Person Represented by Counsel II

- (b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and
 - (1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;
 - (2) who has the authority to obligate the organization with respect to the matter; or
 - (3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

New Rule 4.3

Respect for Rights of Third Persons

(b) A lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

New Rule 4.4(b)

Internet Advertising I

Beware of services that “screen” clients or phone calls about a case. It may be the unauthorized practice of law.

A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Rule 5.5 (b)

Internet Advertising II

Beware of services that assign you all cases in a venue or area code. This violates advertising rules.

A lawyer shall not give anything of value to a person for recommending the lawyer's services; provided, however, that

(b) A lawyer may pay usual, reasonable and customary charges of a lawyer referral service operated by the Louisiana State Bar Association, any local bar association, or any other not-for-profit organization, provided the lawyer referral service: continued. . . .

Rule 7.2 (b)

Internet Advertising II, continued...

- (i) prohibits lawyers from increasing their fee to a client to compensate for the referral service charges; and
- (ii) refers all persons who request legal services to a participating lawyer;
- (iii) fairly and equitably distributes referral cases among the participating lawyers, within their area of practice, by random allotment or by rotation.

No Blanket Or “Administrative” Fee May Be Charged Client

Charging an “administrative fee” is not provided for by the rules. An attorney may recover out-of-pocket expenses. These out-of-pocket expenses may include items such as postage and copying costs. These expenses, if deducted from the client’s portion of any recovery, should be itemized and included in any “case settlement sheet” reflecting the disbursement of funds. A blanket fee, however, is not permissible.

Responsibility Of Partners, Managers, And Supervisory Lawyers I

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Rule 5.1 (a) and (b)

Responsibility Of Partners, Managers, And Supervisory Lawyers II

- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if
- (1) the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Insurance Coverage For Disciplinary Proceedings

Although not Damages, the Company will pay, in addition to the applicable limit of liability:

Up to \$10,000.00 for any Insured and in the aggregate, for attorney fees and other reasonable costs, expenses or fees (the “Disciplinary Fees”) resulting from a Disciplinary Proceeding incurred as the result of a notice of such Disciplinary Proceeding both first received by the Insured and reported to the Company during the policy period, arising out of an act or omission in the rendering of legal services by such insured. Except as set forth below, the amount payable hereunder shall not exceed \$10,000.00 despite the number of Insureds hereunder or the number of proceedings.