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**HOW TO PRACTICE LAW, ABIDE BY THE RULES OF PROFESSIONAL CONDUCT,
AND HAVE A LIFE THAT RULES**

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Part One: Our Representation: If We Save You Time, We Can Get You Home in Time for Fun

We sell knowledge, good judgment and advice. We use hours either directly to sell our services, or as a benchmark.

Hence, our quality of life can be improved by providing the same (or better) result to our clients, using lower hours.

You are giving up 90 minutes this Wednesday afternoon. Our trade with you is to demonstrate to you that if you follow practices that we discuss, you will save at a minimum 8 hours/year, and up to 200 to 300 hours a year. At 200 hours saved, assuming you don't replace that with MORE WORK (200 hours to be exact), we will have provided you with 5 new vacation weeks.

Not yet believin'?

Here's one for those that use email a lot. This will get you to a minimum of 8 hours saved per year. Ready? Turn off your email alert icons (we will show you how a bit later). You lose nothing other than being disturbed, by turning these off.

	In seconds
Email notice of incoming email (a distraction)	
Each one: stop and start what you are doing, don't even go to the email (most of us do if the email is interesting)	5 seconds
25 of these a day: that's low	125
5 days a week (some would say 6 or 7)	625
48 weeks a year	30000
60 seconds per minute	500
60 minutes per hour	8.333333333
Day equivalent for one tiny action	1 day

To accomplish time savings, we need to be mindful of a protocol on using technology efficiently, managing our daily practices, creating and taking vacation time, taking in clients who are good prospects, and dismissing evil clients, that will minimize effort and maximize output. Many of us may need to look at these areas with a certain degree of focus that in the past we have dismissed.

We start with the New Vast Wasteland, Emails.

The mantra for practitioners with Emails, ABA Model Rule 1.6, preserve the confidentiality of information:

Rule 1.6 (c): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Ever sent an email to the wrong person?

Part Two: Manage Email Correctly

Email, used incorrectly is the 2013 version of a Faustian challenge.

A. The Problem:

As a backdrop, studies are now showing that receipts and transmittals of emails have an endorphin like response in our bodies, meaning we “feel good.” This may be the reason why, when we get to work, our first effort is to open up and read our emails.¹ We need to get beyond that and recognize that email is a tool to our quality of life, not the intellectual equivalent of a good workout.²

Maybe you are not prey to this dilemma.

Unlike the rest of us, do you not jump to your inbox every time you hear a chime or see a note about a new email?

You don’t feel nervous or that you are giving bad service if you fail to respond to emails immediately?

You can go a full day without once looking at emails.

At the end of the day, you don’t lean back and say, “Gee, not many billable hours here, have been responding to emails all day.”

Perhaps your inbox is not a collection of work, junk, unanswered client communiques, and to- do items.³

If you find that the above traits do not accurately describe your day to day existence, perhaps the email monster is out of control. The road to email addiction recovery is first to acknowledge that you have a problem.⁴

¹ If you do not do this, congratulations. You are mentally-email healthy. Don’t change. We love you the way you are.

² Another activity that releases endorphins that make us feel good, and make the ills of the day more tolerable.

³ Your focus each day is on the tough, substantive work, and real client meetings, not on the use of email to achieve the metaphorical equivalent of a mental hike up a challenging mountain of intellectual conundrums and humorous quips.

B. Goal in the Use of Email: Be FIRM

As a lawyer, we want to achieve something FIRM with email. Not amorphous, abstract, obtuse, or obscure; something concrete. We should strive for email to enhance the quality of our life. For a lawyer, quality of life requires the efficient management of work time. To the extent that email efficiently manages your business life, that enhances QOL. To the extent of inefficiency, that subtracts from QOL.

Specifically, we want to (F)OCUS on when to use it.

We want the (I)NTELLIGENT use of email using shortcut keys for those activities that occur daily, and most importantly, the efficient storage of emails.

We need to be diligent to (R)EVIEW and (R)EMOVE absurd, irrelevant, non-repeating, and non-action item emails.

We should not ignore the importance of (M)ANAGING client expectations as to when responses will be made, and MANAGING (and setting) our expectations by defining boundaries of use for emails.

⁴ Here's a deception: our practices, even with the inefficient use of email, are still more efficient than our practices used to be. That is not the test, though. With proper use of email, our practices can be even more efficient.

C. FOCUS on When to Use Email⁵

1. Benefits

Used effectively,⁶ it can achieve the following:

1. Increase speed in communications and efficiently conveying ideas (organizing a football game among a group of people, for example; setting up a conference call). *Leads to getting projects done faster, making clients happier, and decreasing malpractice exposure.*
2. Efficiency in communication: no pregnant pauses, or stops to say “how you doing?” *Encourages follow up to clients.*
3. Comfort—easy to use, type and send. *Encourages legal work.*
4. Time shifting—you can communicate whenever and at weird hours. *Allows you to work on client projects more often.* Be conversant with the Delay Delivery Option (discussed below)
5. Facilitate projects by give and take and immediate answers to significant and insignificant questions. *Allows projects to be completed quicker.*
6. Overall, increase client happiness.

2. Detriments

Used ineffectively, email can be a TSA (time sucking abyss) that constantly annoys. Do we really need to get texts and emails during dinner? Do we have enough focus during the day on substantive projects? Are we being interrupted during our drafting, telephone conferences, in person meetings, in office meetings, by the email?

⁵ Not for this conversation, but we want to make a controversial statement—immediate reachability, like through blackberrys and I-phones, for lawyers, is inefficient and hurts revenue, quality of the practice, and a lawyer’s quality of life. I know that 99 % of people who use these devices disagree with me. All I request is an honest assessment by all those individuals as to whether Blackberry truly adds to quality of life, or is indeed the Crackberry of our mental existence.

⁶ Work Objective: Profitability. Ask yourself, how is email making me more profitable? If email could allow us to (1) communicate better, (2) get projects done quicker, (3) get answers easier, (4) manage projects, or (5) manage colleagues, these are all good objectives.

Too many emails can actually confuse a project – who is doing what, what stage the project is in, or create a substantive confusion.

Assume you charge by the hour. Your first foray into the analysis is to be honest about how much email costs you per day. Example, if you do not charge for email, and you spend 2 hours on it, isn't it costing you 2 hours?

3. Heuristic as to Proper Email Use

1. Email cannot be on all day, in front of you. You do not have the discipline NOT to be distracted.⁷

Example: Texting and driving. Try the following experiment. We know that texting and driving is incredibly dangerous. Discuss that topic with your spouse. Have your spouse agree to that conclusion -- not to text and drive. Then, set up a short 15 minute trip with your spouse. Have one of your kid's text your spouse, every 3 or 4 minutes, during the drive. Make sure your spouse's phone is on, so that your spouse hears the text coming in. There is no way your spouse does not pick up the phone at some point to see who the text is from. We are all Pavlovian email (text) Dogs, which is really bad when it comes to email communiqués. Since we will not have the discipline or desire to turn on and off your email system in a given day, try some of these techniques:

- a. Turn off the chimes, icons, beeps, pop ups, and other interruptions that inform you about new incoming emails. Really now, why are these here? If you do nothing else from this presentation, do that.
 - i. To do that, try going to Home, then Options, then Mail.
 - ii. You will see the boxes to uncheck about notification of new emails.
- b. Another technique, not for the faint of heart: change the default view in Outlook to Calendar instead of Inbox. To shift to your inbox, all you have to do is hit Control+Shift+I, or Control +1. To shift to your calendar, hit Control+2. Default view in calendar will

⁷ Email is more fun than any other project. In your in box, there will be some "good news," some funny stuff, some happy stuff. Hence, it is by its nature distracting. Also, if it truly does release endorphins, email becomes an addictive behavior.

make sure you don't miss any meetings, as well as not distract you with incoming emails. Lou try.

