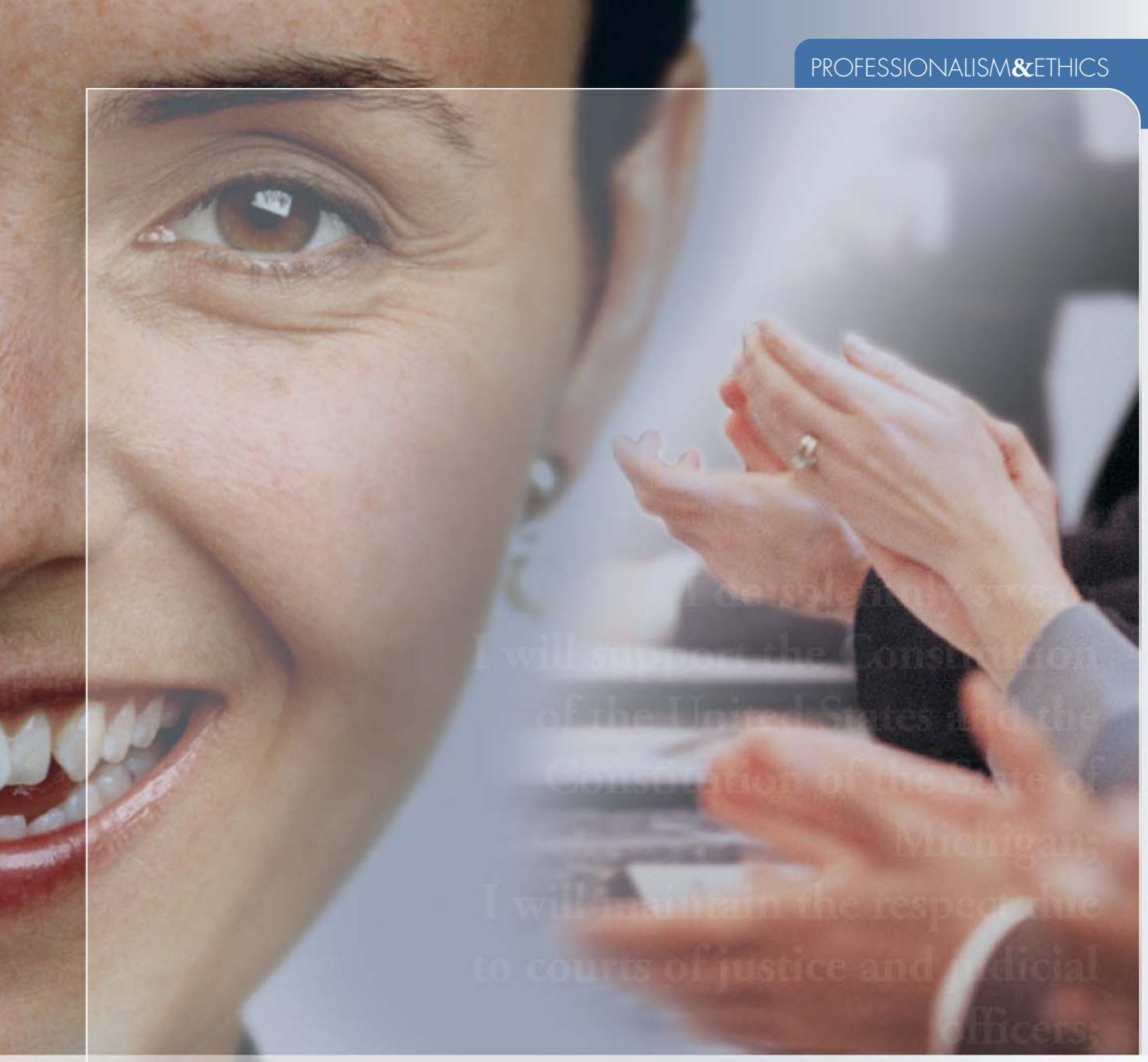

TEN WAYS TO IMPROVE YOUR PRACTICE

and Stay Out of Trouble

By Dawn M. Evans

All lawyers, regardless of area of practice, size of firm, or years of licensure, occasionally face an ethical dilemma that requires an in-depth knowledge of their duties and obligations as lawyers. Michigan lawyers can contact the State Bar of Michigan's Ethics Helpline at (877) 558-4760 for free, informal direction on applicable ethics rules and opinions. While not a substitute for legal representation nor appropriate if the issue is already in litigation or in the attorney grievance process, many practitioners have received invaluable help in understanding such topics as handling client funds, navigating disqualification issues when changing firms, and appropriately terminating a client relationship.

