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The 10 Most Common Ethical Problems - A Quick Hit

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Speaker(s)

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>>: Good morning, everybody, and thanks for your patience. So my topic is basically how to not become the target of a bar council investigation. And I intend to just give you some, you know, some basic tips about the kinds of issues that bring lawyers before us and how to avoid being one of those lawyers. So as I - as you can see here, there's three not very happy looking people. The women have their arms folded, suggesting that they are skeptical and disappointed. Let's move on to the first slide. OK. So one of the chief causes - if not the chief cause - of unhappy clients who file complaints with our office is that they - their lawyers have not communicated with them in such a way that they know what's going on. I didn't mean to do that. It seems straightforward, but, obviously, when you're in a busy practice dealing with a lot of clients, or you're in court, or all sorts of things are going on, you can put getting back to your clients on the back burner, and that's a bad thing. What you should be aware of is that you should respond as much as possible to your client's calls, emails, texts and letters. We recognize that there's clients who are going to call you every day or feels like every day, and, clearly, we're not - nobody expects you to call your client back every day, but the rule - and there's a rule about this, which is 1.4, requires you to at least keep in reasonable touch. And maybe that means responding once a month or just sending back a quick e-mail saying nothing new is going on or something very simple like that, but don't ignore - don't ignore your client's communications with you. Also, if you're going to be talking to a client on the phone or in person, keep notes. You know, you're not going to - you think you're going to remember what you said to the client and the client said to you on the

phone, but you're not going to, so keep notes of all of those conversations. Keep them, you know, either electronically or on paper, and know where they are so that you can pull them up if you need to remind yourself of what you talked about. If you have staff, make sure that they are trained to be polite and responsive - that if a client calls, they - first of all, that they tell you that the client has called, that they tell the client what to expect in terms of response - you know, you're going to get back to them next week, or you're on vacation, or there's nothing new to report, but make sure your staff knows how to, basically, keep your client satisfied. Of course, you want to keep your clients informed of any development in their situation - you know, something that was filed in court or, you know, in a real estate deal, that the seller signed the purchase and sale - whatever it is. And, again, if there's nothing to report, which, you know, clearly in some cases is the case, maybe, you know, a month later or every other month, just an email to say, sorry to say, nothing is new. And most importantly, I think, you know, you want to convey to the clients that you care about them, that you take their matter, you know, seriously, and that you're trying to get a result for them. People who feel cared about and feel heard and responded to are going to be a lot less likely to complain than if they feel like you're blowing them off. OK. So the rules require that certain things have to be put in writing. One of them is fee agreements. I think everybody hopefully knows by now that, a few years ago, the rule was changed to require all fee agreements to be put in writing. The only exception is for a fee of less than $500. But no matter what kind of a fee deal you have with your client, whether it's an hourly fee, a flat fee, or a contingent fee, it must be in writing, and that is spelled out in Rule 1.5(b) and 1.5(c). If you're going to do flat fee agreements - in other words, you're going to charge the client $2,000 for - to accomplish a transaction or to do a divorce or whatever it is - make sure you're clear about exactly the scope of work that you're agreeing to do for the fee. The rule also requires that, if there is a conflict of interest - and, obviously, you must disclose that conflict of interest to the client and explain to them what the conflict consists of - you must get their consent to the conflict in writing. And the consent should, you know, spell out what the conflict is and that you've explained to them the client understands and consents to your representation despite the conflict. Another thing that must be in writing is when you take any kind of fee payments from a client trust account. So if your client gives you a