- c. Understand that answering emails does not have to be immediate. Life threatening crises are rarely communicated by email.
 - i. Try the following: every Wednesday, for a month, set a rule that says, "I will be unable to answer emails until the end of the day." Dedicate 3 pm to 5 pm to answering emails each Wednesday. Try a few times—was your practice truly polluted by your non-responsiveness from 7 am to 3 pm?
 - ii. Also, learn the Delay Delivery option. Example: I happen to be on the email system and a client asks me a real interesting question about whether the Credit Shelter Trust can be a grantor trust. I like the question and the mental challenge of answering it. I type an answer; it takes me 15 minutes. The client asked me the question at 1 pm; I am ready to send at 1:15 pm. Do I really want to hit send?
 - d. It is extremely difficult to do substantive concentration with the Devil that is Your Computer right in front of you. Accordingly, you must have in your office a desk, stand up or sit down, where you can lay out papers and do work. Get there as much as possible.
 - e. Can you do email "batching?" This is where you look at your emails only a certain intervals during the day, say 9 to 10 am, 1 to 2 pm, and 5 to 6 pm.
- 2. You need to charge for emails. Figure out what works for you.
 - 3. You need to have an empty in box. Wow. Spam filters work. Junk mail (more on that below) works. Rules (more on that below) work. But, "you are powerless to stop the never ending onslaught of emails." Like a developing cancer, it consumes more and more of your (mental) energy resources. It's not going in the other direction.

D. INTELLIGENT Use of Quick Keys

Memorize these quick keys:

1. F1—Displays the Help Pane.
2. F6—To Toggle between tech Help Pane and the active application.
3. Control+Shift+I to switch to IN box, or Control 1, when in calendar mode. Control 2, to shift to calendar when in In box.
4. Control+N to compose a new message
5. Control+Shift+S to post an email to a folder
6. Control+Shift +G to display an email in the task pane for follow up.
7. Control + B to add bold
8. Control+Shift+L to add bullets
9. Control+ I to add italics
10. Control+T to increase indent. Do not hit tab bar.
11. Control+shift + T to decrease indent.
12. Control x to cut
13. Control C to copy
14. Control v to paste
15. Control +Shift + Z to clear formatting
16. Control U to underline
17. Control +f2 to open print preview
18. Alt+P to print
19. Control+Shift+f to find prior emails.
20. Control+Shift+D, NEVER USE.

E. Review Only Once and Remove

Your goal is to understand that 100 emails, per day, with half of them viewed twice (because we don't want to deal with them the first time), results in 150 emails a day. Multiplied by 300 working days, that means that 15,000 emails are viewed a second time. If each email view is 10 seconds, not very long, that is 150,000 seconds. That is equivalent to 41 hours. 41 hours to do NOTHING PRODUCTIVE OTHER THAN TO VIEW FOR A SECOND TIME EMAILS. We cannot do this. We have to train ourselves not to do this.

Here then are our considerations on managing email to remove crap, and remove a "second look":

1. NOME—work towards NO Messages in your in box.
2. Each email needs to be dealt with. The 4 D's, delete, do, delegate, or defer should be replaced with the 3Ds, delete, do, or delegate.⁸ Not easy in a day of difficulties
 - a. Example: You return to your office. There are 30 unopened emails from 15 minutes before. One is an emergency, and you open and deal with it. It was 28 emails after the other ones. The other 28 are now buried. Was it really an emergency?
 - b. Delete all non critical emails.
 - c. If an email can be done in 1 minute or less, respond to it and get it done. See h, below.
 - d. If you have time to deal with slightly longer emails, do them. Aside: do not use LOL, funny pictures, abbreviations, or the like. You are not an employee at a technology company.
 - e. If an email looks too long to read now, or respond to, many of us turn it into a task or appointment. Here's how: If you hit Control + Shift + G, you can put it in the Task List. The problem of course is that your task list becomes in and of itself unmanageable unless you attend to it often.

⁸ Please regard Defer as a 4 letter word.

- i. As a solution, I offer the offload as a possibility—send the email to a colleague to work on; and
 - ii. Concurrently, calendar follow up for a week. By right clicking the email, you can drag it into your calendar for follow up. And it's out of your in box (yeah).
 - f. Delegate to the extent possible all emails.
 - g. Start including verbs instead of nouns in the subject line for emails --- that way the reader has a hint of what is required.
 - h. Ponder the B approach as to all, or non critical emails, those not rendering legal advice.
 - i. Silence is a Beautiful Event.
- 3. If you need an email for future reference, file it away in a folder. To do so, you need to set up a file and then hit Control+Shift+S when you are reading a message to send it to that file. Personally, I shy away from folders, and try more global systems, like a link to an Imanage system. Folders complicate my life.
 - a. Example of folder
 - b. Example of Imanage
- 4. Use rules.
 - a. Do alpha tests first to make sure you don't do something you will regret. We sort of like the Junk Mail system.
- 5. Out of Office Assistant. It is effective not only when you are on vacation, but when you have day trips out of the office, when you may be tied up for the day, when you may be tied up for half the day, or are you feeling like it will just be a nasty day of meetings. You have two options: You can be human and just not respond for 24 or more hours. Or you can try one of these. "I have really important meetings that will keep me from responding to your banal requests for information, now or in the future." Or, "I will be out of the office and not responding to emails until ...For any emergency, please email my assistant, .., or call me at 847 254 1170" don't insert your real number; here, for fun, insert one of those phone numbers that charges \$4.99 per minute:

- i. “Sorry, I am out of the office and unable to respond until to your email. Please contact my assistant, Glenda, at gmskie@harrisonheld.com, for immediate assistance.
 - ii. Often, I get replies like, “I know you are there and monitoring emails.”
 - iii. The system is simple, so it takes about 5 seconds to implement this.
 - iv. Copy out your reply, and put in Word; do a spell-check to make sure the auto reply that is being sent doesn’t have typos.
 - v. Check the button that says, “Out of Office Assistant,” On.
 - b. I am not making the following up. Once, when opposing counsel was so ridiculously over the top, sending me nasty emails every 2 seconds, I put a rule for it that auto replied to his emails with the following “Please note that I died about a week ago. Like Generalissimo Francisco Franco, I am likely to remain dead. Please direct future emails to____.” After receiving this 4 times, the same message, he realized it was an auto reply. What I got back was something like “blah, blah, blah, Attorney Registration disciplinary action, “blah, blah, malpractice, blah, blah, I am going to kick your...” So it sort of didn’t work.
 - c. Reply to all. It is nice to avoid the problem of Replying to All when you intended to Reply only to the Sender because your reply was critical of a few other people on the list. Oops. You can install a pop up message that will ask if you really want to do this before it is sent—www.sperrysoftware.com—avoids the “oops, I didn’t mean to do that” problem. I recommend this.
6. Don’t invite replies. Example, “Lou, I can meet 10 am on Tuesday. Name it.” Reply: “How about 11 am then?” Instead, “I’ll see you at 11 am.”
 7. My colleague once tried to implement the following to cut down on emails: “Please never reply to me with a “thanks” or “you’re welcome.” Do you think it worked?