Many questions pertaining to troubled attorney-client relationships actually stem from poor communication rather than the quality of the legal service provided. Avoiding a premature termination of the attorney-client relationship starts with establishing ground rules early on in the relationship. This article discusses some tips for promoting a successful attorney-client relationship.

Practice Tip 1 Develop staff guidelines for telephone contact with potential clients.

The importance of the tone and content of the initial conversation cannot be overemphasized. In those brief moments, the potential client is evaluating whether to entrust you—a total stranger—with perhaps the most important matter of his or her lifetime for a significant and as yet unknown amount of money.

Beyond the basic concepts of courtesy, professionalism, and clarity, your staff members should understand that their obligation when speaking with potential clients is to provide general information only, such as office location and areas of practice, and, as appropriate, to schedule appointments. Your staff should not impart information that could be construed as legal advice or imply, in any way, that they have the authority to speak on your behalf.

Every lawyer has heard about the would-be client who "shops" lawyers by telephone and later files a motion to disqualify when a lawyer who was not hired (and who failed to maintain any record of the conversation) is hired by the other party. The motion typically identifies the moving party as the "former client," averring that certain attorney-client privileged information was imparted that prohibits the lawyer from representing the "second" client. This is avoidable by appropriate screening, follow-up, and record retention.

Before scheduling an appointment, the staff person should determine if the caller is an adverse party to an existing client and, if so, gracefully terminate the call before any case-specific information is conveyed.

Practice Tip 2 Check for conflicts before the initial meeting.

Client information forms completed in your waiting room should identify opposing parties and persons with differing interests. This information should be cross-checked against the existing and former client base *before* the initial meeting. That way, if a conflict is identified, you can handle it before any conversation occurs in the privacy of your office, where it will be construed as attorney-client privileged information.

Every lawyer should develop a system for handling the casual inquiry—a system that has a beginning, middle, and an end.

Practice Tip 3 Follow up—whether you're hired or not.

When it becomes clear that there will be no appointment or, after meeting, that you will not be retained, send a letter confirming that (1) no attorney-client relationship was established, (2) you were not retained, and (3) you will do no work for that person. You should maintain a record of this contact—and the follow-up letter confirming that you were not hired—at least to the extent that the person's name can be identified in subsequent conflict checks.

Practice Tip 4 Manage client expectations—establish them early, reinforce them often, and document them.

You must establish ground rules in the first client meeting. In addition to obtaining detailed information about the subject matter of the representation and both preferred and emergency contact information, your initial conversation should include:

- a straightforward conversation about fees and expenses (more on this later)
- a step-by-step description of the legal process that is involved in addressing the client's situation, including a realistic timetable for milestones and completion of the matter
- a detailed listing of your expectations of the client (such as candor, timely responses to requests for information, and restraint from undertaking actions that

FAST FACTS

The quality of communication with prospective, existing, and former clients is the principal ingredient to a mutually satisfying attorney-client relationship.

The client's expectations of the lawyer and the lawyer's expectations of the client must be established, modified, and revisited as appropriate, and honored during the representation.

Concluding the representation appropriately provides closure, reinforces how all key issues have been resolved and whether any matters remain to be handled, and affords a final opportunity to reinforce the caliber of the work done.

might impact the case absent consulting with you)

- an introduction of the client to staff members with whom he or she will have regular contact, identifying who should be contacted (other than you) for specific matters, such as scheduling or cancelling appointments
- an understanding of the client's expectations—either modifying them from the outset (if they are unreasonable or unattainable) or acknowledging and recording them

Absent this initial conversation, you may be unaware (until it's too late) that the client's expectations were, from the outset, wholly unrealistic or unattainable. Clients who have not been realistically apprised of the merits of their case will believe it's your fault if their expectations aren't met—even if they never shared their expectations with you. If you did not understand and address the client's expectations, there's at least an element of truth to the client's professed dissatisfaction.

You should send a letter containing these key points shortly after the initial meeting. This will memorialize the discussion and ensure that the client understands the projected results. Similar letters, outlining progress toward and, most importantly, changes in projected results, should routinely follow.

Practice Tip 5 Fee agreements, including rates, expenses, and payment terms, should be agreed to in writing.