retainer, and, two months later, you've earned half that retainer and you want to take the retainer and put it into your own operating account or personal account, you must first send the client a statement - a written notice saying exact - a bill explaining the work that you're charging for, the amount and date of the fee withdrawal, and a statement of the funds left in the account after you've withdrawn the amount that you've earned. So a lot of people get in trouble this way. They have a retainer, and they just, you know, move some of the retainer from their IOLTA account to the trust - to an operating account without sending the client a bill, and that is a per say rule violation. Now, beyond the things that you must put in writing - that the rules require - there's also many things that you should put in writing just to protect yourself. Based on, you know, our experience at the Office of Bar Counsel, a lot of disputes may arise after the fact if a client was not informed in writing of certain things that happened during the representation. Settlement offers is a good example. If the insurance company makes an offer and your client rejects it, make sure that you have notified your client in writing that the offer was made and that the client has rejected it, and maybe you also want to say in that writing, you know, what your advice was, that you advised them to take it or you agreed with their decision not to take it, so that, going forward, your client can't complain to us that you never told them about a settlement offer. Nonengagement - this - I think this used to be more of a problem than it is now, but a prospective client comes into your office, wants you to take their, for instance, medical malpractice case. Maybe they present you with a box full of their medical records, and you tell them that you, you know, need to review the records before you can decide whether to take the case. Well, when you're done reviewing the records - which should be promptly - and you've decided not to take the case, you know, you need to send the client a letter saying, you know, I've reviewed your documents. I'm not taking the case. You should advise them of any statutes of limitations and return documents that they gave you. In the past, we definitely, you know, had situations where somebody would complain that their lawyer never filed their case, and the lawyer would tell us, I never took the case, but there was nothing in writing to indicate that, and this becomes a factual dispute between the client and the lawyer. Something has gone wrong, the case was dismissed, etc. - you need to put that in writing and tell the client. Again, we see lawyers who lie to the client, who

don't tell them that the case was dismissed. This happens all the time. Lawyer blows the statute of limitations or fails to answer interrogatories or doesn't get the complaint served on the defendants, the court issues an order of dismissal, and the lawyer doesn't tell the client, probably thinking in his or her own head that he's going to rectify the client - the problem before the client needs to know, but that doesn't happen, and the failure to tell the client or lie to the client about what's going on becomes the real basis of the discipline, which is even more problematic than the original acts that caused the complaint to be dismissed. Major case developments, clearly, you want to tell your client in writing. And requests for compliance - if you're asking your client to give you information to put on the bankruptcy filing or the, you know, divorce complaint or financial statement, communicate that you need that information to the client in writing so that, if the client doesn't provide it and you, again, miss a deadline, it is clear that it was not your fault. All right. Lack of diligence - obviously, a major source of the complaints that we get from clients - you know, my lawyer didn't do what he said he was going to do, et cetera. So to avoid this problem - I'm going to start with the last one, which is know your own habits and limitations. And I think this is the most important thing for you to focus on, especially if you're just becoming a lawyer or haven't been practicing too long. You know, what - you know yourself. I mean, what is it that you're likely to do? Are you likely to just take on more work than you can possibly handle? Are you likely to - are you the kind of person who likes to deliver a lot of good news and so you're going to tell the client, oh, I'm going to get you a great settlement, you know, this is an easy case, we'll have this settled in six months, et cetera. You know, if you understand what your tendencies are, you're in a better position to deal with it and prevent the problems from happening. Procrastination, of course, is another one. People know that they're procrastinators and that's something that, if you're going to be a lawyer, you have to deal with. Being a procrastinator and a lawyer is not very compatible. If you can't meet a deadline, seek a timely extension or a continuance, don't just let it go. And use tickler systems, obviously, to keep track of the deadlines that you have to meet. If a representation ends either because you end it or because the client ends it, you have an obligation, if the client asks, to provide the client or the client's new lawyer with a copy of the file and this is set off - set forward in a lot of detail in Mass Rule 1.15(A). You need to make sure that