F. Manage Client Expectations

Client: “I have been emailing you all day, where are you?”

Answer: “Sorry, I was reviewing the site, www.adulttopics.com, all morning. What’s up?”

Well, maybe not. Managing client email expectations can be done expressly and indirectly. Expressly, we have discussed, with rules about where you are and when you will get back to them.

Indirectly by implementing a few self discipline structures:

1. Do not get in the habit of immediate replies, even when you can. This is tough. But a reply within 3 hours is quite good; a reply in 2 minutes implies a level of responsiveness/precedent that will cost you quality of life. See discussion on Delay Delivery options.
2. Charge for emails. For substantive emails, this has to be a no exception policy. You are liable for the advice, you are giving advice, why in the world would you not charge? And for shorter emails, emails are still a disruption; be judicious and charge more often than you think if it is substantive discourse that is occurring. At a minimum, this should discourage the proliferation of emails.
3. Do you have your own rules on emails? No emails on holidays?
4. Do you control your co-workers?
5. Do not apologize for slowness in responding. I was so infuriated by a Bank that sent me 3 emails within 48 hours, to sign a letter of authorization that was non critical, not preceded by a client call, not time sensitive, with the 3rd email inquiring as to whether I was involved in an accident, that I sent the following response:

“Hi Charlie,

I am generally tied up most days with meetings and planning; and non-urgent emails often take 2-5 business days for me to review and respond to. I will do a global search for this right now; sounds like an emergency. I am sure it must be on my email system. Stay tuned; if I find, I will fax before I leave tonight.

Regards,

Lou”

MANAGING EMAILS IS THE MOUNT EVEREST OF ADMINISTRATIVE
MOUNTAINS TO CLIMB, BUT YOU STILL HAVE TO MAKE THE REST
OF THE DAY MORE PRODUCTIVE

Part Three: Managing the Day to Day Practice in a Way that Achieves the Twin Objectives of Client Satisfaction and Practitioner Happiness⁹

Lawyers are problem solvers. However, we may not be the best at the business of practicing law. The business requires that we get quality work out the door timely, that we are responsive to clients, that we bill and get paid, and that we enjoy practicing. Those are the minimal requirements. How can we accomplish these requirements? The following are practical suggestions to produce more work in less time and thus have more free time.

A. Set Boundaries. Lawyers are service oriented. However, to practice law efficiently, lawyers need to set boundaries.

1. **With Clients.** *Set reasonable parameters for the engagement.* Do not agree to meet on Saturday morning unless it really is an emergency. Train your client to call you on your cell phone or home phone only in an emergency. Do not apologize for responding to an email within ____ time of receiving it.
2. **With Staff.** *Set reasonable parameters for work interaction.* Encourage your staff to schedule short meetings with you for you to answer questions. Encourage your staff to do the heavy lifting. They should email you/provide you with bullet point questions and possible answers not open-ended questions (“I’ll respond to the client if you tell me what to say.”). Train your staff to compile information so that interruptions in your day are minimal --- once a day is much more efficient than 6 times a day.
3. **With Colleagues.** *Set reasonable parameters for water cooler talk.* We generally are friends with our law partners. We love rehashing the football game, baseball game, Oscars, Grammys, whatever. These interactions are important for esprit de corps. However, too much of a good thing is a bad thing and

⁹For an excellent in-depth discussion of this topic, see *Time Management for Attorneys: A Lawyer’s Guide to Decreasing Stress, Eliminating Interruptions & Getting Home on Time*. Mark Powers and Shawn McNalis (2008).

interspersed throughout the day is detrimental to focus and efficiency. Consider telling your colleague, “I am trying to use my morning productive time to get documents out. Can we do lunch and catch up?”

4. **With Myself.** *Be disciplined in scheduling/work/focus.* I am my own worst enemy. I schedule too many meetings without preparation/decompression time in between. I allow myself to be distracted with email. I am the colleague interrupting my partners with another BCS National Championship review (Roll Tide!). I must practice what I preach and set boundaries and be disciplined.

B. Maximize Productivity. Lawyers sell expertise, advice, documents: widgets. If we can produce more quality widgets in the same amount of time, we will make more money or we could make the same amount of money in less time – more free time.

1. **Identify and Utilize Peak Brain Time.** Each person has “peak” time during the day when he or she is at her best intellectually – some are morning people/some are evening people. Identify when you are at your best and reserve that time for your hardest work.
2. **Identify and Utilize Low Energy Time.** Each person has low energy time during the day. Identify that time and schedule what requires less brain power or what might pick you up during that time – phone conferences? Meetings? Staff meetings?
3. **Set Reasonable Goals Each Morning.** We need to accomplish tasks and feel a sense of accomplishment. If every morning, we list 10 things to accomplish that day and never achieve the goals, we will feel overwhelmed and may have a sense of failure. Rather, each day, we should list no more than 3 things to accomplish that day. We are more likely to be successful and the feeling of success will help carry us forward.
4. **Set Regular “No Client Meeting” Days.** Instead of working every weekend to catch up because your week was full of client meetings, set one day a week for no client meetings. Use that day to get administrative work done. Use that day to catch up on

drafting or reviews. Allow the staff to be casual that day (even jeans) because no clients will see them.

5. **Set Regular Drafting/Review Days.** Practicing law requires intensive blocks of time to get documents/PLRs/briefs/whatever done. Consider working in a conference room or at home periodically (once per week?). Wherever you work, do not connect to email or phone during your drafting/review time. Utilize that time to focus and complete projects.
 6. **Set Regular Time to Do Client Bills.** Pick one day early each month and block out sufficient time to get client bills reviewed and out.
 7. **Keep Time Contemporaneously.** Do not leave for the day if your time is not entered. It takes longer to recreate and inevitably, time (and money) is lost if you enter your time after the fact.
 8. **Get the Staff on Board.** Let the staff know what you are trying to accomplish and enlist their assistance.
 9. **Be Disciplined.** The above will work only if you are disciplined and follow through.
- C. **Delegate.** The best and perhaps the hardest way to have more time, is to delegate.
1. **Identify What Really Requires Your Attention.** Identify and attend to those projects that require your attention. Delegate all other projects or parts of projects to associates and staff.
 2. **Delegation = Leverage = Higher Profitability.** Enough said.
 3. **Mentor/Train Associates and Staff.** How often do we think, “I can do this faster than handing it off?” That is a true statement but is short-sighted. You can never delegate if you have not invested in mentoring and training. Set regular “tutorials” and put the associates in charge of the topics. Schedule one-on-one time with associates and staff to explain mark-ups to documents.

4. **Include Associate/Paralegal in Client Meetings.** Bring a junior person in meetings to take notes, to follow up with clients on action items, and to summarize work to be done after the meeting.
5. **Assign File Preparation to Staff.** Implement a system whereby a staff member is responsible for reviewing your calendar for client meetings and then locating the file, making sure all associated files and documents are there, and having them ready for the client meeting.
6. **Have Regular Work Status Meetings.** Periodically (once a month?), have a meeting with your lawyers and staff to review the status of projects, to check workload (Who is overloaded? Who has capacity?), and to make sure all client matters are being handled (malpractice protection).

