Solo and Small Firm Conference 2019: Success Beyond Tech

Cosponsored by the
Solo and Small Firm Section

Friday, September 20, 2019
9 a.m.–5 p.m.
Saturday, September 21, 2019
8:30 a.m.–12:15 p.m.

4 General CLE credits,
3.5 Ethics credits (Oregon specific),
1 Business Marketing credit, and
1 Personal Management Assistance credit
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SCHEDULE

Friday, September 20, 2019

8:00  Continental Breakfast and Registration/Exhibit Hall Opens

9:00  Building Trust with Clients and Opposing Counsel

Trust leads to the flow of information and is the foundation of every relationship, both professional and personal. Learn how to gain trust and use it once you have it, from negotiations during a case matter to establishing and maintaining your law practice.

Kwame Christian, American Negotiation Institute, Columbus, OH

10:00 Tax Matters for Solo and Small Firms

Successful solo or small firm practitioners are also savvy small business owners; staying on top of tax issues is crucial. Gain an overview of recent tax laws changes that can affect your practice so you can recognize tax issues before they become tax problems.

Paul Britton, Heltzel Williams PC, Salem, OR
Barbara Smith, Heltzel Williams PC, Salem, OR

11:00 Networking Break

11:20 Breakout A—The DIY Solo

Either you did it or you're thinking about it: going out on your own and forming a solo or small firm. You still don't have staff, and every once in a while—daily?—you wonder what others are doing, what they've learned, and how they've improved their practices since they started up. This lively panel of solo attorneys will explore a wide range of topics about what they do to succeed. Come for ideas and bring your questions.

Drake Aehegma, Attorney at Law, Portland, OR
Karen Mockrin, Attorney at Law, Tigard, OR
Ksen Pallegedara Murry, KPM Law LLC, Milwaukie, OR
Lee Wachocki, Professional Liability Fund, Tigard, OR

Breakout B—Beyond Employment Law 101: Being a Good Boss Is Good for Business

Developing a productive employer/employee relationship is part of a successful law practice. Even with a single employee you need to know the basics of how to navigate the law. One of Oregon’s top employment law lawyers and an experienced law firm COO will share their insight about what makes a productive legal team, along with pointers on effective hiring and when and how to part company.

Paula Barran, Barran Liebman LLP, Portland, OR
Denise Gaskin, Schwabe Williamson & Wyatt PC, Portland, OR

12:20 Lunch

1:30  Communication, Conflicts, and Common Sense: Running an Ethical Law Practice

85% of malpractice suits result simply from mishandling the attorney-client relationship. The skills lawyers need are rarely taught in law school. This fast-paced hour will look at everything from interview skills (and the two questions you always must ask) to understanding ethical duties, client communication, and running a modern office.

Claude Ducloux, National Director of Education, Ethics and State Compliance, LawPay, Austin, TX
2:30  Transition Break

2:40  Breakout C—The Ethics in Contract Drafting
Take a look at six common situations where lawyers make drafting errors and run into trouble. Ideal for transactional attorneys.
Claude Ducloux, National Director of Education, Ethics and State Compliance, LawPay, Austin, TX

Breakout D—Why Litigators Who Write Well Win
You’re not an appellate lawyer. You don’t have associates to do the research and writing you labored through in law school. Attorneys who litigate at the front lines still need writing skills to win. Gain advice and tips for putting your best foot forward in what and how you write, and learn how to get the attention and respect of the trial judge before, during, and after court.
The Honorable Stephen Bushong, Presiding Judge, Multnomah County Circuit Court, Portland, OR
The Honorable Kelly Skye, Multnomah County Circuit Court, Portland, OR

3:40  Networking Break

4:00  Personality Based Persuasion
Learn about different personality types and the various traits that make certain personalities susceptible to different types of persuasion. Discover how to interact and analyze people through casual conversations and develop persuasion techniques that can benefit your law practice and your personal life.
Kwame Christian, American Negotiation Institute, Columbus, OH

5:00  Adjourn

Saturday, September 21

8:00  Continental Buffet and Late Registration/Exhibit Hall Opens

8:30  The Ethics of Fee Sharing: Referrals, Cocounsel, and Freelancers
Are you aware of the ethical implications when lawyers associate with other lawyers to assist in performing legal tasks or drafting documents? What does it mean to be a freelance lawyer? When must the client be consulted and the hiring approved? What are the duties of confidentiality? Explore the answers to these and other related questions and learn best practices to observe when hiring, referring, or being hired by another law firm.
Claude Ducloux, National Director of Education, Ethics and State Compliance, LawPay, Austin, TX

10:00 Networking Break

10:15 Clio’s Legal Trends Report—What You Need to Know
Clio helps attorneys become client-centered and firm-focused. Its 2018 report shares vital aspects about what drives success in a legal practice. Dive into data provided by tens of thousands of legal professionals and gain insight to key questions, such as how much to charge and what services clients are seeking.
Emily van Siereveld, Clio Specialist, West Linn, OR
11:15 The Rainmaking Game

You don’t need a huge internet presence to be a good rainmaker. Learn how to build upon existing relationships and skills to get quality referrals. Create an action plan to target the clients you want. Whether you want to start with some small steps or think big, this program will help you take your practice to the next level.

Gil Price, PMG, Seattle, WA

12:15 Adjourn
FACULTY

Drake Aehegma, Attorney at Law, Portland, OR. Mr. Aehegma practices in the areas of personal injury, criminal defense, and family law. He is a member of the Oregon Trial Lawyers Association, the Multnomah Bar Association Young Lawyers Division, and the Oregon Criminal Defense Lawyers Association.

Paula Barran, Barran Liebman LLP, Portland, OR. Ms. Barran concentrates her practice on labor and employment law and the law of higher education. She is a Fellow of the College of Labor and Employment Lawyers and the American Bar Foundation, a Senior Fellow of Litigation Counsel of America, a Life Fellow of the American Bar Foundation, and a member of the Association of Title IX Administrators Northwest Chapter Board of Directors, the Super Lawyers National Advisory Board, the National Association of College and University Attorneys, the Canadian American Bar Association, American Bar Association Labor & Employment Section, the Defense Research Institute, and the Oregon State Bar Labor & Employment Section. She has written extensively on management law, higher education, and investigative processes, and she is a national speaker and trainer. Ms. Barran holds an Association of Title IX Administrators Title IX Coordinator Certificate. She is admitted to practice in Oregon and Washington and before the U.S. Supreme Court.

Paul Britton, Heltzel Williams PC, Salem, OR. Mr. Britton practices in the areas of business law, real estate law, tax law, estate planning, and probate and trust administration. Among other things, he helps clients develop succession planning strategies, drafts complex real estate transactions, and performs tax research.

The Honorable Stephen Bushong, Presiding Judge, Multnomah County Circuit Court, Portland. Judge Bushong has been a Circuit Court Judge in Multnomah County since 2008. He was named Chief Civil Judge in 2013 and Presiding Judge in 2018. He worked for the Oregon Department of Justice from 1994 until he was appointed to the bench. At DOJ, he served as an Assistant Attorney General, Attorney-in-Charge of the Special Litigation Unit, and Chief Trial Counsel of the department’s Trial Division. Judge Bushong serves on the Oregon Law Commission. He has served on the Oregon State Bar Uniform Civil Jury Instruction Committee, the OSB Litigation Section Executive Committee, and the OSB Government Law Section Executive Committee, and he is past chair of Multnomah Bar Association Professionalism Committee. He authored chapters in the OSB publications on Civil Pleading and Practice (2012) and Oregon Constitutional Law (2013) and regularly submits articles on “Recent Significant Oregon Cases” featured in the OSB Litigation Section’s Litigation Journal.

Kwame Christian, American Negotiation Institute, Columbus, OH. Mr. Christian is the Director of the American Negotiation Institute, where he conducts negotiation and conflict management workshops around the country. As an attorney and mediator with undergraduate and graduate degrees in psychology and public policy, he brings a unique multidisciplinary approach to the topics of conflict management and negotiation. He is the author of Nobody Will Play with Me: How to Find Confidence in Conflict. He presented a 2017 TEDx Talk on “Finding Confidence in Conflict,” and he hosts the podcast “Negotiate Anything.”

Claude Ducloux, National Director of Education, Ethics and State Compliance, LawPay, Austin, TX. Mr. Ducloux is an attorney in private practice and Director of Education, Ethics and Compliance for LawPay. He is board certified in Civil Trial Law and Civil Appellate Law by the Texas Board of Legal Specialization. Mr. Ducloux is an Associate of the American Board of Trial Advocates, and he serves as a Texas Supreme Court appointee to the Committee on Disciplinary Rules and Referenda. He has held numerous leadership positions in Texas professional organizations, including chairing the 2004 United States Fifth Circuit Judicial Conference in Austin. He is a nationally recognized speaker on law office management, client relations, and legal ethics. In 2010, Mr. Ducloux was named Distinguished Mediator by the Texas Mediator Credentialing Association. Mr. Ducloux is admitted to practice in Texas, California, and Colorado.
Denise Gaskin, Schwabe Williamson & Wyatt PC, Portland, OR. Dr. Gaskin is Schwabe’s Chief Operating Officer and a member of the firm’s Executive Committee. She provides leadership to the team that oversees the firm’s administrative functions, including finance, technology, talent management, marketing, and business development. She is a member of the Association of Legal Administrators. She holds an MS in Counseling Psychology and a Ph.D. in Collaborative Learning.

Karen Mockrin, Attorney at Law, Tigard, OR.

Ksen Pallegedara Murry, KPM Law LLC, Milwaukie, OR. Mr. Murry is a sole practitioner whose practice is dedicated to providing accessible representation in family law matters with an emphasis on serving traditionally underserved populations, including members of the LGBT community and immigrants from the former USSR. Prior to earning his JD, Mr. Murry coauthored the first LGBT nondiscrimination policy for the New York City Administration for Children’s Services, and he was one of the founding members of the Sylvia Rivera Law Project.

Gil Price, PMG, Seattle, WA. Mr. Price is the principal of Price Management Group (PMG). PMG provides cost-effective and affordable business management and business development services to solo practitioners and small and mid-size law firms. In addition to building his clients’ practice areas, Mr. Price has been instrumental in growing two nonprofits, the Washington State Community Associations Institute and Seattle Ski Buddies. He is a member of the Association of Legal Administrators. Mr. Price holds an MS in Business Administration from Boston University and a BA in Political Science from Seattle University.

The Honorable Kelly Skye, Multnomah County Circuit Court, Portland, OR. Judge Skye was appointed to the Multnomah County Circuit Court in 2009. Prior to becoming a judge, she was Governor Ted Kulongoski’s deputy general counsel and later general counsel, and she also served as the governor’s liaison to Oregon’s nine federally recognized Indian tribes.

Barbara Smith, Heltzel Williams PC, Salem, OR. Ms. Smith focuses her practice in the areas of estate planning, probate and trust administration, charitable gift planning, business law, family business, and tax law. Ms. Smith is a member of the Oregon State Bar Estate Planning & Administration Section Executive Committee, past chair of the Willamette Valley Estate Planning Council, and past chair of the Oregon State Bar Taxation Section. Ms. Smith has served as an adjunct professor at Willamette University College of Law, teaching the Estate and Gift Tax course. She has presented at continuing legal education courses for the Oregon State Bar and the Willamette Valley Estate Planning Council.

Emily van Sierveld, Clio Specialist, West Linn, OR. Ms. van Sierveld is a Clio Specialist with experience both as a representative and as a client. As a former office manager for a Portland-based law firm, she has a background in researching and implementing case management software. After learning more about the product and the company, she joined the Clio team and managed their Live Events portfolio, touring the country to introduce attorneys to the software and present on topics related to legal technology.

Lee Wachocki, Professional Liability Fund, Tigard, OR. In his role as a practice management advisor for the PLF, Mr. Wachocki provides free and confidential practice management assistance to Oregon attorneys. Prior to joining the PLF in 2018, Mr. Wachocki practiced law as a sole practitioner, with Multnomah Defenders, Inc., and as an associate in several law firms. His practice areas included criminal defense, family law, and civil litigation. He is a member of the Oregon Criminal Defense Lawyers Association and the American Bar Association Practice Management Workgroup. Mr. Wachocki is admitted to practice in Oregon and New York. Mr. Wachocki writes for the PLF’s inPractice blog (https://www.osbplf.org/inpractice/).
Chapter 1

Helpful Resources

Kwame Christian
American Negotiation Institute
Columbus, Ohio

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HELPFUL RESOURCES

FREE GUIDES

Download all of our free guides

https://americannegotiationinstitute.com/guide

RECOMMENDED READING

Nobody Will Play With Me: How to Use Compassionate Curiosity to Find Confidence in Conflict by Kwame Christian Esq., M.A.

https://tinyurl.com/NobodyWillPlayWithMe

Winning from Within: A Breakthrough Method for Leading, Living, and Lasting Change by Erica Ariel Fox

https://tinyurl.com/WinningFromWithin

Never Split the Difference: Negotiating As If Your Life Depended On It by Chris Voss & Tahl Raz

https://tinyurl.com/NeverSplitTheDifferenceVossRaz

The Like Switch: An Ex-FBI Agent's Guide to Influencing, Attracting, and Winning People Over by Jake Schafer & Marvin Karlins

https://tinyurl.com/TheLikeSwitch

What Every BODY Is Saying: An Ex-FBI Agent’s Guide to Speed-Reading People by Joe Navarro & Marvin Karlins

https://tinyurl.com/WhatEveryBodyIsSayingNavarro

Find Out Anything From Anyone, Anytime: Secrets of Calculated Questioning From a Veteran Interrogator by James O. Pyle & Maryann Karinch

https://tinyurl.com/FindOutAnythingPyleKarinch

FEATURED PODCAST EPISODES

How to Use Negotiation Jiu Jitsu to Resolve Conflicts & Persuade with Doug Witten, Esq.


How to Use Negotiation as a Problem Solving Tool with Veronica Cravener, Esq.

Chapter 1—Helpful Resources

THE AMERICAN NEGOTIATION INSTITUTE

How to Negotiate Like an FBI Agent with Chris Voss, Author of Never Split the Difference

How to Deal with Difficult People with Kris Plachy

Salary Negotiation and Career Advancement with Vanessa Gaboleiro

Are They Bluffing? How to Recognize and Defend Against This Tactic
https://www.buzzsprout.com/58026/374321-are-they-bluffing-how-to-recognize-and-defend-against-this-tactic

How to Manage Their Emotions and Yours in Difficult Conversations with Jeanine Carroll M.Ed and Helen Rapp Esq.

How to Develop a Winning Mindset with Mark Davis
https://www.buzzsprout.com/58026/848839-how-to-develop-a-winning-mindset-with-mark-davis

WHAT AM I READING?

Kwame’s Book List—2017-2019
https://tinyurl.com/KwameBookList
# Chapter 2

## Tax Matters for Solo and Small Firms

**Paul Britton**  
Heltzel Williams PC  
Salem, Oregon

**Barbara Smith**  
Heltzel Williams PC  
Salem, Oregon

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Disclaimer: Every business is different and requires an individualized assessment for tax planning. This presentation is designed as an introduction to helpful topics and is intended to get you thinking about general tax issues that you may encounter while managing a solo or small law firm.

Theme: Tax issues that arise as a lawyer or law firm operates and grows

I. Income Tax

*Income less Deductions equals taxable income* – multiply by the applicable rates to calculate the income tax due.

A. Income

1. Gross income defined:

   IRC § 61 – “income from whatever source derived”

   Including:
   “Compensation for services, including fees, commissions, fringe benefits, and similar items;
   “Gross income derived from business; . . . ”

2. Examples:
   a. A client paying for your services in cash, check or by credit card;
   b. A client gives you three chickens in return for your sage advice;
   c. A client transfers Bitcoin to you in return for your services;
   d. In the course of representation your client learns you really enjoy Sunriver. With the case going on and on, the client offers a week at their home in Sunriver in exchange for some services; and
   e. A client is having difficulty paying and you still want to help, but the client wouldn’t hear of it if it felt like charity, so you accept the client putting on a surf and turf barbecue for the office after work one evening – something the client does exceptionally well.

B. Deductions

1. General rules. IRC § 162
   a. Activities of the taxpayer must constitute a trade or business;
   b. Expenditure was ordinary and necessary for business; and
   c. Incurred while carrying on business.
2. **Limitations.**
   
a. Capital expenditures are depreciated, not deducted (**IRC § 263**);
   
b. Payments that violate public policy (**Tank Truck Rentals, Inc. v. Commissioner**); and
   
c. Illegal bribes, kickbacks, etc. (**IRC § 162(c)**).

3. **Deduction vs. Depreciation.**

C. **Specific Deduction Examples**

Remember that each of these deductions needs to meet the general rules of **IRC § 162** first.

1. **Licensing/Education related:**
   
a. Law School expenses
      
      No, see **Wassenaar v. Commissioner**, 72 T.C. 1195 (1979)
      
      Not incurred while carrying on business
   
b. Bar Exam Preparation and Test Cost:
      
      No, not incurred while carrying on business
   
c. Bar Dues – Deductible
   
d. PLF premiums – Deductible
   
e. CLEs – Deductible

2. **Start-up expenses** – **IRC § 179** election allows a deduction rather than having to depreciate these as capital expenditures.

3. **Business Loans**
   
a. The principal borrowed is not treated as income
   
b. Interest paid on business loans is deductible (**IRC § 163**), so long as:
      
      i. Taxpayer is legally liable for the debt;
      
      ii. Taxpayer and lender intend that the debt be repaid; and
      
      iii. Taxpayer and lender have a true debtor-creditor relationship (**IRS Publication 535**)

      IRS does not want to provide deductions for loans that will never be repaid

4. **Home office**

5. **Vehicles**
Chapter 2—Tax Matters for Solo and Small Firms

a. Listed Property. **IRC § 280F(d)(4)**
   b. Must be used more than 50% for business use.
   c. Mileage deduction is available instead at 58 cents per mile.

6. Cellular Phones
   a. No longer Listed Property (as of 2010)
   b. Cell phone provided by employer for business use:
      i. 100% deductible by employer
      ii. Excluded from employee’s taxable income if provided for substantial business reasons (and not as compensation); personal use is considered a *de minimis* fringe benefit (See IRS Publication 15-B (2019)).
   c. Self-employed lawyers may deduct cell phone expenses proportionate to business use.
      i. Should obtain itemized cell phone bill to determine proportion of expense attributable to business use
      ii. Should maintain documentation of one-time deductions necessary due to business use, such as an activation fee for an upgraded phone plan

7. Hiring an employee
   a. Salary and wages plus FICA, FUTA, SUTA, - Deductible
   b. General rule is that an employer may not give gifts to employees. Any transfers are part of compensation and thus Deductible.
   c. Qualified Transportation Fringe benefits – Not Deductible (**IRC §274(a)(4)**)
      i. Parking (if more than $268 per month, see addition rules)
      ii. Transit pass
      iii. Bicycle commuting reimbursement

8. Charitable Donations
   a. Not deductible by your law practice except by C corporations. C corporations limited to 10% of taxable income
   b. For pass-through entities and sole proprietorships, deduction will pass through to owner’s individual return.
   c. There is never a deduction for your pro bono service.
   d. Can it qualify as a marketing or advertising deduction?

9. Country club admission fee and dues – no longer deductible (**IRC § 274)**

10. Membership fee for Chamber of Commerce or a service club such as Rotary – Deductible
11. Tickets for you and a referral source or client for entertainment and the purchase of food at the event – entertainment not deductible, food 50%;

12. Travel and Lodging Expenses – Deductible, except for extravagant or lavish travel expenses (IRC § 162(a)(2));

13. Contribution to qualified retirement accounts – Deductible

14. HSAs/Healthcare Insurance – Deductible

15. Commuting expenses from your home to an office – not deductible.

16. Ticket to a political fundraising dinner for a political candidate that could help your clients or your practice – not deductible

17. Blogging about legal industry news?

18. Life insurance on life of one of the partners/employees – not deductible

19. Qualified Business Income Deduction. See Section IV.

II. Self-Employment/FICA Tax

A. Self-employment tax -- 15.3% on the first $132,900 of net income plus 2.9% of the net income in excess of $132,900.

B. FICA – the employer and employee each pay one-half of these amounts, so it is the same effective tax rate of 15.3% when you own the business.

III. Personal Property Tax - Oregon personal property tax (ORS 308.105 et seq.)

A. Important Dates:

1. Assessed as of January 1 at 1am

2. Tax Return due to the county by March 15

3. Tax due November 15 (but can pay in three installments)

You have to file every year even if for the prior year the county sent you a confirmation that there is no tax because your total asset value fell below the threshold for taxation (currently $17,000).
B. See sample completed personal property tax return attached. The blank form can be found at:


More information is at:

https://www.oregon.gov/DOR/programs/property/Pages/personal-property.aspx

C. Property that is taxed:

1. Tangible personal property

2. 100% of the value even if your business use is only a percentage of the use. E.g. cell phones.

3. For valuing any law books go to:

https://www.osbar.org/_docs/resources/libraryvalues18.pdf

IV. Qualified Business Income Deduction (IRC 199A)

Pass Through Entities Deduction aka QBI Deduction (Section 199A)
Warning – This is a gross over simplification of the tax code. In preparation of a tax return the actual code and regulations and/or a tax professional familiar with the code and regulations should be consulted.

A. Limitations.

1. Attorneys are totally ineligible if for married taxpayers filing jointly taxable income exceeds $415,000 or for other filers, taxable income exceeds $207,500.

2. Start of the phase out for attorneys: Married taxpayers filing jointly with taxable income exceeding $315,000 and for all other filers, taxable income exceeding $157,500.

3. This outline will not detail the calculation of the phase out.

4. This deduction sunsets, so tax year 2025 is the last year to take advantage of it unless Congress renews it.

5. This is not a deduction against self-employment tax or a reduction of the income upon which self-employment tax is determined.
B. Deduction. In general terms, the deduction is 20% of Qualified Business Income, but there is an overall limitation that is figured using another deduction as well. The deduction also applies to alternative minimum tax (AMT). The rule can be more properly stated as follows:

Add 20% of the QBI Amount to 20% of the combined amount of Qualified REIT Dividends and Qualified Publicly Traded Partnership Income and then compare it to 20% of the excess of the taxpayer’s taxable income over the sum of the taxpayer’s net capital gain. The lesser of these two amounts is the Section 199A deduction.

C. Examples (assumes there are no Qualified REIT Dividends or Qualified Publicly Traded Partnership income):

Example 1. Attorney A is single and has $60,000 of QBI. A also has $200,000 of long term capital gain, $40,000 of wages and uses the $12,200 standard deduction. Therefore, A has taxable income of $287,800. A’s deduction is limited to the lesser of:

- 20% of $60,000 = $12,000
- 20% of ($287,800 - $200,000) = $17,560.

Example 2. Attorney A is single and has $100,000 of QBI. A also has $200,000 of long-term capital gains, no wages and uses the $12,200 standard deduction. Therefore, A has taxable income of $287,800. A’s deduction is limited to the lesser of:

- 20% of $100,000 = $20,000
- 20% of ($287,800 - $200,000) = $17,560.

Example 3. Assume the same facts as above except there are no capital gains. Example 1 saves approximately 24% of $12,000 in income taxes or $2,880. Example 2 saves approximately 24% of $20,000 in income taxes or $4,800. But Example 2 costs $9,180 more in self-employment taxes.

- 15.3% of $40,000 = $6,120.
- 15.3% of $100,000 = $15,300.

Key Takeaways:

1. Find a good CPA from the beginning
2. Audits take time, so organize and document well
Chapter 2—Tax Matters for Solo and Small Firms

2019 Confidential Personal Property Return—Form OR-CPPR (ORS 308.290)

Assessment of Business: Furniture, Fixtures, Equipment, Floating Property, and Leased or Rented Property

ATTENTION: If you did not receive a tax bill last year because your total assessed value was below $17,000, you may not have to complete this entire form. See General information #2.

Filing deadline for this return is March 15, 2019

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<td>Attorneys at Law</td>
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<tr>
<td>PO Box XWZ</td>
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<td>Dufur, OR 12345</td>
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</tr>
</tbody>
</table>

Make any name or mailing address corrections above. This return is subject to audit.

Location of personal property on January 1, 2019.
File a separate return for each tax code area or location. Attach a separate listing if needed.

123 EZ Street, Dufur, OR 12345

Date business originated in county 09/01/2018
Type of business Law Practice

Was a return filed last year? ☐ Yes County __________________ X No

First-time filer, see General information no. 1
If your total assessed value was below $17,000 last year, see General information no. 2. Doesn’t apply to first time filers.

Remember to sign the Taxpayer’s declaration at right

No personal property to report (See General information no. 3.)

☐ Business closed? ☐ Moved out of county?
Date closed: Date moved:______________________________
☐ Business sold? ☐ New address: ______________________________
Date of sale: ______________________________

Name and address of new owner (If business sold)

☐ If we MAY NOT FORWARD current property list to new owner.
Signature X

Multiple locations within this county (See General information no. 5.)

Business name: ___________________________ Business location: ___________________________

Logging exemption in previous year ☐ Logging exemption in _______________________ County (See General information no. 4)

Submit your original return and attachments to your county assessor. Keep a photocopy and the attached instructions for your records.

Schedule 1—Leased or rented personal property (Don’t report real property. Enter “None” if no personal property to report.)

<table>
<thead>
<tr>
<th>Name and address of Second party involved in lease/rent agreement</th>
<th>Description (include model year)</th>
<th>Payer of taxes to county</th>
<th>Amount of lease</th>
<th>Date agreement began</th>
<th>Length of agreement</th>
<th>No. of units</th>
<th>Original cost</th>
<th>Owner’s opinion of real market value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mail Finance</td>
<td>IN-360ND Mail Machine</td>
<td>X</td>
<td>73</td>
<td>9/1/18</td>
<td>5 Years</td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If Schedule 1 items are reported on separate attachments, check here: ☐ Schedule 1 total: (Include attachments)

Taxpayer’s declaration

Invalid if not signed. Under the penalties described in ORS 305.990(4), I affirm that I have examined this return and all attachments. All statements made are true. To the best of my knowledge, all taxable personal property I own, possess, or control, which was in this county as of 1:00 A.M., January 1, 2019, has been reported.

Name of firm/owner
Dewey, Cheetum & Howe
E-mail address
feelinglucky@dch.com

Assumed business name of firm assessed
Telephone no. (503) 123-1234
Assessor’s name

Mailing address
Po Box XYZ
City Dufur
State OR
ZIP code 12345

Person completing return
John Dewey
Phone 503-123-1234
Title Partner

This return is being filed for:
An individual ☐ A partnership (No. of persons 3) ☒
A corporation ☐ A limited partnership ☐
A limited liability company ☐ A limited liability partnership ☐

Attach a separate list of names and addresses of each individual partner for corporations, LLCs, LLPs, and partnerships.

Dewey Cheetum & Howe
Attorneys at Law
PO Box XWZ
Dufur, OR 12345

Dewey, Cheetum & Howe
09/01/2018 Law Practice
feelinglucky@dch.com
503 123-1234
09/01/2018
Dufur OR 12345
John Dewey
Partner
503-123-1234

Mail Finance IN-360ND Mail Machine X 73 9/1/18 5 Years 1

Filing deadline for this return is March 15, 2019
## Chapter 2: Tax Matters for Solo and Small Firms

### Schedule 2—Noninventory supplies

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost when purchased</th>
<th>Owner's opinion</th>
<th>Assessor's RMV</th>
</tr>
</thead>
<tbody>
<tr>
<td>General office supplies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maintenance supplies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Operating supplies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spare parts</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other noninventory supplies</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Report total cost on hand as of January 1

If Schedule 2 items are reported on separate attachments, check here: [ ] Schedule 2 total: [ ]

### Schedule 3—Floating property

<table>
<thead>
<tr>
<th>Registration no.</th>
<th>Oregon Marine Board no.</th>
<th>Date purchased</th>
<th>Purchase price</th>
<th>Owner's opinion</th>
<th>Assessor's RMV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Own:</td>
<td>Contract holder:</td>
<td>Exact moorage location on January 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Flood plan</td>
<td>Length of vessel</td>
<td>Type of fishing or activity</td>
<td></td>
<td></td>
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</table>

If Schedule 3 items are reported on separate attachments, check here: [ ] Schedule 3 total: [ ]

### Schedule 4—Professional libraries

<table>
<thead>
<tr>
<th>Type of library</th>
<th>Title of book or set</th>
<th>If set, is it complete?</th>
<th>Number of volumes</th>
<th>Cost when purchased</th>
<th>Owner's opinion</th>
<th>Assessor's RMV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law Library</td>
<td>List attached</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

For example, books, tapes, videos, compact discs

Schedule 4 total: [ ]

### Schedule 5A—All other taxable personal property

<table>
<thead>
<tr>
<th>Item of property</th>
<th>Identification (manufacturer and serial number)</th>
<th>N=New U=Used</th>
<th>Purchased year</th>
<th>Manuf year</th>
<th>Purchased Mo. Yr.</th>
<th>No. of units</th>
<th>Cost when purchased</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dell Optiple X</td>
<td>JD, JC &amp; JH</td>
<td>N</td>
<td>2010</td>
<td>2010</td>
<td>2010</td>
<td>10</td>
<td>150</td>
<td>300</td>
</tr>
<tr>
<td>Mitel 6930 phones</td>
<td>JD, JC &amp; JH</td>
<td>N</td>
<td>2018</td>
<td>2018</td>
<td>2018</td>
<td>3</td>
<td>600</td>
<td>1,800</td>
</tr>
<tr>
<td>Desks</td>
<td>JD, JC &amp; JH</td>
<td>U</td>
<td>1980</td>
<td>1980</td>
<td>1980</td>
<td>3</td>
<td>500</td>
<td>1,500</td>
</tr>
<tr>
<td>iPhones 7</td>
<td>JD, JC &amp; JH</td>
<td>N</td>
<td>2018</td>
<td>2018</td>
<td>2018</td>
<td>3</td>
<td>700</td>
<td>2,100</td>
</tr>
<tr>
<td>Chairs</td>
<td>JD, JC &amp; JH</td>
<td>N</td>
<td>2018</td>
<td>2018</td>
<td>2018</td>
<td>3</td>
<td>200</td>
<td>600</td>
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</tbody>
</table>

Subtotal 5A: [ ]

### Schedule 5B—Small hand tools

<table>
<thead>
<tr>
<th>Type of hand tool</th>
<th>Owner's opinion</th>
<th>Assessor's RMV</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Subtotal 5B: [ ]

Submit your original return and attachments to your county assessor. Keep a copy of the return for your records.
What should I know about filing this return?

1. **First-time filer**—Send your original return with a complete list of assets and non-inventory supplies, and any attachments to the county assessor. Complete a separate return for each location in which you have personal property.

2. **Check and sign**—If your county assessor did not send a property tax bill last year because your total assessed value was below $17,000, and you have not purchased or added any taxable personal property, check the box, sign and date the Taxpayer’s declaration, and submit the return to your county assessor. If you have purchased, added, or disposed of any taxable personal property, report it on this form and return it to your county assessor (ORS 308.250).

3. **No property to report**—If you don’t have taxable personal property in the county, attach a full explanation. Explain the disposition of property you reported last year. Sign and date the Taxpayer’s declaration, and send it to the county assessor before the filing deadline.

4. **Logging exemption**—If you had a logging equipment exemption in the previous year, check the box. If you’re new to the county and you had an exemption in another county, check the box and identify which county granted your exemption. Note: To determine if your equipment qualifies for exemption, you must provide specific information. File form 150-510-026, Environmentally Sensitive Logging Equipment Qualifications, annually with the county in which you file your Confidential Personal Property Return. Receiving an exemption on specific logging equipment, doesn’t relieve the obligation to file a complete return. All assets must be reported and returned to your county assessor (ORS 308.290). General information and the form are available on our website.

5. **Multiple businesses**—If you have multiple businesses within the county, you must complete a return for each business. Check the box and provide the name and location of each business.

What personal property is taxable?

Taxable personal property includes machinery, equipment, and furniture used previously or presently in a business, including any property not currently being used, property placed in storage, property held for sale, expensed items, or items fully depreciated by federal standards.

What personal property isn’t taxable?

- Intangible personal property: Money held at interest, bonds, notes, shares of stock, business records, surveys and designs, and the materials the data is recorded on (paper, tape, film, etc.) (ORS 307.020).
- Computer software (excluding software integrated in equipment).
- Household goods, furniture, tools, and equipment exclusively for personal use in and around your home (ORS 307.190).
- Inventory held for resale (ORS 307.400).
- Livestock (ORS 307.394).
- Licensed vehicles and equipment other than fixed load and mobile equipment. Examples of taxable fixed load and mobile equipment are shown on the back page (ORS 801.285).
- Farm machinery and equipment used primarily in the preparation of land, planting, raising, cultivating, or harvesting farm crops or feeding, breeding, management, and sale of, or the produce of, livestock, poultry, fur-bearing animals, bees, dairies, agricultural, or horticultural use (ORS 307.394).