the file is complete, as defined in 1.15(A)(a). Obviously, in this day and age, it's not just paper, you have to include copies of all the electronic documents. In terms of money - this comes up a lot - lawyer - client owes the lawyer money and the lawyer's trying to figure out how to get the client to pay and so they say, you know, I'm not going to give you your file back until you pay your outstanding bill. You can't do that. The client has a right to file even if they owe you money. On the other hand, the rule allows you to charge for copying certain documents in your file. And I'm not going to go through that, but please check rule 1.15(B) to see what you may charge the client for copying and what you can't. To protect yourself, you want to keep a copy of what you turn over to the client. Again, you know, people are going to come back and say you never gave me this, you never gave me that. If you have a copy - if you've kept a copy, number one, you can send it to them again if need be. And two, you can prove if you have to that you did indeed share that piece of - those documents with the client. And when you send a file to a client through whatever means, please do a cover letter. Please - you know, dear client, enclosed is - and, you know, provide the categories of the documents that you're sending to them. Lawyers sometimes find themselves in sort of ambiguous situations as to what degree they're still representing the client, and that is a bad thing. You're either in or you're out. You know, you can't write the client a letter and say, you know, I'm not going to do anything more on your case until you pay this bill because you are the client's lawyer until the representation is formally terminated. So if you're going to formally terminate it or the client has formally terminated you, you know, send a letter saying, I no longer represent you, this is where the case is at, you know, trial is scheduled to take place in May or the interrogatory answers are due in March or there's a prehearing conference next week, and make it clear that you no longer represent the client. Obviously, if the case is filed in court, you're going to have to get permission from the court to withdraw and you're going to have to file a motion. But in all representations that do not involve court cases, a letter will suffice. I think lawyers are somewhat confused about what is their obligation to stay in a case, and the fact is that the rule about terminating a representation is pretty liberal. Basically, you can terminate a representation unless it will have a material adverse effect on the client. That's rule 1.16(B). So, you know, if the client isn't paying you or the client isn't cooperating with you or, you know, you're sick

or for whatever reasons you feel the need to terminate the representation, ordinarily, you ought to be able to do that in compliance with the rule. On the other hand, you know, if the trial is next week or - you know, or if you're in the middle of a negotiation, that is - determination - if you terminate that representation, it could have a material adverse effect on the client. But I would say, you know, we run the hotline and we take questions from lawyers Monday, Wednesday and Friday and I've often gotten questions from lawyers about whether they can withdraw from a case because they feel that there they're stuck and oftentimes I say, you know, no, it doesn't sound like your withdrawal would have a material adverse effect on the client and you are entitled to get out. Again, you're going to, you know, write the client a letter. If the client owes you money, send a final bill. If you have a withholding - a retainer that you haven't earned, send the client a final bill and refund the unearned retainer funds. If the case is in court, you're going to file your motion to withdraw. And it's important - and I'm going to talk about this a minute - when you - if you do file a motion to withdraw, you have to be careful about what you disclose in that motion that you're going to file with the court. So client confidences - again, I think lawyers are a little bit confused on the topic of confidential information. First of all, the information that you are required to keep confidential is anything that's related to your representation of the client. So it does not mean only things that your client tells you. You may learn things in the representation about your client or you may learn things because you are representing the client from other sources. But that - all that information may be confidential and basically is confidential if - I'm kind of oversimplifying here - it's either protected by the attorney client privilege or it's likely to be detrimental or embarrassing to the client. So we have a case pending before the SJC right now where the question is a lawyer disclosed information about his client after the representation - so it was a former client - which he claims he read about in the local newspaper. And his defense is well, you know, this was generally known information. This wasn't confidential because it was in a newspaper. And so, you know, the question - generally known - I mean, it is an exception to confidentiality if information is generally known, but what does generally known mean? And, you know, the debate is whether generally known means anything that you can find by doing a Google search of a person - which, obviously, is an enormous amount of information - or information that is really a

matter of notoriety and has been widely spread and most people are aware. But for the time being, until the SJC decides the case, you need to err on the side of caution and do not reveal any information about your client even if, you know, you've seen it - even if it's available on some public source or public record unless it's been widely disseminated. You obviously shouldn't be just discussing your client on social media. If you feel the need to talk about a case on Facebook or some other site, you must be 100% sure that you're not sharing any identifying details. So, you know, you can ask a hypothetical question about a legal - you know, a situation that you're in. But when you start talking about which court it's in and what the facts of the case are, you're going to get in trouble because those are identifying details that might lead to somebody knowing that you're talking about your client. Obviously, avoid inadvertent disclosures - you know, so hitting reply all on an email that you're sending to your client or something like that. And be very careful of what you disclose in a motion to withdraw. In motions to withdraw, lawyers are often tempted to - they want to tell the court what a lousy person their client is to justify getting out of the case. Don't do that. You can use some very general language, like your irrevocable breakdown of a relationship or, you know, a difference in approach - something general like that. Not, you know, my client owes me $10,000 or, you know, my client has lied to me about everything in the case. If you do that, you're disclosing confidential information that is harmful to your client. If you really need to disclose some confidential information because you think that's the only way that the judge is going to let you out, ask for an in camera hearing or ask to impound your motion or take other steps to protect your client's privacy. Conflicts - I'm really not going to get into this because I know Rodney's going to talk about it in a little while, but you do need, at the outset of any representation, to understand who you are representing. You know, if two people come together - a mother and daughter - are you going to be representing the mother or the daughter? If you're going to be representing the mother, she's your client and you should try to speak to her independently not in the presence of the daughter to make sure that you understand your client's wishes. At the very beginning, you need to take get enough information about your client to check for conflict. So you may need to know the clients - you know, a former name or a business, the - a DBA that the client uses or other entities that the client must be involved in because