D. Use Technology.

1. **Take Advantage of Software.** Look into your client management software --- does it have capability to efficiently create and manage To Do lists and follow up?
2. **You Do Not Have to Be Paperless --- Set a Goal to Have Less Paper.** Regardless of your position on *paper*, if clients' executed documents are scanned in, you will be more efficient in responding to client inquiries. Example, client calls and asks "Who do I name as guardian for my children?" If the Will is scanned in, you can pull up and answer while on the phone. If the Will is not scanned in, you must physically pull the file (or have someone else pull the file), look at the Will and call the client back.

NOW THAT YOU USING TECHNOLOGY EFFICIENTLY HAS SAVED YOU TIME [(VERSUS TECHNOLOGY USING YOU)], AND YOU HAVE DAY TO DAY PRACTICE TIPS THAT WILL HAVE ALSO SAVED YOU TIME, YOU WILL HAVE TIME FOR VACATION. TAKE IT.

Part Four: Vacation Planning

A. Exactly When Did Being on Vacations Become so Complex

Going back to c. 1980, being on vacation meant one work connection: "I will be at 312-332-1111," if you need me. Please call and leave a message with my secretary.

There were no cell phones. There were no faxes. Federal express was a luxury; no computers, emails, smart phones, or other means of what I like to call PAIN (Painful Annoying Instant Noise).

A vacation meant you were away with others handling your matters.

B. 2013, a vacation could mean that you are working, albeit less and albeit in a nice venue with good weather. Unfortunately, a vacation could mean an experience that is actually more painful than just work, as the responsibilities to family, work, and yourself are all scrambling on top of one another at the same time.

Although the way to take a vacation remains myriad and subject to debate, one item we can agree on is that the Etymology of the word "Vacation" is no longer applicable to our view of the word.

B. Vacation Etymology

Late 14c., "Freedom from obligations, leisure, release" (from some activity or occupation), from Old French vacation, from Latin vacationem (nominative vacatio) "leisure, a being free from duty," noun of state from past participle stem of vacare "be empty, free, or at leisure" (see [vain](#)).

Meanings "state of being unoccupied; process of vacating" are early 15c. Meaning "formal suspension of activity" (in reference to schools, courts, etc.) is recorded from mid-15c. As the U.S. equivalent of what in Britain is called a [holiday](#), it is attested from 1878.

C. The Starting Point for the Protocol

“Vacation has become a murky concept for me. I’m working remotely most of the time now, and I can do it from anywhere with a good Internet connection. Unrestricted access to my work is great in lots of ways. However, it does allow work to intrude even when I’m trying not to work. It’s a mental game, and it’s trickier now than it has ever been.”

The consensus was that it is important for every one of us to define what we want to achieve from the vacation, and how we are viewing it, before we take it. Honesty, thought, and then action, are precursor variables that will allow each of us to incorporate the following protocol into our vacation planning.

D. Why We Take Vacation

The following are examples of different categories. All of them intersect, and can be viewed differently by each of us. But let’s use them as templates for why do a vacation:

1. Refresh and regenerate from a cruel work environment the past X months.
2. Spend time more time with the family.
3. To spend less time with the family (solo vacation).
4. To pursue hobbies that make one feel like a fuller person.
5. To travel and learn new cultures and facts and history.
6. To avoid friends and relatives.
7. To visit friends and relatives.
8. To get in better shape (the hiking/biking vacation, for example).
9. To get in worse shape (the drinking trip to the Rose Bowl for example).
10. To find a spouse.
11. To vacate from a spouse.
12. To do a daring and scary act (other than work), like say skydiving, or being Alone and Naked in the wilderness.¹⁰
13. To find oneself.¹¹

¹⁰ No TV at our abode, but I did see this weirdo and scary show when visiting my in-laws

¹¹ No matter where I am, clients find me, so probably not easy to hide from myself either.

14. To let clients know that we actually do have a life other than responding within a nanosecond to their questions.

Once you get to the point of your vacation, then you need to structure the actual vacation behind the goal. Based on the intent, your vacation will fall within one of the following structures:

- a. Staycation [a/k/a too scared to go out of town because of work.]
- b. Workation¹² [Out of office, minimize work, but still be attentive.]
- c. Relackation¹³ [I am on vacation, but working most of the time so that when I return, it's not stressful; instead, I commit X hours per day to stressing me out during vacation to lower my stress when I return.]
- d. Graduacation [The process of using the vacation to develop into a new person.]
- e. Vacation c. 1980 [Contact me by phone at the resort if there is an emergency. And I hope not to hear from you.]

E. The Art of Taking a Vacation

You have identified the type of vacation you want. There are now two categories that you have to get over. The status quo bias, namely, not taking a vacation is easier than taking one, and then how to plan correctly for the type of vacation you will choose.¹⁴

F. Status Quo Bias: Fear of Taking a Vacation

Identify the reason that is preventing you from taking one, they are all unreasonable:

- 1. Self-worth: "If I go, people will perhaps not regard me as invaluable." [Face it, you are not invaluable.]
- 2. Status: "I like the fact that I can boast that I don't take vacation." [Find something better to demonstrate your self worth.]

¹² Trademark, LSH. If you use it, you must cite me.

¹³ Trademark, LSH. If you use it, you must cite me.

¹⁴ You can do exactly what you have been doing, but hopefully the materials that follow offer one or two useful tips that are worth trying.

3. Hassle: “Hassle to plan, hassle to leave, hassle to come back.” [Do a better job planning and create a soft re-entry.]
4. Afraid of client loss, ego tied up in work that you don’t feel like a human being. [So what.]
5. Puritanical worth effort. [You’ll be deceased too soon and your puritanical work ethics will accompany you. Be self-indulgent.]
6. You will miss an important event during your vacation:
 - a. New business: Important, but, is 1 less client, even the BEST client ever, worth this. If yes, do a probability analysis. E.g., you have 500 clients. Let’s assume you obtain 2 referrals per week, or 104 per year. Out of these, you take 50 of the referrals. Out of the 50, 2 are your best clients that should not be missed. You therefore have a chance to have one of your best clients the week you are gone as $2/52 * 2$ (weeks of vacation), or 4%. At most, you have a 1 out of 25 chance of not being there to get the call.
 - b. Death of a client
 - c. Client complaint
 - d. Summonses against you for legal malpractice
7. The real reason not to take a vacation is [the Cost of a vacation.] Taking time off of the office is expensive in terms of opportunity costs. A two week vacation, a real one, will cost you 4% of your annual next income.
 - a. Quantify it: if your gross income is \$300,000, a 2 week vacation will cost you approximately \$12,000 in out of the office time. If your gross income is \$500,000, this cost is \$20,000.
 - b. \$20,000, wow, that’s too expensive?
 - c. Nah, but, your life is easier if you recognize it, accept it, and do it.

G. Vacation planning: Do it by blocking off time, carve out days before and after

1. Define the type of vacation and plan early:
 - a. If a vacation that you are doing emails, determine what system of internet the venues have (don’t assume).
 - b. Determine when during the day you will be returning emails.
 - c. Make sure you set Out of Office Assistant to say you are out of the office and not returning emails. [No one believes you anyways]
 - d. As of January 1 each year, segregate your calendar so that you have 2 weeks blocked off every quarter. You can override this, but nice to start with blocks of free time.
 - e. Iphone: can you turn emails off?