What happens if I falsify the information on the return?

Any person who furnishes false information is subject to criminal penalties [ORS 305.815 and 305.990(4)].

What happens after the return is filed with the county?

Your return will remain confidential at all times. In some cases, an appraiser may inspect your property. On or before October 25, you will receive a tax statement showing the value of your personal property and the tax due (ORS 311.235).

When do the taxes become my responsibility?

On July 1, personal property taxes become a lien against the assessed value of the property, but they are not due until January 1 (ORS 311.235).

Keep a copy of the return and instructions for your records. This return is subject to audit. Filing deadline is March 15, 2019.

Instructions for completing your personal property return

At your request, the assessor’s office will assist you in completing your return.

**Schedule 1—Leased or rented personal property**

Report all leased or rented items as of January 1.

If you don’t lease equipment to or from others, write “None.”

**Equipment leased to others.** Attach a list showing name and address of lessee, situs of equipment, description, date of acquisition, length of lease, and original cost. If a manufacturer, report real market value rather than original cost.

**Equipment leased from others.** Attach a list showing name and address of lessor, situs of equipment, description, date of acquisition, and original cost. If original cost isn’t known, give length of lease and amount of the monthly payment. Advise if included with other assets to avoid duplicate assessment.

**Item 3.** Who is responsible for paying the tax? Check either lessor or lessee.

**Schedule 2—Noninventory supplies**

As of January 1, report total cost on hand of any taxable item that won’t become part of finished goods or won’t be directly sold to customers. For example:

**General office supplies:** Copy paper, envelopes, pens, stationery, etc.

**Maintenance supplies:** Cleaning supplies, axle grease, etc.

**Operating supplies:** Straws, paper cups, sacks, gasoline, diesel, etc.

**Spare parts:** Repair parts, computer parts, automotive parts, etc.

**Other noninventory supplies:** Items not covered by the other categories.

**Schedule 3—Floating property [ORS 307.190(2)(c)]**

Report floating homes, docks, and boathouses. Don’t include personal licensed boats used only for personal use.

**All other vessels**

Report houseboats (self-propelled) used in rental businesses and other required floating vessels.
Schedule 4—Libraries

Report all professional libraries in this schedule format. All items should be listed on a separate page. Libraries include, but are not limited to, those held by accountants, architects, attorneys, consultants, doctors, health science professionals, other science professionals, surveyors, and title companies. Electronic, mechanical, and other technical professionals should also use this schedule.

1. Enter type of library media (books, electronic media, compact discs, tapes, videos, etc. If “None,” explain).
2. Enter the title of the reported book or set.
3/4. If the item reported is a multiple volume set, check the yes or no column to indicate if the set is complete or not.
5. Enter the number of volumes. If a set, enter the number you have, not the number in the original set.
6. Enter cost when purchased.
7. Enter the best estimate of the real market value for each item as of January 1. Reporters of law books report the value shown on the schedule published by the Oregon Department of Revenue in cooperation with the Oregon State Bar Association.
8. Leave blank.

Attachments. Check the box indicated in each applicable schedule if attachments are included. Values reported on this return are not binding on the assessor.

Examples of taxable personal property to be reported on this return (this isn’t a complete list)

A/V equipment
Air conditioners
Aircraft equipment
Alarm systems
Amusement devices
Appliances—free standing
Art work
ATM machines—portable
Auto diagnostic electric
Auto repair equipment
Backbars
Bakery equipment
Bank vaults (doors)
Barber shop equipment
Battery chargers
Beauty shop equipment
Bowling equipment
Bulk plant equipment
Butcher shop equipment
Cabinet shop equipment
Cable TV systems
CAD/CAM equipment
Calculators
Cameras
Cameras-digital-DVD-Video
Car wash equipment
Cash register
Cellular phones
Chain saws
Chairs
Child care furniture
Coin counters
Coin-operated laundry equipment
Computers
Concession equipment
Construction tools
Copiers
cameras
Costume/tuxedo rentals
Decor
Dental equipment
Desks
display racks
Dry cleaning equipment
Dryers
DVD players
DVDs (movies)
Electronic mfg. equipment
Fiberglass/boat molds
Filing cabinets
Fish processing equipment
Fitness equipment
Foster home furniture and supplies
Freezers
Frozen food cases
Golf carts and course equipment
Grocery equipment
Grocery store fixtures
Handpieces (dental)
Heavy equipment
Hospital equipment
Hotel furniture/fixtures
Ice cream machines
Ice making machines
Juke boxes
Landscaping equipment
Laser equipment
Lasers
Leasinghold improvements
Libraries
Lift trucks
Lenses
Logging equipment
Lottery video terminals
Machine shop equipment
Manufacturing—general
Meat processing equipment
Medical-high tech equipment
Medical-lab equipment
Medical-office equipment
Medical-surgical equipment
Medical equipment-major
Mining equipment
Mobile radio/phones
Mobile yard equipment
Modular offices
Molds
Motel furniture/fixtures
Movie production equipment
MUSICAL instrument rentals
Newspaper equipment
Nursing home equipment
Office fixtures
Office furniture
Office machines
Optical equipment
Pagers
Pallet jacks
Pallets/bins/crates
Pay phones
Photographic equipment
Pinball machines
Pool tables
Popcorn machines
Printing equipment
Professional equipment
Radio and TV broadcast
Radio and TV repair equipment
Recording studio equipment
Refrigerated cases
Restaurant equipment
Retail store fixtures
Road construction equipment
Safe deposit boxes
Safes
Satellite dish relays
Saw mills—portable
Scanners
Scientific equipment
Service station equipment
Sewing/apparel equipment
Shake mills—portable
Sheet metal fabrication
Shelving
Shingle mills—portable
Signs
Small hand tools—
Barber and beauty
Carpentry
Construction
Landscape
Logging
Mechanics
Medical
Radio and TV shop
Soft drink equipment
Sound equipment
Steam cleaners
Survey equipment
Tanning equipment
Tavern equipment
Telephone systems
Testing equipment
Theatre/projection
Tire recapping equipment
Tool boxes
Tractors
TV sets
Typewriters
Unlicensed vehicles
Utility trailers—unlicensed
VCs
Vending carts
Vending machines
Ventilating fans
Video/DVD game rental equipment
Video games
Video recording equipment
Video tape/DVD rental equipment
Video tapes (movies) and cases
Walk in coolers
Warehouse equipment
Washers
Winery equipment
Woodworking equipment
Work benches
X-ray equipment

Fixed load and mobile equipment

Air compressors and drills
Asphalt/rock crushing plants
Asphalt spreaders
Backhoes
Bituminous mixer
Bituminous plants
Bituminous spreaders
Bucket loaders
Catering/vendor trucks/wagons
Concrete mixers
Concrete batch plants
Cranes
Crawlers
Diggers
Earthmoving equipment
Electric generators
Excavators
Fork lifts
Front end loaders
High lifts
Levelling graders
Lighting plants
Motor graders
Paving equipment
Portable storage bins
Portable storage tanks
Power plants
Rotary screens
Sand classifiers
Scrap metal balers
Scrapers
Skidders
Tractors
Welding equipment
Yarders

Filing deadline for this return is March 15, 2019
DEWEY CHEETAM & HOWE
List of Partners
On January 1, 2019

John Dewey, Partner
123 EZ Street
Dufur, OR 12345

James Cheetam, Partner
123 EZ Street
Dufur, OR 12345

Joseph Howe, Partner
123 EZ Street
Dufur, OR 12345
### SCHEDULE 4: Law Library

<table>
<thead>
<tr>
<th>Law Library Class</th>
<th>Title of Book or Set</th>
<th>Set Comp.</th>
<th>No. of Vol.</th>
<th>Market Each</th>
<th>Value Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CODES AND STATUTES:</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>C</td>
<td>Oregon Revised Statutes 2017</td>
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<td></td>
<td>Oregon Revised Statutes 2018 supplement</td>
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<td>Q</td>
<td>Restatement 3rd of Property (Wills)</td>
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<td>3</td>
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<td>$12.00</td>
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<td>4</td>
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</tr>
<tr>
<td></td>
<td>Restatement 2nd of Agency (softbound)</td>
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<td>$3.00</td>
<td>$6.00</td>
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<tr>
<td><strong>TEXTS:</strong></td>
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<td></td>
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<tr>
<td>Q</td>
<td>Trusts and Estates</td>
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<td>Charitable Lead Trusts Manual</td>
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<td>$3.00</td>
<td>$3.00</td>
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<tr>
<td>Q</td>
<td>Institute on Estate Planning - Miami</td>
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<td>41</td>
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<td>Price on Contemporary Estate Planning</td>
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<td></td>
<td>$3.00</td>
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</tbody>
</table>

**SCHEDULE 4: Page 1 - Law Library**
## SCHEDULE 4: Law Library

<table>
<thead>
<tr>
<th>Law Library Class</th>
<th>Title of Book or Set</th>
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<th>Market Each</th>
<th>Value Total</th>
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</thead>
<tbody>
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**Pensions**

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| Q | ERISA Regulations 2017 | Y | 2 | $3.00 | $6.00 |
| Q | ERISA Selected Legislative History | 1 | $3.00 | $3.00 |
| Q | Military Retirement Benefits in Divorce | 1 | $3.00 | $3.00 |
| Q | Value of Pensions on Divorce | 1 | $3.00 | $3.00 |
| Q | Taxation of Compensation and Benefits | Y | 2 | $3.00 | $6.00 |
| Q | Corbel Pension Plan Guide (online) | | | $0.00 | $0.00 |
| Q | The Pension Answer Book | 1 | $3.00 | $3.00 |
| Q | QDRO Answer Book | 1 | $3.00 | $3.00 |
| Q | Qualified Deferred Compensation Plans (Callaghan) | 2 | $3.00 | $6.00 |
| Q | Dividing Pensions on Divorce | 1 | $3.00 | $3.00 |
| Q | QDRO (Snyer) | 1 | $3.00 | $3.00 |
| Q | Defined Benefit Answer Book | 1 | $3.00 | $3.00 |
| Q | QDRO Handbook | 1 | $3.00 | $3.00 |

**Tax**

| Q | Auditor's Letter Handbook | 1 | $3.00 | $3.00 |
| Q | The Exchanger’s Handbook | 1 | $3.00 | $3.00 |
| Q | Federal Income Taxation of Corporations and Shareholders | 1 | $3.00 | $3.00 |
| Q | Federal Income Taxation of S Corporations | 1 | $3.00 | $3.00 |
| Q | Federal Taxation of Partnerships & Partners | 2 | $3.00 | $6.00 |
| Q | Federal Income Taxation of Real Estate (not current) | 2 | $3.00 | $6.00 |
| Q | Income Taxation of Fiduciaries and Beneficiaries | 2 | $3.00 | $6.00 |
| Q | IRS Practice and Procedure | 1 | $3.00 | $3.00 |
| Q | The New Form 1099 | 1 | $3.00 | $3.00 |
| Q | Nonprofit Handbook | 1 | $3.00 | $3.00 |
| Q | Pass-Through Entity Tax Digest | 1 | $3.00 | $3.00 |
| Q | Passive Activity Loss Rules | 1 | $3.00 | $3.00 |
| Q | Prepare Your Own 501(c)(3) Tax Return | 1 | $3.00 | $3.00 |
| Q | Tax Facts | Y | 2 | $3.00 | $6.00 |
| Q | Tax Free Exchanges | 1 | $3.00 | $3.00 |
| Q | Tax Guide for Buying & Selling a Business | 1 | $3.00 | $3.00 |

**Business**

| Q | 2018 Corporate Law Handbook | 1 | $3.00 | $3.00 |
## Chapter 2—Tax Matters for Solo and Small Firms

### SCHEDULE 4: Law Library

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#### Banking

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| Q                 | The Guide to National Banking Law                   |           | 1           | $3.00       | $3.00       |
| Q                 | Law of Bank Deposits, Collections & Credit Cards    |           | 2           | $3.00       | $6.00       |

#### Real Estate

| Q                 | The Appraisal of Real Estate                        |           | 1           | $3.00       | $3.00       |
| Q                 | Drafting a Fair Office Lease                        |           | 1           | $3.00       | $3.00       |
| Q                 | Friedman on Leases                                  |           | 3           | $3.00       | $9.00       |
| Q                 | Fundamentals of Real Estate Taxation                |           | 1           | $3.00       | $3.00       |
| Q                 | Managing Environmental Risk                         |           | 1           | $3.00       | $3.00       |
| Q                 | Mortgages - Osborne                                 |           | 1           | $3.00       | $3.00       |
| Q                 | Real Estate Finance Law                             |           | 1           | $3.00       | $3.00       |
| Q                 | Commercial Ground Leases (PLI)                      |           | 1           | $3.00       | $3.00       |

#### General Law

| Q                 | ABA Commercial Retail Leases and Outlot Purchases   |           | 1           | $3.00       | $3.00       |
| Q                 | ABA Title Insurance: A Comprehensive Overview of the Law | | 1 | $3.00 | $3.00 |
| Q                 | ABA The Commercial Lease Formbook: Expert Tools     |           | 1           | $3.00       | $3.00       |
| Q                 | Antitrust and Health Care: New Approaches           |           | 1           | $3.00       | $3.00       |
| Q                 | Antitrust Law Handbook                              |           | 1           | $3.00       | $3.00       |
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| Q                 | Attorney General's Administrative Law Manual        |           | 1           | $3.00       | $3.00       |
| Q                 | Attorney General's Model Public Contract Rules Manual |     | 1           | $3.00       | $3.00       |
| Q                 | The Border Guide                                    |           | 1           | $3.00       | $3.00       |
| Q                 | Brady on Bank Checks                                |           | 1           | $3.00       | $3.00       |
| Q                 | 2018 Civil Rights Law Handbook                      |           | 1           | $3.00       | $3.00       |
| Q                 | Compensation Journal                                |           | 1           | $3.00       | $3.00       |
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| Q                 | Evidence - McCormick                                |           | 2           | $3.00       | $6.00       |
| Q                 | Oregon Evidence                                    |           | 1           | $3.00       | $3.00       |
| Q                 | Family Leave Law Handbook                           |           | 1           | $3.00       | $3.00       |
| Q                 | Federal Rules of Evidence Manual - Saltzburg        |           | 1           | $3.00       | $3.00       |
| Q                 | Guide to Employee Handbooks                         |           | 1           | $3.00       | $3.00       |
| Q                 | How to Save Time and Taxes - Estates                |           | 1           | $3.00       | $3.00       |
| Q                 | How to Manage your Law Office                       |           | 2           | $3.00       | $6.00       |

SCHEDULE 4: Page 3 - Law Library
## SCHEDULE 4: Law Library

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TOTAL: $4,659.50
Chapter 3

Presentation Slides: The DIY Solo—Practice Tips and Perspectives from Sole Practitioners

**Moderator: Lee Wachocki**
Professional Liability Fund
Tigard, Oregon

**Drake Aehegma**
Attorney at Law
Portland, Oregon

**Karen Mockrin**
Attorney at Law
Tigard, Oregon

**Ksen Pallegedara Murry**
KPM Law LLC
Milwaukie, Oregon
The DIY Solo

Practice Tips and Perspectives from Sole Practitioners

featuring Drake Aegema, Karen Mockrin, and Ksen Murry
moderated by Lee Wachocki

Topic 1 – Expectations vs. Reality

Did your expectations about flying solo match the reality?
**Topic 2 – Your Worth**

How do you:

- get paid what you’re worth?
- manage your inner white knight?

**Topic 3 – Firing Clients**

How do you approach firing clients?
Chapter 3—Presentation Slides: The DIY Solo—Practice Tips and Perspectives from Sole Practitioners

**Topic 4 – Opposing Parties & Bar Complaints**

*How do you deal with them?*

**Topic 5 – Red Flags and Clients Not to Take**

*What are they, who are they, and what do you do about them?*
**Topic 6 - Collections**

What do you do when a client owes you money?

---

**Topic 7 - Communicating with Clients**

Any suggestions?
Topic 8 – Nontraditional Offices

If your office arrangement is nontraditional:

• What is it?
• Why does it work for you?

Topic 9 – The Magic Number

What’s your magic number of cases?
Topic 10 – Technology & Services

What hardware, software, and services do you use?
Chapter 4

Presentation Slides: Beyond Employment Law
101: Being a Good Boss Is Good for Business

PAULA BARRAN
Barran Liebman LLP
Portland, Oregon

DENISE GASKIN
Schwabe Williamson & Wyatt PC
Portland, Oregon
Beyond Employment Law 101: Being a Good Boss is Good for Business

September 20th, 2019

Presented by Paula Barran of Barran Liebman LLP & Denise Gaskin of Schwabe Williamson & Wyatt

What We Are Going To Cover Today

• What are the restrictions on hiring employees and how do we find the best person for the job without being able to ask questions about things that may be important?
• What compensation issues and decisions do we need to worry about and how do we engage with our employees?
• Oregon just added the nation’s most aggressive leave law. How do we comply with that and how can we get the work done?
• Is employment really at will, and what does that really mean? How do we end a relationship without conflict?
Old Rules With A New Twist

- Hiring the best person for the job is a good goal, but there are many factors that employers are forbidden from considering.
- Plan to provide a day’s pay for a day’s work, but remember minimum wage, overtime, equal pay, fair pay, recordkeeping, mandatory breaks and meal periods, lactation breaks, statutory paid leave, unpaid statutory leave, and paycheck rules including deductions and final paychecks.
- Employment is an arm’s length relationship that is terminable at will, but there are exceptions for contracts, laws, and public policy that greatly diminish the general rule.

Operational Wisdom Needed Here!
Hiring Do’s & Don’ts

Things You Are Not Allowed to Know or Do

• In general, avoid any questions that provide information about membership in protected classes such as gender, race, age, religion, ethnicity, marital or pregnancy status, presence of a disability, or need for an accommodation.

• Recent laws and regulations significantly narrow an employer’s right to information or impose requirements on how that information is gathered: ban-the-box (limited information about criminal background), limits on background checks, credit history, pre-employment physicals or genetic information, military status, salary history, place of birth, immigration status, polygraphs, drug testing
Eligibility Documentation

- Employers must complete a Form I-9
- Employers MAY use the federal e-verify process
- Form I-9 must be completed
  - No earlier than acceptance of the job offer
  - Within three business days of hire
- Employers cannot knowingly employ ineligible workers but may not discriminate against them.

Operational Wisdom Needed Here!
Paying Employees

Pay, Paid Time, & Paydays

- Hiring: embargo on prior salary history
- Oregon has an expansive pay equity law: equal pay for work of comparable character,
  - Ten protected classes
  - Lawful reasons for disparities: seniority, merit, pay for quantity/quality, location, required travel, education, training, experience
- Minimum wage and overtime (understand exempt and nonexempt)
  - July 1, 2019, Portland $13.25
  - Overtime: 1-1/2 x regular hourly rate for work over 40 hours in a workweek
- Working “off the clock” is a serious violation
Operational Wisdom Needed Here!

Breaks, Meal Periods, & More

• For nonexempt employees who work an 8 hour shift:
  • 2 ten minutes paid rest periods
  • 1 thirty minute unpaid meal period
  • Timing is strictly controlled
  • Employees must be relieved of all duties

• Nursing mothers: reasonable breaks in a private location that is NOT a restroom
Operational Wisdom Needed Here!

Protected Leave, Paid & Unpaid

- Family and serious health condition leave (federal and state depending on size)
- Crime victim leave
- “Safe” leave
- Military leave
- Military family leave
- Bone marrow transplant leave
- Jury duty leave
- Oregon paid sick leave
- Paid family or care leave (new)
Operational Wisdom Needed Here!

When Employees Complain

- Employers need to understand:
  - When are employee complaints about legal issues?
    - What do you do then?
  - What is retaliation?
    - Legal issues and requirements
Operational Wisdom Needed Here!

Ending the Relationship

• Employment is an arm’s length relationship that is terminable at will, but there are exceptions for contracts, laws, and public policy that greatly diminish the general rule.
Operational Wisdom Needed Here!

Thank You!

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(503) 796-2878  
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Chapter 5

Effective Client Relationships—Communication, Care, and Collaboration

Claude DuCloux
National Director of Education, Ethics and State Compliance
LawPay
Austin, Texas

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In my speeches to young lawyers around the country I tell them there is no more important skill to the successful practice of law than to effectively communicate with all of the participants in your legal system. This includes your clients, any court or governmental unit which is involved in your practice, as well as opposing counsel. Your ability to communicate effectively demonstrates integrity, knowledge, empathy, and continuing thoughtful evaluation of changing circumstances.

I also personally believe that good communication habits also make you a better lawyer because effective communication practices require you to constantly evaluate, distill and clarify positions, changing dynamics, risk, and opportunities for resolution.

Additionally, I preach that lawyers often overlook a crucial element of communication: your billing invoice! Effective and smart billing communication allows the lawyer to control the “narrative” of the case for the client. Those bills are every bit as important as a report letter to the client of what happened at your last hearing. But, I’m getting a bit ahead of myself. Let’s discuss this in the general chronological order of practice:

**Part I: REMEMBER WHAT BUSINESS YOU ARE IN**

A. **The Client** – Always keep in mind that most lawyers rarely encounter a new client in a celebratory mood. Clients who are coming to see lawyers (just like doctors) are usually trying to address a stressful failure in their life, perhaps a betrayal, or an unexpected social condition, or a failure resulting from their own inappropriate decisions, or other unforeseen event, like an injury or other loss caused by themselves or an opposing party. Bottom line: new clients are rarely happy.

B. **You are a Problem Solver** -- Although we all have various skills and expertise, remember that your initial role is to diagnose and problem-solve. This takes intense concentration, a respect and appreciation of the stresses which usually have brought the client to your meeting. Your initial presentation and communications skills can help you form the “bond” of trust and professionalism which survives long after the representation is over. So, how do you do that?

C. **Initial Presentation:** First and foremost, present yourself as a professional. For me, someone that has been practicing nearly 40 years, I will look like a lawyer, if nothing else to match my client’s expectation. I want to look like the image that a new client would expect someone of my age and generation to look like (which generally means, I wear a tie). While your own personal style, your age, your cultural orientation may dictate a different look, the result should be that the Client sees a person who looks professional. If you present unprofessionally, you add an unnecessary barrier which you must overcome. We will discuss that in more detail later in this presentation.

D. **Be sensitive, attentive, and thorough:** As I explain in **Part II**, a good client interview has many elements. But in any initial interview, you “begin the healing process.” Devote 100% of your attention to interviewing and sizing up this client. Emotionally, this means empathizing with their plight, being patient as they unload information (which often may
be more than you actually need), and simply allowing the Client to “vent.” As you will see, because the goal of this initial interview is “reasonable expectations” on everyone’s part, you may be required to “push back” on unrealistic expectations, bad facts, etc. You cannot do that (ie., thoughtfully criticize or push back) with credibility unless you have thoroughly extracted all the information from the client which will be the basis of your overall analysis. Further, by being patient, you may discover facts which change your opinion of the case.

E. **The Goal: Reasonable Expectations:** Remember, your client is always looking for you to lead the client to a solution. Lawyers are taught early in law school that a good contract requires a “meeting of the minds.” This applies to the attorney-client relationship. The object of a good interview is to result in reasonable expectations: the scope of work the lawyer will do, the relief or resolution being sought, the alternatives to be explored, and the basis of the fee.

F. **Clearly Establish the Payment Plan:** Moreover, the client’s willingness to pay you (as well as your willingness to continue working) depends on each side honoring this agreement. Boiled down to its most basic formula the interchanged messages should be:
   - **From Lawyer’s perspective:** "I will do this for you and you will compensate me by doing X."
   - **From the client’s perspective:** the Client should leave with these thoughts and understandings: “I understand what you are going to do for me, what my alternatives are, how long it might take, and how I will compensate you.”

G. **Collaboration:** The best attorney-client relationships are collaborations towards a goal. If you achieve reasonable expectations, it allows you to collaborate with the client to achieve realistic and lawful goals and outcomes. Keep the word "collaboration" in the front of your mind.

H. **Following Through** – Once you have communicated and formed a bond of confidence and an impression in the client’s mind that you are competent to do the work, **you need to follow through.** Get started. Do the hard work. Stay late if other things get in your way. It goes without saying that communication is more than just the spoken or written word. It is the way you carry yourself, respond, and continue to encourage confidence in your performance. You destroy that early bond of confidence by immediately delaying work you promised to do. By contrast, early communication and updates following your initial interview "seals" the bond of confidence you are trying to encourage. It says, "You can count on me."

I. **Communication During the Case** – A lawyer should always report each event in the case to clients to keep them informed of each process and allow the client the opportunity to ask questions. This serves not only to keep the client calm, but protects the lawyer from a claim of neglect. Obviously, in our adversarial system, not every case will go perfectly. I have had a habit for 25 years of simply sending newsy updates to the Client even when nothing is happening. Sending out ten 2-sentence emails to ten clients advising them briefly of case status is a true winning habit, and sends the client the message: “I’m
thinking about your case.” Those little messages are an effective inoculation against grievances.

J. Never Withhold Bad News: There can be setbacks in terms of rulings, failures of evidence, and simply unexpected bad things happening. Each time, however, your communication can serve to either reassure the client that you have the matter in hand, or be a harbinger of likely adverse outcomes that militate toward modifying your goal. It is much better for the client to be warned well in advance of that likelihood long before it happens. And be aware, some clients recoil at hearing bad news and immediately want to blame the lawyer. When that inevitably happens, never respond with evidence of exasperation, frustration or anger. Your communications are critical to the character you present. The bottom line is never write a letter you’d hate to see on a poster board.

K. Never Let the Client Change the Narrative. Never allow the client to communicate something you know is untrue: (You promised this whole case would [only take 6 weeks!] [only cost $1500!]) Always respond as soon as possible with the facts. Your failure to respond is always considered an admission against interest. Remember, you have the fiduciary duty to the client, and because of that, the surpassing duty to keep the record straight. I have handled scores of grievance complaints, and it is devastating to the accused lawyer to show a series of correspondence from the client for which there was no reply. Don't risk it. Practice defensively when setting the record straight. In this same vein, if an adverse event is based upon a misrepresentation by the client or someone acting on the client’s behalf upon which the you, the lawyer, relied in appraising the case, the reasons for such outcome should be communicated (albeit diplomatically, as necessary) so that the client can understand the connection between the misrepresentation and the ultimate outcome. There are many examples of this. The easiest is a client telling his family lawyer: “My spouse and I have already agreed to everything. How much will this cost?” This is almost universally false, as the client may not even know the scope of agreements required. Another example could be if a client assures you that a particular document will be available to prove timeliness of a condition precedent - and then the document turns out not to be available or doesn’t support the client’s statement, the lawyer should reference that disparity in the communication to the client.

L. Good Lawyers ARE Good Communicators: Here’s the undeniable truth, which I mention at the outset: Good communication habits make you a better lawyer. By this, I mean that if you require yourself to have robust client communications, you’ll pay more attention to your cases, and accomplish more, and more quickly. If you avoid communication, it unfailingly leads to neglect, mutual frustration, and a breakdown of your bond of confidence.

M. Requesting Second Opinions – Some lawyers are threatened by a client’s request in a case for a second opinion. Do NOT be threatened. I always welcome that opportunity. It is my theory that if a lawyer with equal or better specialized skills than I have has a different perspective, I want to hear about it because we are "collaborating" to achieve the best outcome for a client and not simply preserve our dignity or pride. In my career I have never had a bad outcome as a result of the client’s request for a second opinion. My
only advice is to have the client ensure that the reviewing attorney has the requisite experience and skill.

N. **Mistakes in Communication - Caveat:** Making predications “off the cuff” – A very dangerous situation presents whenever a client asks you to guess as to the outcome of a future event. Why? Because the client rarely will remember the “construct” of your opinion, just the *best possible* outcome predicted, and will hold you to that fictitious prediction. Your "guesstimates" frequently rely on unproven facts (facts often suggested by the client). The best advice I can give is to scrupulously avoid guessing about the future. The best I will do is to say “My job is to do the best I can for you, and based upon the facts I know today [e.g., I am comfortable that we are on the right track].”

O. **Civility in all Communications** – Despite the nastiness you see on lawyer TV shows, every lawyer has a duty to attempt to keep all the communications civil. Civility is a process. It avoids unnecessary confrontation and it relies on the Rule of Law. At this point, you're eyes are glazing over thinking, "blah bla…Rule of Law." But let's talk about that:

*What is the "Rule of Law?"* Simply put, it is society’s social compact to resolve issues within frameworks and rules. To observe neutral methods to achieve best outcomes based upon fairness, process, and opportunity to present facts. We choose to live in this society rather than to allow money, or brute force, guns and swords to dictate outcomes. That is exactly why we need to preserve it. Our first step in that preservation is civility.

P. **Civility depends upon communication;** that is, keeping in touch and responding. Civility observes respect of all the participants: your clients, opposing counsel and judicial system. The most effective way to serve your client generally is maintaining a productive and problem-solving relationship with the opposing counsel. In this regard, the words you use matter. Thus:

a. “*How do we solve this?*” works better than “*I demand you do this.*”

b. “*When may I expect the documents?*” works better than “*Once again you blew by the discovery response deadline.*”

Always remember, you should never expect better treatment yourself than you are offering the other side.

Q. **Civility is Social Insurance:** Finally, remember how dependent you are on the good will of the other participants of the legal system: clerks, administrators, and other state, county, or city employees who will review or handle your work. Be kind, gracious and humble, appreciating that those people often have stressful jobs for unappreciative citizens.

In my 2001 article about “The Ten Rules of Life and the Practice of Law: or Growing Balder and Wiser,” - [http://claudeducloux.com/entre-nous](http://claudeducloux.com/entre-nous) - I list this lesson within
Chapter 5—Effective Client Relationships—Communication, Care, and Collaboration

Rule 7: “Friendship is social insurance, and you never know when you need to make a claim.” Remember that. If you’re a jerk, expect to be treated as a jerk.

R. Nonverbal Communication – As old fashioned as this sounds, please remember that a client will make an appraisal as to competence and confidence by what they hear and how they see you being treated. Bad press affecting you and your practice undermines confidence. If those negative images evoke reminders to a client of how he/she is being treated, it is likely that client will change counsel.

S. Communication on Billings – As I explain in Part III, you can influence the narrative of the entire representation of your client with intelligent billing habits and techniques. Accurate, explanatory billing survives faulty and failed memories and suspicions. Accuracy in billing increases exponentially when you record time immediately or as close to the event billed as possible, and increases the likelihood of payment.

If you set proper expectations, prompt billing reminds the Client of his/her end of the bargain. Not sending billing promptly sends a completely different message: “I’m too rich and important to get my bills out. And it’s not a priority for my practice.” Good luck expecting prompt payments. Now, let’s start at the beginning:

PART II: THE ART OF THE INTERVIEW: How to Interview Clients in a Way that Results in Reasonable Expectations

While interviewing skills are critical to a lawyer's success, few of us are ever trained how to do it. While colleagues in the medical profession spend a great deal of time learning how to “take a history” and probe the client for clues as to the source of their ailment or discomfort, few programs appear to respect the importance of that process for lawyers. The value of properly interviewing proposed clients is immeasurable. A good interview can result in candor, trust, credibility, and choosing the most appropriate remedy for the issue presented.

The true purpose of a legal interview should result in the following: realistic expectations as to the limits of the legal rights involved, timelines and costs, as well as alternatives that may be available to the client.

The Incoming Client

A. The Incoming Client: As we discussed above, always keep in mind that as a lawyer you are first and foremost a problem solver, and that you rarely see people at their best during a client interview. Think of your own hopefulness when you have a debilitating medical problem and go to the doctor hoping that he or she will fix it for you. Expect the same hopeful expectation in the person consulting you: to fix a problem.

All of your technical skills are simply tools for you to solve problems. So, always look at every legal matter as a problem which requires resolution.
B. Resolve Potential Conflicts of Interest Early: Older lawyers generally have learned the importance of resolving potential conflicts of interest early into the interview. If you wait 45 minutes into the interview, after the client has poured out his entire financial, moral, family history and goals, and only then discover a conflict, you likely have already formed an attorney-client relationship, regardless of your being paid, or your intention to handle the matter.

*Practice Tip:* Remember, whether or not an attorney-client relationship has been formed is in the mind of the client and not in yours. If, by your action or inaction, you have encouraged the prospective client to disclose all of his most serious, confidential information to you and only then do you determine that a potential opposing party is a client of your or the firm’s, you may be completely conflicted from handling any portion of that case, even for your existing client.