Fees and expenses should be discussed and agreed upon before engagement. A written fee agreement, while not mandated, is strongly recommended. By discussing the terms of the agreement in the initial conversation, you will learn immediately whether money will be a concern. This is invaluable information to have early on, before making a significant investment of time and energy.

The fee agreement should be written in plain English. If the client does not read or comprehend English, either (1) provide a translation or (2) have the client and the translator execute a document averring that the fee agreement was explained to the client in his or her language.

At a minimum, the fee agreement should contain:

- the amount of money that must be paid to initiate the representation
- a description of applicable hourly rates, identifying the persons or categories of persons pertaining to each rate
- a representative list of billable expense items
- billing methodology and frequency
- payment terms, including policies for delinquent payment or nonpayment

Practice Tip 6 Abide by the fee agreement.

Almost as important as establishing and securing the fee agreement is consistently abiding by its terms. If the agreement provides for a monthly bill, bill monthly. Clients who receive nothing for six months and in the seventh month receive a cumulative bill will be shocked (and unhappy), both because that bill will necessarily be larger than the monthly statements would have been and because they will have assumed (with some justification, based upon the language in the fee agreement) that no bills during the intervening months meant nothing was owed for those months.

Avoid reworking the fee arrangement midstream. Changing hourly rates, requiring security interests or collateral not previously sought, or attempting to fundamentally alter the method of calculation (such as moving from a contingent to an hourly fee) may foment unwanted consequences, even if documented with an amended contract or a novation. Under certain circumstances, it may be viewed as an adhesion contract if entered into on the eve of trial.

Both MRPC 1.5, which discusses the "clearly excessive fee," and MRPC 1.8, which addresses prohibited transactions (such as certain testamentary gifts, certain financial assistance to clients, and acquiring literary rights to the subject matter of the representation during the pendency of the matter), bear reviewing.

Practice Tip 7 Deposit all client and third-party funds into appropriate IOLTA[1] or non-IOLTA accounts.

During 2005, the Michigan Supreme Court twice modified the rule pertaining to trust accounts, with the expressed intention of (1) ensuring interest-rate parity between IOLTA accounts and other types of investment accounts and (2) bringing the Michigan trust account rule in line with *Brown v Legal Foundation of Washington*.[2]

What is unchanged is that you *must* deposit client funds into a trust or escrow account separate from any funds that you own or claim. As fees are earned and billed to the client, you can transfer appropriate monies to your operating account in accordance with the fee agreement.

A written fee agreement, while not mandated, is strongly recommended. By discussing the terms of the agreement in the initial conversation, you will learn immediately whether money will be a concern.

What has changed is the *method* of determining whether the client's or a third party's funds are deposited into an IOLTA account or a separate interest-bearing account opened for that purpose. The previous bright-line "$50 interest threshold" is no longer in place, replaced by the concept that, if the potential interest to be earned on the client's funds exceeds the costs that would be incurred in maintaining the funds—taking into consideration applicable interest rates, the anticipated length of the deposit, and any other relevant factors—the funds must be placed in an interest-bearing, non-IOLTA trust account.

Practice Tip 8 Keep the client informed, set and meet communication expectations, and secure necessary consents.

The most common client complaint is that the lawyer failed to promptly return

phone calls. For many lawyers, this is not because they don't like to return calls, but because they believe the client is calling *too frequently,* particularly if there is nothing new to report.

You can avoid this complaint by managing client expectations. Establish ground rules for communicating, including directing routine, nonlegal inquiries to staff equipped to handle them, and using e-mail or mail when phone calls are unnecessary or inconvenient. Clients should be given an anticipated response time to inquiries, and you or your appropriate staff member should strive to abide by the timeframe given. Clients should be educated about the amount of time involved in the legal process. They must trust you to provide information as it becomes available, but understand that frequently calling you will not speed up the process. You have an ethical obligation to provide sufficient information to permit the client to make informed decisions and a specific obligation to secure client consent to accept or reject settlement offers or mediation evaluations. In a criminal case, you must abide by the client's decision with regard to whether to enter a plea, waive a jury trial, or testify.

Critical in each of these situations is the quality and clarity of communication with the client. You must be very clear on the pros and cons of each choice being weighed and secure an unequivocal assent to the course to be pursued. Finally, you must retain some documentation of the communication and agreement—even if it is simply your own notes within the file.