- f. Emergency contact information for phone calls
 - g. If a no email vacation, then, calendar one week before you go to take care of the following
 - i. Define what projects have to be done
 - ii. Define who your go to person is while you are gone
 - iii. Provide numbers to that person before you go.
2. Eliminate excuses that prevent you from taking a vacation:
- i. There is never a good time to go
 - ii. Partners do not take holidays
 - iii. Need to get caught up first
 - iv. Take a day off and call that a holiday
 - v. There's no time
 - vi. Work is fun
 - vii. Planning for trips is too stressful
3. 1 day rule
- a. Before vacation, make sure the last work day HAS NO MEETINGS, NO EXCEPTIONS. Block it off.
4. Who is your back-up and what is expected
- a. Handling matters
 - b. Calling clients
 - c. Reviewing emails (probably not)
 - i. C: on emails (rule to forward emails-do alpha test)
 - ii. Out of office assistant has contact info for admin assistant and lawyer
5. The Do Not Catch on Fire on Reentry Rule
- a. 2 day rule:
 - i. No meetings. Cannot violate this.
 - ii. No conference calls
6. The Voicemail Misstatement Rule
- a. Let the message say you are back 2 days after you are physically back.
7. Do Not Rest on Sunday:

- a. Ideally, return on a Saturday; allocate Sunday for the immersion back to emails.
8. Have your staff sort your mail into categories:
 - a. office mail that needs attention: have someone else in the office review it to make sure it gets taken care of.
 - b. other personal mail.
 - c. all the junk mail. Throw it all out.
9. When you are having lots of fun on your vacation, write down how you feel, what it's like, so the week you get back, you can remember why you went and how much fun you had. When you are back and stressed out, for a moment, remember a great moment during the vacation and how it felt.
10. While you are on vacation, tell yourself that you are going to pretend, for the vacation, that you don't have to work for a living. That you are a person of independent means enjoying life. It's a great attitude adjustment for a vacation.

H. Incentives to Take More Vacation Time

1. Alternative billing reduces "An hour of vacation costs me \$X" from the mental equation.
2. Ponder if your clients (the post mortem administration ones) would have preferred more vacation versus how hard they worked?
3. Plan the vacation carefully and well in advance.
4. Make sure the descent back is not ugly
5. Ask yourself if you know anyone who at the end of their life said they regretted not spending more time at the office.
6. Think of the couple who retired, one of them died, the other married down a generation and spent all the time traveling with the new spouse. Do you want some other person spending the money you worked so hard to get?

YOU'RE ROCKING AND ROLLING EFFICIENTLY DURING THE DAY, AND WITH EMAILS, BUT THEN THE DARTH VADER OF CLIENTS SHOOTS YOU AN ACCUSATORY, DEBILITATING, AD HOMINEM ATTACK OF A NOTE. YOU'RE SLOWED DOWN. AGAIN. DON'T LET DARTH VADERS INTO YOUR PRACTICE.

ONCE IN YOUR PRACTICE, BE MINDFUL OF ABA RULES 1.2 AND 1.3

ABA RULE 1.3: "A LAWYER SHOULD PURSUE A MATTER ON BEHALF OF A CLIENT DESPITE OPPOSITION, OBSTRUCTION OR PERSONAL INCONVENIENCE TO THE LAWYER, AND TAKE WHATEVER LAWFUL AND ETHICAL MEASURES ARE REQUIRED TO VINDICATE A CLIENT'S CAUSE OR ENDEAVOR."

ABA RULE 1.2: "[A] LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION AND ...SHALL CONSULT WITH THE CLIENT AS TO THE MEANS BY WHICH THEY ARE TO BE PURSUED."

UGH.

Part Five: Client Selection

A. Protocol

We practice law with an informal protocol of which clients to serve and which ones not to. I often get asked, “Do you have minimums?” Rarely is there a more irrelevant question to an estate planning practice.

Example 1: Client with \$100 million calls you for a new engagement. The engagement is to “review” drafts of the planning documents that his current lawyer, who is in Idaho, is finishing up. The new client is in Illinois and would like you to make sure that the Idaho lawyer drafted documents to comply with Illinois law. (Do not take this case.) Contrast with: Daughter of Decedent D calls to inquire whether you can handle an undue influence case for her. D, her dad, was married for 3 months before his death. He had an estate of \$1.4 million and left it all to his 4th wife. As an aside, and not really relevant, D was 92 when he died; his new wife, 43. (Take this case.)

The real question is an opportunity cost question. If I represent this new client, how does that affect what I could be doing:

1. Am I busy? If not, is it okay NOT to be busy?
2. Will the new client expect service that pollutes my other clients?
3. Will there be an emotional toll on me that pollutes my other clients?
4. Is there a reputational risk here?
5. What is my peace of mind worth?

The reality is that few of us have a protocol, formal or informal, as to how we want to approach new clients.

This topic is intended to provide that protocol.

The protocol can be divided into the following segments:

1. The initial referral and responsiveness

2. The science of conducting that initial call
3. Due diligence and marketing after the initial call
4. Dismissal prior to meeting
5. The meeting
6. Dismissal post meeting
7. Rewarding good clients

We go through eleven heuristics as to how to achieve a winning protocol.

1. Reaction to Initial Referral

Our initial contact may be direct from the potential client or indirect from a referring source (an accountant, CPA, current client, insurance professional). We need to be diligent here.

Hence, we pivot off of the initial phone call. We receive a voice mail. Our day is packed. We don't have time YET for another drawn out story, or to discuss the background on an estate planning matter. We'll deal with it LATER.

RULE NUMBER ONE: EAT YOUR ICE CREAM CONE BEFORE IT MELTS

Think of the time between an initial referral and client contact as an Ice Cream Cone left out on the counter. The best time to eat it is now; as time goes on, it starts melting. At some point, it's a mess (or doesn't exist anymore) and not edible.

To be the master of the obvious:

1. The matter is important to whoever referred it to you. Your immediate call back demonstrates that the referral and matter is important to you.
2. The matter may have been referred to a few people. First person that calls back is in the lead. In business, they refer to this as First Mover Advantage. It's true.

3. The longer you wait, the more likely you will forget to even call back.
4. The longer you wait, the more likely you will forget why the person called in the first place.

That's the easy part, knowing that you have to call back ASAP.

RULE NUMBER TWO: LESS THAN 10

The practical issue—we could be in a meeting, may have emergencies, definitely have more interesting and work essential projects to complete now, we may be groggy, tired, or burned out from client communications, we just don't feel like yet another call, or perhaps our schedule really only has 15 minutes and we know that clients are long winded and boring.

We need a protocol. Possibilities:

1. Train your legal assistant, if appropriate, to call back a referral source and schedule for you 30 minutes with the prospect. This is either doable or not doable. If doable, start the protocol and implement. If not doable, need different protocol.
2. Call back immediately but have script in your mind.
3. If you have email address, send email with a suggested time to talk.

2. Call Back:

RULE NUMBER THREE: INVOKE THE 5 MINUTE LIMITATION

The 5-Minute Rule: before the scheduled meeting, and before the Soap Opera story, you can glean disaster or importance in the first 5 minutes. Be prepared to allocate:

1. If a disaster client for you and the firm, be prepared to ship off immediately to a referral outside of the firm. You should have contact information handy, and be ready with state of mind to do so.

2. If a disaster for you, but you want to keep in firm, same state of mind and contact information for referral to a colleague inside of the firm.

If the client survives the 5 minute rule, the call may be short or long.

For example, the potential merely wants to schedule a meeting, what is a good time for you?