So, experienced lawyers attempt to discover in the first 5 minutes of an interview the names of parties or entities that may be involved, and quickly determine whether a conflict exists. This is a hard lesson, especially for young lawyers who may not have had but a few dozen clients. Early on, a young lawyer may have few conflicts. But conflicts frequently become a strong possibility after 35 years of practice, even in a large city. Anecdotally, I can tell my readers that in my very broad general practice of nearly 40 years I discover conflicts of interest regularly, and if you have a reputation for skill and special ability in an area of law, your opposing counsel will waste no time trying to remove you from a case. So, just like checking the gas in the tank before you take off on a long trip, always check your conflicts before you get too far into an interview.

C. Form an early Bond of Trust: Remember the old adage: you never get a second chance to make a first impression. This applies to your initial interview. Look like a lawyer. You want an aura of professionalism, confidence, and dedication. I apologize to those who will call my thinking old-fashioned, but if you show up in a T-shirt and flip flops to a first meeting, you are diminishing the client’s assessment of your professionalism, and setting yourself as perhaps a cheap alternative to a "real" lawyer.

D. Complete Attention to Facts: Next, when the meeting starts, stop checking emails, hold all your calls. Feel free to make notes (I take very precise notes of the facts) and dedicate yourself 100% to attending to that client. Take a clue from our psychotherapy colleagues, who believe that "healing begins when people believe they are being listened to." Listen closely, carefully, and make sure the client appreciates your concentrated efforts to understand their issue.

Another important interview technique I practice is to *repeat key facts*, dates, relationships and parties BACK to the client for accuracy. The “meta-communication” of such repetition is to tell the client: “I am listening carefully, and every fact is important to my advice as assessment. So be careful.”

If you show interest, concentration, and ask intelligent questions, you very often are forming not only a attorney-client relationship, but a friend for life.
E. To end with Reasonable Goals, Ask “the Magic Questions”: After you have listened carefully, your interview must ultimately end with both parties having reasonable goals and expectations. With regard to goals, you must determine: what do they hope to achieve? This can tell you a lot about the personality of the client you will be dealing with. Also, what are their motivations? Are they doing this for the right reasons or to inflict pain on someone else? After you have listened carefully, I urge that there are two magic questions you must ask:

First, diplomatically inquire: "What do you think I can do for you?"

Second, if the matter has an opposing party: "If we were listening to the person who is on the other side of this transaction or claim talk about you, what would he/she be saying about you?"

The best answer to the first question is some version of: "You're the lawyer, you tell me." In any event, the answers to these questions will be very illuminating. If, for example, they have presented a small personal injury or consumer case which you assess has maybe $20,000 in potential damages, and they express an expectation of $1 Million, you have a problem that you must resolve before you can take the case, or you must absolutely pass. You cannot take that case unless you both agree that the goal you are trying to receive is reasonable and supported by the law and that the client has sufficient means to get you to the goal line. If you know that this client doesn’t have the means to take this matter all the way through what could be a long process, hearing or trial, then your retention by the client should be subject to that agreement and understanding, which may include some contingency fee for you.

F. “I want to Sue for the Principle of it!” My most serious "red flag" warning is the siren call of those potential clients who inform you that they "want to sue for the principle of it." Translation: “I have been wronged, and dagnabbit, I'll show that [wrongdoer] what's for!” Be aware of this unalterable, immutable, and bitter truth: YOU will never make that client happy, as they enter the relationship with completely unrealistic expectations, and they expect you to meet those expectations 100% (and that’s at a minimum). If you decide to take this on, raise your rate, as you'll earn it. Later, you can send me your regrets.

G. Encourage Questions: Also, I think it is very important to encourage the client to ask you questions. Be prepared that one of their earliest questions will be “Do you do this [type of legal work]?” If you have not, do not exaggerate your skills or experience, or there is an 80% - 90% that such exaggeration will come back to haunt you.

H. “What Are My Options?” Whether the client actually asks you this question or NOT, advice on potential routes of resolution should always be offered. Why? So the client clearly knows that he directed you to take this route of resolution, and doesn’t blame you if that route proves expensive, time-consuming and difficult. For example, you might assess in a consumer case that a partial refund is a reasonably quick possibility, but a full refund will likely take a lawsuit and all the time and expense that entails. "If you get
80% of your money back now, would that be sufficient? More than that will likely mean litigation and a much longer and more expensive timeline." Make good notes of those conversations.

I. Practicing Defensively: As the overall title of this article implies, the single most important word in the practice of law is communication. Communicate with everyone: your client, your opposing counsel and the Court at its staff when necessary. Never leave any stone unturned if there is a possibility of a miscommunication.

You should know by now that I cannot overstate the importance of communication to grievance avoidance and client relations. By communicating carefully and thoughtfully with your client, you control the narrative. If you allow your client to respond with a changed narrative and you do not correct that, you are setting yourself up for problems in the future. If, for example, you informed the client that the cost of the legal services, depending upon the response from the opposing party, will be between $1,500 to $10,000, and the client writes back confirming that you have told the client that you will do the whole case for $1,500, you are allowing the client to change the narrative. Always respond quickly, effectively and courteously with the correct information that you have discussed. As I discussed earlier, your failure the correct that, again, is a huge problem, and may be presumed to be evidence against you.

J. Clear Expectations Should include a Complete Payment Plan. This is extremely simple: never get started representing a client without a clear understanding of what you are charging, and how and when the client is expected to pay. Have modern contracts which could be put on a power point slide and be understood. Include those matters which the law now protects and requires.

K. Clear Expectations Result in Good relationships. If your client interview results in reasonable understandings of what your client wants you to do, your own belief that such results are achievable, and you have carefully explained time frames and likely range of costs, you will not only have a client who trusts you, but a friend and a future source of referrals upon which you can expect more work.

Part III: GETTING PAID: The Lifeblood of Your Law Practice

Nothing helps a law practice more than hearty and dependable cash flow. It is indeed, the holy grail of financial success. But, old fashioned lawyers (especially in my generation) seem to make every mistake you can in promoting the easy payment of bills.

One of the most difficult concepts for lawyers (especially older lawyers) to understand is the changing relationship between their perceived professionalism, and modern payment systems that make it easy for clients to pay their fees. Thirty years ago, no self-respecting lawyer or law firm would accept credit cards (“What are we? Bartenders?”). But, the ease and ubiquitous nature of debit/credit cards and our increasingly cash-less society have made cards the preferred method of instant payment, especially among younger clients.
The truth is: all law firms can benefit from providing their clients will safe and secure credit card payment systems. Personally, when I started allowing credit card payments, it was an amazing boost in my cash flow. My success led me to create the CLE program for LawPay.

The large firms with corporate or institutional clients who only get paid quarterly may not feel a need for credit card payments. But for the rest of us, relying on mailed-out bills and return-mail checks is like telling your clients you're relying on carbon-paper copies and typewriters. Frankly, if you can't take credit cards, you are missing the boat by not providing your clients an easy opportunity to pay your bill with debit or credit cards.

But (and let me make this emphatic), using a good payment system like LawPay is only 1/3 of the prescription for getting paid promptly. Of equal importance are: a) a good client contract which creates reasonable expectations, and b) promptly billing your client to show your income is important to you!

A. The Client Contract: All of these elements should be discussed with the Client and Included in the fee agreement:

Scope of work
Basis of Fee (Flat fee? Hourly? Contingent?)
When payment shall be expected (within x days of billing)
Who will be working on it (You? Legal Asst? Assoc.?)
Communication Methods (Primarily email? Phone?)
Office Hours
Texas now requires the firm to have a “Privacy Policy”
Amount of Prepaid Fee Retainer and disclosure it will not earn interest.

Additional Optional and Helpful Provisions include:

Client’s Rights to be provided respect, explanations and communication
Rejection of Settlement Offers and Rights to Terminate/Withdraw
Venue for disputes: your home county
Employment of Outside Counsel if required
File Destruction Policies
Paperless Office Policies (“Digital File Maintenance”)
How to Contact State Bar
Continuing Charge Authority to Credit Card
Third party Credit Card Authorizations

B. Getting Bills Out the Door: Every lawyer and firm should have an absolute, inalterable rule to send bills promptly, and good billing habits which facilitate those billings. Remember that clients HATE getting bills 3 months after the event, and the client’s willingness to pay a lawyer’s bills without objection diminishes precipitously after 30 days. Indeed, the typical write-offs of big firms who rarely get bills out for 60-90 days are enormous.
C. Billing discipline: It is a matter of good habits to accurately record time daily. Accurate, timely explanatory billing trumps faulty and failed memories and suspicions. Accuracy in billing increases exponentially when you record time immediately or as close to the event billed as possible, and increases the likelihood of payment. It actually takes less than 5 minutes per day with a modern system to accurately record time. 

**Practice tip:** If you can’t remember what you worked on, always check your outgoing email for valuable reminders and clues what your busy day entailed.

D. Use good descriptors that the Client can understand:

Here's a short list of good habits:

a. Remember your audience: use words your client will understand if you expect to be paid. Use Client’s name rather than “client.”

b. Again, keep in mind that your bills may be subject to third party review in the event you are seeking reimbursement in court, or the client complains. That means you are unlikely to be able to redact, and therefore reveal no client confidences, but add enough information so a court or committee can evaluate what you did.

c. Add free events: "Called Bob to remind him of pre-trial on Oct 10. --0.2 hours, NO CHARGE.”

d. Be prepared to defend every event you are billing.

Now, here's a short list of bad habits:

a. Using meaningless techno-legal babble: "File review - .3 hours"

b. Using confusing shorthand: “cc wC re:mot.” *Huh?*

c. Overbilling: "Draft Original Petition for Divorce - 1.5 hours" *Really?* Even if it takes you 1.5 hours for a task, charge a market (reasonable and necessary) rate.

d. Revealing confidences: “Client told me he doesn’t have documents, so try to settle for 35K.”

e. Making your stapler a profit center: do not bill for office supplies! You're a lawyer! Clients expect you'll have paper, paper clips and staples, and you didn't have to run out to the office supply store just because they hired you! It is the smallest charges on your bill that often cause the most anger (like seeing a $20 aspirin on a hospital bill).

E. Prepare Clients Ahead of Time for Unexpected Bills: Intrinsic in this process is to have created a reasonable expectation with your client of what you are doing and how much it is likely to cost. Anytime you go outside that legal budget you need to proactively explain (prior to shocking the client with an unexpectedly high bill) to your client with some communication why the cost is outside the parameters of what you discussed.

F. You Need to Get Paid! The biggest mistake that lawyers make in the whole billing cycle is not getting the bills out on time. If your income depends on billing for your time, writing it down is just as important as eating lunch or having an extra coffee break. No excuses: do it. In my office, we have absolute inviolate rule that our monthly legal fee
bills go out on the first business day of the month following service (ie, March bills go out April 1, etc)

G. The 5 steps to good billing:
1. Write down your time as soon as you can;
2. Review the bills promptly at the end of the month for modifications, adjustments and corrections; and
3. Have the bills go out of the first business day;
4. Incentivize clients to pay with credit card with a hyper-link to your payment page;
5. I personally encourage clients to keep their points/miles/rewards.

H. Send Reminders During the Process: Each month, as I review the bills, I also see who may not have paid a bill last month, and I stop and send that client a cheery reminder (Eg. “Hi Bob, I just noticed you didn’t pay for the [services]. I hope you got the bill, but here’s a reminder and a hyperlink to go ahead and pay now with your credit card”). That reminder is amazingly effective in producing immediate payments, and often a quick apology email from client: “Oops. sorry. Thanks for the reminder.”

I. Waiving surcharges/convenience fees. This is clearly my own opinion, but I stand by it. Undoubtedly, there are those of you who believe that if you have to pay 2% of the collected fee to the credit card processor, that you should somehow charge a convenience fee or surcharge. Frankly, in my opinion, that’s misguided. You’ll be creating ill-will and additional barriers for your fees to be paid. If you have a good credit card processing company, your fees will be minimal and it is well worth it. I would very gladly pay the 1.95% (which is the typical fee for standard Visa, Mastercard and Discover card) to encourage that client to pay me immediately. Further, surcharging the client requires you to specify how much of the charge is for the surcharge or convenience fee, and you must check what limits your state allows. Again, paying the $19.50 for every $1,000 paid allows me to sleep soundly knowing my cash flow supports my operations.

The Danger of Suing Your Clients

Let me discuss something all lawyers will face, and you can't prevent - but you can minimize. First, folks do run out of money. Be cognizant and thoughtfully consider when that happens. Why? Because at least 50% of the time, you had something to do with it! You underestimated costs, you improvidently took on the case by not assessing your client's abilities to pay, or the case took an unexpected turn... which you should have anticipated and discussed with the client.

When clients run out of money, experience has shown the relationship will take one of two directions:
A) good clients will do their best to work something out with you and you will never need to sue them.
B) Bad clients will do, say, and claim anything, including your malpractice, to get out of paying you. And, if you do sue and win,...they are almost always judgment proof!
Remember that under *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), in the case of breach of fiduciary duty, now the Judge has the discretion not only to deny your fee recovery, but have you disgorge previous fees paid. So, never sue unless it is an “existential threat” to the firm; meaning, your firm will fold without this fee. And never sue a bad client. Suing is a time vampire, and you will likely make more money with new business.

What you want instead is to think of every client as a potential friend for life, and treat them from the beginning as such. I do. But that alone won't get you paid. You need these additional skills and disciplines, which are absolutely, time-proven, solid foundations of a productive, cash-flowing law practice.

**Final Thoughts**

**Claude's Three Rules:**

a. Treat every client like you will live next door to them for the rest of your life. That thought changes how you will interact. No one wants a bad, angry neighbor.

b. Always tell the truth. There will be far less paperwork if you do.


To distill what we've discussed above, always remember it is your responsibility to appear professional, knowledgeable and collaborative.

Only sign-on to represent a client when you have a meeting of the minds as to reasonable expectations. Communicate actively and informatively in a way that connects you as a team member for your client's reasonable goals.

Treat every person, firm, agency and interest with respect and courtesy, observing your duty of civility. When stress arises, be "the adult in the room" who can control the emotion and act civilly and responsibly.

If you follow these rules, you will likely have clients who will be friends for life, as well as lawyer-colleagues who will refer you more business because they have had a good experience working with you.

In other words, you will be a success.
Creating Strong and Effective Client Relationships
The Art of Collaboration and Communication

Claude E. Ducloux
Board Certified- Civil Trial Law & Civil Appellate Law
Texas Board of Legal Specialization

2 Claude E. Ducloux

• 42-year seasoned attorney
• Board Certified in Civil Trial Law and Civil Appellate Law – Texas Board of Legal Specialization
• Former President, Austin Bar Assoc.
• Received Gene Cavin Award and Pat Nester Award for Lifetime Achievement in Teaching Continuing Education
 Preview

1. The Potential Client
2. Documenting Representation
3. Running Your Office
4. Using a Trust Account

5 common problems

1. Communication
2. Neglect
3. Handling the Attorney-Client Relationship
4. Poor Billing Habits
5. Misuse of Retainer Accounts
PART 1

The Potential Client

Intake: Your initial chance to bond and assess the client history

- Listen respectfully, intensely—full attention
- Do not allow any interruptions
- Check EARLY for conflicts
- Ask good questions
- Ask client to repeat key facts—keep good notes
7 Discuss what your client wants

**Find out:**
What they really hope to achieve and is that realistic?

**Inform:**
What goals can they expect to accomplish?
- Timeline
- Cost
- Alternatives

8 Two initial interview questions you should ask the client

1. What do you think I can do for you?

   **Good answer:**
   "You’re the attorney, you tell me."

2. What is the other party telling their attorney about you?

   **Caveat:** Remember, a person suing “for the principle” will never be happy with your work.
Objectives in contested matters

Discuss their most important objective—is it to win or delay the inevitable?

Warning: If a client says they are suing “for the principle,” that rarely results in a good outcome.

(Consider raising your rate)

The “speeches”

- Discuss conflicts up front
  If there is more than one party involved in your legal matter:
  Make sure all know whom (which entity) you will represent.

- Are there other entities involved? Other Counsel?

- Describe your duties of communication in different scenarios.
  Ex. “If I represent your entity, you should expect no confidentiality between me and the rest of you.”
Your goal: Reasonable expectations

- A good interview results in reasonable expectations for you and your client
- The good interviewing techniques should result in Client’s reasonable expectations.
- What about you?
  - Time to ask yourself: Is this a prudent piece of business for you to handle?
    - Do you have the skills?
    - Do you have the desire?
    - Do you have the technology?

Bottom Line: don’t sign on to handle matters you are clearly unable to manage.
Never underestimate fees

THE CLIENT WILL REMEMBER THE LOWEST FEE YOU QUOTE

Discuss client payment plan

- Does this client have the money?
- Is there a payment plan?
  - IF SO, what is it?
  - IF NOT, don’t start the case.
What should be in a good fee agreement?

For the client, make sure you discuss:

• Scope of work
• Basis of fee
• Who will be working on it (You? Legal Assistant? Associate?)
• How will updates be communicated (Primarily email? Phone?)
• Many states do, or will require, a privacy policy
• Office hours
• Amount of prepaid fees, and disclosure it will not earn interest

Additional contract provisions

• Client’s rights—what the client has a right to expect from you
• Rejection of settlement offers (procedure for second opinions)
• Venue for any disputes (your home county)
• Termination rights/withdrawal by attorney
• Employment of other counsel for related matters
• How client can contact the bar if a complaint arises
Rights and duties in conflicts

If there is a potential conflict, You, the lawyer have the duty to:

a. Disclose
b. Secure permission if it can be waived
c. Withdraw if it cannot be, or will not be waived by one or more parties.

In 2016, 7% of all malpractice suits were based upon Conflict of Interest resulting in bad outcomes.

Complete disclosure by lawyer means:

1. The EXISTENCE of the conflict
2. The NATURE of the conflict
3. The IMPLICATIONS of the conflict
4. Possible ADVERSE CONSEQUENCES of common representation
5. ADVANTAGES of common representation
Managing your difficult clients

Just because your client is unreasonably emotional does not give you the right to be the same way.

Observe your duties to the courts and opposing/cooperating counsel and ensure your client understands your duty to do so.

Doing business with the client

Guidelines:
- Must be fair to client
- Must have full disclosure
- Must give client the right to seek independent advice
- MUST GET THE CONSENT IN WRITING!
PART 3

Running Your Office

Financial control

• How often do you review statements and checks?
• Who is allowed access to your checking accounts?
Chapter 5—Effective Client Relationships—Communication, Care, and Collaboration

Payment systems

- How do you bill? How often?
- How difficult do you make it to be paid?
- How many options do you give Clients to pay you?

Law Office Budgeting

- The ABA estimates that most lawyers actually bill just under 4 hours per day.
- This means most lawyers (especially solo-small firms) should know how to configure their law office budgets on that basis.

The three elements you must know are:

1. The reasonable billing rate in your community for the legal services you provide.
2. Your personal income budget you are responsible for producing every month for your living costs; and
3. How much your office operations (overhead) cost you.
Ok, so how do I set my hourly rate?

1. What is reasonable and necessary for you?

2. What is a client willing to pay?

You cannot charge less than you need to support yourself (and often your family) given all resources available to you.

You can’t charge more than a fair/reasonable rate in your community for your area of practice.

Step one: What is charged in my community?

1. Ask attorneys in your practice area

2. Ask the judges in your area
Step two: How do I figure out my personal budget?

1. Annual goal
2. Daily goal

Remember, your formula should support this reality…

4-Hour Per Day Rule
A lawyer should be able to survive on billing and collecting four hours per day

How do I calculate the 4-hour per day method?

Formula

<table>
<thead>
<tr>
<th>Add all personal expenses, plus law office expenses:</th>
<th>$8,000 + $4,500</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$12,500</td>
</tr>
</tbody>
</table>

20 billing days x 4 = 80 hrs a month
$12,500 ÷ 80 hrs

$156 HOURLY RATE
How do I implement the 4-hour per day method?

Your office will succeed with the 4-hour per day method if:

- Your hourly rate is within the accepted rate; and
- You monitor/check each day to make sure you are confident you can bill and COLLECT for four hours

In our previous example, the need for $12,500 per month translated to a daily average income need of 4 hours x 156 = $624 per day.

- I call that daily rate my “income microcosm”
- 12,500 x 12 = $150,000 per year is my “income macrocosm.”

Billing and collecting: The “life blood” of your practice

NONE of your budgeting or planning mean a thing unless you have EXCELLENT billing habits!!

- Record time diligently
- Send bills out on time
- Give clients payment options
- Incentivize them to pay
- Follow up on unpaid items
Strive for 90%+ collection rate

Always record your time daily.
You'll forget the very next day what you did.

Tip 1: Check outgoing mail
Tip 2: Don't use shorthand
Tip 3: Never reveal confidences

Psychology of billing

Throw in entries of activity at no charge.

Bad billing habits:
1. Making the stapler a profit center (charging for binding, office supplies)
2. Charging a surcharge for use of credit cards
3. Charging excessively for “legal research” or using bland descriptions like “file review” or “file update”
4. Charging too much for copies/faxes
Billing habits that work: the path to success

1. Timely billing: It is a “mortal sin” not to get bills out on a set day each month.

2. Remember the client satisfaction curve!
   The client satisfaction curve declines steeply after 30 days.

3. Always give clients the option of emailing them their bills. Most younger clients rarely use checks—they prefer debit/credit cards.

4. Use a payment link in your email, on invoices, and attach one to your website.

Make payments easy
Payment systems

What if I Don’t get paid?  
Suing clients—a bad idea

Never sue a client unless it is an “existential threat” to the firm!

Why not?
1. Good clients will work with you.
2. Bad clients lie (and you have the burden of proof as fiduciary).
3. Counterclaims against you are mandatory.
4. It is a time vampire. Go make new money!

Instead: Use ADR (i.e., fee dispute committees) whenever possible.
PART 4

Using a Trust Account

What belongs in an IOLTA account?

• Client funds that have not been earned by you
• Client funds being held in escrow for an event or contract or costs

What doesn’t belong in there?

• Your money! When you earn it, take it out and transfer it to your operating account
• Non-refundable retainers, absent agreement to contrary (non-refundables are similar to flat fee)
What checks/transfers should come out of Attorney Trust account?

- Payment directly to attorney of earned fees (have a billing to back that up!)
- Payment of costs on behalf of client from client’s retainer
- Refunds to client in appropriate circumstances (i.e., fee for matter completed is less than retainer)

What checks/transfers should NOT come out of the IOLTA account?

- Lawyer’s personal bills, overhead, costs, credit card fees, etc.
- Lawyer’s payroll, dues, fines, sanctions, etc. (even if it's from a “non-refundable retainer”)

Distributions from a lawyer Trust account

Improper distributions from Trust
Chapter 5—Effective Client Relationships—Communication, Care, and Collaboration

10 biggest mistakes

1. Not establishing reasonable expectations with the client from the very beginning

2. Not resisting the client’s invitation to “guess” or predict outcomes or costs without sufficient facts

3. Not keeping the client informed regularly, truthfully, and aggressively to avoid mistakes and negative inferences

4. Failing to respond to client contact which changes the narrative, i.e., expression of client’s mistaken interpretation of your communication, facts, or options

5. Stupid billing—not using correct, intelligent descriptions in billing, thus raising suspicions of overbilling

6. Writing a letter or email that you would hate to have seen by a grievance committee
Chapter 5—Effective Client Relationships—Communication, Care, and Collaboration

10 biggest mistakes

7. Telling a lie, or treating anyone involved in the matter with contempt or disrespect

8. Making a threat, even passively

9. Leading an opposing party to believe that you are neutral or “on their side”

10. Sending a communication to anyone that will “burn a bridge”

Claude’s best tips for a successful practice

- Look professional: inspire confidence.
- Do your share of the work. Don’t make excuses.
- Get involved in your profession. People will think of you.
- Communicate often with everyone.
- Use the world’s greatest research tool: the telephone.
Communicate often: it’s a Magic Shield

- Communicate proactively with clients, opposing counsel, and the courts
- Do not let client change your narrative: “You promised X”
- Always reply with the facts
- Send “newsy” updates
- Remind your client often of their goals and expectations if that needs reinforcement
- If either the goals or methods of obtaining them need modification, write that down and sign it—practice defensively

Six concepts attorneys believe clients want

- Competence
- Accountability
- Accessibility
- Communication
- Collaboration
- Respect & Courtesy
What clients really want

The six concepts:
• Competence
• Communication
• Accessibility
• Collaboration
• Respect and courtesy
• Accountability

“Survey says—”
1. Collaboration
2. Accessibility
3. Communicator
4. Accountability
5. Respect and courtesy
6. Competence

Summary

1. The Potential Client
2. Documenting Representation
3. Running Your Office
4. Using a Trust Account
Final thoughts

- Make sure you interview in a way that results in reasonable expectations
- Have a written agreement
- Communicate often
- Have excellent billing habits
- Promptly send out bills
- Make it easy to get paid!
- Don’t sue if you get burned—it’s all part of doing business
- Use ADR when available

Improve and defend your profession

Support the fair administration of justice

Our Legal Profession will be:
- Courteous – if you are
- Strong – if you are active in it
- A source of service – if you serve
- A source of resolution – if you share your talents
Thank You!

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Chapter 6
Ethics of Contract Drafting and Negotiation*

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*Incorporating (with permission) portions of material prepared by Professor Scott J. Burnham, ret., former Curley Professor of Law, Gonzaga University School of Law, and published in ABA Business Law Today, December 2012.
Any time a lawyer negotiates or drafts a contract there are at least six ethical concepts in play which apply to your duties to the client under the Texas Disciplinary Rules of Professional Conduct. Those include the following:

1. Competence- knowing what you are doing. That is covered by TDRPC 1.01, ABA Model Rule 6-101;
2. Conflicts of Interest- covered by TDRPC 1.06 and ABA Model Rule DR5-105;
3. Whether or not the contract is connected with business with the client. That is covered by TDRPC 1.08(b) and ABA DR5-104;
4. Your duty to engage in truth in statements to others under TDRPC 4.01 and ABA Rule 4.1;
5. Additional duties arise if you are dealing with unrepresented persons under TDRPC 4.03 and ABA DR7-104(A)(2); and
6. Your duty to refrain from conduct involving dishonesty, fraud, deceit or misrepresentation, TDRPC 8.04 and ABA DR1-102.

ANALYSIS OF CLAIMS

Whenever the Court is required to make an analysis of the conduct of the parties when it comes to contract negotiation, the key to that is an examination of the status of the case when the documents are received. First, we must examine the expectations of the sending party as follows:

A. Is it clearly a "rough draft" for review?
B. Is it intended to be "take it or leave it"?
C. Did it come with representations (for example. "This is the State Bar form I used.")?
D. Did the sender indicate that the sender has no authority to make any changes without client approval?
E. Who was responsible for sending the original draft and what representations where made at that time?

STRATEGIES

Anytime there is a complex negotiation there are several strategies that an attorney can easily employ if he or she is not sure that the document has been drafted properly, or whether or not changes had been made.

1. Ask for a representation as to changes in the document under discussion. Lawyers are under a duty to tell you in good faith whether or not there have been any modifications.

2. Once you receive a representation, send a confirming communication of that representation that removes any doubt of what you were told.
3. Make your intentions clear on what the document should include.

All of these strategies, however, are undergirded with the duty not to be negligent. If you send a party a 13-page document and it comes back as an 11-page document with the representation that no changes have been made, you are probably negligent in not noticing those changes based upon the standard that a typical attorney would notice that the document had been altered.
INCORRECT RECITATIONS OF LAW

Occasionally, a lawyer will unwittingly cite incorrect laws. For example, if the lawyer says, you must bring all tort claims in [Texas] within 4 years after accrual, and the actual statute limits such claims to 2 years, does the receiving lawyer have the duty to notify of the incorrect recitation of law, or simply enjoy the additional benefits of what clearly appears to be a drafting error.

The answer may be, whether the error involves a "material term," a circumstance which we will discuss hereinafter in Hypothetical 4 below. As we will discuss, if a material term is not correct, "the deal" is not "the deal" the parties intended to enter, and the court will have power to reform it to include the provision the party intended.

ATTORNEY LIABILITY AND EXEMPTIONS

_Cantey Hanger, LLP_“. _Byrd, 467 S.W.3d 467_ (Tex. 2015). Fairly recently the Texas Supreme Court addressed the liabilities and immunities of a firm involved in litigation. In this case, the Cantey Hanger firm is handling a big divorce for the Wife. It settles and the Wife is awarded three (3) aircraft (together with all taxes, liens and assessments). Months later Cantey drafts transfer document on one aircraft to a third party directly from Husband's Corporation, so title never goes first to the Wife (represented by Cantey) which has the effect of transferring the tax liability from Wife (their client) to Husband's Corporation in contravention of the Decree. _Byrd_ sues Cantey Hanger. The Texas Supreme Court gave the attorney immunity in a 5 to 4 decision, in essence saying that Cantey owes no duty to the opposing party, even for fraud. Part of the Opinion states:

"Fraud is not an exception to attorney immunity; rather the defense does not extend to fraudulent conduct that is outside the scope of the attorney’s legal representation of his client, just as it does not extend to the other wrongful conduct outside the scope of representation."

Thus, so long as an attorney is in the scope of his duties when fraud is committed, he's immune. The four members of the Supreme Court who dissented insisted that the majority "overlooks an important element of the form of attorney immunity at issue in this case--that the attorney’s conduct [to be immune] must have occurred in litigation --and applies the attorney immunity in a manner that results in much broader, more expansive liability protection." And, the dissent continues: "The Court holds that attorney immunity shields Cantey Hanger from liability arising from its alleged drafting of the Bill of Sale more than year after the entry of the Divorce Decree." "Instead of limiting this form of attorney immunity to the context of litigation, the Courts' cursory analysis implicitly adopts a test in which attorneys are shielded from civil liability to non-clients if their conduct merely occurs in the scope of client representation or in the discharge of duties to the client."

Many professional responsibility attorneys think that the Supreme Court will be revisiting this decision when appropriate facts present themselves to narrow the scope of Cantey Hanger.

NEGOTIATING HONESTLY

ABA Model Rule 4.1, 2 states that the prohibition against making false statements of material fact or Jaws intended to cover only representations of fact and not statements of opinion or those that merely reflect the speaker's state of mind. Whether statements should be considered one of fact as opposed to opinion depends on the circumstances. The question is how do you distinguish fact from
Chapter 6—Ethics of Contract Drafting and Negotiation

opinion? The difference is if something is expected to be a representation of fact versus simply puffery. If the lawyer, for example, says:

"I have handled 10 of these cases and I have won every case . . ."

Such a statement is clearly intended to be understood as a statement of fact.

However, if the attorney says,

"This is the worst case of fraud I've ever seen,"

…a statement like that is likely to be considered simply puffing or negotiation.

Attached as appendices A and C are State Bar of California Formal Opinion 2015-I 94 discussing the ethical limitations on statements the attorney may make to third parties that may be considered "puffing" or posturing, and American Bar Association Formal Opinion 06-439 dated April 12, 2006, which discusses in detail the lawyer's obligation for truthfulness and negotiation.

This article looks at this situation and a number of other situations arising during the process of negotiating a draft agreement that raise ethical issues. While the Rules of Professional Conduct are an initial resource in attempting to resolve the questions, it can be a challenge to apply the Rules to the tasks of the transactional lawyer. The principal Rules relevant to drafting are 1.2 and 4.1, which state in relevant part:

1.2 A lawyer shall not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent ...

and

4.1 In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

In determining whether conduct is ethical, it may be helpful to examine:

- Whether there is a duty to read a draft.
- Whether an affirmative misrepresentation is made.
- Whether there is a duty to disclose.
- What the reasonable expectations of the parties are.

FOUR HYPOTHETICAL SITUATIONS

1. **The attorney receiving the draft alters it after receipt.**

An employer discharged an employee, offering the employee $38,000 if he agreed, in the words of the release he was tendered. to release the employer "from all claims." The employee thought it over and later agreed to sign the release. which he returned to the employer. After the
release was signed, the employee sued the employer for age discrimination and breach of contract. When the employer raised the release as a defense, the employee said, "Ha ha," and pointed to the language of the release, which stated that the employee released the employer "from all claims except as to claims of age discrimination and breach of contract." When the employer protested that it had been tricked, the employee acknowledged that he had changed the language of the document but claimed that because a party is bound by the agreement it signs, it fails to read the agreement at its peril.

The facts are from the case of *Hand v. Dayton-Hudson*, 775 F.2d 757 (6th Cir. 1985). Did Hand act unethically in failing to inform Dayton-Hudson that he had made the changes? On Dayton-Hudson's motion for summary judgment, the trial court found that because Dayton-Hudson's signature had been induced by fraud, the agreement would be reformed to conform to its understanding. The appellate court affirmed. It probably did not help his case that Hand, the perpetrator of the fraud, had been employed by Dayton-Hudson as an attorney, even if he was not acting as an attorney in the matter in issue.