your conflict system is not going to pick up a lot of things - important things if you only put in the client's name. You have to consider whether you have a personal conflict of interest. If you're going to be, you know, representing somebody who you've done business with or who you hope to do business with or somebody who you have some other kind of relationship with or - you must be very careful not to make sure that you don't have any relationship, obviously, with the opposing parties in the matter before you agree to take on a client. And let me just say that, you know, conflicts can be extremely tricky too to recognize and to figure out and if it is - if you're finding yourself in doubt about whether or not you have a conflict, please get some help from an expert or call our hotline. Again, we're there Monday, Tuesday and Wednesday - Monday, Wednesday and Friday. We handle a lot of conflict questions and we'll give you the time to lay out the situation, to explain exactly who's who and what you believe the problem is and we will try to walk through you with it and determine whether or not you have a conflict. In my experience, a lot of lawyers think that they might have a conflict when they don't. And so in many instances, you know, we're able to reassure a lawyer that, no, you can represent that client, you don't have a conflict. But make sure you you think it through clearly because the rules are a little bit hard to interpret. All right. This is the source of a lot of lawyers getting disciplined, which is that they don't keep their IOLTA records in compliance with rule 1.15. Clearly, those requirements are challenging to many people, and I think, you know, part of the problem is that lawyers used software and that the software it doesn't always create the reports that the rules require. The rules require you to keep track of basically every cent that you have - that you're holding in trust for clients or third parties, and so you need to have a very complete check register which shows every transaction coming in and out, shows the payees, the payors, maintains a running balance and, at the same time, you need to have ledgers for each one of your clients or third parties who you're holding money for and you must make sure that, you know, if you know that you have a total of $50,000 in your account at the end of December, that the sum of your client ledgers add up to $50,000 - so you know you're holding 10,000 for client A, 20,000 for client B and 20,000 for client C. That has to match. On top of that, you have to make sure that your balances match with your bank statements. And even though it sounds straightforward, obviously, if you've got a lot of money and a lot of

transactions, it gets complicated. You - again, this is something that - you know, we offer help, we have classes once a month to give lawyers a complete explanation of the kinds of records that they need to meet - need to have for their client funds. Take advantage of that. Come to our classes. We also have a lot of information on our website about how to keep these records. If you have a lot of money and you can't do it yourself, you know, think about hiring some kind of a bookkeeper to balance your - to review your accounts every month. But even if you do delegate this work to somebody else, ultimately, it is your responsibility to make sure that your records are kept properly. So fine to allow, you know, your paralegal or secretary or bookkeeper to do the initial work in this, but you must review it, you must make sure that everything is in order. And every year we get, you know, one or two cases in which a lawyer has delegated this work to a secretary or paralegal. Sometimes, you know, it's a person they've worked with for many, many years. And all of a sudden they discover that, you know, 50,000 or $500,000 is missing and that their employee has been involved in some kind of a scheme to siphon off money and try to hide it in the records. So it is your responsibility, even if you, you know, only have two transactions a month, even if you're only holding 500 bucks in your IOLTA account, you still need to do this. And, you know, you can do it by hand. There's lawyers who do that because their records are relatively simple. But you still need to do it properly and within the rules. And as you may or may not know, banks who hold IOLTA accounts for lawyers are obligated to inform bar counsel if a check is dishonored. And so we get a couple hundred of those a year and then we will look at your accounts and figure out why a check bounced, and that often leads us to to discover that the records aren't being properly kept. So for your own sake, please comply with this rule strictly. Beyond your obligations to your clients, the rules are quite clear that you have obligations to the court and to opposing counsel, and those obligations mostly have to do with with honesty. Do not, under any circumstances, make a misrepresentation to a tribunal, no matter how small it is. So don't tell the court that, you know, you have to postpone the hearing because you're going to be in court in Haverhill or, you know, because your - have to visit somebody in the hospital or you're going to be on vacation if that is not true. You would think you'd be able to get away with this but, you know, judges can be very tricky. They check with other judges and other courts. Opposing counsel, you know, may