Or the potential starts interviewing you on the phone. Not the best, but you have to keep re-directing it to what the Potential wants.

Or, the potential tells you about their estate plan and asks for advice. If it is really bad, you may be able to re-allocate the client immediately to someone else.

RULE NUMBER FOUR: STAY CONNECTED

The goal with any variety is to get background information, quickly, and set up a meeting. It is easier to sell in person than on the phone. And setting up a meeting allows you to do further due diligence. Whether you charge for the initial meeting is irrelevant. We all do it one way or the other. But getting them in, and scheduled, is critical. And get their email address.

- a. “Prelim to initial meeting, how about if I send you an initial questionnaire to fill out and background on the firm and me, and background on estate planning. Let’s set a meeting for _____. At that meeting, we can talk about the project and costs.”
 - i. Do not quote cost on phone if you can avoid it. (No charge for initial meeting unless you are hired.)
 - ii. **THIS IS KEY; SOME ARE SO BAD ON PAPER, THAT NO FOLLOW UP IS REQUIRED.** When questionnaire comes in, may not be the kind of client you are looking for. Have assistant re-direct them to someone else.

3. Call Back: Long call

On the call back, be prepared to start your due diligence, your marketing and be diligent. Calls will either be of the short variety or the longer variety. You need to be prepared for both. We start with the easier of the two, the short call.

Five minutes into the call, you know it is going longer. The client survives the 5 minute rule, but there is no way to schedule the meeting; you are committed to a longer call.

Example 2: “I have been wronged, dad left me nothing under the Will. I don't understand why my siblings hate me. I am currently unemployed, estranged from my family, living in my Buick Corvaire, and need some money from dad's estate. Let me tell you my life story.” They will want to tell you the whole story. Phone call is a good place to ferret out if they are a few fries short of a McDonald's Happy Meal. Within 30 minutes, should be able to tell. If lucid, bring them in for a consultation.

RULE NUMBER FIVE: MTP (minimize the pain)

Preparation for the longer phone call is important. In a perfect world, a good client will be a 30 minute call prior to the actual in-office meeting, and a bad one 5 minutes prior to dismissal. Your preparation is to cover two contingencies:

- A. Good client: You need to be ready to either allocate time or have time, in short order, to allocate. If client matter sounds good, phone call is key to begin marketing. Be careful not to exit call without having prospective client buy in as to next steps.
- B. Bad client: You want to be done in 5 minutes. I am always ready with the mute button, and work in front of me, if the answer is “no” after 5 minutes but the client feels a need to burn 30 to 60 minutes of my time.

To minimize the pain, the protocol is to listen, segue, and schedule.

4. Due Diligence and Marketing: Post Referral and Initial Contact

We had mentioned getting their email address. After the phone call and before the initial meeting, consider a bit of marketing, through email and social media. Ponder whether any of the following could work for you:

1. Send emails. “Billy Bob, it was nice talking to you. Look forward to seeing you on the 29th. Attached is a questionnaire that I would appreciate you filling out and returning to me prior to the meeting.”
2. In addition, as you are doing the conflicts check, make sure you ask your colleagues if anyone knows of Billy Bob or his business.
3. Then, social media:
 - a. Go to Facebook or LinkedIn; you can get background information without becoming a friend or linked in. Social media allows you to find out if your potential new client is Attila the Hun clothed as Mother Theresa; but also allows you to be intelligent at your first meeting. What is important to the new client, demonstrate that you are interested in his business, focus your business meeting on what is important to him or her.
 - b. Do a Google search, smart search. To do a smart search, type in name in QUOTES.
4. Secretary of state information on businesses:
 - a. Other searches pre-meeting.
 - b. Westlaw searches have not been productive; but ARDC, case law, and other clever areas (trade associations for example).
5. Consider sending client other materials pre-meeting, by email:
 - a. Attached is a fascinating article on how to avoid the implications of the reciprocal trust doctrine.

- b. I thought you would find my CV of interest, as it lists many articles on planning I have authored that you may want to read.

5. Dismissal Prior to Meeting

RULE NUMBER SIX: JUST SAY NO.

Cancelling the meeting: Burning a referral source is scary, bad, and easy to do. Rejection = burns. Hence, approach the rejection area subtlety. Possibilities include:

1. Preferred. I think my rates will be too high for this matter, and I have a great solo guy who can do it cheaper.
2. Possible.

Example 3: “My schedule is really bad for the next month? I have to drill down and focus on my current clients and give them perfect service. Now that we have talked, I can tell that your matter needs immediate attention. Hence, let me suggest that you use:”

- a. Person in firm; or
 - b. Another person. If you can wait until April, I will be ready to give it great attention, but unlikely.
3. Legitimate. This is not an area of strength. Let me direct you to _____.
 4. Reasonable. Your matter is important. However, because I think you can get it done in a straightforward fashion, I am not the best person. Most of my matters have complication and hair, and for better or worse, I get dragged into the real messy situations. Yours can be attended to by _____.
 5. If You Have to, Only. What I call the “I neither Love you, nor am in Love With You.” A soft but firm approach is an email or letter as follows:

Example 4: Since our discussion last Tuesday, John and I have taken on new matters that will now prevent us from accepting your current representation. We endeavor to provide excellent service to

all clients, and our plates do get full and we must decline work that we would otherwise have enjoyed.

6. The Date/Meeting

RULE NUMBER SEVEN: REMEMBER CONFUSCIOUS' VIEW OF ESTATE PLANNING

One Axiom of Truth: Keep this meeting at one hour or less.¹⁵ You don't need more time:

1. The goal is to figure out if you want this client. Personality wise, you should be able to tell in 5 minutes. Substance wise, you should be able to tell in 15 minutes. Note: client may appreciate having 2 to 3 hours of your time for you to be their therapist. Judgment call if you want to do this.
2. Keep the recommendations contained and understandable. For quite a few behavioral finance reasons, clients will be more receptive to accomplishing one step at a time. LTs, Wills, and POAs are good for the initial meeting; perhaps, with a dose of how you can save estate taxes.
3. Have your SSM ready and handy, for the client review pre or post meeting.

RULE NUMBER EIGHT: DO NOT IGNORE THE BUZZ WORDS THAT RESULT IN A BUZZ KILL

4. At meeting, listen carefully to the buzz words and concepts that will make you want to engage or dismiss client. These include the ones on the list below. The Trigger signs for a bad client (and test your colleagues on these), illustrated:

¹⁵ To the client before the meeting. "I like to always have at least two senior planners on the team, in case you cannot reach me. Therefore, at the initial meeting, I will have my partner, Druzilla, sit in."

- a. The prospect has had too many lawyers before you, and may even refuse to name them –Or, worse, wants to consult with you about how and why he should not pay his prior attorney.
- b. The prospect thinks all previous lawyers were “idiots,” or makes otherwise derogatory statements about lawyers in general.
- c. The prospect cannot demonstrate he/she can pay for the cost of your services, balks at paying a retainer, and/or asks for a special reduced rate or payment terms up front.
- d. **WANTS TO BE NOT JUST A PRIORITY, WHICH ALL CLIENTS ARE, BUT THE SOLE AND PRIMARY PRIORITY.** The prospect is too demanding and expects their work will be handled before all other client work – usually recognized by a demand that the suit or action happen **TODAY** when there is no justification for the rush, or they are leaving on vacation tomorrow.
- e. You really dislike the prospect personally. Determined within about 30 seconds. BTW, sometimes that intense early dislike is later proved to be wrong.
- f. You do not agree with the prospect’s legal position.
- g. You do not believe the prospect is being truthful.
- h. VAV
- i. Client hires you to sue his prior attorney. And you are an estate planning attorney engaged in trusts and estates. *See, e.g.,* the case of _____, a prominent San Francisco legal malpractice attorney. He claims a former client defamed him with posts on complaintsboard.com. In the posts, his client accused him of a "horrific fraud" that ruined his life during the course of a legal malpractice action against his client’s previous attorney. Important that you conduct searches on social media, periodically, to see what is being said about you.
- j. The prospect is a family member.