The decision is undoubtedly correct. By returning the document while saying it was acceptable, Hand was effectively saying that the document as prepared by Dayton-Hudson was acceptable. Although Rule 4.1 prohibits only "mak[ing] a false statement of material fact," and Hand's lapse was his non-disclosure, here non-disclosure seems the equivalent of an affirmative misrepresentation. In these circumstances, Dayton-Hudson's duty to read should be excused since the employer would reasonably expect that Hand was returning the document it had tendered to him. As a general rule, when one attorney makes changes to the other's draft, the ethical practice is to inform the other attorney of those changes.

**BUT WHAT IF THE CHANGES ARE MADE BEFORE THE DRAFT IS PRESENTED TO THE OTHER ATTORNEY; THAT IS, THEY ARE MADE TO A FORM CONTRACT?**

2. **The party preparing the draft alters a standard form contract.**

Assume that the attorneys are negotiating a contract for the sale of real property, and in the jurisdiction, it is customary for the seller to pay certain closing costs. The seller's attorney tenders to the buyer's attorney a draft contract in which the seller's attorney has altered the customary language to provide that these costs are borne by the buyer rather than by the seller. The buyer's attorney reads the variable terms, but not the boilerplate terms, and does not notice this change before her client signs the agreement. At closing, the change becomes apparent.

Did the seller's attorney act unethically in altering the customary terms without informing the buyer's attorney?

Even though this is a sharp practice on the part of the seller's attorney, I don't think an attorney has a duty to disclose the fact that changes were made to the customary terms. No affirmative misrepresentation was made, and the buyer's attorney may not be justified in assuming the draft contract contains the customary terms. The situation is different if the form was presented as a model form prepared, for example, by the ABA or a state bar. In that case, there may be a reasonable expectation that the boilerplate terms are those set forth in the model form. But in other cases, I think the attorney to whom the contract was tendered takes the risk that it does not contain the expected terms. That attorney should either read it, put it through the "compare" feature of a word processor or
stand-alone program that will compare it to standardized terms, or ask the other lawyer to make an affirmative statement about whether any changes were made to the customary terms.

WHAT IF CHANGES ARE DISCLOSED, BUT NOT THE CONSEQUENCES OF THOSE CHANGES?

3. The attorney requesting a change fails to disclose ripple effects.

The first attorney asks for a change in a term, which the second attorney agrees to, but the first attorney does not inform the second attorney that the change in that term affects a term in another part of the agreement that is not favorable to the party represented by the second attorney. An example might be a choice of law provision, where the law in the chosen jurisdiction affects another part of the agreement. Does the first attorney have a duty to inform the second attorney that the change in language may affect another part of the agreement?

The State Bar of California in Formal Opinion No. 2013-189, seems to indicate that, absent fraud or deceit, there is no such duty (See attached Appendix B). One attorney does not have to educate another as to the legal effect of a contract provision, as long as no affirmative misrepresentation is made. In fact, the lawyer's duty of competent representation in Rule 1.1 would require the recipient to recognize the ripple effects.

These problems are exacerbated when the contract is drafted not through an exchange of drafts over time, but in real time, using a program such as Google Docs. The first attorney can suggest a change by typing it in, and the other attorney can assent or not. The alteration itself is clearly disclosed, but not the effect that the change in paragraph 7.2 has on paragraph 14.4. This is a significant drawback to real-time drafting, for such repercussions can best be discovered by reviewing the document in its entirety. Alas, the pace of modern business may not grant us this luxury. An attorney must therefore know the transaction well, including knowledge of how all the parts fit together.

FINALLY, WHAT IF AN AGREED TERM IS OMITTED ALTOGETHER?

4. The final contract omits a term the parties agreed to.

The parties agree to the terms of an agreement. One attorney reduces the agreement to writing and both parties review and sign it. Later, the first attorney realizes that an important term has been omitted. The second attorney acknowledges this "scrivener's error," but refuses to modify the writing, which purports to contain the final and complete agreement of the parties. Should the second attorney agree to reform the contract to include the missing provision?

The Restatement (Second) of Contracts says the answer is "yes." Section 155 provides:

Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, . . .

Calamari and Perillo state the rule more succinctly in § 9.31 of their Contracts hornbook: "Contracts are not reformed for mistake; records are" Note that this situation must be distinguished
from the situation in which the parol evidence rule applies. The parol evidence rule provides that once the parties have adopted a writing that they intend to contain their final and complete agreement, then evidence may not be offered of terms that supplement or contradict it. The distinction is in the intent of the parties. In the case governed by the *parol evidence rule*, the party opposing inclusion of the term claims that while the parties may have discussed the term during negotiations, they did not intend it to be a part of their final agreement; in the *mistake* case, the party admits that they agreed to it and intended to include it in the writing, but inadvertently omitted it.

ABA Informal Opinion 86-1518 (Appendix D) addressed this issue, concluding that under Rules 1.2 and 4.1, an attorney has a duty to disclose the omission of the term to the other attorney and to agree to reform the writing. An attorney might maintain that he informed his client of the omission, and while the attorney would of course be willing to disclose it, he had a duty to zealously represent his client, who insisted on taking advantage of the situation. The opinion concluded that because the client had already agreed to include the term in the contract, the attorney need not even consult the client before agreeing to reform the contract. Curiously, the Maryland State Bar Association Committee on Ethics addressed the same issue in Ethics Docket 89-44 and, without mentioning the ABA opinion, reached the contrary conclusion. However, the Maryland opinion did warn the attorney to explain to the client, pursuant to Rule 1.4(b), information necessary to permit the client to make an informed decision, including the fact that the other party may bring a reformation action, the likelihood of success of such an action, and the cost of defending it.

**CONCLUSION**

The attorney's duty to read the draft contract is excused when there is fraud or mistake. Nevertheless, as a matter of preventive law, the attorney should review the contract—perhaps with the help of a computer program—before it is signed. Also, the attorney should provide the client with an opportunity to review it. Not only can review by a second set of eyes be helpful in detecting problems, but if the attorney victimized by these situations faces a client's malpractice claim, it will be helpful if the attorney gave the client an adequate opportunity to review the contract, for most of the problems could be detected (or at least questioned) by the review of a layperson.
ISSUE: When an attorney is engaged in negotiations on behalf of a client, are there ethical limitations on the statements the attorney may make to third parties, including statements that may be considered “puffing” or posturing?

DIGEST: Statements made by counsel during negotiations are subject to those rules prohibiting an attorney from engaging in dishonesty, deceit or collusion. Thus, it is improper for an attorney to make false statements of fact or implicit misrepresentations of material fact during negotiations. However, puffery and posturing, such as statements about a party’s negotiating goals or willingness to compromise, are generally permissible because they are not considered statements of fact.


STATEMENT OF FACTS

Plaintiff is injured in an automobile accident and retains Attorney to sue the other driver (Defendant). As a result of the accident, Plaintiff incurs $50,000 in medical expenses and Plaintiff tells Attorney she is no longer able to work. Prior to the accident Plaintiff was earning $50,000 per year.

Attorney files a lawsuit on Plaintiff’s behalf. Prior to any discovery, the parties agree to participate in a court-sponsored settlement conference that will be presided over by a local attorney volunteer. Leading up to and during the settlement conference, the following occurs:

1. In the settlement conference brief submitted on Plaintiff’s behalf, Attorney asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Attorney references the existence of an eyewitness to the accident, asserts that the eyewitness’s account is undisputed, asserts that the eyewitness specifically saw Defendant texting while driving immediately prior to the accident, and asserts that the eyewitness’s credibility is excellent. In fact, Attorney has been unable to locate any eyewitness to the accident.

2. While the settlement officer is talking privately with Attorney and Plaintiff, he asks Attorney and Plaintiff about Plaintiff’s wage loss claim. Attorney tells the settlement officer that Plaintiff was...
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earning $75,000 per year, which is $25,000 more than Client was actually earning; Attorney is aware that the settlement officer will convey this figure to Defendant, which he does.

3. While talking privately outside the presence of the settlement officer, Attorney and Plaintiff discuss Plaintiff’s “bottom line” settlement number. Plaintiff advises Attorney that Plaintiff’s “bottom line” settlement number is $175,000. When the settlement officer asks Attorney for Plaintiff’s demand, Attorney says, “Plaintiff needs $375,000 if you want to settle this case.”

4. In response to Plaintiff’s settlement demand, Defendant’s lawyer informs the settlement officer that Defendant’s insurance policy limit is $50,000. In fact, Defendant has a $500,000 insurance policy.

5. Defendant’s lawyer also states that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict. In fact, two weeks prior to the mediation, Defendant consulted with a bankruptcy lawyer and was advised that Defendant does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him. Defendant has informed his lawyer of the results of his consultation with bankruptcy counsel and that Defendant does not intend to file for bankruptcy.

6. The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff’s medical expenses and future earnings claim. In particular, Attorney agrees to provide additional information showing Plaintiff’s efforts to obtain other employment in mitigation of her damages and the results of those efforts. During that month, Attorney learns that Plaintiff has accepted an offer of employment and that Plaintiff’s starting salary will be $75,000. Recognizing that accepting this position may negatively impact her future earnings claim, Plaintiff instructs Attorney not to mention Plaintiff’s new employment at the upcoming settlement conference and not to include any information concerning her efforts to obtain employment with this employer in the exchange of additional documents with Defendant. At the settlement conference, Attorney makes a settlement demand that lists lost future earnings as a component of Plaintiff’s damages and attributes a specific dollar amount to that component.

DISCUSSION

Although attorneys must advocate zealously for their clients (see Davis v. State Bar (1983) 33 Cal.3d 231, 238 [188 Cal.Rptr. 441]), there are limits to an attorney’s conduct, as set forth in the Rules of Professional Conduct and the Business and Professions Code. (See Hawk v. Superior Court (1974) 42 Cal.App.3d 108, 126 [116 Cal.Rptr. 713] [“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . ..”].) Business and Professions Code section 6068 requires, among other things, that an attorney “employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth.” (Business and Professions Code section 6068(d).) 2

2 Attorneys further must “maintain the respect due to the courts of justice and judicial officers,” and cannot “seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” (Business and Professions Code section 6068(b) and (d); see also Rule 5-200(B).) If a judicial officer was presiding over the settlement conference, these rules would prohibit the attorney from making a false statement of fact or law. Whether a lawyer who serves as a settlement officer is a “judicial officer” for purposes of these provisions is beyond the scope of this opinion.
Under Business and Professions Code section 6106, an attorney who commits any act of moral turpitude or dishonesty, whether or not in the course of the attorney’s conduct as an attorney, is subject to disbarment or suspension. (Business and Professions Code section 6106.)

Furthermore, Business and Professions Code section 6128(a) provides that “[e]very attorney is guilty of a misdemeanor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . .”

Finally, the State Bar’s non-binding California Attorney Guidelines of Civility and Professionalism address an attorney’s conduct when negotiating a written agreement on behalf of a client. Specifically, Section 18, “Negotiation of Written Agreements” provides:

An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client’s wishes or previous oral agreements.

In addition to the applicable California authority, in 2006, the American Bar Association published ABA Formal Opinion No. 06-439, specifically addressing this issue. According to ABA Formal Opinion No. 06-439:

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” ordinarily are not considered “false statements of material fact” within the meaning of the Model Rules.

3/ The Standards for Attorney Sanctions for Professional Misconduct (“Standards”) are based on the State Bar Act and “are adopted by the Board of Trustees to set forth a means for determining the appropriate disciplinary sanction in a particular case.” With respect to acts of dishonesty, Standard 2.11 states:

Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member’s practice of law.

Moreover, “misrepresentation” is an aggravating circumstance in determining the appropriate sanction for attorney misconduct. (Standards, Section 1.5(e).)

4/ California State Bar’s California Attorney Guidelines of Civility and Professionalism are non-binding, but do provide some general guidance to California lawyers. “[T]he Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, [and] they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.”

5/ The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. (City & County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].) Thus, in the absence of related California authority, we may look to the ABA Model Rules, and the ABA Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) “[E]thics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.”); State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)
“Of the same nature are overstatements or understatements of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation.” (ABA Form. Opn. 06-439, p. 6.) False statements of material fact, in addition to “implicit misrepresentations created by a lawyer’s failure to make truthful statements,” may result in ethical violations. An attorney may not, for example, settle a pending personal injury lawsuit filed on behalf of a client without disclosing that the client had died. This conclusion is based on “the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive.” (ABA Form. Opn. 06-439, p. 5; discussing ABA Form. Opn. 95-397.)

The ABA cautions that a lower standard of lawyer truthfulness is not warranted because of the consensual nature of mediation or because the parties somehow waive protection from lawyer misrepresentation “by agreeing to engage in a process in which it is somehow ‘understood’ that false statements will be made.” (ABA Form. Opn. 06-439, p. 8.) On the other hand, the ABA has recognized that “puffing” or posturing may be permissible based on the generally understood norms of negotiation. The ABA defines “puffing” or posturing as “statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely.” (ABA Form. Opn. 06-439, p. 2.)

ABA Formal Opinion No. 06-439 relies on Rule 4.1 of the ABA Model Rules of Professional Conduct, which prohibits an attorney from making a false statement of material fact or law to a third person and failing to “disclose a material fact . . . when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

Comment [2] to Model Rule 4.1 clarifies that the Rule applies to statements of fact:

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category . . . . Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

The California Rules of Professional Conduct do not contain a rule that corresponds to Model Rule 4.1. Under California’s statutes and case law governing attorney honesty; however, California lawyers are not permitted to intentionally deceive opposing counsel. (See Business and Professions Code sections 6106, 6128(a), and 6068(d); Coviello v. State Bar (1955) 45 Cal.2d 57, 66 [286 P.2d 357] [upholding a six-month suspension based on lawyer’s intentional deceit of opposing counsel because “[s]uch conduct falls short of the honesty and integrity required of an attorney at law in the performance of his professional duties.”]; Monroe v. State Bar (1961) 55 Cal.2d 145, 152 [10 Cal.Rptr. 257] [upholding a nine-month suspension because “intentionally deceiving opposing counsel is ground for disciplinary action.”]; Hallinan v. State Bar (1948) 33 Cal.2d 246 [200 P.2d 787] [attorney suspended for three months after attorney admitted that he simulated a client’s name on a settlement release even though he knew that the opposing counsel wanted the attorney’s client to personally sign the settlement papers]; Scofield v. State Bar (1965) 62 Cal.2d 624, 628 [43 Cal.Rptr. 825] [“Affirmative representations made with intent to deceive are grounds for discipline, even though no harm results.”].)6

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6 For purposes of imposing discipline, an attorney’s representations may be characterized as “moral turpitude,” “dishonesty” or “corruption” under Business and Professions Code section 6106 only if the representations were made with an intent to mislead. (See Wallis v. State Bar (1942) 21 Cal.2d 322, 328 [131 P.2d 531].)
Acts of moral turpitude, which are prohibited by Business and Professions Code section 6106, “include
concealment as well as affirmative misrepresentations . . . . ‘[N]o distinction can . . . be drawn among
concealment, half-truth, and false statement of fact.’” (In the Matter of Loftus (Review Dept. 2007) 5 Cal.
State Bar Ct. Rptr. 80, 86, citations omitted, quoting In the Matter of Dale (Review Dept. 2005) 4 Cal.
State Bar Ct. Rptr. 798, 808.) In Loftus, an attorney who obtained a recorded statement from a putative
defendant by creating the false impression that she was not an adverse party and the conversation was not
being recorded was disciplined for violating Business and Professions Code section 6106. In Dale, an
attorney was found culpable of moral turpitude for making misleading statements in order to induce an
unrepresented party to sign a declaration confessing to arson.

“A member of the bar should not under any circumstances attempt to deceive another. [Citations.] ‘An
attorney’s practice of deceit involves moral turpitude.’” (Segretti v. State Bar (1976) 15 Cal.3d 878, 888

In addition, various California courts have found attorneys liable in tort for making, during the course of
their representation of a client, false statements of material fact to third parties. In Vega v. Jones, Day,
Reavis & Pogue (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26], for example, that court held: “a
lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement
of material fact to the nonclient [citation], and may be liable to a nonclient for fraudulent statements made
during business negotiations.” That court also stated: “A fraud claim against a lawyer is no different from
a fraud claim against anyone else.” (Id.; see also Goodman v. Kennedy (1976) 18 Cal.3d 335, 346 [134
is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney
negotiating at arm’s length”]; see also California State Bar Formal Opn. No. 2013-189, fn. 11, 12.)

When considering what types of statements may give rise to civil liability under a variety of legal
theories, such as false advertising or fraud, California courts consider the type of statement and whether
the statement is likely to induce reliance. A statement of opinion is not actionable, nor is a statement of
“puffery.” A statement of puffery is one that is “extremely unlikely” to induce reliance. “Ultimately, the
difference between a statement of fact and mere puffery rests in the specificity or generality of the
claim.” (Demetriades v. Yelp, Inc. (2014) 228 Cal.App.4th 294, 311 [175 Cal.Rptr.3d 131], reh’g denied
(9th Cir. 2008) 513 F.3d 1038, 1053.) A statement that is quantifiable, specific or absolute will generally
be actionable, whereas a statement that is general or subjective will not. (Id.)

The standards for determining whether there is civil liability for fraud are different than those for
determining an attorney’s ethical obligations of honesty. However, the factors considered in civil cases to
determine whether a statement is one of verifiable fact are instructive in determining whether an
attorney’s statements may fairly be characterized as deceitful, not “consistent with truth,” collusive or
dishonest in violation of an attorney’s ethical duties.

In our scenario, the attorneys make two types of representations worthy of discussion here: (1) statements
that constitute impermissible misrepresentations of material fact upon which the opposing party is

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7/ The intentional tort of fraud has various elements that go beyond making a false statement of material fact.
Whether or not all of the elements of fraud exist, however, is a separate inquiry. Even if not satisfying all of the
elements of the intentional tort, an attorney may violate ethical rules by making a false statement of fact to the
opposing party in settlement negotiations because such statements could constitute deceit, employment of means not
“consistent with truth” and dishonest conduct, all of which are ethically prohibited by Business and Professions
Code sections 6106, 6128(a), and 6068(d).
intended to rely; and (2) statements that constitute acceptable exaggeration, posturing or “puffing” in negotiations.

Specific Examples

We will consider the examples set forth in the hypotheticals:

Example Number 1: Attorney’s misrepresentations about the existence of a favorable eyewitness and the substance of his expected testimony.

Attorney’s misrepresentations about the existence of a favorable eyewitness and the substance of the testimony the attorney purportedly expects the witness to give are improper false statements of fact, intended to mislead Defendant and his lawyer. Attorney is making representations regarding the existence of favorable evidence for the purpose of having Defendant rely on them. Attorney has no factual basis for the statements made. Further, Attorney’s misrepresentation is not an expression of opinion, but a material representation that “a reasonable [person] would attach importance to . . . in determining his choice of action in the transaction in question . . .” (Charpentier v. Los Angeles Rams Football Co., Inc. (1999) 75 Cal.App.4th 301, 313 [89 Cal.Rptr.2d 115] quoting Rest.2d Torts, § 538).

Thus, Attorney’s misrepresentations regarding the existence of a favorable eyewitness constitute improper false statements and are not ethically permissible. This is consistent with Business and Professions Code section 6128(a), supra, and Business and Professions Code section 6106, supra, which make any act involving deceit, moral turpitude, dishonesty or corruption a cause for disbarment or suspension.

Example Number 2: Attorney’s inaccurate representations to the settlement officer which Attorney intended be conveyed to Defendant and Defendant’s lawyer regarding Plaintiff’s wage loss claim.

Attorney’s statement that Plaintiff was earning $75,000 per year, when Plaintiff was actually earning $50,000, is an intentional misstatement of a fact. Attorney is not expressing his opinion, but rather is stating a fact that is likely to be material to the negotiations, and upon which he knows the other side may rely, particularly in the context of these settlement discussions, which are taking place prior to discovery. As with Example Number 1, above, Attorney’s statement constitutes an improper false statement and is not permissible.

Example Number 3: Attorney’s inaccurate representation regarding Client’s “bottom line” settlement number.

Statements regarding a party’s negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or “puffery,” are among those that are not considered verifiable statements of fact. A party negotiating at arm’s length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise.

Here, Attorney’s statement of what Plaintiff will need to settle the matter is allowable “puffery” rather than a misrepresentation of fact. Attorney has not committed an ethical violation by overstating Plaintiff’s “bottom line” settlement number.

Example Number 4: Defendant’s lawyer’s representation that Defendant’s insurance policy is for $50,000 although it is really $500,000.

Defendant’s lawyer’s inaccurate representations regarding Defendant’s policy limits is an intentional misrepresentation of fact intended to mislead Plaintiff and her lawyer. (See Shafer v. Berger, Kahn,
Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 76 [131 Cal.Rptr.2d 777] [plaintiffs “reasonably relied on the coverage representations made by counsel for an insurance company”]. As with Example Number 1, above, Defendant’s lawyer’s intentional misrepresentation about the available policy limits is improper.

**Example Number 5: Defendant’s lawyer’s representation that Defendant will file for bankruptcy if there is not a defense verdict.**

Whether Defendant’s lawyer’s representations regarding Defendant’s plans to file for bankruptcy in the event that Defendant does not win a defense verdict constitute a permissible negotiating tactic will hinge on the specific representations made and the facts known. Here, Defendant’s lawyer knows that Defendant does not intend to file for bankruptcy and that Defendant consulted with bankruptcy counsel before the mediation and was informed that Defendant is not legally eligible to file for bankruptcy. A statement by Defendant’s lawyer that expresses or implies that Defendant’s financial condition is such that he is in fact eligible to file for bankruptcy is therefore a false representation of fact. The conclusion may be different; however, if Defendant’s lawyer does not know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge.

**Example Number 6: Plaintiff’s instruction to Attorney to conceal material facts from Defendant and Defendant’s lawyer prior to the follow-up settlement conference.**

This example raises two issues: the failure to disclose the new employment, and Plaintiff’s instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, it is assumed that Plaintiff would not be entitled to lost future earnings if Plaintiff found a new job. As such, including in the list of Plaintiff’s damages a separate component for lost future earnings is an implicit misrepresentation that Plaintiff has not yet found a job. This is particularly true because Plaintiff agreed to show documentation of her job search efforts to establish her mitigation efforts, but did not include any documentation showing that she had, in fact, been hired. Listing such damages, then, constitutes an impermissible misrepresentation. (See, e.g., Scofield v. State Bar, supra, 62 Cal.2d at 629 [attorney who combined special damages resulting from two different auto accidents in separate claims against each defendant disciplined for making affirmative misrepresentations with the intent to deceive]; Pickering v. State Bar (1944) 24 Cal.2d 141, 144 [148 P.2d 1] [attorney who alleged claim for loss of consortium knowing that plaintiff was not married and that her significant other was out of town during the relevant time period violated Business and Professions Code section 6068(d)].)

Second, Attorney was specifically instructed by Plaintiff not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under Rule 3-100 and Business and Professions Code section 6068(e). While an attorney is generally required to follow his client’s instructions, Rule 3-700(B)(2) requires withdrawal if an attorney’s representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff’s instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If Plaintiff refuses, Attorney must withdraw under Rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Form. Opn. No. 2013-189; see also Los Angeles County Bar Association Opn. 520).

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8/ California State Bar Form. Opn. No. 2013-189 contains a full discussion regarding an attorney’s ethical obligations when a client instructs his or her attorney to conceal material facts from the opposing party and/or opposing counsel. As addressed more fully in that opinion, an attorney should first counsel his or her client regarding the client’s request and, if the client refuses to reconsider, the attorney may be obligated to withdraw his or her representation, pursuant to Rule 3-700(B)(2).
CONCLUSION

Attorneys are prohibited from making false statements intended to be relied upon, including during the course of negotiating with a third party and even where those negotiations occur through a third party neutral. Such prohibited communications include an attorney’s implicit misrepresentations. However, attorneys may engage in permissible posturing or “puffery” during negotiations and may generally make statements regarding a client’s negotiation goals or willingness to compromise because such statements are not the type of statements upon which parties to a negotiation ordinarily would justifiably be expected to rely.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.
ISSUE: Has an attorney engaged in deceitful conduct by not alerting opposing counsel of: (A) an apparent material error made by opposing counsel in contract language; or (B) a material change made by the attorney in contract language?

DIGEST: Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligations.

AUTHORITIES INTERPRETED: Rule 3-700(B)(2) of the Rules of Professional Conduct of the State Bar of California.¹

Business and Professions Code section 6106.

Business and Professions Code section 6128(a).

STATEMENT OF FACTS

Buyer and Seller have been in discussions regarding the sale of the Company from Seller to Buyer, and have agreed in concept to some of the material terms, including total consideration of $5 million to be paid by Buyer and Buyer’s requirement that Seller enter into a covenant not to compete with the Company following the sale. Buyer’s Attorney and Seller’s Attorney are tasked with preparing a Purchase and Sale Agreement to reflect the agreement of the parties.

Buyer’s Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer’s sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete. Another section in the front of the draft agreement provides that, of the $5 million to be paid by Buyer, $3 million is to be allocated to the purchase price for the Company and $2 million is to be allocated as consideration for the covenant not to compete.

Scenario A

After soliciting input on the initial draft from Seller and Seller’s tax advisor, Seller’s Attorney provides Buyer’s Attorney with comments on the initial draft, including the observation from Seller’s tax advisor that payments received by Seller with respect to the covenant not to compete are not as favorable, from a tax perspective, as payments with respect to the purchase price for the Company.

Buyer’s Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller’s Attorney, provides for an allocation of only $1 as consideration for

¹ Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.
the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller’s Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer’s sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller’s Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer’s Attorney. Seller instructs Seller’s Attorney to not inform Buyer’s Attorney of this apparent error. Seller’s Attorney says nothing to Buyer’s Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

Scenario B

After receiving the initial draft from Buyer’s Attorney, Seller’s Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller’s Attorney had no intention of keeping this change secret from Buyer’s Attorney, Seller’s Attorney generates a “redline” of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer’s Attorney. Subsequently, Seller’s Attorney discovers the unintended defect in the “redline” and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller’s Attorney to not inform Buyer’s Attorney of the change. Seller’s Attorney says nothing to Buyer’s Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

Under either Scenario, has Seller’s Attorney violated any ethical duties?2/

DISCUSSION

Following Client’s Instruction to Not Disclose

Attorneys generally must follow the instructions of their clients. See ABA Model Rule 1.2(a) (“a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by [ABA Model] Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation …”). However, if the client insists on certain unethical conduct, the attorney may have an obligation to withdraw from the representation. Rule 3-700(B)(2) provides “[a] member representing a client . . . shall withdraw from employment, if: . . . [t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act.” Such an obligation, for example, may arise if the unethical conduct in question involves a fraudulent failure to make a disclosure. As the Los Angeles County Bar Association has opined, upon discovering that an adverse party made an overpayment under a settlement agreement, “[c]ounsel is obligated to inform his/her client of the overpayment under [rule] 3-500. Under [Bus. & Prof. Code] § 6068(e) . . ., where the client has requested the information be held in confidence, the attorney is obligated to preserve the secret. The attorney should counsel the client to disclose and return

2/ This opinion addresses a situation arising out of a transaction setting only, and because the matter is not pending before a tribunal, a lawyer’s duty of candor to the court found in rule 5-200 and Business and Professions Code section 6068(d) are not being addressed in this opinion. See Dattig v. Dove Books, Inc. (1999) 73 Cal.App.4th 964, 980-981 [87 Cal.Rptr.2d 719].

3/ The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. City & County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771]. Thus, in the absence of related California authority, we may look to the ABA Model Rules, and the ABA Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799]).
the overpayment. If the client refuses, however, the attorney must consider whether the failure to disclose constitutes fraud. The attorney must then determine whether he/she may or must withdraw from the representation pursuant to [rule] 3-700.” Los Angeles County Bar Assn. Formal Opn. No. 520.

Under either Scenario A or Scenario B of our Statement of Facts, once Seller’s Attorney has informed Seller of the development, 4/ Seller’s Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller’s Attorney, then Seller’s Attorney may have an obligation to withdraw from the representation under such circumstances. See Cal. State Bar Formal Opn. No. 1996-146.

**Failure to Alert Opposing Counsel**

Attorneys are held to a high standard, and may be subject to general obligations of professionalism. For example, attorneys have been held to have a duty to respect the legitimate interests of opposing counsel. “An attorney has an obligation not only to protect his client’s interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.” Kirsch v. Duryea (1978) 21 Cal.3d 303, 309 [146 Cal.Rptr. 218] (overturning a malpractice judgment against an attorney for withdrawing from a case he believed lacked merit). Further, this Committee has previously concluded that attorneys should treat opposing counsel with candor and fairness. (See Cal. State Bar Formal Opn. No. 1967-11 “[It is true that, under [former] canon 15 of the Canons of Ethics of the American Bar Association, an attorney must zealously advance the interests of his client, but not by using ‘any manner of fraud or chicane. He must obey his own conscience and not that of his client.’ One of the obligations of conscience to which the lawyer must conform is stated in [former] canon 22: his conduct with other lawyers ‘should be characterized by candor and fairness.’ [Former] canon 29 states that a lawyer ‘should strive at all times to uphold the honor and to maintain the dignity of the profession . . . ’ All of the canons are commended to the members of the State Bar by rule [former] 1 of the Rules of Professional Conduct of the State Bar.”). 5/

See also ABA Model Rule 3.4. 6/

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4/ Attorneys have an obligation to keep their clients reasonably informed about significant developments relating to the matter for which they have been employed. Rule 3-500 and Bus. & Prof. Code, § 6068(m). See also rule 3-510. Both the apparent error made by Buyer’s Attorney in Scenario A and the intentional change made by Seller’s Attorney in Scenario B would constitute a “significant development,” which would require that Seller be informed of the potential for added costs and burdens of enforcement, including litigation and the likelihood that Buyer may seek reformation of the Purchase and Sale Agreement. See Civ. Code, §§ 3399, 1689. See also Dyke v. Zaiser (1947) 80 Cal.App.2d 639 [182 P.2d 344] and Stare v. Tate (1971) 21 Cal.App.3d 432 [98 Cal.Rptr. 264]. On the other hand, if Seller’s Attorney intends to inform Buyer’s Attorney of the apparent error, Seller’s Attorney need not inform Seller of the apparent error. Where a client has already agreed to a contract provision which is inadequately reflected in the draft contract prepared by opposing counsel, the inadvertent error by opposing counsel by itself (i.e., unless left uncorrected in the final executed version) does not constitute a significant development, and the client’s attorney may correct the drafting error and need not inform the client. See ABA Informal Opn. No. 86-1518 (attorney has no obligation to inform his client of the error because “the decision on the contract ha[d] already been made by the client.”).

5/ An insertion added by the Committee is placed in brackets and italicized to distinguish it from bracketed insertions appearing in the original material.

6/ See also, the California State Bar’s California Attorney Guidelines of Civility and Professionalism, (posted online at http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=mPBEL3nGaFs%3d&tabid=455 (as of May 20, 2013)) which, among other things, encourages attorneys “to be professional with . . . other parties and counsel . . . .” We note, however, that such guidelines are nonbinding: “[T]he Guidelines are [voluntary and] not mandatory rules of professional conduct, nor rules of practice, nor standards of care, [and] they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.” California Attorney Guidelines of Civility and Professionalism, adopted by the Board of Trustees July 20, 2007, long version at page 3. A copy is on file with the State Bar.
Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 961 [226 Cal.Rptr. 532] ("an attorney has no duty to protect the interests of an adverse party [citations] for the obvious reasons that the adverse party is not the intended beneficiary of the attorney’s services, and that the attorney’s undivided loyalty belongs to the client."). See also *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 702 [282 Cal.Rptr. 627] ("no [attorney] duty has been found when the third party is someone with whom the client is dealing at arm’s length, rather than someone intended to be benefited by the attorney-client transaction."). Furthermore, a duty to nonclients would damage the attorney-client relationship. *Fox, supra*, 181 Cal.App.3d at p. 962 ("The effect of such a duty on respondent would be the eradication of confidentiality (Bus. & Prof. Code, § 6068 subd. (e); Evid. Code, § 950 et seq.), the creation of a conflict of interest ([former] rules 4-101, 5-101, 5-102, Rules Prof. Conduct) and the consequent destruction of the attorney-client relationship between respondent and his clients.").

Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure. *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342, 346 [134 Cal.Rptr. 375]. There is also no duty to correct erroneous assumptions of opposing counsel. See ABA Formal Opn. No. 94-387 (no duty to disclose to opposing party that statute of limitations has run). See also Ethical Guidelines for Settlement Negotiations (August 2002), ABA Section of Litigation, at page 56,7 (“there is no general ethics obligation, in the settlement context or elsewhere, to correct the erroneous assumptions of the opposing party or opposing counsel . . .”).8

On the other hand, it is unlawful (and a violation of an attorney’s ethical obligations) for an attorney to commit any act of moral turpitude, dishonesty, or corruption. Business and Professions Code section 6106 provides that: “The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.” It is similarly inappropriate for an attorney to engage in deceit or active concealment, or make a false statement of a material fact to a nonclient. Business and Professions Code section 6128(a) provides that: “Every attorney is guilty of a misdemeanor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.” Also, an attorney may not knowingly assist his or her client in any criminal or fraudulent conduct. See: rule 3-210 ("A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid."); Business and Professions Code section 6068(a) (it is the duty of an attorney to “support the Constitution and laws of the United States and of this state.”); and ABA Model Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.").9

7/  Posted online at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiatio ns.pdf (as of May 20, 2013). A copy is on file with the State Bar.