discover that you've made a misstatement. So even the smallest misstatement may come back to haunt you. And, you know, it's not worth it. It's just not worth it because the penalties for making intentional misrepresentations to the court are very tough. The cases say that a one-year suspension is basically the standard sanction for making a misrepresentation to the court and it doesn't necessarily matter if that representation is substantive or...

>>: How you doing?

>>: Hello? OK. Don't make me...

>>: The land court has - I mean, we submitted and they haven't approved it yet because they haven't finalized it. Then we - initial submission had the garage still on it and I took it off on...

>>: Somebody doesn't know they're not muted.

>>: Yeah, I'm going to reach out to Jeff now and let him know.

>>: OK.

>>: I think I just muted him.

>>: OK, great. Thanks. Make - don't make misrepresentations to us or the board. One common subject of misrepresentation has to do with malpractice insurance. Lawyers who work for CPCS have to have malpractice insurance and, if they don't and they can't afford it or whatever, we've found many lawyers lying to CPCS about that. Also, when you're - if you are unfortunate enough to get involved in an investigation where we're asking you for information about what happened, don't lie to us. The lie, as - you know, is, say - well, I couldn't think of the word, but everybody knows that the cover-up can be worse than the original crime. So don't give in to the temptation to try to clear yourself by telling - by making misrepresentations to us in an investigation. Don't mislead your opposing counsel or opposing parties by telling half-truths or making omissions. And don't let your clients make misrepresentations to a tribunal. This is, again, I

think a difficult area of the rules. When you find out that your client has lied in court or intends to lie in court, you are obligated to take some remedial measures and make sure that doesn't happen. But, of course, it's a difficult situation. Do you tell on your client? And - or, you know, are you able to convince your client to take back the misrepresentations? Or do you just have to get out of the case? So if you find yourself in that kind of situation, again, I would advise you to seek, you know, other opinions, including by calling us and laying out the facts. And finally, just be professional. As I think I said before, you know, many, many complaints come to us because lawyer - I mean because clients, you know, feel like they've been dissed or they feel like they've been treated rudely, either by a lawyer or even by the lawyer's staff. Clients who feel that they are, you know, being treated nicely and the lawyer cares about them are a lot less likely to file a complaint even if the complaint is valid. So even if you did screw up your client's case - if you, you know, admit it to your client and tell them, you know, that you're going to take remedial action, that you're going to try to get their case, you know, reinstated and that you've reported the error to your malpractice company and you give them the name of the malpractice insurer, they are much less likely to come to us with a complaint. These are just basic human nature. Be civil to your opposing parties, counsel. I mean, why get yourself in trouble with us just because you can't keep your temper when the opposing party - opposing counsel is making you so mad? You know, exercise some self-control and don't allow yourself to be drawn into screaming matches or mutual insults, whether orally or on paper. You know, we see a lot of these lawyers exchanging nasty letters. Well, you know, you can say what you need to say without being nasty. Don't yield to that temptation. Clearly, in this day and age, everybody knows that you shouldn't be engaging in any sexual banter or suggestive comments with your clients, court personnel, opposing counsel. People still get in trouble with it. You know, we still see lawyers sexting their clients in the middle of the night. Not a lot, I - mind you, but the occasional one - that sort of thing. Don't do it. And don't be overly casual in your professional communications. Those communications, if they're writing, obviously, you know, can wind up before a tribunal, they can wind up before us. Keep it professional. So that's basically all I had to say. Happy to answer any questions if there are any. Otherwise, I guess we'll just move on.

>>: Thanks, Dorothy.