ETHICAL ISSUES IN
FAMILY LAW

By

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The Louisiana Rules of Professional Conduct set forth the minimum standards for professional and ethical conduct.

- **Disciplinary proceedings** are driven by the standards set forth in these Rules.

- **Legal malpractice actions** concern attorney negligence, the determination of which is often based on the breach of an attorney’s professional duty as set forth in these Rules.

## I. ETHICAL ISSUES IN CLIENT RELATIONS

The overwhelming numbers of complaints filed are lodged against members of small firms and solo practitioners.

Small firms and individual practitioners do not typically represent institutional clients, such as large businesses, governmental entities, etc. When corporate clients, for example, become dissatisfied with their legal representation, such clients present their dissatisfaction to a senior partner, supervising lawyer, or simply go to another large firm. By comparison, small firms and solo practitioners generally represent individuals with a serious and all important legal problem and you were hired to fix it. They usually have no experience with the legal system, other than what they have seen in the movies or on television. If such clients become unhappy or have a less than acceptable outcome, the result can be (and often is) the filing of a disciplinary complaint.

### 1. Client Intake.

This is the single most critical phase, yet it is here that the most blunders occur. In domestic cases, scrutinize carefully the following types of potential clients:

(a) **Young clients**

- less than 40 years old, especially if fees paid by parent.

(b) **Pure analytical thinkers** (registered nurses, engineers)

- Convergent thinkers = My new job will be great or terrible.
- Divergent thinkers = options and possibilities

(c) **Victims**, as opposed to potential clients under psychological distress.

- Understanding distress patterns
2. Communication.

The single most frequent complaint filed against lawyers by their clients is the alleged failure by attorneys to communicate with them. Rule 1.4 addresses this ethical duty.

**Practice Tip:** Policy of returning calls within 24 hours; if a phone call cannot be returned within 24 hours, schedule an office conference.

Explain time demands of your practice — significant time in court and thus not always accessible.

**Additional Tips (when communicating with clients):**

- Bad news never gets better with time.
- Summarize, explain, and repeat important information.
- Keep it simple.
- Instill confidence without creating unrealistic expectations.

3. Confirm Your Fee Arrangement.

Rule 1.5 of the Louisiana Rules of Professional Conduct requires that attorney fees and costs be reasonable. While only contingency fee agreements must be in writing, see Rule 1.5(c), all fee arrangements should be reduced to writing, and ideally in a contract signed by the client at the outset with a copy provided.

**Note:** A true retainer is one that purchases the lawyer’s “general availability” and is not related to a particular representation. *Compare with advance deposit representations*, which are typically hourly billing.

Rule 1.5(d)(1) prohibits a lawyer from entering into an arrangement for, charging, or collecting any fee in a family law matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony and child support, or property settlement in lieu thereof. The public policy reasons for discouraging contingent fee contracts in family law cases are to discourage the lawyer from preventing a reconciliation between the parties.

**Significantly,** Rule 1.5(d)(1) does not proscribe a contingency fee in a divorce case for partition of the community property, assuming the spouses are divorced and further assuming that the property partition is not in lieu of spousal support. In *Oliver v. Doga*, 384 So. 2d 330, 311 (La. 1979), the Louisiana Supreme Court explained: “There is no public policy against a wife protecting her share in the community of acquets and gains existing between her and her husband. If public policy were an issue, it would be in favor of protecting her interest therein.”
Practice Tip: The importance of the explanation of legal services for each time entry cannot be overstated. Don’t bill for the drive home. If working in the wee hours, email clients a 3:00 a.m. status update.

4. Completing or Ending the Representation.

Rule 1.16 of the Rules of Professional Conduct speaks to the ethical duties associated with declining or terminating representation. As the rule illustrates, there are ample reasons available to the lawyer to terminate the representation of a client where the need arises.

Some keys to avoiding a disciplinary complaint include:

1. Get out early. If possible, make the decision to terminate the relationship as early on in the representation as possible. If a client feels as though he is being “abandoned” at the last minute without the opportunity to engage new counsel, they may view the lawyer’s conduct as unethical — and they could be right!

2. Post-Termination. Immediately return fees and costs that were neither earned nor incurred. Nothing ensures the filing of a disciplinary complaint like holding onto a client’s money while walking away from the engagement.

   Where the attorney and client disagree on whether or not a fee has been fully earned, the disputed portion must be placed in trust (or in the registry of the court) while the dispute is resolved. Suggest to the client that resort to the LSBA fee dispute arbitration program is a quick, inexpensive means of resolving the matter.