8/  This opinion does not address a scrivener’s error. See ABA Informal Opn. No. 86-1518: interpreting Model Rule 1.2(d) to conclude that where a transcription of an agreement contains a scrivener’s error, an attorney cannot allow his or her client to benefit from the mistake and must notify the other party’s attorney (“Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error."). See also In re Conduct of Gallagher (Or. 2001) 332 Or. 173 [26 P.3d 131] (attorney who was aware of opposing counsel’s mistake regarding settlement checks – settlement amount had been wrongly calculated – had a duty to correct such mistake). But see Md. State Bar Ass’n, Comm. on Ethics Opn. No. 89-44 (1989) (opining that there is no obligation to reveal the omission of a material term in a contract).

9/  See also ABA Model Rule 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); ABA Model Rule 4.1 [Truthfulness In Statements To Others] ("In the course of representing a client a lawyer shall not knowingly: (a) make a
As a result, an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.\textsuperscript{10} “While an attorney’s professional duty of care extends only to his own client and intended beneficiaries of his legal work, the limitations on liability for negligence do not apply to liability for fraud. [Citation.] Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation] . . . .” Vega v. Jones, Day, Reavis & Pogue (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26].\textsuperscript{11} Even when no duty of disclosure would otherwise exist, “where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. [Citation.] One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud.” Cicone v. URS Corp. (1986) 183 Cal.App.3d 194, 201. See Goodman, supra, 18 Cal.3d at pp. 346-347 and Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 72 [131 Cal.Rptr.2d 777].\textsuperscript{12}

Scenario A

In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer’s Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller’s Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties’ mutual understanding. Under these circumstances, where Seller’s Attorney has not engaged in deceit, active false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”); Ethical Guidelines for Settlement Negotiations (August 2002), ABA Section of Litigation, at pages 56-57, (“the duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer’s client and not to exploit such mistakes.”); and In Re Martinez (Bankr. D. Nev. 2008) 393 B.R. 27, 35 (attorneys sanctioned for “advocating the propriety of [a] mistaken stipulation when they knew, or should have known, that the continued assertion of the validity of the stipulation, and the order entered on it, was not ‘warranted by existing law.’”).


\textsuperscript{11} If a person commits actual fraud, the fact that such person does so in the capacity of attorney does not relieve the person of liability. See: Goodman, supra, 18 Cal.3d at p. 346; and Vega, supra, 121 Cal.App.4th at p. 291 (“A fraud claim against a lawyer is no different from a fraud claim against anyone else.”). Also, the fact that the other person is also an attorney makes no difference. Cicone v. URS Corp. (1986) 183 Cal.App.3d 194, 202 [227 Cal.Rptr. 887] (“the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm’s length.”).

\textsuperscript{12} See also Vega, supra, 121 Cal.App.4th at p. 294 (“it is established by statute ‘that intentional concealment of a material fact is an alternative form of fraud and deceit equivalent to direct affirmative misrepresentation’ [citations omitted] . . . . In some but not all circumstances, an independent duty to disclose is required; active concealment may exist where a party ‘[w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated.’” [Fn. omitted.]); Lovejoy v. AT&T Corp. (2001) 92 Cal.App.4th 85, 97 [111 Cal.Rptr.2d 711]; Stevens v. Superior Court (1986) 180 Cal.App.3d 605, 608 [225 Cal.Rptr. 624].
concealment or fraud, we conclude that Seller’s Attorney does not have an affirmative duty to disclose the apparent error to Buyer’s Attorney. 13/

Scenario B

Had Seller’s Attorney intentionally created a defective “redline” to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller’s Attorney’s ethical obligations. However, in Scenario B of our Statement of Facts, Seller’s Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective “redline” that failed to highlight for Buyer’s Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller’s Attorney has engaged in no such unethical conduct. But once Seller’s Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer’s Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. 14/ If Seller instructs Seller’s Attorney to not advise Buyer’s Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller’s Attorney may have to consider withdrawing. 15/

CONCLUSION

Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment, or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligations.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

13/ We do not address whether such conduct is offensive or unprofessional – only that such conduct does not violate Seller’s Attorney’s ethical obligations.

14/ Any such determination – which may depend, for example, on whether the changed provision is further negotiated and revised (thereby effectively calling Buyer’s Attorney’s attention to the changed language) – is beyond the scope of this opinion. See, e.g., Cal. State Bar Formal Opn. No. 1996-146 (“A lawyer acts unethically where she assists in the commission of a fraud by implying facts and circumstances that are not true in a context likely to be misleading.”); cf. Dätig, supra, 73 Cal.App.4th at pp. 980-981 (once attorney realized he had negligently misled the court, the attorney had an affirmative duty to immediately notify the court).

15/ Subject to any ethical obligations regarding withdrawal from representation. See, e.g., rule 3-700.
Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

April 12, 2006

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” ordinarily are not considered “false statements of material fact” within the meaning of the Model Rules.¹

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff’s demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to

¹ This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.
reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as “posturing” or “puffing,” are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered “posturing” for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

**Applicable Provision of the Model Rules**

The issues addressed herein are governed by Rule 4.1(a). That rule prohibits a lawyer, “[i]n the course of representing a client,” from knowingly making “a false statement of material fact or law to a third person.” As to what constitutes a “statement of fact,” Comment [2] to Rule 4.1 provides additional explanation:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a

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2 Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a “tribunal.” It does not apply in mediation because a mediator is not a “tribunal” as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer’s duty of candor is governed by Rule 3.3. Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.


Rule 8.4(c), which on its face broadly proscribes “conduct involving dishonesty, fraud, deceit or misrepresentation,” does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting “misrepresentations by a lawyer other than in the course of representing a client . . .” In addition, Comment [5] to Rule 2.4 explains that the duty of candor of “lawyers who represent clients in alternative dispute resolution processes” is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer’s state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. See Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).
transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.3

**Truthfulness in Negotiation**

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer’s own client.4 Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.5 Still others have suggested that lawyers should strive to balance the apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.6 Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.7

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Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker’s knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker’s state of mind.

4. See, e.g., Reed Elizabeth Loder, “Moral Truthseeking and the Virtuous Negotiator,” 8 Geo. J Legal Ethics 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, “A Causerie on Lawyers’ Ethics in Negotiation,” 35 La. L Rev. 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, “The Ethics of Negotiation: Are There Any?,” 56 La. L. Rev. 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).


Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370\(^8\) that, although a lawyer may in some circumstances ethically decline to answer a judge’s questions concerning the limits of the lawyer’s settlement authority in a civil matter,\(^9\) the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

> [w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party’s actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,\(^10\) we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client’s claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397\(^11\) that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client’s death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.\(^12\)


\(^9\) The opinion also concluded that it would be improper for a judge to insist that a lawyer “disclose settlement limits authorized by the lawyer’s client, or the lawyer’s advice to the client regarding settlement terms.”


\(^12\) See New York County Lawyers’ Ass’n Committee on Prof’l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlative, not required to correct misapprehensions of other party attributable to outside sources regarding the client’s financial resources); Pennsylvania Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to
False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer’s failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died.\(^{13}\) Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for stating to opposing counsel that, to the best of his knowledge, his client’s insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage.\(^{14}\) Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions,\(^{15}\) and the setting aside of settlement agreements,\(^{16}\) as well as civil lawsuits against the lawyers themselves.\(^{17}\)

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s “bottom line” position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.\(^{18}\)

\(^{13}\) Kentucky Bar Ass’n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); see also In re Warner, 851 So. 2d 1029, 1037 (La.), reh’g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); Toledo Bar Ass’n v. Fell, 364 N.E.2d 872, 874 (1977) (same).


\(^{18}\) Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person” Similarly, Model Rule 3.2 requires lawyers to “make reasonable efforts to expedite litigation consistent with the interests of the client.”
Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation. ¹⁹

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of “telephone,” the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called “deception synergy,” proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations. ²⁰

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation—particularly in a caucused mediation—precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes. ²¹

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¹⁹ This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (see note 2 above). C.f. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 04-433 (2004) (Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.


²¹ Mediators are “the conductors—the orchestrators—of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators’ control extends to what nonconfidential
Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a “tribunal,” the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow “understood” that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.22

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements “of fact,” are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client’s Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” are ordinarily not considered “false statements of material fact” within the meaning of the Model Rules.

22 There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator’s trust or to provide the mediator with critical information regarding the client’s goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, “perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives.” Menkel-Meadow, supra note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer’s duty to provide competent representation under Model Rule 1.1.
American Bar Association
Informal Opinion 86-1518
Notice to Opposing Counsel of Inadvertent Omission of Contract Provision
February 9, 1986

Where the lawyer/or A has received for signature from the lawyer for B the final transcription of a contract from which an Important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.

A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the patties and without which B would have refused to come to overall agreement. However, A’s lawyer discovered that the final draft of the contract typed in the office of B’s lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A’s lawyer in that circumstance.

The Committee considers this situation to involve merely a scrivener’s error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation.¹

A’s lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983). “The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests and the client’s overall requirements as to the character of representation.” Comment to Rule 1.4. In this circumstance there is no “informed decision,” in the language of Rule 1.4, that A needs to make; the decision on the contract has already been made by the client. Furthermore, the Comment to Rule 1.2 points out that the lawyer may decide the “technical” means to be employed to carry out the objective of the representation, without consultation with the client.

The client does not have a right to take unfair advantage of the error. The client’s right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by B and B’s lawyer, might raise a serious question of the violation of the duty of A’s lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

¹ Assuming purposes of discussion that the error is “information relating to [the] representation,” under Rule 1.6 disclosure would be “impliedly authorized in order to carry out the representation.” The Comment to Rule 1.6 points out that a lawyer has implied authority to make “a disclosure that facilitates a satisfactory conclusion: —in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer’s duty if the client wishes to exploit the error.
The result would be the same under the predecessor ABA Model Code of Professional Responsibility (1969, revised 1980). While EC 7-8 teaches that a lawyer should use best efforts to ensure that the client’s decisions are made after the client has been informed of relevant considerations, the EC 9-2 charges the lawyer with fully and promptly informing the client of material developments, the scrivener’s error is neither a relevant consideration nor a material development and therefore does not establish an opportunity for a client’s decision. The duty of zealous representation in DR 7-101 is limited to lawful objectives. See DR 7-102. Rule 1.2 evolved from DR 7-102(A)(7), which prohibits a lawyer from counseling or assisting the client in conduct know to be fraudulent. See also DR 1-102(A)(4), the precursor to Rule 8.4(c), prohibiting the lawyer from engaging in conduct involving dishonesty fraud, deceit, or misrepresentation.

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2 The delivery of the erroneous document is not a “material development” of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a “material fact” which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B’s lawyer.
Ethical Considerations in Drafting Contracts

Claude E. Ducloux
Attorney At Law - Austin, Texas

Oregon State Bar Solo/Small Firm Meeting
November 20-21 2019  Tigard, Oregon

Purposes and goals

• Discuss whether the conduct presented is ethical
• Discuss when a lawyer has a duty to reveal the error of the other lawyer
• Examine when or if the lawyer must consult the client before fixing the error
• Practice strategies to avoid these problems
• Special duties when doing business with client.
Concepts we will cover

1. The Duty of Competence – knowing what you’re doing.
2. Conflicts of interest – what limitations exist when the lawyer has conflicts affecting the contract in question.
3. Doing business with client – When you or your firm are a party, what special duties apply?
4. Truth in statements to other – When do you have to tell the truth, and when does puffery become acceptable in negotiations.

5. Deal with unrepresented persons – When you are preparing a contract which will be signed by an unrepresented party, what duties apply.
6. Conduct involving dishonesty, fraud, deceit, and misrepresentation
Rules covering our concepts

1. Competence—knowing what you’re doing: **ABA Model Rule 1.1, 1.3; TX Rule 1.01; FL Rule 4-1.1; CA Rule 3-110; MO Rule 1.1, ARK Rules 1.1, 1.3** Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. Conflicts of interest: **ABA Rule 1.7, 1.8, 1.9; TX Rule 1.06; CA Rule 3-310; FL Rule 4-1.7–4-1.10; ARK Rule 1.7(a)**

3. Doing business with client: **ABA DR 5-104; TX Rule 1.08(b); CA Rule 3-300; FL Rule 4-1.8; ARK Rule 1.8(a)**

Rules covering our concepts

4. Truth in statements to others: **ABA Rule 3.4, 3.9; TX Rule 4.01; CA Rule 3-700(B)(2); FL Rule 4-4.1, 4-8.4; MO Rule 4.1; ARK Rule 1.4(a), 1.4(b)**

5. Dealing with unrepresented persons: **ABA Rule 4.1; TX Rule 4.03; CA Rule 5-100; FL Rule 4-4.3; ARK Rule 4.3,**

6. Conduct involving dishonesty, fraud, deceit, and misrepresentation: **ABA Rule 4.1 8.4; TX Rule 8.04; CA Rule 5-200; FL Rule 4-8.4; MO Rule 4.1; California Ethics Opinion 2013-189; ARK Rules 4.3, 5.7, 8.1**
Situation 1

**Wording changes**

After sending settlement and release to the opposing party, they modify a term, sign it, and do NOT identify the modification, which now does not release "all claims" but only "claims presented in the lawsuit."

A year later, the releasing party sues on an ancillary claim which wasn’t released due to that change, and your client looks to you to protect them.
Situation 1: Wording changes

Question: Was the unidentified modification unethical?

What rules are involved?

• ABA 1.3 (diligence); TX Rules 4.01 and 8.04; Cal Opinion 2013-189; FL 4-4.1; MO Rule 4.1. ARK Rule 4.1

• What principles apply?
• How should the Court analyze this occurrence?
• Are you negligent for not catching it?
• What strategies can you use to avoid this?
What case laws apply?

*Hand v. Dayton Hudson, 775 F.2d 757 (6th Cir. 1985)* found the lawyer acted *unethically* in not revealing changes.

ABA Informal Opinion 86.1518 also addressed this issue, concluding that under Rules 1.2 and 4.1 of the Model Rules an attorney has a duty to disclose the omission of the term to the other attorney and to agree to reform the writing.

Key to analysis

*What was the status of the negotiations when documents are received?*

**Examine the expectations of the “sending” party:**

- Is it clearly a “rough draft” for review?
- Is it intended to be a “take it or leave it?”
- Did it come with representations, e.g., “This is the state bar form I use?”
- “I cannot make changes without client approval.”
- Did the other party request you draft the agreement of the parties? Does that excuse your review if he says, “I think this accurately reflects the agreement we made?”
Strategies to protect yourself

1. Ask for a representation by the other lawyer that the document has no modifications.
2. Send a confirming communication concerning that representation.
3. Make it clear when you send a final version that finality is your intent.

Situation 2

Altering a standard form
Situation 2: Altering a standard form

Before work processors, lawyers regularly used standard printed forms, which made changes and deletions obvious. The drafter filled in the blanks, and “XXX’ed” our the deletions.

Question:
When a lawyer sends out the standard state bar real estate form for, e.g., a Deed of Trust, may the receiving lawyer assume it’s signed with no alteration? Or should the presumption be that the receiving lawyer always retains the duty to check the document upon receipt?
Chapter 6—Ethics of Contract Drafting and Negotiation

To whom is the duty owed?

If the document comes back signed, how significant is your duty to ensure no changes have been made?

Does it depend on who handled it at the other end? A pro se signer vs a represented party?

Are your duties different if a non-lawyer gets it and signs it, and returns it to you without representation?

Are your strategies the same?

Ask: are there any more modifications?

Send a confirming communication

What if modification is obvious?

What is the standard for your conduct in reviewing it?
Situation 3: Informing the other party of a change

1. Attorney 1 asks for a change in terms
2. Attorney 2 agrees to it but the change affects another part of the agreement.
3. Does Attorney 1 have a duty to inform Attorney 2 of the ripple effect?
To whom is duty owed?

Professor Scott Burham from Gonzaga University School of Law says, in effect:

“There is no such duty to inform the other counsel of the ripple effect of the change. Assuming such duty would make the duty “endless.” Each attorney has the duty to know the deal, and its terms well enough to adjust risk and outcomes.”

Your duty to get the most favorable outcome is owed to your client, unless that outcome violates another duty.

Situation 4
Incorrectly reciting the law
Situation 4:  
Incorrectly reciting the law

Suppose you’re in a state (like Texas) where there is a two-year statute of limitations for tort, and the other lawyer gives your client “four years to bring a case for negligence under [state] law.”

Questions:
Do you have a duty to inform the other attorney that that is an incorrect statement of law?

Or do you shut up and give your client an addition two years?
Situation 5: Omitting a term by accident

What if the final contract omits a term the parties agreed to?
Attorney 1 reduces the agreement to writing and both parties review and sign it. Later, Attorney 1 realizes an important term has been omitted. Attorney 2 acknowledges there is a “scrivener’s” error but refuses to modify it because it has an integration clause saying it’s the final and complete agreement of the parties.
Situation 5:
Omitting a term by accident

Question:
Assuming the error is mutual, is Attorney 1 entitled to reformation?

Answer: Yes! ...but why?

Notes on reformation

*Calamari & Perillo on Contracts § 9.31*
Note this distinction: “Contracts are not reformed for mistakes; records are.” If it is a true contract, it truly embodies the parties’ agreement. If it mistakenly records the agreement, it should be reformed to **record the agreement** correctly. The distinction is in the intent of the parties. In a case governed by the Parol Evidence Rule, the party opposing inclusion of the term claims that, while the parties have discussed the term during negotiations they did not intend it to be a part of their final agreement. In the mistake case, the party admits they agreed to it and intended to include it, but inadvertently omitted it.
How does the client fit into reformation of contracts?

**Question:**
Do you have to inform your client first of the advantage you’ve gotten by error before you agreed to correct it?

An oversight gives your client an unexpected advantage, shouldn’t you have to consult before correct that oversight?

**ABA Informal Opinion 86-1518 says no.** The attorney need not consult the client because the client had already agreed to include the missing term in the contract. However, the Maryland State Bar Association reached a contrary conclusion and advised attorneys to explain to the client what happened and provide enough information to permit the client to make an informed decision on whether to stand on the mistaken contract or advising of the likelihood of success of the other side’s reformation action and the cost of defending it.
What is the attorney liable?

**Look at: Cantey Hanger, LLP v. Byrd, 467 S.W.3d 467 (Tex 2015)**

The firm, Cantey Hanger is handling big divorce for Wife. It settles, and W awarded 3 aircraft (together with all taxes, liens and assessments). Months later, Cantey drafts transfer documents on one aircraft to a third party directly from H’s corp. (so title never goes first to W), which has the effect of transferring the tax liability from Wife (their client) to Husband’s Corporation, in contravention of the Decree. (Byrd) sues.

What is the attorney liable?

**Nope:** Cantey owes no duty to opposing party...even for fraud?

- Texas Supreme Court gives Attorney immunity; 5-to-4 decision
- “Fraud is not an exception to attorney immunity; rather, the defense does not extend to fraudulent conduct that is *outside the scope of an attorney’s legal representation of his client*, just as it does not extend to other wrongful conduct outside the scope of representation.”
- Thus, so long as attorney in scope of duties when fraud is committed, he’s immune.
What is the attorney liable?

- Does Cantey’s protections apply in non-litigation negotiations settings?
- Supreme Court Dissent: the majority “overlooks an important element of the form of attorney immunity at issue in this case—*that the attorney’s conduct [to be immune] must have occurred in litigation*—and applies the attorney immunity in a manner that results in a much broader, more expansive liability protection.

What is the attorney liable?

- Dissent continues: “The Court holds that attorney immunity shields Cantey Hanger from liability arising from its alleged drafting of the bill of sale *more than a year after entry of the divorce decree.*”
What is the attorney liable?

“Instead of limiting this form of attorney immunity to the context of litigation, the Court’s cursory analysis implicitly adopts a test in which attorneys are shielded from civil liability to non-clients if their conduct merely occurs in the scope of client representation or in the discharge of duties to the client.”

Situation 6

Negotiating honestly
Situation 6

Negotiating honestly

**ABA Model Rule 4.1 Comment 2:**

The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker’s state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances.

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**Question:**

How do you distinguish fact from opinion?
Situation 6

**Negotiating honestly**

**Are these statements or FACT or OPINION?**

- This case is worth $1,000,000.
- Identical cases have settled for $1,000,000.
- I’ll give you this Watch (which looks like a Rolex).
- Our expert is ready to testify as to liability and damages.
- I have $65,000 worth of attorney fees in this case.

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**Situation 6**

**Negotiating honestly**

- My client is disabled.
- This is the worst case of fraud I’ve ever seen.
- We won’t settle for less than $500,000.
Situation 7
Drafting for both parties

• Your client Bob asks you to draft a note payable to his neighbor, Pat. You draft it favorably to Bob with a lower interest rate, and long notice and cure periods.

• Payee Pat has been your client in the past for a separate matter, but not for many years. Pat trusts you and says, “Hey, just let me know if this note is normal and typical, and I trust you, and I’ll sign it.”

• What are your obligations to Pat? Do you need to inform him of the whole Conflicts of Interest Matrix?
Rights and duties when conflicts arise

**When discovering a conflict, the lawyer has the duty to:**

a) Disclose  
b) Secure permission  
c) Withdraw when appropriate

Complete disclosure

**Disclosing the conflict effectively includes:**

1. The *existence* of the conflict  
2. The *nature* of the conflict  
3. The *implications* of the conflict  
4. Possible *adverse consequences* of common representation  
5. *Advantages* of common representation
Situation 8
Doing business with a client

Anytime you are doing a deal with a client you must observe certain rules!

What is “doing business?”

1. Acquiring an undivided interest in a client entity.
2. Purchasing something outright
3. Agreeing to accept “Alternate Consideration”
4. Selling an asset, item or interest to Client
5. Sharing business opportunities, e.g., Real Estate Development
Situation 8: Doing business with a client

Your objectives:
1. Be fair to the client
2. Have full disclosure
3. Have written documentation to protect yourself
4. Give the client the right to seek independent advice
5. Reaffirm your fiduciary duties to be fair in the writing, and put important points in large bold type.
6. Get the client’s consent in writing!

Takeaways
1. The attorney’s duty to read the contract draft is excused when there is fraud or a mutual mistake.
2. Nevertheless, as a matter of preventive law, attorneys should review contracts diligently before signature.
3. Ask for a representation as to changes and modifications from the other party—especially their attorney—and document the opposing lawyer’s reply as to changes.
4. Whenever possible, attorneys should allow clients to read contracts. A second set of eyes can be helpful in detecting problems.
Thank You!
Chapter 7
Writing Effective Trial Motions and Briefs

THE HONORABLE STEPHEN BUSHONG
Presiding Judge, Multnomah County Circuit Court
Portland, Oregon

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“Thanks to the Editor” by the Honorable Erin C. Lagesen ............................ 7–3
The desire for simplification is a perennial weakness of the human mind, even the mind of judges.


The judge does not possess the luxury of time for leisurely, detached meditation. You’d better sell the sizzle as soon as possible; the steak can wait.


I. Organization

- Outline your arguments before writing
- Use your outline to organize your brief; the outline becomes a Table of Contents
- Use short sections and subsections with appropriate headings; briefs longer than 10 pages should have a Table of Contents
- The judge should be able to understand your arguments just from reading the outline
- Understand the purpose of each part of your brief. Are you trying to educate the judge, persuade the judge, or both?
- Consider separating the educational section from the persuasive sections; education is neutral, persuasion is not
- Use a Summary of Argument for longer briefs
- If appropriate, attach an appendix with copies of key cases (especially federal cases or cases from other states), legislative history, or statutes from other jurisdictions

II. Practical Tips on Writing Style and Technique

- Have someone else read your brief/motion before you file it
- Summarize key facts, with citations to supporting affidavits/exhibits
- Shepardize and cite check your cases
- State your point first, then back it up; don’t write “backwards”
- Don’t make the judge work to understand your point; use short, simple sentences
- Be direct; don’t make the judge guess at what you’re trying to say. Just say it
- Don’t use exclamation points! Don’t ever use them!
- Use adjectives and adverbs sparingly; understatement is better than overstatement
- Do not belittle opposing counsel, other litigants, or their arguments
- Do not speculate about opposing counsel/party’s thoughts, motivations, or beliefs
- Define key terms/phrases once, then use the definitions consistently thereafter
- Use active voice
- Make it sound right; use italics for emphasis
- Don’t state the obvious or repeat points already made
- Eliminate unnecessary words: “Defendant submits that…”
- Proofread and revise often
- Don’t overuse commas; use dashes to set off explanatory phrases or related comments
• Use “and” and “but” to begin some sentences. But don’t overdo it. And don’t do it unnecessarily
• Appearance counts; make it look good (and readable). Footnotes should be the same size/font as text
• Don’t say that there is only one reasonable/logical conclusion. Let the judge reach that conclusion on his/her own
• Be creative to maximize the judge’s ability to easily understand your arguments and increase the persuasive force of your brief

III. Substance

• Judges are generalists; they may not be very familiar with specialized areas of the law. Educate the judge on complex areas, but don’t make it more complicated; simplify.
• Give the judge some context, the “lay of the land.” Explain how granting/denying the requested relief affects the case, and whether it is consistent with how other courts have addressed the issue. Let the judge know if the issue is a “hot topic” in the area, or if you are advocating for a majority rule, a minority rule or a new rule. Don’t hide the ball.
• Explain procedural background/prior developments in your case only when necessary for the particular motion at issue. Don’t expect the judge to know every detail of your case. Ask yourself “does the judge need to know this?” “Why?”
• Address controlling authority first. If it is favorable, tell the judge that it is controlling and explain why. If unfavorable, distinguish it or find some other reason to explain why it doesn’t control. Or explain that you’re just raising it to preserve the issue for appeal.
• If there is no controlling authority, figure out why you are citing a case. Are you contending that the test, standard or rule established in that case applies here? Are you arguing that the holding and/or analysis of the case supports the result you are advocating? Discuss facts and arguments accepted/rejected in other cases when necessary to show that the case is analogous precedent that should be followed in your case.
• Use subsequent history of cases to show which rule/line of authority is more widely accepted.
• Quote the text of a statute, case or contract verbatim, and then apply that text consistently in your analysis. Avoid lengthy, block quotes.
• Don’t string-cite lots of cases; a few good ones will do. Put holdings and key quotations in parentheses to explain the significance of a case.
• Address any “elephants in the room.” Ignoring significant factual, legal, or policy considerations won’t make them go away; it just lets the other side address them first.
• Be sure to specify precisely what you want the judge to do: “The court should grant defendant’s motion for summary judgment on claims 1-4, and deny plaintiff’s cross-motion for summary judgment on claims 2 and 3.”
Thanks to the Editor

_Hon. Erin C. Lagesen_

With all apologies to Nick Hornby,

BOOKS BOUGHT:

- *The Lively Art of Writing* — Lucile Vaughan Payne
- *The Elements of Style* — William Strunk, Jr., and E.B. White
- *Legal Writing in Plain English* — Bryan A. Garner
- *Point Taken: How to Write Like the World’s Best Judges* — Ross Guberman

BOOKS READ:

- *The Lively Art of Writing* — Lucile Vaughan Payne
- *Dreyer’s English* — Benjamin Dreyer
- *Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing* — Stephen V. Armstrong and Timothy P. Terrell

As is most likely the case with the other submissions to this almanac, this one was triggered by an email from Nora Coon. She said that she had heard that I recommended _Dreyer’s English_, and wondered whether I’d be willing to write up some book recommendations for lesser-known books along the lines of _Dreyer’s_.

Nora’s idea was a good one; the Almanac is the perfect place to include recommendations about books on writing. Appellate lawyers and judges—professional writers—make up its audience. To recommend some books along the lines of _Dreyer’s_, however, I would need to read some. Even then, would it be right to recommend a book on writing just from reading? To earn a recommendation, shouldn’t the book first have to show itself to be a trustworthy resource in the course of day-to-day work?

True, I recently read _Dreyer’s_ on the recommendation of Kelly Zusman, the appellate chief and writing expert at the U.S. Attorney’s Office for the District of Oregon. I also promptly placed copies of _Dreyer’s_ in the hands of Department Three’s judges and staff, because it seems a potentially helpful tool for making the style and tone choices we must make in our written opinions. At a minimum, it is an entertaining read for anyone who writes or who thinks about writing and offers easy-to-understand lessons (or reminders) on grammar and style. The index makes it quick to find the answers you need. Unlike most (or all) other writing books, the footnotes offer celebrity gossip, trivia, and authorial confessions. But the book is not yet dog-eared, and it is too soon to tell if it will be.

The only other book on which I’ve relied regularly in my current work is Armstrong and Terrell’s _Thinking Like a Writer_. I’ve used it mainly for its instruction on editing, which is invaluable if you need to bring along other writers so that you can rely on their work in your own. It demonstrates how to edit another’s work without rewriting it for them. I’ve given the book to clerks for its lessons on writing—the book contains helpful exercises for improving legal writing and good advice on how to think about the structure of legal arguments or opinions. But I haven’t looked to it when thinking about my own writing.

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1 Since 2003, the novelist Nick Hornby (*Fever Pitch*, *High Fidelity*, *About a Boy*, among others) has written the column “Stuff I’ve Been Reading” for the magazine *The Believer*. Each column begins with an accounting of “Books Bought” and “Books Read” for the period covered by the column. _Housekeeping vs. The Dirt_ (Believer Books 2006) collects 14 months of those columns written over the course of 2005-06.
Not wanting to disappoint Nora, I bought some books to see if I could find something to recommend. Some were books I’d read or owned in the past; some were books that I’d heard about, or that others had recommended, but that I’d never gotten around to reading. I would have bought more, but some were out of stock and not likely to arrive in time to be read and recommended. So now the living room table contains a stack that paints the household as one track when it comes to reading. The salvation, perhaps, is that most of the books have not been cracked.

The problem comes down to this: most of what I know about writing I learned from people, and from reading and listening to writers who write about things other than writing itself. To the extent I can write, it is because three high school teachers—Mrs. Salvi (Freshman English); Mr. Basaraba (Sophomore English); Mr. Murray (Junior English, Philosophy through Literature)—insisted that we learn to explore complex topics, form educated opinions on those topics, corral the evidence needed to support those opinions, and then communicate them in a structure that made sense, using words and phrases that made our points concrete. Often, they accomplished this by taking words and constructs away from us, barring us from using passive voice; the phrases “there is” or “there are”; the first person; weak or overused words like “nice,” “good,” and “bad.” They would enforce these restrictions by dropping our papers a letter grade for each use of a prohibited term or construct. Then they took the time to critique our writing with honesty.

It is also because my parents (especially my mother, who was a teacher herself) cared enough to provide direct and honest criticism of my high school writing, even though it meant they risked detonating the incomparable, irrational fury of a teenager who knows what she’s hearing is right, and who knows she needs to do more work (but she’s already worked hard, and it’s April and sunny, and that hardly ever happens in Oregon, and her brothers are in the back shooting HORSE with friends and clearly having a good time, and it would be awesome to be outside with them to get a tan or at least a sunburn).

2 I’ve learned plenty from reading and listening. Raymond Carver wrote in stark and simple terms with empathy, and without sentimentality, about everyday life in and around the Northwest. Willy Vlautin writes that way today. That is often what lawyers and judges are called upon to do when writing about the disputes that they are helping to resolve in the Oregon courts. The singer-songwriter Jeff Tweedy routinely manages to construct phrases that sound as if they’ve been part of American speech for years even though they are completely new. Communicating a new idea in a way that sounds familiar makes the idea less frightening, encouraging a reader or listener to stay with it and think about it, rather than run away. That also can be important when talking about the law. The opinions of other appellate courts offer a lot to think about in terms of structure, tone, and style. The variety of approaches and writing styles is enormous, and it is always helpful to think about whether an opinion accomplished what it needed to accomplish in the best way possible, or whether better choices might have been available to communicate a particular holding.

3 It was terrifying. Our teachers took away the major tools in the teenage vocabulary (anyone’s vocabulary, really) without supplying replacements; how easy it would be to slip up! At the same time, without those words and phrases, our writings started to reveal voice and character. But did we want anyone to hear our voices, or know our characters? Wouldn’t it be better, or at least easier, to remain invisible, to sound the same as everyone else, at least until we figured out who we really were?