- k. The prospect indicates they know the law and what they want to do, and just wants the attorney to do the front end work for them.

7. Dismissal Post Meeting

Both you and the client are partially vested. The client likes you and wants you to proceed. You have invested perhaps three or more hours into the preliminaries. What a shame to waste this good billable hour time.

RULE NUMBER NINE: JIM MORRISON SAYS, "WHEN THE MUSIC'S OVER TURN OFF THE LIGHTS"

A mindset that is willing to give away a few hours to prospective clients, or non clients, is a good one to have. Losing 3 to 5 hours per week on prospects is not as economically inefficient as one may suppose.

Example 5: Assume a real BAD prospect year. Each week, you commit 3 hours to clients for whom you do not proceed. On a discrete basis, you have lost a lot of money that year, correct? $3 * 52$ hours, is 156 hours, times say 400/hour, is \$60,000. Yikes. I could have had a Lexus 460. Be real though: if 20 % of your clients are bad ones, you will be in the negotiation business, or lost-hour business, as you fight with these clients for collections, or waste non-billable time on mental anguish of unreasonableness and explaining positions, bills, non-ESP actions, non-rapid enough responses. Let's look at the 20 % scenario. You bill 1,800 hours. 20 % of these people, are AYMs, Angry Young Men. Assume this correlates linearly to billable dollars. 360 hours are unpleasant, and say your write off non-billable time on average for these hours is 50 %. When you honestly factor in the anguish, whether it is lost sleep, fighting with nasty letters, or the worst case, fending off an ethical or legal challenge, that 50 % figure is probably low. That is 180 hours *400/hour, or \$72,000 per year. In addition, bad clients cause us to do lesser jobs on good matters, such as making mistakes, slowing the completion of projects and creating bad will with good clients, mental wasted time, opportunity costs, and negative marketing.

Need standard form Declination letter. You want to be able to send your assistant a note: "Please prepare 'Declination' letter or email to Sam the Sham client." E.g., you want no further mental commitment,

and you want to be able to get it done right now. Consider the following:

Example 6: “Dear Theo,

What a pleasure it was to meet with you and Abigail last week. Thank you so much for the time, and for the opportunity to get to know you better.

After the meeting, I reviewed my current work list and calendar over the next few months, and regret that I will not be able to represent you in the many matters that we discussed. I would agree with your high energy assessment. You are a professional that comes with many good thoughts and in need of good attention. Unfortunately, or fortunately, my practice has grown to an extent where, to be fair to my current clients, I must decline representation in certain new matters, and, specifically, for your matters.

I am returning, under separate cover, the materials (unopened), that you sent me.”

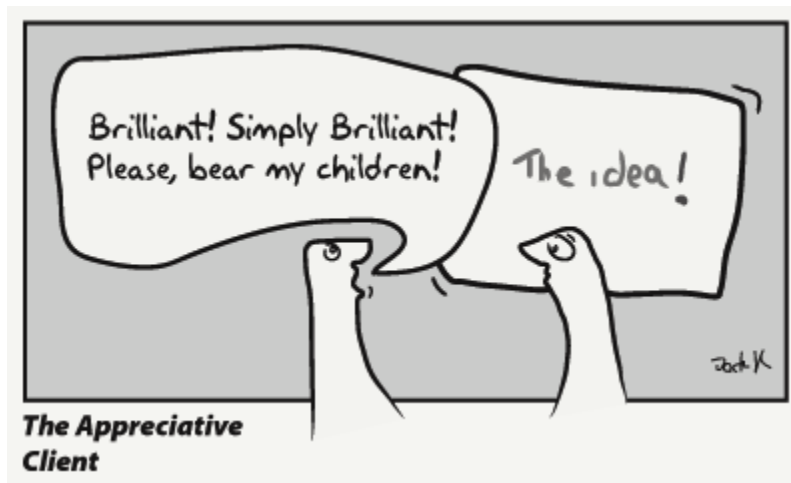
1. Litigator brethren would contend that we add standard language about “non reliance” and “having provided no legal opinion” and statute of limitations. It would be as follows:
 - a. You should be aware that the passage of time may bar you from pursuing whatever, if any, claim you may have against X. You need to immediately contact another firm for assistance.
 - b. In declining to undertake this matter, the Firm is not expressing an opinion on whether you will prevail if a complaint is filed. None of our discussions should be taken as providing legal advice at any level and you are not authorized to rely on any discussions we had.

8. Let us Not Forget Our Good Clients—90 %

BONUS RULE NUMBER TEN: REMEMBER VALENTINE’S DAY

AND PLEASE PAY THE APPRECIATE CLIENT THE HOMAGE THEY DESERVE. BEST SERVICE, DISCOUNT ON FEES, AND STEP IN FRONT

OF A BUS FOR THEM. Client Breed #5: The Appreciative Client, quoted from Jack Breed, “Dealing with Clients” (2007, web)



How To Spot One:

The appreciative client will shower you with praise and make you feel special – gosh I love an appreciative client!

The Highs:

The appreciative client will make your life very easy as they'll often pick the first version of the first draft and declare it perfect. They're very enthusiastic and generally a delight to work with.

Even when the appreciative client does not like something they often word things in ways that make you happy to continue work on the project to get it pitch perfect.

The Lows:

They'll make the rest of your clients look bad.

How To Work With One:

Sit back and enjoy the glory. Make sure you get them a very nice Christmas gift and throw in a freebie every now and then. An appreciative client is like gold to a freelancer, so do your best work and make them feel like a VIP.

OOPS, DARTH VADER IS MY CLIENT. CAN WE GET RID OF HIM/HER/IT ETHICALLY AND WITHOUT BEING SUED? REMEMBER THE JIM MORRISON RULE NUMBER 9, ABOVE: WHEN THE MUSIC'S OVER, TURN OFF THE LIGHTS.

IN ADDITION TO PRACTICAL CONCERNS, WE DO HAVE THE ETHICAL BOUNDARIES:

ABA Model Rule 1.16(d):

(D) UPON TERMINATION OF REPRESENTATION, A LAWYER SHALL TAKE STEPS TO THE EXTENT REASONABLY PRACTICABLE TO PROTECT A 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 OR EXPENSE THAT HAS NOT BEEN EARNED OR INCURRED. THE LAWYER MAY RETAIN PAPERS RELATING TO THE CLIENT TO THE EXTENT PERMITTED BY OTHER LAW.

So, all is going right. But then it begins to go wrong. In walking to work, you have an epiphany. “I don’t like this client being a client. He needs to be an X client.”

Part Five: Termination Of The Attorney-Client Relationship

Obligations of Attorney When Fired or Upon Withdrawal.