3. Post-Termination. Immediately return the entire file. It is not permissible in Louisiana to hold a client’s file “hostage” to secure payment of outstanding fees or costs, including the cost to copy the file which, unless agreed upon by the client, must be borne at least initially by the lawyer.

II.

ETHICAL ISSUES (AND MALPRACTICE) IN ADMINISTRATION

Attorneys are professionally and ethically responsible for the administrative aspects of their law practice.

1. Malpractice to fail to properly calendar.

   As addressed in Rules 5.1 through 5.3, attorneys are responsible for the misconduct of their staff and subordinate attorneys. E.g., trial dates; contradictory motions; exceptions; discovery depositions; filing deadlines, including both prescription (substantive law) and procedural deadlines (briefing deadlines, applications for new trial, motions for appeal, writ applications, etc.)
2. Malpractice to lose (or misplace) files, documents, or evidence.

Not only does losing materials impair an attorney’s ability to adequately represent his client, such misconduct is addressed in Rule 3.4. Maintaining a proper filing system assures that client documents and materials will not go missing or misplaced.

   Practice Tip: Fujitsu ScanSnap.

3. Malpractice to procrastinate in rendering legal services.

Rule 1.3 provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Complaints regarding a lack of communication, allegations of neglect and lack of diligence can be minimized at the outset of the representation.

A few helpful tips:

- Monitor your caseload. A reactionary practice is a dangerous practice.
- Avoid procrastination. Sounds simple enough, but in reality it is the single largest reason why lawyers do not get things done in a timely fashion. Domestic Cases Move Rapidly.
- Touch every file in your office periodically, which may mean once a month, etc.
- Honesty and transparency with clients.

Secretary: “What do I tell the client?”

III.

ETHICAL ISSUES (AND MALPRACTICE) IN SUBSTANTIVE REPRESENTATION

1. Negligent or improper drafting of documents negatively impacting client.

Many documents are generated in the process of resolving legal disputes, from letters to final judgments. Attorneys must be thorough in drafting and finalizing all documents. The action for malpractice based on improper drafting of documents can be complicated. For instance, in Broadscape.com, Inc. v. Walker, 866 So. 2d 1085 (La. App. 4 Cir. 2004), the attorneys were hired to confect two contracts for the client. When the client initiated arbitration proceedings to enforce the contracts, the panel found portions of the contracts were unenforceable. The legal malpractice claim followed.

In Allen v. Carollo, 674 So. 2d 283 (La. App. 1 Cir. 1996), the client sued his former attorney for alleged improper preparation of an affidavit related to a succession proceeding. The
Court ultimately dismissed the lawsuit for prescription, but noted the troubles of the underlying action.

2. Not knowing the applicable law.

Rule 1.1(a) states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Stay within your area of expertise. While possible, it is no longer advisable to maintain a broad based general practice. Do you agree? If not, pay particular attention to the following domestic law subtleties:

- Child support and interim spousal support are matters of public order and cannot be waived.
- Partition agreements, unlike partition judgments, can be assailed for lesion.
- The pitfalls associated with the new fault-based divorce grounds.

3. Failing to understand or anticipate tax consequences.

In Merchant v. Kelly, Haglund, Garnsey & Kahn, 874 F.Supp. 300 (D. Co. 1995), a postnuptial agreement included a transfer of pension and profit sharing plans to the wife without the required qualified domestic relations order. After entering the post-nuptial agreement, the spouses moved to Seattle and retained another law firm to terminate the pension and profit sharing plan. In connection with this representation, the newly hired law firm advised the husband that the post-nuptial agreement was inconsistent with ERISA, and required either a QDRO or an amendment. However, when the agreement was amended to comply with ERISA, the husband sued his original attorney for malpractice because he had received less under the amended agreement. The Court denied summary judgment because a question of fact remained as to whether a reasonably prudent attorney should have foreseen litigation as a likely result of language.

Query: Wife receives 401(k) with an accrued balance of $300,000; Husband receives house appraised at $300,000. Did the spouses receive assets of an equal fair market value?


Domestic cases regularly involve calculations, such as child and spousal support, community property values, reimbursements, incomes, and other valuations. Accurate calculations are essential. In Blanchard v. Blanchard, 112 So. 3d 243 (La. App. 1 Cir. 2012), the first circuit found that the plaintiff had stated a cause of action in negligence and intentional tort
against her ex-husband's personal injury attorneys with regard to the manner in which the attorneys calculated her portion of the settlement proceeds; in reaching its decision, the court emphasized that the plaintiff was not an adversary of her ex-husband in the personal injury litigation. See id. at 251.

Practice Tip: Excel