4 They did not set themselves up for pleasure reading. Here’s what Mr. Murray got from me junior year: “Sartre: Elusive Escapes. Thesis: In his works, Sartre, depicts characters who attempt to escape the absurdity and anguish of their existences by establishing dependencies.” What could a 16-year-old possibly have to say about that? I’m afraid to read past the cover. Mr. Murray wasn’t.
And, it is because the people with whom I have worked as a lawyer and as a judge have thought a lot about how best to communicate ideas in writing and have been generous with honest feedback and suggestions about how to make a point in writing in a way that will resonate with a reader.

Still, how not to disappoint Nora? As I thought about it, I could identify one book on writing that I—with honesty—could say helped me become a writer. Perhaps other Oregon appellate judges and justices, past and present, would be able to do the same. Then we could supply a list of books that have helped people become better writers, rather than a list of books that, in the perspective of a single reader (me), seem like they might have that potential.

For me that book is Lucile Vaughan Payne’s 1965 *The Lively Art of Writing*. I met this book at age 15 in Mr. Basaraba’s sophomore English class. It was the source of many of the word and construct limitations that he placed on us. That book, and his classroom implementation of it, showed me why becoming a good writer is worth the serious amount of work that it takes. But at the time Nora asked me to submit this piece to the Almanac, several decades had elapsed since I last read it. Did it hold up after all that time? So many more books about writing have been written since 1965. I needed to revisit it before recommending it.

The book is slim, the cover promising help with “one of today’s most necessary skills” to “students, teachers, businessmen, aspiring authors [and] complaining consumers.” The introductory note is direct about the book’s objective:

“This book has one purpose: to help you improve your writing style.

“Style, if it can be summed up in a sentence, is the ability to say in writing, with clarity and economy and grace, precisely what you want to say. It sounds quite simple, put that way. But of course it is not simple at all. And it is not an easy thing to learn.”

Then, in 15 short chapters (typically, seven to nine pages each) the book walks through the components of compelling writing: forming an opinion, developing the knowledge to support it, connecting the sentences within a paragraph, connecting one paragraph to another, eliminating passive voice when possible, adding rhythm, using parallel structures, choosing words to set tone and make ideas “real and tangible,” using metaphors and allusions to make reading more pleasurable for those who understand them, but without detracting from the experience of the readers who don’t. It supplies an “odds and ends” list of things to consider and things to avoid. Each chapter ends with exercises, allowing

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5 Payne’s first two “commandments” are:
“1. Do not use the first person.
“2. Do not use the word ‘there’—ever.”

6 Payne’s thoughts on the passive voice illustrate the book’s flavor:

“What bores us in real life bores us no less in writing. And although good manners usually prevent us from shaking some life into passive, listless acquaintances, politeness need not deter us from shaking up our own sentences.”

7 Payne says that she hopes some of the words and constructs identified in her list will vanish from American speech and usage completely, and it seems that her wishes may have come true. In *Dreyer’s* Benjamin Dreyer provides similar lists in Chapter 9, “Peeves and Crotchets,” and in Chapter 13, “The Miscellany.” Comparing Dreyer’s thoughts with Payne’s provides an interesting insight into how American patterns of speech and usage have
for practice of the points just learned. Throughout the book, Payne reiterates an important message: stay focused on communicating the intended point, not on yourself. Payne recommends writing about a subject as if you are photographing it, and avoiding cuteness which, in her view, is a way for the author to talk about herself and not her subject. For legal writers, this is a useful insight. Although we’re often told to avoid cleverness in legal writing, we’re not always told the reason for it (apart from the fact that it can be a distraction): that it represents a shift in subject matter from the subject at hand to the writer’s own self, a shift that can derail otherwise powerful writing by redirecting the reader’s attention from the subject of the law to the subject of the author of the brief or opinion.

As I reread the book, I was struck by how well it communicates the why and how of good writing, and how well it captures the work required. Apart from the fact that some of the hypotheticals in the exercises and several other aspects of the book appear to embody a 1965 perspective on gender roles, making the book sound a little dated, the book remains a helpful reference for people seeking to communicate more compellingly in writing—including lawyers and judges.

As it turns out, a number of other judges also were able to identify with precision the book, books or other works that influenced them as writers. Here are those works:

Judge DeHoog: the works of Tim Terrell and Bryan Garner.

Justice Flynn: Armstrong and Terrell, Thinking Like a Writer.

Justice Garrett: George Orwell, “Politics and the English Language” (Essay).

Judge Hadlock: Appellate briefs authored by writers she admired, including Virginia Linder and Rives Kistler (before they were judges).


Judge James: Anthony Weston, A Rulebook for Arguments.

Justice Landau (retired, Supreme Court and Court of Appeals): Armstrong and Terrell, Thinking Like a Writer.

changed over the past fifty years or so.

Jeff Tweedy makes a similar point about writing songs in his memoir, Let’s Go (So We Can Get Back): A Memoir of Recording and Discording with Wilco, Etc. (Dutton 2018), equating cleverness with an attempt to “show off”:

“I don’t feel like I’m always trusted to make the best choices consciously. I trust myself enough to commit to a process, see what gets made, and respond with feeling and intuition, but when my ego gets involved I know I’m just going to cater to it, in other words, avoid embarrassment, be clever, show off. There’s nothing that makes me crazy like a song that just wants to be clever.”
Judge Mooney: Megan McAlpin, Beyond the First Draft: Editing Strategies for Powerful Legal Writing.

Judge Shorr: Strunk and White, The Elements of Style.
Chapter 8
Helpful Resources

KWAME CHRISTIAN
American Negotiation Institute
Columbus, Ohio

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THE AMERICAN NEGOTIATION INSTITUTE

HELPFUL RESOURCES

FREE GUIDES

Download all of our free guides
https://americannegotiationinstitute.com/guide

RECOMMENDED READING

Nobody Will Play With Me: How to Use Compassionate Curiosity to Find Confidence in Conflict by Kwame Christian Esq., M.A.
https://tinyurl.com/NobodyWillPlayWithMe

Winning from Within: A Breakthrough Method for Leading, Living, and Lasting Change by Erica Ariel Fox
https://tinyurl.com/WinningFromWithin

Never Split the Difference: Negotiating As If Your Life Depended On It by Chris Voss & Tahl Raz
https://tinyurl.com/NeverSplitTheDifferenceVossRaz

The Like Switch: An Ex-FBI Agent's Guide to Influencing, Attracting, and Winning People Over by Jake Schafer & Marvin Karlins
https://tinyurl.com/TheLikeSwitch

What Every BODY Is Saying: An Ex-FBI Agent’s Guide to Speed-Reading People by Joe Navarro & Marvin Karlins
https://tinyurl.com/WhatEveryBODYIsSayingNavarro

Find Out Anything From Anyone, Anytime: Secrets of Calculated Questioning From a Veteran Interrogator by James O. Pyle & Maryann Karinch
https://tinyurl.com/FindOutAnythingPyleKarinch

FEATURED PODCAST EPISODES

How to Use Negotiation Jiu Jitsu to Resolve Conflicts & Persuade with Doug Witten, Esq.

How to Use Negotiation as a Problem Solving Tool with Veronica Cravener, Esq.
THE AMERICAN NEGOTIATION INSTITUTE

How to Negotiate Like an FBI Agent with Chris Voss, Author of Never Split the Difference

How to Deal with Difficult People with Kris Plachy

Salary Negotiation and Career Advancement with Vanessa Gaboleiro

Are They Bluffing? How to Recognize and Defend Against This Tactic
https://www.buzzsprout.com/58026/374321-are-they-bluffing-how-to-recognize-and-defend-against-this-tactic

How to Manage Their Emotions and Yours in Difficult Conversations with Jeanine Carroll M.Ed and Helen Rapp Esq.

How to Develop a Winning Mindset with Mark Davis
https://www.buzzsprout.com/58026/848839-how-to-develop-a-winning-mindset-with-mark-davis

WHAT AM I READING?

Kwame’s Book List—2017-2019
https://tinyurl.com/KwameBookList
Chapter 9

The Financial World of the Small Law Office: Conflict, Contracts, and Costs

CLAUDE DUCLUS
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LawPay
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If statistic are to be believed, more than 10,000 lawyers per year open up solo or small practice offices staffed with 1-4 attorneys. A great many of these lawyers are young and (sadly) completely untrained in running any new business, much less a law practice. Although there are hundreds of resources out there, including Law Practice Management programs of various State Bars, the ABA, as well as seminars (from great to dreadful) devoted to this, the purpose of this piece is, in short order, to talk about two central issues that will (and should) occupy a lot of your thoughts: Overhead - meaning the cost you spend practicing law; and Income - the amount you need to make to keep going, both personally and professionally.

1. **Overhead, Overhead, Overhead –**

   To succeed as a lawyer, your income must exceed the global costs of your personal living expenses (or your contribution to your household's costs) as well as any overhead that you incur in office operations. The chief cost factors for most lawyers will be rent; secretarial/administrative assistance; financial/software-management systems; and equipment. Let's discuss these in order:

   a. **Where should I practice?**

      While many young lawyers choose to operate from their homes to save money on overhead, having a “stand alone” office in a respectable location is still a preferred method for obtaining the appearance of professionalism that most lawyers desire.

      Interim solutions for the new lawyer may be the use of part-time “office suites” where, for a small price a month and a rental fee, a lawyer can buy the use of an office and/or conference room on a *per diem* basis. But that is just a substitute for a full-time office location. Anecdotally, most young lawyers tell me it has not been a great solution to the bigger of creating professional image.

      However, if you are determined to have a full-time office in a decent location, you may try to find a bargain. Be careful. While deals are certainly available in odd locations for the frugal solo-practitioner, a decent Class A or Class B office building will generally be more expensive. Moreover, if you can combine resources with 2 or 3 other lawyers, you can likely make an office affordable. Four lawyers practicing together, even without partnership seems to be a good dynamic number for economies of size. If you practice alone, you have buy and maintain everything yourself. With several more, you can secure a better copier/scanner and other central equipment, and still handle your individual practices without the necessity of partnership. More than 4 usually requires additional administrative personnel, like a receptionist.

   b. **But whom should I practice with?**

      One of the best pieces of advice I ever received was as a baby lawyer from an attorney in Austin named Broadus Spivey, who later became President of the State Bar of Texas. Broadus had a small law office concentrating in Personal Injury Law, but his advice to us young lawyers was this: “There is no perfect way to practice law. You just have to *like the people you see every morning.*” That advice has proven true and has resonated throughout my practice.
As a 1977 law graduate, there were traditionally a lot of governmental opportunities available to us: we could seek appointments at a State Prosecutor’s office, County Attorney’s office, and other governmental agencies, and get a couple of years of practice under our belt on governmental expense. That’s what I did. Then, I moved on to a 10 lawyer law firm and then to a huge national firm. In 1989, however, I left the big national firm to open up a small office with 3 other lawyers sharing a wonderful downtown office. That was one of the best decisions of my career.


Traditionally, lawyers thought they needed to be "partners" to share office space and work together out of it. Now the law also authorizes both Professional Corporations and Limited Liability Partnerships. So, what should you choose? What did we choose?

It was our desire to practice independently of each other and only combine our resources for the overall management of the office. Therefore, I drafted some simple “Articles of Association” (which I have shared dozens of times with other lawyers) in which we contracted with each other to equally share the costs of the suite, but we confirmed in those Articles that nothing in this agreement would intertwine us as to the practice of law. We practiced that way for the next 27 years without a hitch. To do that, each lawyer had his own operating account, his own trust account. We operated one single "joint" bank account as signatories simply for the purposes of rent, payroll and office expenses that we all contributed to equally. Nothing prevented us from buying our own additional books and resources, but we all paid our own expenses other than rent and other building expenses, and the payroll expenses of our two employees, whom we divided up by agreement: Legal Asst 1 would work for lawyers A & B, and Legal Asst 2 would work for Lawyers C & D. The amounts paid to each Assistant was confidential, as were bonuses. That incentivized each employee to do best efforts for his/her attorney bosses.

But, you still ask: "Why didn’t you all form a law firm?" The answer was easy, we had all been members of big law firms and hated the politics, the gossip, the back-biting and the greed of who got what money or what bonus. Under this arrangement, we could work as much or as little as our resources permitted (or required) us to work, without ever arguing over our respective incomes. As long as we paid our share of the overhead, everyone was happy. If Lawyer's A resources allowed him to take off early, or take longer vacations, there was no ill-will with the others, because we weren't divvying up a pot of net income like a firm.

“Did we ever get into an argument?” you may ask. In retrospect, we probably argued 10 minutes and it was back in the olden days of getting paper libraries. Since we all had divergent law practices (I did litigation, family law, and appeals, Allen did real estate, Don did estate planning and guardianship), we clashed at first over what we should order for our library. Then, the solution hit us like a bolt of good judgment: we would only buy the state statutes together. After that, anyone could buy whatever they wanted for themselves. Of course, nowadays, these large paper libraries are all replaced by online resources, which we again purchase for ourselves. We never argued about things like copy paper, office supplies, pens or pencils or post-it notes, or intangible use of such products.Honestly, it probably wasn’t worth $100 to $200 a year to keep
track of such nonsense. (eg. "You're using more copy paper for your real estate practice than I use in my litigation practice... so, I should get a break!" ← we never did that).

Now, these comments are not intended to sway those of you who have decided that you and your best friend for life want to form a law professional partnership or PC. I’m just saying that this terrific alliance that we had (we mockingly called ourselves a “confederacy”) eliminated any of the standard jealousy or concerns that traditionally afflict lawyers when it is perceived that one lawyer is having to work much harder than the others, or one brings in all the business and feels entitled to greater "share" of revenues.

Frankly, the bottom line on forming law partnership is twofold: if your aim is to create a larger firm with more employees, you should consider a larger, organized entity. But if you don't you need to decide whether you believe you can gain a net benefit from that formal entity rather than lose a net benefit by having it in place. Keep that concept in mind while you’re deciding.

d. Financial Systems You Must Have –

i. Banking: Obviously, you need to have an operating account, a Client Trust account which complies with your state’s ethics requirements. And to keep increase your cash flow, sign up with LawPay, a great credit card provider which provides lawyers with nationwide credit card payment systems at extremely reasonable rates. My own use of LawPay supercharged my cash flow, because so many clients love paying me online with credit cards. Do NOT overlook the necessity of giving clients incentive to pay you with credit cards securely, conveniently and online.

ii. Bookkeeping: There are many automated bookkeeping systems available. However, it is probably worth your time to spend 30 minutes with a CPA who is a general business accountant whom I predict will unquestionably will give you great ideas on setting up your bookkeeping. My accountant way back in 1989 told me exactly what to do and I am following his recommendations today in organizing and categorizing office expenses, which makes it easy to do my tax return at the end of the year.

iii. Management Software: Throughout my early practice days, we were besieged by salesmen trying to sell us a million different books, forms, and other products on a daily basis and some of these salesmen were pretty good at relieving us of cash for things we didn't need. Now, it is the software merchants promising you ease and prosperity. Be Careful! Buy proven products. The primary software applications 25 years ago were word processing programs like WordPerfect and MS-Word, as well as separate Billing Programs. Both of course are still necessary. But solos and small firm lawyers can take advantage of excellent integrated office management software which do billing, calendaring, and other organizational tasks for you. Systems like Clio, Practice Panther and Cosmolex, all integrate with the LawPay credit card payment system. They provide proven assistance for small offices. Again, be careful not to succumb to the “latest and greatest” software craze.
2. Law Firm Budgeting –

Okay, so now you have a place to practice law and potentially some people to see every morning, how do you set your law firm budget? The truth of the matter is if you are correctly placed in your community you should be able to survive on 4 hours per day (5 days per week, 20 hours per month) of collected billings at a reasonable billing rate. Let me try to explain this in context:

The Big Concept – you can’t charge more than:
A. What is reasonable and necessary in your community; and
B. What a client is likely to pay you in your community with your level of skill and reputation.

You cannot charge less than what you need to support yourself (and often your family) given all the resources available to you and your family. Here are the steps to get a handle on that:

A. Find out what is charged in your community. "How?" you ask.
   The most common methods of finding out what lawyers are charging in your community and your practice group are:
   1. Ask other lawyers – pick up the phone and ask your colleagues how they bill services and what they charge. Lawyers, in my experience, have been very candid about that. In fact, some bar associations circulate lists of lawyers’ hourly rates (although this is frowned upon by the antitrust advocates especially if such lists come of as a “what you should charge list”);
   2. Ask the judges in your community - Most judges hear attorney fees claims every day and have very rigid ideas on what a fair range of fees are. If you acquainted with a local judge, ask him or her “What do you see attorneys with my years of experience in [my particular practice group] charging?” Judges will give you a very objective range.

For the purposes of moving through this example let’s say that you find out that lawyers in your community in your practice group charge $175 per hour. The next thing you need to do is find out:

B. What is my personal budget. To do this, you need to know two numbers:
   1. Your macrocosm of success: This is how much I need to make in a year; and
   2. Your microcosm of success: How does that break down to what I need every day? By every day I mean billing 5 days a week, 20 days a month for 48 weeks per year.

The successful financial model for private or solo-practitioners exists: If you have correctly priced your services and have appropriately adjusted overhead, you should be able to have a successful practice billing and collecting 4 hours per day, 20 days per month. If your personal budget plus your overhead requires you to bill 6 or more hours per day, your financial model may fail.
How do I calculate the 4 hour per day method?

a. Add up all of your personal bills – mortgage, groceries, car payment, insurance, practice overhead (ALWAYS INCLUDE ESTIMATED INCOME TAX WITHHOLDINGS AS PART OF YOUR BUDGET).

Example: Your personal budget is $8,000 per month;
Law office overhead costs $4,500 per month
The total I need to make each month is $12,500

Divide $12,500 by 80 hours (20 billing days X 4 hours per day)
Equals my hourly rate of $156

As long as your resulting hourly rate is within the accepted range in your community, you have a successful financial model. As we can see from my calculations above, the rate of $156 per hour could actually be low, that’s if the lawyer can charge and collect $175 per hour his or her office will succeed.

b. Why do you use this method? Because you can get an idea on a day-by-day basis by looking at your time if you are “succeeding” in your financial model.

[CAVEAT: All of these calculations are meaningless if you don’t have good work ethic, have reasonable expectations with your clients, and have excellent billing habits.]

3. Getting Clients -

"If you do good work, you won't have a problem getting work in the door, you'll have trouble getting work out the door!"  -H. Allen Hill

Clearly, getting business is the holy grail, and 10,000 speeches, books and papers have been written on the subject. But I can only anecdotally tell you what worked for me, and worked well:

a. Do good work and show you care about your work product.
b. Always, always, always do your work on time. If you promised to have the contract there by Monday, have it there by Monday. You will impress the other party, client, or attorney with your dependability. Lawyers rarely refer work to an undependable lawyer.
c. Get involved in your profession. Join your local bar; volunteer for a committee, get your name known. You'll be thought of as a representative of your profession.
d. Treat every client like they were going to be your next door neighbor for life.

I know that lawyers believe they need to advertise, so I am not minimizing the value of some web-presence. But the vast majority of my own work has resulted from referrals from happy clients, and lawyers who enjoy doing work with me, because I am dependable, straight-forward, and reasonably priced.
4. Your Best Resource – I have written well over 200 articles and papers over the past 35 years for all my speeches for the State Bar of Texas, local bars, and many other law related entities as well as my educational programs at LawPay. It is my intention to make many papers available on the LawPay website, including *The Art of the Client Interview, Billing and Collection; Avoiding Grievances, etc.* I won’t discuss them again here, but I do want to remind any of our readers and client attorneys that the best research tool in the world remains ... your telephone. Call another lawyer in your community to discuss issues involving the practice of law. Throughout my practice I have found lawyers extremely generous with their time and knowledge, with their forms and their advice. I keep a form file developed over nearly 40 years of practice which I make available to anyone who asks and I discuss issues with lawyers who call me regularly and walk them through everything from office practices to sticky ethical situations lawyers find themselves in.

Work hard, work smart, but know that there are people out there who will help you when a question arises. Reach out, and your practice will succeed.

*Questions? Claude Ducloux may be contacted at claude@lawpay.com*
Ethics of Freelance Legal Services:
Issues and Best Practices

Presented at the OREGON STATE BAR
SOLO and SMALL FIRM CONFERENCE
September 20-21, 2019 - Wilsonville, OR

Claude E. Ducloux, Presenter

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3 Your speaker

Claude E. Ducloux

• 42-year seasoned attorney
• Board Certified in Civil Trial Law and Civil Appellate Law—Texas Board of Legal Specialization
• Former President, Austin Bar Assoc.
• Received Gene Cavin Award for Lifetime Achievement in Teaching Continuing Education
• claude@lawpay.com
5 Purpose of this course

Define freelance legal services

Ethical issues involved:
• Conflicts
• Confidentiality
• Compensation
• Supervision

Citations to OR Rules 1.1 Competence, 1.5(d) Fees, .1.10 ConflictsTexas DRules 1.02 (b); 1.04; 1.05; 1.09; --Model Rules 2-107(A)- Divisions of Fees; 4-101 (C) Disclosure; 5-101 Conflicts

6 What does freelance mean?

Freelance includes all of these other terms:
• Temporary lawyer
• Contract lawyer
• Freelance lawyer

Contract often implies attachment to a single firm while freelance means doing work for many different firms.
Who is the “hiring” lawyer?

The term hiring lawyer may also be synonymous with:
• Retaining lawyer
• Engaging lawyer
• Outsourcing lawyer

Many ethics opinions use them interchangeably

Types of freelance legal services

| One lawyer hires a non-employee lawyer to provide legal services to the firm for a client |
| Usually done with independent contractor agreements identifying the services |
| Defined fees or flat rates and limits of services |
Benefits of freelancing

- Flexibility of schedules
- Flexibility of conditions
- Use/non-use of hiring firm’s premises or equipment
- Complete remote work schedule
- Ability to work for many different hiring lawyers simultaneously

Client/lawyer relationship

Does the freelance lawyer have an attorney/client relationship with the underlying client?

Yes, almost all ethics analyses verify the existence of that. See, OR Rule 1.6, 1.7; Colorado Bar Formal Ethics Opinion 105; ABA Model Rule 4-101; TX Rule 1.04. This exists even if they never meet or if the lawyer only handles minor or limited tasks.
11 Recommended terms

It is safest to use written agreements:

• Scope of representation
• How billing is handled
• Who is supervising responsibility
• Conflicts
• Confidentiality

See, generally, Tx Rule 1.04(f); Model Rule 4-101, and similar rules requiring client knowledge and consent.

12 Confirming “independent contractor” status

Agreement should state that the freelance lawyer is an independent contractor working on a limited or temporary basis and such basis does not constitute an employer/employee relationship. Freelance lawyer shall be compensated on a W-9/1099 basis and shall be responsible for his/her own taxes.

Caveat: Giving too many instructions/requirements of when/where/how may belie your attempt to declare independent contractor status.
13 Malpractice insurance—not required, but recommended

If you are the hiring firm or lawyer, you may need to add freelancer on your policy, unless you accept total responsibility for his/her work.

14 Additional terms

• Provisions of temporary office space
• Provisions of electronic discovery authorizations – freelancer may have to sign “Protective Order Acknowledgement”
• Provisions of computer equipment
• Billing should include nature and terms of compensation or “per project” rate
• Date when payment is due to freelance lawyer

ABA Model Rule 6-101–duty to secure competent counsel includes freelance counsel. See, e.g., OR Rule 5.1 and 5.2; TX Rule 1.01(a) likewise requires lawyers to secure competent help.
Avoidance of fee splitting

To avoid the risk that a freelance relationship could be fee splitting, the agreement should clearly state that the hiring attorney is obligated to pay the freelance lawyer regardless of client payment.

Oregon does not appear to require “joint responsibility”

ABA Rule 2-107, TX Rule 1.04

Supervisory responsibility

The agreement between the hiring and freelance lawyer should clearly identify:

1. How the freelance lawyer’s work will be adopted by the hiring lawyer;
2. That the hiring lawyer is ultimately responsible for the representation of the client (and is entitled to ownership of the work product);
3. Verification that the hiring lawyer has provided the freelance lawyer with information adequate to evaluate conflicts of interest; and
4. Freelance lawyer should verify that he/she performed a conflicts check and any conflicts identified were effectively waived. See, Conflicts of Interest Rules; ABA Model Rules 4-101; TX Rules 1.05, 1.06, Mo. Rule 4-1.7, Calif Rules 2-200, 3-100, 3-300; OR Rule 1.8
Confidentiality

To avoid imputed conflicts, the agreement between hiring and freelance lawyer should include clauses which carefully “limit” and “verify.” Include recitations that the parties have made these efforts:

**Limit:** the hiring lawyer is providing freelance lawyer with only the information necessary for the particular representation.

**Verify:** that freelance lawyer does not have access to hiring lawyer’s or firm’s files for other clients.

CAVEAT - Use of “Flat Rate” Agreement

The use of any Freelance Work agreement requires a high level of competency and experience in the area of the law covered, anticipated completion times and expected costs and practice variables. Further, the user should review applicable disciplinary rules and ethical guidelines to ensure compliance with any limitations imposed.

So...unless you really know what you are doing, you should consider carefully doing a “flat rate” agreement. [Ex. “I agree to probate this will through final hearing and provide the Inventory and Appraisal for a flat fee of $1500 and court filing fees.”]

Advice: write down the basis of your fee, (and client’s representations to you) advising that unexpected events, challenges, objections to admission, shall result in a higher fee to resolve those matters.

See, Tx Ethics Op. 689 (Sept 2018) – on issues faced when trying to amend fee agreement.
Duties of supervising lawyer

The level of supervision is important. It is relevant to these issues:

- Whether you have to disclose the use of a freelance lawyer to the client
- Whether you can (or should) impose a surcharge for the freelance lawyer’s work
- Whether you can disclose confidential information to the freelance lawyer without client consent

What does the duty of supervising entail?

- Reasonable efforts to ensure that the hired lawyer conforms to the Rules of Professional Conduct. *ABA Model Rule 6-101*
- All lawyers must act competently
- Use of legal knowledge, skill, thoughtfulness, and preparation reasonably necessary for representation
Ethical duties during hiring process

- Evaluate the lawyer’s educational background
- Verify the lawyer is licensed and in good standing
- Assess the lawyer’s professional experience and expertise
- Conduct reference checks on the freelance lawyer
- Assess the freelance lawyer’s character
- Ask about the freelance lawyer’s conflict-screening system
- Ask about the freelance lawyer’s measures to ensure confidentiality

See ABA Model Rule 6-101

Appropriate scope of supervision: hiring lawyer

The duty of the hiring lawyer is to:
- Clearly define the scope of services
- Communicate in writing about each lawyer’s responsibility for meeting deadlines, filings, arranging services, and other matters
- Periodically check in with the freelance lawyer
- Evaluate the freelance lawyer’s experience
- Propose remedial actions, if necessary
- Be available for the freelance lawyer to ask questions, brainstorm, and discuss the matter
Ethical duties of freelance lawyer

- Diligently handle the client matters
- Ensure reasonable communication between the lawyer and client
- May not reveal information relating to the representation
- Avoids conflicts of interest with current or former clients
- Analysis of whether the freelance lawyer’s personal needs or other relationships with hiring lawyers may create “a significant risk” that the representation will be materially limited

See ABA rules 6-101; 7-101, 7-102; TX Rules 1.01, 1.02

Freelance vs. “unbundled” services

Unbundled (aka limited scope) representation is a product of the “gig economy” in the legal profession. Unbundled service is typically used for on-demand, efficient, and cost-effective representation.
How are you officially providing limited scope?

Some states require you, the lawyer, to file a “Notice of Limited Appearance” (e.g., Colorado Rule 1.2(c)) as well as file a “Notice of Completion of Limited Appearance,” thus terminating the lawyer’s appearance without further action.

Oregon Rule 1.2 (b) also gives attorneys right to limit the scope of services.

Caveat: Some courts require you to file a “Motion for Leave to Provide Limited Scope Representation” (e.g., US District Courts in Colorado). This may be an “Entry of Appearance to Provide Limited Representation” and the lawyer then is required to obtain an order that defines the scope of the representation and requires further appeal of any changes.

How do you define full legal representation?

Generally speaking, full bundle legal representation includes:

• Gathering the facts
• Advising the client
• Discovering facts of the opposing party
• Performing legal research
• Drafting correspondence and documents
• Negotiating and representing the client in court
What might unbundled services include?

- Providing litigation support to pro se litigants
- Assisting pro se litigants with preparing pleadings or other documents
- Providing other non-litigation advice to pro se litigants
- Assisting clients with transactional matters

Question: can you offer temporary help to someone, eg. Filling out legal forms, on the condition that Client agree “NO ATTORNEY CLIENT relationship is formed”?

Answer: Nope. See, Tex Ethics Opinion 635, if your services involve the practice of law, you have formed that relationship.

Disclosure and form consent

Hiring lawyers have an obligation to communicate to the client to the extent necessary to commit the client to make an informed decision regarding the freelance lawyer’s retention. See, Texas rule 1.04; eg. Colorado Rule 1.5, Oregon Rules 1.4(b), 1.5(d)

This also includes the basis or rate of the fee and expenses that will be charged to the client.
Financial arrangements

**Remember**, if there is fee splitting, the client must give an informed consent and the state’s normal rule usually requires that division is permitted only if:

1. The lawyers assume joint responsibility; or
2. The division of fee is proportional to the representation; and
3. The client gives informed consent in writing and the total fee is reasonable.  
   *See, ABA Model Rule 2-107, TX Rule 1.04*

Fiduciary duty and fees

Generally, the **client** must approve all fee arrangements. Fees must be fair and reasonable TRDPC 1.04(a)

**Reasonableness?** Look at ABA Rule 2-106 factors (similar to Tex Rule 1.04(b), Calif Rule 4-200; Colo. Rule 1.5)

**Contingency fees?** Must be in writing, and not prohibited by law (Not in criminal case 1.04(e)) Oregon: Nor in family cases 1.5(c)

**Referral fees?** Covered by Tex Rule 1.04(f) and (g)
What is not fee splitting?

1. The firm agrees to pay temporary lawyer an hourly rate for temporary service;
2. The firm agrees to pay temporary lawyer a flat rate; or
3. The firm agrees to pay temporary lawyer a fixed fee.

Remember, the fee has to be paid regardless of outcome for it not to constitute fee splitting.

What is joint responsibility?

“Joint responsibility” implies that both the referring and receiving lawyers would be held liable for any claim of malpractice.

Some interpreters of the rule believe that it is enough for referring lawyers to simply state such responsibility in the referral agreement.

However, others believe that the referring lawyer must actually do something other than make the referral in the actual representation, but even regular brief contact with the client or an occasional review of relevant documents would probably suffice.
Joint responsibility (cont’d)

**Question:** What is the benefit of signing on to joint responsibility for the case?

**Answer:** None, except if you are going to be sharing the overall fee and not doing very much work.

**Question:** If I merely sign on (associate) to do certain tasks, and I’m paid by hour, do I need to sign on to Joint Responsibility Agreement?

**Answer:** No. You will only be liable for your own work.

Disclosure: impact on representation

If the freelance lawyer’s hiring constitutes a significant development in the representation of the client, the lawyer must communicate with the client about the status of the legal matter. *See, e.g., Colorado Rule 1.4(a)*

Also, if the lawyer anticipates being called as a witness, he/she should withdraw unless testimony related to matters excepted on DR5-101(B)(1) through (4). *ABA Model Rule 5-101, TX Rule 3.08, Oregon Rule 3.7*
Conflicts of interest

Freelance lawyers are governed by all the rules applicable to lawyers regarding conflicts. A lawyer may not represent a client if there is a concurrent conflict of interest.

A conflict exists if the representation is directly adverse to another client even if the matters are unrelated, or materially limited by the lawyer’s responsibility to another client, a third party, or the lawyer’s personal interests. See ABA Rules 5-101–5-105; TX Rules 1.06–1.09.

Freelance lawyers conflicted out

Remember, a freelance lawyer who has represented a client cannot later represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the former client.

ABA Model Rule 5-105(D); TX Rule 1.09(C)
Hiring lawyer duties re: conflicts

The hiring lawyer should provide the freelance lawyer with all the information necessary to evaluate potential conflicts, including name of client, opposing parties, related parties, and associated counsel, as well as the substance of the matter.

Takeaways

Best practices:
- Pick your freelance lawyer with the knowledge that you’ll likely be responsible for his/her work
- Always have a written contract defining duties and independent contractor status
- Check for conflicts and do not give or take access to all firm client files
- Be specific about deadlines, duties, and expectations
- Reveal associated lawyer to client and get approval of rate charged to client
- Avoid joint assumption of risks as freelance by providing freelance is paid no matter what
Takeaways for Freelance

**Best practices:**

- Be careful about what you promise, and the time frames.
- Always be courteous and prompt for meetings.
- Always meet your specific deadline and duties as promised.
- Always have a written contract defining duties and independent contractor status.
- Don’t accept access to all firm client files.
- Make sure your hiring is approved if required under your rules.
- Avoid joint assumption of risks as freelance unless agreed to in advance and approved by client.