Practice Tip 9 Remain current in your practice area and retain co-counsel/experts to ensure the quality of representation.

Competence begins with having the base of legal knowledge necessary to apply the law to a client's unique situation and to seek achievement of the client's goals. It entails knowing what information to obtain, what legal remedies are available, and how to initiate, respond to, and navigate through the legal proceedings. Frequently, you can achieve competence in unfamiliar legal territory through research and self-study. In other instances, you must admit that other expertise is necessary and secure that expertise to provide competent service.

Legal competence in a specific matter requires thoroughness and adequate preparation. You have an ongoing obligation to maintain competence by engaging in continuing study and education.

Practice Tip 10 Conclude the representation appropriately; complete and deliver pertinent documents (providing closure and inviting return business) and maintain records necessary to defend against future claims.

Nearly as important as how the attorney-client relationship begins is how it concludes. Provide the client with copies of any pertinent documents, accompanied by a closing letter that describes what is provided, delineates any further steps to be taken or issues remaining, and encloses, as appropriate, the final billing. Any original documentation (particularly, title instruments and wills) should be returned and receipt acknowledged.

In addition to expressing appreciation for a client's business, careful lawyers will advise the client of their record retention policy and the date after which the file may be destroyed.

You should maintain a core file that contains, at a minimum, a copy of any significant document not otherwise accessible through courthouse records until the expiration of any application statute of limitations for claims that might be brought by the client or third parties regarding the subject of the representation. Trust account records should be maintained for at least five years.

Bonus Q&A Do I have to return the contents of my file to the client upon termination of representation?

This question is typically raised when the attorney-client relationship ends *before* the matter has been concluded. The reasons vary: sometimes the lawyer seeks to withdraw, due to nonpayment of fees or conflicts with the client; sometimes the client is dissatisfied, whether justifiably or not. MRPC 1.16, addressing the attorney's termination of representation, requires that the lawyer "take reasonable steps to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned."[3]

Although the most recent formal opinion by the State Bar Standing Committee on Ethics discussing the concept of client property notes that "the determination of what papers the client is entitled to receive and what information is the property of the client are questions of law beyond the jurisdiction of the Committee," it nonetheless draws a distinction between things identifiably belonging to the client—such as original deeds, photographs proffered as potential evidence, stock certificates, and original contracts—and those that belong to the lawyer. The opinion notes that "[t]he rules are not designed to change what is essentially the lawyer's work product into something belonging to the client." In concluding that a lawyer can charge the client for a copy of the file, the Committee points out that "[t]here is no legal support in Michigan for the proposition that the files are the property of the client."[4]

Items identifiably belonging to the client should be returned as a regular course of business in concluding a client matter so that you do not have to wrestle with the problem of how to return them before destroying the file. Additionally, property "to which the client is entitled" may include work already paid for, such as expert reports or depositions.

In addition to expressing appreciation for a client's business, careful lawyers will advise the client of their record retention policy and the date after which the file may be destroyed.

Work product, such as your handwritten notes or interoffice legal memoranda, may not comport with a narrow definition of client property; but whether you nonetheless provide copies of such items when the representation ends abruptly should be considered on a case-by-case basis. If, for example, withdrawal is accomplished on the eve of trial and the client's ability to pursue legal remedies may be jeopardized absent certain materials, you should gauge whether standing on the definition of "client property" in withholding materials is worth the potential risk of a malpractice or grievance claim.

Simply stated, the client's legal right to secure the entire file *in an ongoing matter* differs from the obligations owed when the attorney-client relationship extends to conclusion and information is being sought about a closed matter.

If this article has sparked questions regarding the Michigan Rules of Professional Conduct, contact the Ethics Helpline at (877) 558-4760. A similar helpline for judges seeking information about the Code of Judicial Conduct and opinions pertaining to that code is available at (877) 558-4761. ◆

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Footnotes

1. IOLTA stands for "Interest on Lawyers' Trust Accounts." An explanatory brochure that provides guidelines to attorneys about how and when to use an IOLTA account can be found at http://www.msbf.org/iolta/IOLTAAttorneyBrochure102005.pdf.
2. 538 US 216, 123 S Ct 1406, 144 L Ed 2d 376 (2003).
3. MPRC 1.16(d).
4. See Opinion R-19, dated August 4, 2000, available at http://www.michbar.org/opinions/ethics/numbered_opinions/r-019.htm.