Improve and defend your profession

- Support the fair administration of justice.
- Make sure people understand the judiciary is the third branch of government.
- Speak out as a true professional when you see undue criticism.

*Don’t be the “Sleepy Column”*
THANK YOU!

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Civil Appellate Law, Texas Board of Legal Specialization

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Claude gratefully acknowledges the work of Sarah Coleman, Attorney at Law, and recommends her article, “Ethical Considerations when Using Freelance Legal Services,” appearing in the June, 2018, Colorado Lawyer
ATTORNEY FEE CONTRACT

STATE OF TEXAS §

COUNTY OF TRAVIS §

WHEREAS, Glen G. Quagmire, ("Client") desires to employ Peter Griffin ("Attorney")
to represent him in the following legal matter:

To file and complete an action for Modification of Custody in Travis County, Texas
and to represent Client in any and all claims and defenses to which the client may be entitled in connection therewith;

WITNESS THEREFORE THE FOLLOWING AGREEMENT:

Client hereby employs Peter Griffin as legal counsel to represent him in the above stated matters and issues related to the above-referenced modification action, and any hearings, discovery matters or settlement negotiations of the above-referenced matter and in any related matter necessary to the resolution of any pending controversies.

Client agrees to compensate Attorney by paying attorneys fees at the rate of $300.00 per hour for all legal work performed in this matter. Attorney will charge lesser rates for work performed by legal assistants and/or law clerks ($40.00 per hour).

Attorney acknowledges the receipt of a pre-paid fee retainer from Client in the amount of $2500.00. This retainer shall be deposited into the Attorney’s trust account, to be drawn out monthly and credited against attorneys fees to be earned by attorney. Any unused retainer shall be refunded to Client if the matter is concluded prior to the exhaustion of any funds held on retainer. No Funds deposited in Attorney’s Client trust account will earn interest for Client.

Attorney will provide Client, at monthly intervals, an itemized statement setting forth in reasonable detail, all services by Attorney on behalf of Client, and any costs which have been incurred and/or advanced by Attorney on behalf of Client in the above-referenced matter.

IN THE EVENT AN APPEAL IS NECESSARY AFTER ANY TRIAL, IT IS UNDERSTOOD THAT ATTORNEY WILL NOT PROCEED WITH AN APPEAL WITHOUT AN ADDITIONAL AGREEMENT WITH CLIENT FOR ATTORNEY'S SERVICES.

No claim will be compromised or settled without the express authorization of Client.

Client understands that Attorney has made no representations promises or warranties concerning the likelihood of a favorable outcome of any action filed or to be filed. Any statements by Attorney in this regard are statements of opinion only.
Expenses

Client agrees to reimburse Attorney for any and all expenses incurred by Attorney in connection with the prosecution and settlement of claims, including, but not limited to, court costs, deposition fees, transcript fees, reproduction fees, expert witness fees, travel expenses, investigative expenses, telephone expenses and other expenses which Attorney determines to be necessary.

Termination or Withdrawal

In the event Client desires to dismiss Attorney and retain other counsel after the date of signing this contract, IT IS UNDERSTOOD THAT THE TERMS OF THIS CONTRACT PERTAINING TO THE FEES FOR SERVICES RENDERED UP TO AND INCLUDING THE DATE OF DISMISSAL SHALL REMAIN IN FULL FORCE AND EFFECT.

It is agreed that Attorney may withdraw from the Client's representation in this matter at any time if the client insists upon pursuing a course of conduct which, in Attorney's opinion, is illegal or unethical, or is contrary to Attorney's advice even if not illegal, or if Client disregards his obligation to pay for Attorney's fees or expenses when due and payable.

In the event of termination or withdrawal from employment, Attorney will take reasonable steps to avoid foreseeable prejudice to the Client, including giving notice, allowing time for employment of other counsel, and returning to Client all papers and property to which Client is entitled. If Client discharges Attorney, such notice shall be in writing.

This agreement shall be construed under and in accordance with the laws of the State of Texas. All obligations of the parties are performable and fees are to be paid in Travis County, Texas.

Disposition of Client files and Information. At the conclusion of this matter, Client is advised that all matters in the Client's file shall be returned to Client upon request. Client is further advised to retain all confidential information or original documents from Attorney's file. Client otherwise authorizes Attorney to destroy in a secure manner the information contained in Attorney's file after four years from the date the legal services are completed.

EXECUTED this _____ day of _____, 201_.

ATTORNEY:  ______________________________

Glen Quagmire
123 Bottom Lane
Silly, TX 77770
(512) 345-6789
gquagmire@quagmire.com

CLIENT:

Peter Griffin
400 W. Main Street, Suite 200
Austin, Texas 78701
(512) 474-7000
(512) 474-5000 (FAX)
Email: peter@griffinlaw.com
C:FEE.AGR
FIVE FORMS TO CONSIDER

Optional Provisions to Add to a Lawyer Attorney Fee Agreement, Service Agreement or Retainer Contracts to acknowledge Use of Technology, Privacy Laws or “Paperless” Offices, and the Use of “Cloud” Storage

The following provisions have been compiled by Claude E. Ducloux, Attorney at Law – Director of Education, Ethics and State Compliance – Lawpay. Each of these clauses addresses the lawyer’s potential use of a newer technology, billing, or a legal requirement imposed by the majority of states to secure private information, or to advise clients of file destruction policies. A lawyer may consider using one or more of these, edited or adapted for the lawyer’s own use. Lawyers may also consider combining one or more into an “Exhibit” appended to and executed at the time of the initial agreement. Note that this compilation has been assembled with a demonstrative footer which should appear below indicating the Client’s initials for approval.

DISCLAIMER: The sample agreements made available on this website are provided for individual review and analysis, and are delivered without warranty or representation of fitness for specific use or compliance. The receiver hereof is advised to make any necessary modifications or adaptations which may be required for the user's specific needs, or for compliance with the user's applicable practice rules or state statutes.

FORM 1: Privacy Policy – most states do, or will have a requirement that holders of private, sensitive or protected information (as defined by law) have in place a Privacy policy. The following simple form may be considered or adapted for that purpose -Ed. Note.

ATTORNEY PRIVACY POLICY

1. THIS LAW FIRM MAINTAINS A PRIVACY POLICY AS TO SOCIAL SECURITY NUMBERS AND OTHER PRIVATE INFORMATION AS DEFINED BY LAW.
2. SOCIAL SECURITY NUMBERS AND DRIVER’S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.
3. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.
4. ALL PRIVATE NUMBERS, INCLUDING BUT NOT LIMITED TO ACCOUNTS, HEALTH DATA, AND OTHER IDENTIFYING DATA PROTECTED BY LAW RECEIVED FROM A CLIENT ARE, AND REMAIN CONFIDENTIAL, AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.

5. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY AUTHORIZATION.

6. EVERY STEP IS TAKEN TO PROTECT YOUR PRIVACY. YOUR INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE SHREDDED OR SECURELY DELETED PER THE FIRM’S FILE DISPOSITION POLICIES.

FORM 2: Digital File Maintenance – Use with the “Paperless” Office. The purpose of this particular paragraph is to advise the client of the need to securely retain the digital files you will be sending during the representation, and shifting the burden of cost of “paper copies” to the Client, rather than to the lawyer. Secondly, if a client requires encryption, this shifts the burden of obtaining and installing encryption software to the Client. Shifting that burden is discussed an authorized in an ABA Ethics Opinion 471, which allows Lawyers who maintain paperless offices to disclose to clients up-front that if client wants paper copies, they will be expensed

2. File Maintenance: During our representation of you, we will be sending you copies of all important contracts, pleadings, letters, notices, and other material which we believe you should review. Our office strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. You should have a secure place to keep these documents. If you need additional paper copies at any time, we can make those at your expense for our normal copy fees, or cooperate in sending the data to the secure copy service of Client’s choice. Clients may control such costs by keeping digital copies. Should you believe your particular file requires an encryption, you should advise us of the form of such encryption. If our office is required to secure encryption software specifically for your case, the cost of that software shall be included in your bill.

FORM 3: Disposition/Destruction of Client Files – Lawyers have a duty to review client files prior to shredding or deletion to ensure original documents, or other document of value such as share certificates or cash/cash equivalents have
been returned to Client. However, this form allows the Lawyer to advise Client’s at the time of retention that they will safely shred or delete the file after 4 years, unless required by law to maintain them longer, such as actions involving trusts or minors. This form duplicates some of the “copy charge” language of Form 2 above, so such duplication should be edited out if these forms are combined.

3. Disposition of Client files. At the conclusion of this matter, Client is advised that all matters in the Client's file shall be returned to Client upon request. Client is further advised to retain all confidential information or original documents from Attorney's file. Client otherwise authorizes Attorney to destroy in a secure manner the information contained in Attorney's file after four years from the date the legal service is completed. If you want a copy of your file at any time, we shall deliver it to you in the same format in which the file is maintained in our office. If you desire paper copies of files or data which we have solely maintained in digital format, we will either provide you the digital copies as well as making you the paper copies at an additional expense, or cooperate in delivering your digital file to a copy printing service of your choice so that your selected copies may be made at your expense.

FORM 4: Disclaimer of Liability for Use of Cloud Storage or Technology
Exposing Client info to “hacking” Lawyers have a duty to act as prudent custodians and fiduciaries of and for client information. This clause is not intended to waive any lawyer duty in that regard, but countenances that a breach of security in cloud-based services or internet service providers may occur without any negligence on the part of the lawyer. Even with this clause, a Client will likely always be able to argue, absent a “real” hack-attack, that there is a lapse on the attorney's part to secure information if confidential information is mistakenly shared.

4. Storage and Use of Electronic Data: Client is aware, and consents to the retention, maintenance, and storage of client’s information and records relating to this matter in the following forms/locations: Paper (in office and/or storage files); electronic (e.g. computer, handheld devices for e-mail, fax, and/or via the Internet using “cloud storage”); or other like mediums. Attorney will endeavor to take all steps necessary to preserve and maintain the confidentiality of all Client information and records, however Client recognizes and agrees that such information and records are subject to unauthorized access outside the control of Attorney, and agrees to hold Attorney harmless from any non-Attorney caused breaches of confidentiality of Client information and records.

FORM 5: Billing and Credit Card Use Sample Language – this simple form may be added or appended to an attorney fee or engagement. Note that the term “retainer” has been modified to include the words “pre-paid fee” retainer, as some jurisdictions (eg. Florida, per comments on Fl.Bar Rule 5-1.1) consider a retainer to be only defined as a flat fee, and thus not to be deposited in the
attorney’s trust account. Many jurisdictions, however, consider the pre-payment of fees to be later applied to services of the firm to be a “retainer.” The lawyer may remove such doubt by calling it a “pre-paid fee retainer.”

5. Attorney Fees and Payments Client agrees to compensate Attorney by paying attorneys fees at the rate of $xxx.00 per hour for all legal work performed in this matter. Attorney will charge lesser rates for work performed by legal assistants and/or law clerks ($xxx.00 per hour).

Attorney acknowledges the receipt of a pre-paid fee retainer from Client in the amount of [$2,500.00.] This retainer shall be deposited into the Attorney’s trust account, to be drawn out monthly and credited against fees to be earned by Attorney. Any unused retainer shall be refunded to Client if the matter is concluded prior to the exhaustion of any funds held on retainer. No Funds deposited in Attorney’s trust account will earn interest for Client.

Attorney will provide Client, at monthly intervals, an itemized statement setting forth in reasonable detail, all services by Attorney on behalf of Client, and any costs which have been incurred and/or advanced by Attorney on behalf of Client in the above-referenced matter. The invoice will also show the application of retainer funds to the monthly invoice, and any resulting balances of retainers and/or unpaid fees.

For Client's convenience, Attorney has created a portal through LawPay, a safe and secure credit card portal designed for lawyers, allowing Client to pay bills and replenish retainers online. Client shall not be charged any fee for credit card use, and no fees are deducted from funds deposited into Attorney's trust account.

Further Authorized Use of Credit Card: Upon the exhaustion of the retainer:

[use one or more of the following options including the blank for client initials]:

[Option 1: automatic replenishment of the retainer]

________ Client authorizes Attorney to replenish the pre-paid fee retainer by charging an additional amounts to the credit card provided by Client as will maintain the retainer at $__________.

[Option 2: no automatic replenishment, but authorization for payment]

________ (initials) Client authorizes Attorney to pay the outstanding fees and costs each month by charging such amounts to the credit card provided by Client for that purpose.

[Option 3: neither automatic payment or replenishment]

________ (Initials) Client agrees to pay the outstanding balance 30 days after the end of month being billed. Client may pay via credit card without any additional fees through LawPay using these links:

To pay or replenish pre-paid retainer: [web address or hyperlink, e.g.]

https://secure.lawpay.com/pages/attorneys/trust

[Note: Call LawPay’s support to help set up these links.]
To pay regular monthly bills: [web address or hyperlink, e.g.]
https://secure.lawpay.com/pages/attorneys/operating

(Initials) “No Refund” Policy: Client understands that fees paid with an authorized credit card payment are not subject to a right by Client to a credit card refund or chargeback after legal services are performed. Refunds, when appropriate, shall be paid by check or other electronic transfer from Attorney to Client.

AT LAWPAY, WE ARE DEDICATED TO YOUR SUCCESS!
Claude@lawpay.com
EXHIBIT A

to Attorney Fee Contract

ATTORNEY PRIVACY and FILE MAINTENANCE POLICIES

1. LAW FIRM PRIVACY POLICY AS TO SOCIAL SECURITY NUMBERS AND OTHER PRIVATE INFORMATION:
   a. SOCIAL SECURITY NUMBERS AND DRIVER’S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.
   b. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.
   c. THESE PRIVATE NUMBERS RECEIVED FROM A CLIENT ARE CONFIDENTIAL, AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.
   d. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY AUTHORIZATION.
   e. EVERY STEP IS TAKEN TO PROTECT YOUR PRIVACY. YOUR INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE SHREDDED PER PARAGRAPH 4 BELOW, OR OTHERWISE DELETED.

2. Protected Health Care Information: If your case involves the disclosure of your protected health care information, you will be given a separate form to authorize us to obtain that information from your health care providers, or to provide that information in the firm’s possession to those parties having a right to review that information as part of the legal matter under consideration.

3. File Maintenance: During our representation of you, we will be sending you copies of all important contracts, pleadings, letters, notices, and other material which we believe you should review. Our office strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. You should have a secure place to keep these documents. If you need additional paper copies at any time, we can make those at your expense for our normal copy fees. Clients may control such costs by keeping digital copies. Should you believe your particular file requires an encryption, you should advise us of the form of such encryption. If our office is required to secure encryption software specifically for your case, the cost of that software shall be included in your bill.
4. **Disposition of Client files**. At the conclusion of this matter, Client is advised that all matters in the Client's file shall be returned to Client upon request. Client is further advised to retain all confidential information or original documents from Attorney's file. Client otherwise authorizes Attorney to destroy in a secure manner the information contained in Attorney's file after four years from the date the legal service is completed. If you want a copy of your file at any time, we shall deliver it to you in the same format in which the file is maintained in our office. If you desire paper copies of files or data which we have solely maintained in digital format, we will either provide you the digital copies as well as making you the paper copies at an additional expense, or cooperate in delivering your digital file to a copy printing service of your choice so that your selected copies may be made at your expense.

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DIGITAL FILE MAINTENANCE CLAUSES
(Potential Amendments to Attorney Fee Contracts)

(Per ABA Opinion 471, which allows Lawyers who maintain paperless offices to disclose
to clients up-front that if client wants paper copies, they will be expensed)

File Maintenance: During our representation of you, we will be sending you copies of all important contracts, pleadings, letters, notices, and other material which we believe you should review. Our office strives to maintain these documents in digital (paperless) format, so more often these copies shall be sent to you in digital format, for ease of retention and portability. You should have a secure place to keep these documents. If you need additional paper copies at any time, we can make those at your expense for our normal copy fees. Clients may control such costs by keeping digital copies. Should you believe your particular file requires an encryption, you should advise us of the form of such encryption. If our office is required to secure encryption software specifically for your case, the cost of that software shall be included in your bill.

Disposition of Client files. At the conclusion of this matter, Client is advised that all matters in the Client's file shall be returned to Client upon request. Client is further advised to retain all confidential information or original documents from Attorney's file. Client otherwise authorizes Attorney to destroy in a secure manner the information contained in Attorney's file after four years from the date the legal service is completed, unless further storage is required by law. If you want a copy of your file at any time, we shall deliver it to you in the same format in which the file is maintained in our office. If you desire paper copies of files or data which we have solely maintained in digital format, we will either provide you the digital copies as well as making you the paper copies at an additional expense, or cooperate in delivering your digital file to a copy or printing service of your choice so that your selected copies may be made at your expense.

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Freelance Work Agreement Independent Contractor - Hourly Rate

Editor’s Note: The use of any Freelance Work agreement requires a high level of competency and experience in the area of the law covered, anticipated completion times and expected costs and practice variables. Further, the user should review applicable disciplinary rules and ethical guidelines to ensure compliance with any limitations imposed. Therefore, this sample agreement is made available and provided for individual review and analysis, and it is delivered without warranty or representation of fitness for specific use or compliance. The receiver hereof is advised to make any necessary modifications or adaptations which may be required for the user's specific needs, or for compliance with the user's applicable practice rules. –Claude Ducloux, Director of Education, LawPay

This agreement is entered into between [Law Firm] ("Law Firm") and [Name of freelance attorney], the undersigned freelance attorney ("Freelance Attorney").

1. Project. Freelance Attorney agrees to complete [Name or title of project] on a contract project basis for Law Firm. The scope of the project includes [Describe scope of work to be done on project, including name of case and deadline]. Freelance Attorney and Law Firm will routinely consult and agree on the logistics and other details of the performance of this Agreement, as needed. Freelance Attorney understands the time limitations imposed on the completion of the work described above. During the duration of this contract, the supervisory responsibility for Law Firm shall be exercised by [Name of freelance attorney].

2. Employment relationship. Freelance Attorney shall be engaged by Law Firm as an independent contractor. Freelance Attorney is not an employee of Law Firm and is therefore not entitled to any benefits afforded to employees or partners of Law Firm. As an independent contractor, Freelance Attorney will determine when, where, and how the above-referenced project will be completed. This Agreement shall not be construed to create any relationship of partnership or joint venture. Freelance Attorney operates as a [Type of entity and how payment should be recorded via tax ID number or social security number]. Freelance Attorney shall be responsible for paying any applicable taxes on the fees earned, including income tax. Freelance Attorney shall also be responsible for paying any business expenses in the normal course of project completion except for included expenses listed below; and unexpected expenses will be subject to further negotiation between Freelance Attorney and Law Firm. “Included Expenses” in this agreement, which shall be itemized by Freelance Attorney, are a) those items which Law Firm specifically requires Freelance Attorney to obtain; b) specific software or encryption required to access the case information; c) travel expenses pre-approved by Law Firm; and d) such other miscellaneous expenses approved in advance.

3. Conflicts of Interest. Freelance Attorney is a licensed attorney in good standing in [Jurisdiction]. Law Firm recognizes that Freelance Attorney enters into freelance work agreements with other attorneys, law firms, and legal entities. Freelance Attorney
agrees to check for conflicts of interest. By signing this agreement, Law Firm warrants that it has provided Freelance Attorney with sufficient information to evaluate conflicts of interest; and Freelance Lawyer warrants that there are no existing conflicts with other present or past clients, or Freelance Attorney’s own interests.

4. Malpractice Insurance. Freelance Attorney maintains professional liability insurance coverage through __[Name of insurer]__.

By signing this Agreement, (choose one)

_____Law Firm represents that it has current professional liability insurance to cover the project outlined in this Agreement.

_____Law Firm maintains professional liability insurance with __[Name of insurer]__ and has notified insurer of the employment of Freelance Attorney, and has been given approval for such employment.

5. Confidentiality. Freelance Attorney shall keep all client information confidential, including client documents disclosed by Law Firm. The parties agree that client information provided by Law Firm shall be limited to only that which is necessary to complete the work contemplated by this Agreement.

6. No Attorney-Client Relationship. This Agreement shall not be construed to create an attorney client relationship between Freelance Attorney and Law Firm’s clients, or between Freelance Attorney and Law Firm, unless such relationship is implied by the disciplinary rules of __[Jurisdiction]__. At all times, Law Firm will exercise its independent professional judgment and make all final decisions regarding its cases and clients.

7. Work Product. Law Firm shall own all rights to any work product generated by Freelance Attorney while completing the project described in this Agreement. Law Firm may modify any work product prepared by Freelance Attorney. Ultimately, Law Firm is responsible for supervising the work of Freelance Attorney, and for the content of pleadings or other material submitted on behalf of its clients.

8. Compensation. Freelance Attorney shall be paid for legal services rendered under this Agreement at the hourly rate of $_____. Freelance Attorney shall submit an invoice to Law Firm, and payment shall be made within thirty (30) days of the submission of the invoice. Freelance Attorney acknowledges and agrees that Law Firm may bill its clients for the amounts due to Freelance Attorney at whatever rate or in whatever manner it deems appropriate and consistent with law and its own billing practices. All payments made by the Law Firm to Freelance Attorney will immediately become property of Freelance Attorney and will not be placed in an attorney trust account. It is specifically agreed between the parties that Freelance Attorney’s fees are not contingent fees subject to case outcome, nor are such fees to be considered “referral fees” as defined under the applicable rules of disciplinary conduct.
9. Severability. All provisions of the Agreement are severable. The determination that any particular provision or term is illegal or unenforceable shall have no effect upon the remaining terms of the Agreement.

10. Assignment. Neither party may assign its duties or rights under the Agreement without prior written approval of the other party.

11. Modification to Agreement. Any modification of this Agreement will be governed effective only if it is in writing and signed by both parties.

12. Termination. Either party shall have the right to terminate this Agreement with reasonable cause, effective immediately upon giving written notice. In the event of termination, Law Firm shall pay Freelance Attorney for work done up to the point of termination.

13. Return of Data and Files. Upon termination or conclusion of services, Freelance Attorney agrees to return, or otherwise dispose in a safe fashion as directed by Law Firm, all privileged information which has been used by Freelance Attorney in the course of this Agreement.

14. Miscellaneous Provisions. During the performance of this agreement, the following additional provisions may apply:

   a. Freelance Attorney may review files at the office of Law Firm, using space and equipment provided by Law Firm.

   b. Freelance Attorney agrees to be bound by any Protective Orders, and sign such Acknowledgments as are required of all custodians of protected materials involved in the legal matter being handled, thus subjecting Freelance Attorney to jurisdiction of the Trial Court or Reviewing Authority.

   c. During the performance of this contract, both parties agree that any changes in circumstance which require disclosure under conflicts of interest rules or other disciplinary rules shall be disclosed to the other party.

 Signed and agreed [on][to be effective on] the ___ day of_____ 20__.
Freelance Work Agreement Independent Contractor - Flat Rate

Editor's Note: The use of any Freelance Work agreement requires a high level of competency and experience in the area of the law covered, anticipated completion times and expected costs and practice variables. Further, the user should review applicable disciplinary rules and ethical guidelines to ensure compliance with any limitations imposed. Therefore, this sample agreement is made available and provided for individual review and analysis, and it is delivered without warranty or representation of fitness for specific use or compliance. The receiver hereof is advised to make any necessary modifications or adaptations which may be required for the user's specific needs, or for compliance with the user's applicable practice rules.

–Claude Ducloux, Director of Education, LawPay
Freelance Work Agreement Independent Contractor - Flat Rate

This agreement is entered into between [Law Firm] ("Law Firm") and [Name of freelance attorney], the undersigned independent attorney ("Contract Attorney").

1. **Project.** Contract Attorney agrees to complete [Name or title of project] on a contract project basis for Law Firm. The scope of the project includes [Describe scope of work to be done on project, including name of case and deadline]. Freelance Attorney and Law Firm will routinely consult and agree on the logistics and other details of the performance of this Agreement, as needed. Contract Attorney understands the time limitations imposed on the completion of the work described above. During the duration of this contract, the supervisory responsibility for Law Firm shall be exercised by [Name of Firm’s supervising attorney].

2. **Employment relationship.** Contract Attorney shall be engaged by Law Firm as an independent contractor. Contract Attorney is not an employee of Law Firm and is therefore not entitled to any benefits afforded to employees or partners of Law Firm. As an independent contractor, Contract Attorney may exercise discretion on where the work will be completed, so long as it is completed within the agreed timelines designated by Law Firm. This Agreement shall not be construed to create any relationship of partnership or joint venture. Contract Attorney operates as a [Type of entity and how payment should be made and/or the Payee’s account information] and shall provide the necessary tax information to facilitate payments of fees contemplated in this agreement. Contract Attorney shall be responsible for paying any applicable taxes on the fees earned, including income tax. Contract Attorney shall also be responsible for paying any business expenses in the normal course of project completion except for included expenses listed below. Any additional or unexpected expenses will be subject to further negotiation between Contract Attorney and Law Firm. “Included Expenses” in this agreement, which shall be itemized by Contract Attorney, are a) those items which Law Firm specifically requires Contract Attorney to obtain; b) specific software or encryption required to access the case information; c) travel expenses pre-approved by Law Firm; and d) such other miscellaneous expenses approved in advance.

3. **Conflicts of Interest.** Contract Attorney is a licensed attorney in good standing in [Jurisdiction]. Law Firm recognizes that Contract Attorney enters into Contract work agreements with other attorneys, law firms, and legal entities. Contract Attorney acknowledges that, prior to the signing of this agreement, Contract Attorney has been provided sufficient disclosures from Law Firm to check for conflicts of interest. By signing this agreement, Law Firm warrants that it has provided Contract Attorney with sufficient information to evaluate conflicts of interest; and Contract Lawyer warrants that there are no existing conflicts with other present or past clients, or Contract Attorney’s own interests, based upon the disclosures made by Law Firm, as well as Contract Attorney’s own conflicts check.
4. **Malpractice Insurance.** Contract Attorney maintains professional liability insurance coverage through [Name of insurer].

By signing this Agreement, (choose one) Law Firm represents that:

- it has current professional liability insurance to cover the project outlined in this Agreement.

- It has notified insurer of the employment of Contract Attorney, and has been given approval for such employment.

5. **Confidentiality.** Contract Attorney shall keep all client information confidential, including client documents disclosed by Law Firm. The parties agree that client information provided by Law Firm shall be limited to only that which is necessary to complete the work contemplated by this Agreement. Contract Attorney further agrees that work product performed under this agreement shall be performed as a work for hire, and shall be the property of Law Firm as provided in paragraph 7 below.

6. **No Attorney-Client Relationship.** This Agreement shall not be construed to create an attorney-client relationship between Contract Attorney and Law Firm’s clients, or between Contract Attorney and Law Firm, unless such relationship is implied by the disciplinary rules of [Jurisdiction]. At all times, Law Firm will exercise its independent professional judgment and make all final decisions regarding its cases and clients.

7. **Work Product.** Law Firm shall own all rights to any work product generated by Contract Attorney while completing the project described in this Agreement. Law Firm may modify any work product prepared by Contract Attorney. Ultimately, Law Firm is responsible for supervising the work of Contract Attorney, and for the content of pleadings or other material submitted on behalf of its clients.

8. **Compensation.** Contract Attorney shall be paid for legal services rendered under this Agreement at the flat rate of $[Flat Amount] [which shall be paid in [lump sum payment of $] [___ weekly/monthly installments of [put payment agreements here] $[)].

Contract Attorney shall submit an invoice to Law Firm, and payment shall be made within thirty (30) days of the submission of the invoice. Contract Attorney acknowledges and agrees that Law Firm may bill its clients for the amounts due to Contract Attorney at whatever rate or in whatever manner it deems appropriate and consistent with law, the rules of professional conduct, and its own billing practices. All payments made by the Law Firm to Contract Attorney will immediately become property of Contract Attorney and will not be placed in an attorney trust account. It is specifically agreed between the parties that Contract Attorney’s fees are not contingent fees subject to case outcome, nor are such fees to be considered “referral fees” as defined under the applicable rules of disciplinary conduct.
9. **Severability.** All provisions of the Agreement are severable. The determination that any particular provision or term is illegal or unenforceable shall have no effect upon the remaining terms of the Agreement.

10. **Assignment.** Neither party may assign its duties or rights under the Agreement without prior written approval of the other party.

11. **Modification to Agreement.** Any modification of this Agreement will be governed effective only if it is in writing and signed by both parties.

12. **Termination.** Either party shall have the right to terminate this Agreement with reasonable cause, effective immediately upon giving written notice. In the event of termination, Law Firm shall pay Contract Attorney for work done up to the point of termination.

13. **Return of Data and Files.** Upon termination or conclusion of services, Contract Attorney agrees to return, or otherwise dispose in a safe fashion as directed by Law Firm, all privileged information which has been used by Contract Attorney in the course of this Agreement.

14. **Miscellaneous Provisions.** During the performance of this agreement, the following additional provisions may apply:

   a. Contract Attorney may review files at the office of Law Firm, using space and equipment provided by Law Firm.

   b. Contract Attorney agrees to be bound by any Protective Orders, and sign such Acknowledgments as are required of all custodians of protected materials involved in the legal matter being handled, thus subjecting Contract Attorney to jurisdiction of the Trial Court or Reviewing Authority.

   c. During the performance of this contract, both parties agree that any changes in circumstance which require disclosure under conflicts of interest rules or other disciplinary rules shall be disclosed to the other party.

SIGNED AND AGREED on this ___ day of ____________ [year]

[Contract Attorney Identification] [Hiring Law Firm Identification]
ENGAGEMENT LETTER: LIMITED SCOPE RETAINER AGREEMENT

This Agreement is made between the Attorney and Client named at the end of this agreement.

1. **Nature of Agreement.** This Agreement describes the relationship between the Attorney and Client. Specifically, this Agreement defines:
   a. The general nature of the Client’s case;
   b. The responsibilities and control that the Client agrees to retain over the case;
   c. The services that the Client seeks from the Attorney in his/her capacity as attorney at law;
   d. The limits of the Attorney’s responsibilities;
   e. Methods to resolve disputes between Attorney and Client; and
   f. The method of payment by Client for services rendered by the Attorney.

2. **Nature of Case.** The Client is requesting services from the Attorney in the following matter:

3. **Client Responsibilities and Control.** The Client intends to handle his/her own case and understands that he/she will remain in control of the case and be responsible for all decisions made in the course of the case. The Client will:
   a. Cooperate with the Attorney or Attorney’s office by complying with all reasonable requests for information in connection with the matter for which the Client is requesting services;
   b. Keep the Attorney or Attorney’s office advised of the Client’s concerns and any information that is pertinent to the Client’s case;
   c. Provide the Attorney with copies of all correspondence to and from the Client relevant to the case; and
   d. Keep all documents related to the case in a file for review by the Attorney.

4. **Services Sought by Client.** The Client seeks the following services from the Attorney (please indicate services sought with check mark):
   ___ a. Legal advice: office visits, telephone calls, fax, mail, electronic mail.
   ___ b. Advice about the availability of alternative means to resolve the dispute, including mediation and arbitration.
   ___ c. Evaluation of the Client’s self-diagnosis of the case and advice about the Client’s legal rights.
   ___ d. Guidance and procedural information for filing or serving documents.
   ___ e. Review of correspondence and court documents.
   ___ f. Preparation of documents and/or suggestions concerning documents to be prepared.
   ___ g. Factual investigation, public record searches, in-depth interview of Client.
   ___ h. Legal research and analysis.
   ___ i. Referrals to other counsel, experts, or professionals.
   ___ j. Preventive planning and/or legal check-ups.
   ___ k. Counseling the Client about an appeal.
   ___ l. Planning for negotiations, including role playing with the Client.
   ___ m. Planning for court appearances to be made by Client, including role-playing with the Client.

[these sections were re-organized –CD]
LITIGATION: THESE MATTERS WILL LIKELY REQUIRE AN “ENTRY OF APPEARANCE” by Attorney

__ n. Assisting the client in limited appearances in court to handle discrete hearings.
__ o. Contacting third party witnesses during litigation
__ p. Handling discovery- interrogatories, depositions, and requests/replies re: document production
__ p. Backup and trouble-shooting during the trial.
__ q. Procedural help with an appeal and assisting with substantive legal argumentation in an appeal.
__ r. Other: ________________________________

5. Attorney’s Responsibilities. The Attorney shall exercise due professional care and observe strict confidentiality in providing the services identified by a checkmark in Paragraph 4 above. In providing those services, Attorney SHALL NOT:
   a. Represent, speak for, appear for, or sign papers on the Client’s behalf unless required under Paragraph 4 above;
   b. Provide services listed in Paragraph 4 that are not identified by a checkmark; or
   c. Make decisions for the Client about any aspect of the case.


   a. Hourly fee. The current hourly fee charged by the Attorney for services under this agreement is as follows: Senior Partner: $_____
      Junior Partner: $___________ Associate: $_____

   Unless a different fee arrangement is specified in clauses (b) or (c) of this Paragraph, the hourly fee shall be payable at the time of the service.

   b. Payment from Retainer. The Client shall have the option of setting up a pre-paid fee retainer by depositing funds in the Attorney’s Client Trust Account. Services are then paid for from this retainer account as they occur. If a pre-paid fee retainer is established under this clause, the Attorney shall mail the Client a billing statement summarizing the type of services performed, the costs and expenses incurred, and the current balance in the retainer after the appropriate deductions have been made. Client [may] [shall] replenish the retainer or continue to draw the funds down as additional services are delivered. If the retainer becomes depleted, the Client must pay for additional services as provided in clauses (a) or (c) of this Paragraph.

   c. Flat Rate Charges. The Attorney has the option of agreeing to provide one or more of the services described in Paragraph 4 for a flat rate. Any such agreement shall be set out in writing, dated, signed by both Attorney and Client, and attached to this Agreement.

   d. Attorneys’ Fees. Should it be necessary to institute any legal action for the enforcement of this Agreement, the prevailing party shall be entitled to receive from the other party all court costs and reasonable attorneys’ fees incurred in that action.

7. Resolving Disputes Between Client and Attorney.

   a. Notice and Negotiation. If any dispute between Client and Attorney arises under this Agreement, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.
b. **Mediation.** If the dispute is not resolved through negotiation, the Client and Attorney shall attempt, within fifteen (15) days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If Attorney and Client cannot agree on a neutral mediator, they shall request that the [local or state] bar association select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of mediation, provided that payment of the costs and any attorneys’ fees may also be mediated.

*[I hate these mandatory arbitration clauses although some bar associations require them: But if not, if we are to call ourselves trial lawyers why are we afraid to go to court? I would never include an arbitration clause in a fee agreement of mine. But fee dispute committees are great options in many cities. My suggestion is that the attorney select the final option he/she wants instead:]*

*[Court or attorney fee dispute committee option]*

c. **Final Resolution:** In the event the non-judicial methods in 7.a. or 7.b. are unsuccessful, either party may file an action in the appropriate court of [attorney’s home county], or pursue resolution through the [local bar association’s] attorney fee dispute committee or mechanism.

c. **Arbitration.** If mediation fails to produce a full settlement of the dispute satisfactory to both Client and Attorney, Client and Attorney agree to submit to binding arbitration under the rules of the [governing] bar association. This arbitration must take place within sixty (60) days of the failure of mediation. Costs and attorneys’ fees for arbitration and prior mediation may be awarded to the prevailing party.

8. **Amendments and Additional Services.** This written Agreement governs the entire relationship between the Client and Attorney. All amendments shall be in writing and attached to this Agreement. If the Client wishes to obtain additional services from the Attorney as defined in Paragraph 4, a photocopy of Paragraph 4 that clearly denotes which extra services are to be provided must be signed and dated by both Attorney and Client and attached to this Agreement. Such a photocopy shall qualify as an amendment to this agreement.

9. **Statement of Client’s Understanding.** I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

___ I have accurately described the nature of my case in Paragraph 2.
___ I will remain in control of my case and assume responsibility for my case as described in Paragraph 3.
___ The services that I want the Attorney to perform in my case are identified by check marks in Paragraph 4. I take responsibility for all other aspects of my case.
___ I accept the limitations on the Attorney’s responsibilities identified in Paragraph 5.
___ I shall pay the Attorney for services rendered as described in Paragraph 6.
___ I will resolve any disputes I have with the Attorney under this Agreement in the manner described in Paragraph 7.
___ I understand that any amendments to this Agreement shall be in writing, as described in Paragraph 8.
I acknowledge that I have been advised by the Attorney that I have the right to consult another independent Attorney to review this Agreement and to advise me on my rights as a Client before I sign this Agreement.

Client
[contact information]

Attorney
[contact information]

Date

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.
Virtual Law Office – (Unbundled Services)
ENGAGEMENT LETTER: TERMS AND CONDITIONS OF USE

The Terms and Conditions of Use (“Agreement”) are provided by FIRMNAME Legal Services, LLC, an online HOMESTATE law practice established in YourCity, HOMESTATE and managed by attorney Jane Smith, a HOMESTATE Board Licensed, solo practitioner. The Agreement will govern your use of this website, including all content provided on the website and through access to all online services provided by FIRMNAME Legal Services. The Agreement to provide legal services to you covers the time period from which you accept this Agreement and we have received your payment through our funds transfer service to the time we have provided you with the requested and purchased legal service.

You agree that it remains your responsibility to proceed as a pro se litigant by filing all legal documents and complying with HOMESTATE state and local legal procedures. By providing you with limited legal services, FIRMNAME Legal Services has not agreed to attend a hearing or trial on your behalf or provide any legal services extending beyond those services which you have purchased and we have agreed to provide. We only provide limited legal assistance and document preparation and review. After performing the services purchased by you, we have no further obligation to you.

**Limitation of Services**

While authorities in some jurisdictions may deem this website and this law practice to be an advertisement for legal services in their jurisdiction, our website is not to be considered as a solicitation for legal services related to any other states’ law. This website and this legal practice offer services related to HOMESTATE law only.

Unlike a geographically located law practice, FIRMNAME Legal Services will not provide physical legal representation or commence litigation on your behalf. The purpose of FIRMNAME Legal Services is to provide limited legal advice and general counseling on HOMESTATE legal matters with prompt service provided in a cost-effective manner. If we determine during our communication with you that your specific legal matter requires the engagement of a full-service law firm, such as in the event that your situation may require the commencement of a formal lawsuit, then we will promptly refer you to a full-service HOMESTATE law firm in your area or refer you to the HOMESTATE Bar Association’s Lawyer Referral Service.

**Nature of Unbundled Legal Services**

FIRMNAME Legal Services is not a pre-paid legal service; it is an online legal practice where you are charged a one-time fee for limited legal services related to HOMESTATE law. FIRMNAME Legal Services provides unbundled legal services. This means that the legal services provided by us only extend to those services of which you have requested and purchased and we have provided. After you have purchased a service and we have agreed to provide it and have completed the work, you cannot expect us to perform in any additional capacity. For example, if we assist you in creating Estate Administration documents, it is not our responsibility to ensure that the forms are properly filed, to attend a hearing or trial on your behalf, or to provide any other legal services related to that matter beyond the original purchased and provided limited legal services. Likewise, after you have paid for the requested services and we have performed them, we will not expect any further payment from you other than payment for the original requested legal services performed by us.

As with any legal service, we cannot guarantee any legal outcome. By purchasing our services, you agree that it remains your responsibility to properly and timely file any legal documents and to comply with HOMESTATE state and local legal procedures.
Confidentiality - Security - Retainment of Records

FIRMNAME Legal Services provides limited legal services pertaining to HOMESTATE law only. The attorney responsible for this site is licensed to practice law only in the State of HOMESTATE.

In compliance with the professional rules and restrictions of the HOMESTATE State Bar and the HOMESTATE Bar Association and for reasons of personal integrity, this practice is bound by stringent professional standards of confidentiality. Any information received by us from our clients is held in strict confidence and is not released to anyone outside of this practice, unless agreed with by you, or as required under applicable law.

An attorney-client relationship with this practice is established only after a specific question has been posed to an attorney at this practice through a prospective client’s personal login page and that question has been confirmed as received through a reply communication from an attorney at this practice. Prospective clients should be aware that our duties of confidentiality and the attorney-client privilege may not arise until an attorney has expressly communicated the ability to respond to that prospective client. Once you have provided us with your personal information, we will first run a crosscheck for any possible conflict of interest before accepting representation of your matter. We may decline to provide our services to you if a conflict of interest is discovered.

All our records are securely retained in electronic files, along with secure backups, for the period of years required under HOMESTATE law.

Articles and Other General Public Information Provided on this Website

Any articles for general knowledge published on this website contain basic information on legal matters and are not meant to provide advice regarding a specific legal problem you may have. We remind you not to rely on this general information without first communicating with us or other legal representation regarding your specific legal situation.

Copyright

FIRMNAME Legal Services claims copyright protection on all of the content provided in this website. The content from this website may not be reproduced, copied and/or redistributed in any form without the express permission of FIRMNAME Legal Services. Furthermore, the content from this website cannot be modified nor can it be used for commercial purpose. Each document posted at this website shall contain the following copyright notice: Copyright (year) - FIRMNAME Legal Services, LLC. All rights reserved.

Client Funds

No fee will be charged or obligation incurred by registering on this website. In most situations, a client’s funds will not be transferred to FIRMNAME Legal Services until the legal services requested by the client are ready to be accessed and received by the client on their personal login page. Some requested services may require the upfront payment of a retainer fee before FIRMNAME Legal Services will begin work. After the client’s payment of the agreed upon price is confirmed through a Cardholder Information Security Program (CISP) compliant credit card processor, the client will have complete access to the legal advice, documents, research or other services provided by the attorney. If further communication with the attorney is required, the client may post a separate question regarding the received legal services or request a price quote for additional legal work. FIRMNAME Legal Services will not pay any court costs associated with your case which may be required as part of a lawsuit, filing fees or service of process fees.
Technology – Security

FIRMNAME Legal Services does not rely on email to communicate with clients. Email as it is commonly sent and received is unencrypted and does not provide a secure means of interacting with our clients. Primary communications are done through this website over Secure HTTP, which provides you with the highest industry standard protection available on the web. All payments are processed by Cardholder Information Security Program (CISP) complaint credit card processors, and no credit card or payment account numbers are stored on our servers. The maintainer of this site has over 7 years’ experience developing secure web-based applications, from tax filing to background checking software, and uses secure programming techniques and best practices along with continual code auditing to ensure that this site is as secure as possible.

Links and Email Addresses

Links posted on this website to other websites are provided only as a convenience to our clients. We assume no responsibility for the content, security or reliability of any websites to which we have posted links. Spamming, the unsolicited broadcasts of email addresses or links in this website, is prohibited and unauthorized.

Web Tracking - Cookies, Information Collection and Privacy Policy

1. General Site

To view the articles and public documents on this site you do not need to reveal any personal information. This site will present your browser with the option of accepting JavaScript and cookies in order to lay out the web page correctly and to store customized settings for your next visit. These features may be disabled by your browser, however this will limit the look and functionality of the website. All page requests are logged in order to properly maintain the service and security of this website.

2. Virtual Law Office

In order to use the virtual law office, you must first register a username and provide personal information about yourself. This information will be used during your transactions with FIRMNAME Legal Services, LLC to provide limited legal services in compliance with HOMESTATE law. Your information may be provided to a third party in order to provide the service you requested and/or as is required by law. All other use of your personal information will be limited to your attorney/client relationship with FIRMNAME Legal Services, LLC. This site uses cookies to store a session id. Therefore, in order to register on the website, cookies must be enabled so that we can provide you with a secure transaction.

Registration

In order to retain our services, you must register on our website. There will be no fee charged for registration on this website. By registering you will receive access to a personal information page where you may request our services in a secure manner. By registering on our website, you are representing that you are at least 18 years of age and able to enter into a binding contact with FIRMNAME Legal Services. Furthermore, by registering you are representing that the information you provide to us is correct, accurate and updated.

Reviewing and Updating Your Personal Content

FIRMNAME Legal Services requests that you keep your personal contact information current. After you have registered or our website, you may enter your personal information page at any time to review and update your personal information.
Contact Information

Because we are a virtual law practice, we would prefer that you provide your information to us using the technology provided for you on your personal client login page. However, if this is not possible and we require further information in order to review your legal matter, our mailing address is P.O. Box 4484, Wilmington NC 28406.

Limitation of Liability - No Warranties

FIRMNAME Legal Services assumes no liability for any errors or omissions in the content of this website. We will not be responsible under any legal theory for damages, including direct, indirect, incidental, consequential or special, arising as a result of your use of this website. As stated above, this website pertains to the practice of HOMESTATE law only. Therefore, the content of this website is not applicable in any other state other than HOMESTATE.

The general information provided on this website is provided without warranty of any kind, express or implied. FIRMNAME Legal Services reserves the right to change, modify, add, and delete the content on this website.

Jurisdiction

The terms of this agreement will be governed by the laws of the State of HOMESTATE. The state and federal courts located in New Hanover County, HOMESTATE will have exclusive jurisdiction over any case or controversy arising from or relating to this agreement, FIRMNAME Legal Services’ website or any services provided by FIRMNAME Legal Services. Each person who registers on this website consents irrevocably to personal jurisdiction in such courts with the respect to any matters and waives any defense of forum non conveniens. Furthermore, each person who registers on this website is deemed to have knowingly and voluntarily waived any right to a trial by jury in any case or controversy related to this agreement, FIRMNAME Legal Services’ website or any services provided by FIRMNAME Legal Services.

Assignment

The rights and obligations created for you under this agreement may not be assigned to any other party.

Force Majeure

FIRMNAME Legal Services will not be deemed to be in breach of this agreement for any delay or failure in performance caused by reasons out of its reasonable control, including acts of God or a public enemy; natural calamities; failure of a third party to perform; changes in the laws or regulations; actions of any civil, military or regulatory authority; power outage or other disruptions of communication methods or any other cause which would be out of the reasonable control of FIRMNAME Legal Services.

Severance

In the event that one or more of the provisions of this agreement shall be found unenforceable, illegal or invalid, it shall not affect any other provisions of this agreement, and this agreement shall be construed as if the provision found to be unenforceable, illegal or invalid had never been contained in the agreement, or the unenforceable, illegal or invalid provision shall be construed, amended and/or reformed to be made enforceable, legal and valid.
IRS Circular 230 Disclosure

In compliance with the requirements of the IRS pertaining to the publication of Circular 230, we inform you that any advice contained on this website or in any communication originating from this website or this law practice which is related to U.S. federal tax advice is not intended or created to be used, and cannot be used, for the purpose of 1) either avoiding penalties under the Internal Revenue Code or promoting, marketing or 2) recommending to another party any transaction or matter that is contained on this website or in any communication originating from this law practice.

Complete Understanding

This agreement supersedes any prior or contemporaneous communications, representations or agreements between FIRMNAME Legal Services and the client and constitutes the complete and final agreement between the parties relating to this agreement, FIRMNAME Legal Services’ website or any services provided by FIRMNAME Legal Services.
Non-Engagement Letter

[Date]

[Client Name]
[Client Address]

Re: Confirmation of Non-Representation
   [Case description: ie. Potential claim for damages]

Dear [Client’s Name]:

Thank you for your visit to [Law Firm] earlier today. Unfortunately, as we discussed, [Law Firm] will be unable to represent you in [Case description]. Although no research or investigation into the merits of the matter has been performed, we believe that [General Description of Reason].

Nonetheless, please understand that [Law Firm] is making no representations in regard to the intrinsic value of your claim, nor are we commenting on the likelihood that you will prevail. We strongly urge you to seek the opinion of another attorney and remind you that you must not delay because of the legal time limits that, if lapsed, can bar your from raising your claim. If you do not have another attorney in mind, we recommend that you immediately contact the [local bar] Association’s Lawyer Referral Service at (800) 555-4444.

Following the standard policy of [Law Firm], you will not be receiving any form of bill for this consultation. While we do charge a fixed rate for consultations in which an evaluation of the case is provided to the potential client, no opinion has been expressed regarding your circumstances and no charges have therefore been incurred.

Thank you again for considering our firm. We wish you the best of luck and hope that you will consider us again with any future legal needs.

Sincerely,

[Attorney Name]
[Law Firm]

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.
Chapter 10

Presentation Slides: Clio’s Legal Trends Report—What You Need to Know

EMILY VAN SIEREVELD
Clio Specialist
West Linn, Oregon
Clio’s Legal Trends Report
What You Need to Know

Presenter

Emily van Siereveld
Clio Specialist

Former Office Manager for Immigration
Law Firm in the Pacific Northwest

Clio Client and Representative

@emily_brubaker
Emily.van.siereveld@gmail.com
Agenda

1. Get excited
2. Introduction + Methodology
3. 2018 LTR review
   ● Let’s talk money
   ● Client Time
   ● What about vacation?
4. Questions?
Part I: Get Excited
So many questions!

Starting a firm
What type of practice?
Where should I practice?
How much should I charge?
How much will I make?
How do I get clients?

Trying to expand your firm
How do I get more inquiries?
How do I get contracts?
Should I change my rates?
Where should I expand?
When should I take vacation?

Pop Quiz:
What is the day with the most billable hours entered?
Part II: Introduction & Methodology

How is this different from the other surveys?
Where does the data come from?

- 60,000 Clio users
- Survey of 2,915 attorneys
- Survey of 2,002 Consumers

What went into the 2017 Legal Trends Report?

| 1,026,038 | matters |
| 10,981,286.13 | hours billed |
| $2,562,864,876.43 | in billables |
| 8 | award-winning data scientists |

So... You look at our data?
Why is this useful?

Strategic Decision Making

Frame the question

Decide

Evaluate

Gather information
Part III:
2018 LTR Review: Key Data Points

Let’s talk money
Questions we can address in this section

How much should I charge?

How much can I expect to make?

Rates
Are Your Rates Competitive?

Benchmark your rates against other legal professionals in the U.S.

What state do you practice in?

- Lawyer
- Non-Lawyer

What is your primary practice area?

Enter Your Hourly Rate

Find Out

Billable Hour Index

Across the USA (as of May 2017)

- Average law firm rate: $240/hour;
- Average lawyer rate: $260/hour;
- Average non-lawyer rate: $149/hour.
Billable Hour Index

Urban versus Rural

- Delivered using US Census Bureau classifications.
- Average urban lawyer rate: $267/hour
- Average rural lawyer rate: $213/hour;

Billable Hour Index

Top 10 MSAs
Chapter 10—Presentation Slides: Clio’s Legal Trends Report—What You Need to Know

Real Hourly Rates
By State

Real Hourly Rates
Largest differences
Key Performance Indicators

Key KPIs - The Lawyer’s Funnel

1. Utilization Rate
2. Realization Rate
3. Collection Rate
Utilization Rate by State

Realization Rates by State
Key KPIs - The Lawyer’s Funnel

Utilization Rate: 29%

Realization Rate: 82%

Collection Rate: 86%

Tip # 1
Know your Utilization Rate
Chapter 10—Presentation Slides: Clio’s Legal Trends Report—What You Need to Know

**Collection Rates**

<table>
<thead>
<tr>
<th>Category</th>
<th>Collect %</th>
<th>Lost %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bankruptcy</td>
<td>74%</td>
<td>26%</td>
</tr>
<tr>
<td>Family</td>
<td>82%</td>
<td>18%</td>
</tr>
<tr>
<td>Criminal</td>
<td>83%</td>
<td>17%</td>
</tr>
<tr>
<td>Immigration</td>
<td>78%</td>
<td>22%</td>
</tr>
<tr>
<td>Insurance</td>
<td>72%</td>
<td>28%</td>
</tr>
<tr>
<td>Small Claims</td>
<td>79%</td>
<td>21%</td>
</tr>
</tbody>
</table>

- Client lacks the funds to pay (44%);
- Client has adequate funds but payment is still late (31%);
- 25% of firms mail bills / 29% rely on checks;
- Firms accepting credit card payments are paid 40% faster.

---

**Impact of Trust Accounts**

On Realization and Collection Rates
Tip # 2
Consider using Trust Accounts

KPIs

Hours worked

8 Hours

2.3 hours 5.7 Hours

Hours billed

????
Chapter 10—Presentation Slides: Clio’s Legal Trends Report—What You Need to Know

### 33% Business Development

### 48% Administrative Tasks

- Licensing and CLE: 16%
- Office Admin: 16%
- Billing: 15%
- Configuring Technology: 11%
- Collections: 6%

#### Monetary Value of a Matter

Solo and Small Firm Conference 2019: Success Beyond Tech
Revenue Collected
Per matter, by practice area

Questions we can address in this section

How much should I charge?
How much can I expect to make?
Chapter 10—Presentation Slides: Clio’s Legal Trends Report—What You Need to Know

How much should I charge?

$235 is the average for attorneys in the state

Review the Legal Trend Report for Practice Area specific Rates

How much can I expect to make?

29% = $545.20
87% = $474.32
89% = $422.15

$109,758.57 a year
Chapter 10—Presentation Slides: Clio’s Legal Trends Report—What You Need to Know

Client Time

Questions we can address in this section

How do I get (more) clients?

Why won’t clients sign up?
Chapter 10—Presentation Slides: Clio’s Legal Trends Report—What You Need to Know

---

**Cost of Acquiring Clients**

- **2 Hours a day on finding clients**
- **41%** Say they would spend more time on finding clients
- **91%** Of firms cannot calculate a return on their marketing

---

**How do consumers find a lawyer?**

- **62%** Get a referral from friend/family
- **37%** Use an online search engine
- **31%** Get referral from another lawyer
- **28%** Look in a lawyer directory or listing
- **16%** Look in the yellow pages
- **13%** Contact a lawyer seen in a TV ad
- **13%** Contact a lawyer seen in an online ad
- **7%** Contact a lawyer heard in a radio ad
- **6%** Contact a lawyer seen on a billboard

---

Solo and Small Firm Conference 2019: Success Beyond Tech

10–25
What are potential clients looking for?

- Responds to first call/email right away: 67%
- Offers free initial consults: 64%
- Offers fixed fees: 47%
- Lets clients pay by credit card: 28%
- Exchanges texts with client: 27%
- Great-looking website: 19%

Questions we can address in this section:

- How do I get (more) inquiries?
- How do I convert calls to contracts?
How do I get (more) inquiries?

Focus on getting clients to review/refer you

To friends and family

Online
  - Yelp
  - Google
  - Avvo

Tip #3
Monitor Your Online Reviews
How do I convert calls to contracts?

- Respond to the initial call/email immediately
- Offer free initial consults
- Offer fixed fees

Future client expectations

- Text and email communications
- Document Sharing
- Online payments
- Credit Cards
Tip # 4
Use Technology to Provide Superior Customer Service

What about vacation?
Chapter 10—Presentation Slides: Clio’s Legal Trends Report—What You Need to Know

Questions we can address in this section

When should I take vacation?

Seasonality by Practice Area

- **Insurance**: Increase in cases at the end of the year
- **Tax**: Increase in cases at the beginning of the year
How can I use this information in my firm?

Strategic Decision Making

1. Frame the question
2. Gather information
3. Evaluate
4. Decide
The estimated average value of a family law matter is $3165

How much can I afford to spend to acquire this case and still be profitable?

Are the matters I am working below, at or above this benchmark?

If I decided to offer an alternative fee arrangement, how would I price it?

How many new matters do I need in order to reach my revenue targets?

Tip # 5
Determine the Value of your Matters
Tip # 6
Use Technology to reduce time spent on administrative tasks

Questions?
Chapter 11—Presentation Slides: The Rainmaking Game

The Rainmaking Game

Presented by:
Gil Price - MSBA
206-234-5898
gil@pmgideas.com
www.pmgideas.com

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Today’s Goals + Topics

1. Who’s here today?
   Solo?; 2-10 attorneys?; 10+ attorneys?; 20+ attorneys?

2. Business cards

3. Relationships

4. Rainmaker qualities

5. Marketing lessons

6. Bus dev lessons

5. Growing your practice

6. Lessons Learned

7. Case study

8. Top tips
BUILDING BUSINESS IS ABOUT BUILDING RELATIONSHIPS

Personal relationships are vital to establishing trust and credibility among professionals.

Clients seek not only superior legal skills, but also a sense of character and trust.

To build your law practice, you must first work on building relationships.

Growing your Client List

- Start with who you know.
- Review old client files - a great place to begin making a list of the names of people you have worked with on a case or project.
Assess old prospect files

- Similar to the old client files, do the same with this list of names. A client that considered hiring you is a good contact. One’s needs change so contact them.

Attack the business cards on your desk

- Divide them into ‘hot and ‘cold’ prospect’ and piles. Start with the hot ones and move onto the cold ones.
Review phone directories from employers and make a list

- Current and former colleagues can be great referral sources.

Review school alumni directories and make a list

- Former classmates are a great resource. People typically want to do business with people they know, like and trust.
Review ORBA, WSBA, directories and make a list.

- Create a list of the attorneys you know, have worked with or have been opposing counsel. People typically want to do business with people they know, like and trust.

Talk to colleagues

- People that work for your firm (employee, intern, office share-mates, executive office suite tenants, office service providers, or contractors) can be great referral sources.
Review affinity group directories and make a list

- People you know from memberships (Lions, Rotary, Church, Synagogue, Mosque, Temple, Bar sections, professional groups tied to various industries such as construction, etc.) in special interest organizations can be great contacts. Think niche practices - LGBTQ, Q-Law.

Speak to others serving your clients

- Accountants, CPA’s, Bankers, Investment managers, Insurance Broker, Hairdresser, Legal Service Providers/Vendors
Contact friends and family

- Add them to your list if you are comfortable with it.

Meet competitors in your industry

- Think about what happens when there is a conflict or capacity issues. Ask to be put on their referral list. Learn about their niche and let them know yours.
Invite LinkedIn & LinkedIn Groups

- Make sure your profile is complete. Invite your contacts to connect with you on LinkedIn.

Speak at seminars, educational seminars, presentations

- Create your own seminar if you don’t get invited to others. Ask your audience to connect with you on LinkedIn, during the conference, include a game to collect business cards, etc.
Have a pitch for holiday and other events

- Take your business cards and make sure you have a clear, concise pitch when asked “what do you do?”.

Case study

- We want you to be THE condo & HOA lawyers for general counsel, collections and CD litigation in the PNW. Go get some work!
- Started with one office with five attorneys + lots of opportunities
- Three years later, three staffed offices & two satellite offices with a total of 12 attorneys. How does one get there and do this?
Growing a practice

- Your boss with 20+ years experience refers to you as the condo/HOA attorney for the PNW. You know nothing about these areas of law.
- You spend all available free time studying these areas of the law trying to absorb what you can. Social life dwindles to nothing.
- You join the condo/HOA industry association, start attending events (social, educational and trade shows)
- Gil creates speaking engagements for you.

Growing a practice

- You write articles for local publications read by potential clients
- You create more speaking engagements (team up with other professionals - insurance, bankers, reserve study, contractors)
- You attend industry events which are made interesting by your charming personality
- You advertise in publications
- You send out announcement cards
- You ask for work
Lessons Learned - *Marketing*

- Turning ME into WE
- Brand = YOU, Your employees
- Involve everyone
- Your pitch (everyone should have it)
- Marketing materials - business cards (for ALL), website (bio, practice pages, etc.) LinkedIn (firm & individual), Facebook (firm & individual), Twitter (firm & individual)

Lessons Learned- *Marketing*

- Firm brochure, flyer update, bus card update w/ practice info (consider multiple cards for multiple practice areas)
- Advertising? - no one offs!
- Open house - address change, staff announcement, clients (current & past), prospects, victory parties
Lessons Learned - Business Development

- Bus dev = sales, growing your practice, increasing revenues, making money, your passion,
- Building trust, relationships
- Connecting people to do business with each other
- Bus dev plan - 3, 6, 12 months
- RFP & Pitch text updates

Lessons Learned - Business Development

- Target & prospects list - how does one do this? Universe of opportunities
- Referral sources - identify and target
- Current & past clients - can we do more for them? Ex. annual updates to wills, trusts
- Educational, speaking opportunities, create your own - don’t wait to be invited to talk!
- Industry associations for your practice areas
## Qualities of a Rainmaker

<table>
<thead>
<tr>
<th>Attorney Perspective</th>
<th>Business Manager Perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td>People skills</td>
<td>In addition to the left side, I would add these:</td>
</tr>
<tr>
<td>Personal contacts</td>
<td>Survival through sales</td>
</tr>
<tr>
<td>Enthusiastic</td>
<td>Learn to sell - sell yourself and your firm</td>
</tr>
<tr>
<td>Self-motivated</td>
<td>Resourceful - be a resource</td>
</tr>
<tr>
<td>Confident</td>
<td>Goal oriented - build trust and relationships</td>
</tr>
<tr>
<td>Appearance</td>
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<tr>
<td>Sincerity</td>
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<tr>
<td>Audacious</td>
<td></td>
</tr>
</tbody>
</table>

## Example individual marketing & bus dev action plan

- **Areas of Practice:** GC, Collections, some CD Lit for COAs/HOAs
- **Target Market:** COA/HOA Associations (BODs)
- **Target Geographic Areas:** WA, OR
- **Referral Markets:**
  - COA/HOA Mgmt companies
  - Existing clients
  - Past clients
  - Industry professionals (RS, CPAs, Ins brokers, bankers, etc.)
  - Law firms that do not have COA/HOA, competitors
  - Associations: WSCAI in WA, OWCAM in OR, CAI in OR
Example individual marketing & bus dev action plan

- **Industry publications**
  - Newsletters published by COA/HOA providers (J. Adamen, CPAs)
  - Target geographic market daily or weekly newspapers (Ex. Ad about Ed. Seminar in RE section)

- **Tasks/Next Steps**
  - Meet with COA/HOA Mgmt company CEOs, COOs; regular follow up w/ referral sources
  - Identify contacts in areas where you want to grow
  - Educational seminars with co-presenters (shared costs)

More examples of tasks/next steps

- Identify specific COA/HOA Mgmt companies
- Identify clients within geographic area (Ex. Sec of State, Title companies)
- Identify referral companies and contact details (name, phone, email) Ex. WS/CAI Service Provider Listing
- Build contacts database
- Join industry association(s) Ex. WSCAI, CAI, OWCAM
- Contact publication(s) to identify writing opportunity
- Build/update/facelift website
- Build profile on social media sites
- Commit to posting at least x day/week on social media
Example individual marketing action plan - Condo & HOAs

- Areas of Practice: General legal counsel & collections for Community Associations (condos & HOAs)
- Target Market: Community Association Boards (Hint - Sec. of State non-profit listing)
- Target Geographic Areas: Your state (think big!), County/s, City/ies
- Referral Markets:
  - Community Association Management companies (hint - condo & HOA industry association (CAI))
  - Bankers (hint - condo & HOA industry association (CAI))
  - Insurance agents (hint - condo & HOA industry association (CAI))
  - Reserve study professionals (hint - condo & HOA industry association (CAI))

Create your individual marketing & business development action plan

- Name
- Date of plan
- Target Market
- Target Geographic area
- Referral Markets/Sources
- Industry Associations
- Industry Publications
- Market Media
Create your individual marketing & business development action plan

Tasks/Next Steps
- Identify specific companies
- Identify clients within geographic area
- Identify referral companies and contact details (name, phone, email)
- Build contacts database
- Join industry association(s)
- Contact publication(s) to identify writing opportunity
- Build/update/facelift website
- Build profile on social media sites
- Commit to posting at least x day/week on social media

Develop your task list

30 day tasks
- Develop individual marketing action plan
- Schedule meetings with referral source

3 month tasks
- Inquire about article opportunities in business publications
- Meet with colleagues to discuss business development goals

6 month tasks
- Develop a seminar
- Join an association, offer to speak at upcoming meetings

12 month tasks
- Review and update your individual marketing action plan!
- Write an article and ask a publication to place it
Chapter 11—Presentation Slides: The Rainmaking Game

Rainmaking takes time

- Even if you only set aside 30 minutes a week, it’s 30 minutes more than you’ve been doing
- Create a task list that is achievable each week (1 or 2 items).
- “The opportunity funnel” - break down goals into achievable parts ($120K p.a. → $10K/month → $2.5K/week, X hours/day)
- Relationships take time to develop

Attorney’s Top Tips

- Read, read, read
- Accept all speaking invitations and send out ideas for presentations to contacts
- Write articles
- Attend local bar luncheons
- Attend Solo & Small Firm Conferences!
- Stay in touch with referral sources and clients
- Create a contact database and keep it up to date
- Advertise creatively
Gil’s Top Twelve Tips

1. Hundreds, if not, thousands of books are written on this topic! A favorite is *Rain Making, Attract New Clients No Matter What Your Field* by Ford Harding.

2. Reputation = Golden (see #3). Protect it!

3. People want to do business with people they like and trust (see #2)

4. Rain making is a numbers game. More you talk to referral sources and potential clients the better chance of winning more business, getting more referrals and keeping the pipeline full.

5. Cultivate referral sources - take them to coffee, ask how you can help them.

6. Education sells (public speaking, writing, Blog, create your own events)

Gil’s Top Tips, *continued*

7. Industry groups (WSCAI.org, ORCAI.org, OWCAM.org)

8. Know your competitors and learn what they are/aren’t doing to build your practice (think of potential conflicts, capacity issues, your ideal client vs. their ideal client)

9. Network, network and network some more. Be “ON” 24/7!

10. Help others, show gratitude

11. Learn to ask for the business (discuss your process as a way of asking for it)

12. Say ‘thank you’!
Questions?

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