ABA Model Rule 1.16(d):

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

1. Lawyer’s Duty: Protect the Client’s Interests.

How???? Surrender “papers and property to which client is entitled;” refund any unearned fees.

What papers and property is the client entitled to receive? Has the client paid his or her fees? If yes, is client entitled to the whole file, including notes, research, documents?

- Generally, a lawyer has a lien on the file if the client has not paid fees.
- Practical issue – if the client is firing the lawyer, the client likely would be willing to pay outstanding fees. If the lawyer insists on payment, is there a greater chance the client will file a malpractice suit or ethical grievance?
- Even if the client has paid fees, should the lawyer be able to charge the client for copies of the file?

- If the lawyer has been scanning documents, notes, and research, then no copies are needed because the lawyer already has an electronic copy of the file. So, does the client get the whole paper or electronic file?
- Should the lawyer spend resources or charge the client to scan file?

2. Recommended Approach to Turning Over the File –

- Cull the file to eliminate printed copies of internal emails, file opening information, *misfiled documents that belong to other clients*, and any other items that do not benefit client (the standard is protecting client's interests).
- If items are not scanned, scan them.
- If the entire file is scanned, cull the file and retrieve misfiled or other non-beneficial documents and give the client an electronic copy of the culled file.
- Give all “work product” (not in the litigation sense, but in the practical sense) – memos, research, documents – after all, if the client paid, it is the widget we sold them. If the client did not pay, there is a conflict between the ethical rules (protecting the client's interests) and common law (lien on the file). For lawyer protection, err on the side of turning over the file.
- Always scan in research memos to avoid reinventing the wheel the next time this or a similar legal issue comes up.
- If the file is too voluminous to spend the time scanning and if the file is being turned over to another lawyer, consider following Congress' MO by kicking the can down the road with the following label on the file:

We are providing this file based on the understanding that Hughes & Scalise, P.C. will be granted access to it in the future, if necessary, for review or photocopying on reasonable notice during normal business hours. DO NOT DESTROY without first notifying Hughes & Scalise, P.C.

This label approach may or may not work but if the lawyer makes a business decision not to copy or scan the file, it may give him/her another bite at the apple if access to the file is needed later.

3. Termination letter.

The lawyer should write the client a termination letter (whether the client fired the lawyer or the lawyer withdrew). The letter should:

- Include a refund of any fees paid in advance;
- Address any pending/unfinished steps to effectuate the plan (filing gift tax return; Crummey notices; transfers of property to FLP, GRAT, QPRT, etc.; signing Wills, etc.);
- Identify any filing deadlines (litigation, tax, year-end, etc.);
- Recommend that the client engage a new lawyer.

4. Litigation Matters.

A lawyer may not withdraw from a matter, even if the client has fired him/her, until the court approves.

Recommended Approach in Litigation.

Assuming the client has hired a new lawyer, have the new lawyer sign his/her Notice of Appearance at the same time the fired lawyer turns over the file.

Keep copies of enough of the file to continue in the case until the court approves the lawyer's departure.

Can a lawyer bill for the time he/she is still in the case? It may depend on lawyer's engagement letter but even if it is not addressed, it seems likely the lawyer could.

5. Receipt for File and Original Documents.

Upon delivery, the lawyer should get a receipt for the file and original documents (from the client or from the new lawyer).

AUTHORITIES

OPINIONS

Connecticut:

Op. 03-06 (2003). Pursuant to MRPC 1.16(d) a law firm in possession of original will should furnish that will to new lawyer on written request of testator's attorney-in-fact, noting that testator through her attorney-in-fact could retain new counsel and authorize transfer of all papers to new counsel.

Iowa:

Op. No. 87-21 (1988). A lawyer must provide a former client with the contents of his file, and may not insist that the request be routed through the successor counsel. "The file belongs to the client and he has the right to direct where they shall be sent."

Minnesota:

Opinion 13 (June 15, 1989). Lawyer may not condition the return of files or property on payment of copying costs, but excluded from the definition of "client files, papers and property" are unfiled, unsent and unexecuted materials for which the client has not paid a fee.

Rhode Island:

Op. No. 2000-6 (2000). Lawyer must turn over copy of joint file of clients A and B to client B as required under MRPC 1.16(d).

Utah:

Op. 06-02 (2006). Under Utah Rule 1.16, at the end of the representation the lawyer must return the client's "file" and there is no exception conferring a retaining lien against the client's file in the event of nonpayment. The Committee here concludes that an unexecuted trust and will prepared by the lawyers, for which the client has not paid, are not part of the client's "file" which must be returned to the client at the end of the representation.

CASES

Federal:

In re Grand Jury Proceedings, 727 F.2d 941 (10th Cir. 1984) – Files belong to the client and are held by attorney in representative capacity, therefore attorney cannot invoke Fifth Amendment privilege.

Clark v. Milam, 847 F. Supp. 424, 426 (D. W.Va. 1994) - The Commissioner claimed that he was entitled to the attorney's work product, which she created during her representation of the company in various cases. The attorney claimed that the documents were immune from

discovery. The court held that the magistrate's denial of the Commissioner's request for the attorney's work product was contrary to law. The attorney could not invoke work product immunity against her own client in regard to work product created during the course of representing that client. The magistrate's decision to the contrary was therefore reversible under [Fed. R. Civ. P. 72\(a\)](#). The court reversed the magistrate's decision insofar as it prohibited discovery of work product created during the attorney's representation of the company. In all other respects, the court adopted and affirmed the magistrate's holding.

Martin v. Valley Nat. Bank of Arizona, 140 F.R.D. 291 (S.D.N.Y. 1991) - As a general matter, the work-product rule applies only to documents prepared principally or exclusively to assist in anticipated or ongoing litigation. It follows, then, that if a party prepares a document in the ordinary course of its business, it will not be protected even if the party is aware that the document may also be useful in the event of litigation.

Resolution Trust Corp v. H---, P.C., 128 F.R.D. 647 (N.D. Tex. 1989) – Law firm was required to turn over to Plaintiff the entire contents, including previously withheld attorneys' notes and legal memoranda, of all filed maintained for client by the law firm.

Arizona:

In the Matter of Van Baalen, 123 Ariz. 82, 597 P.2d 985 (1979) – Attorney publicly censured for refusing client access to file until a \$30 fee for copying was paid.

Nevada:

Morse v. District Court, 195 P.2d 199 (1948) - The court granted to petitioner attorneys a writ of certiorari against respondent trial court, directing respondent to modify its previous order so as to require plaintiffs in litigation pending before respondent to provide to petitioners a bond or other form of security for payment of their fees before requiring petitioners to turn over papers and documents in their possession to substituted counsel retained by plaintiffs.

Matter of Kaufman, 567 P.2d 957 (1977) - In Nevada, an attorney has the right to retain clients' papers, documents, and files as a passive lien for the payment of fees owing as of the attorney's withdrawal. The question of whether or not the lien in question is a retaining lien or a "special or charging" lien, as well as the fact of a lawyer's voluntary withdrawal from a case, greatly affects the ability of a lawyer to keep property belonging to the client. A "special or charging" lien is defined as the right to be paid out of a fund or judgment which he has been instrumental in recovering for his client.

Figliuzzi v. District Court, 890 P.2d 798 (1995) - In Nevada, there are two types of liens an attorney may hold to ensure that clients pay their attorney's fees: (1) a special or charging lien on the judgment or settlement the attorney has obtained for the client; and (2) a general or retaining lien that entitles an attorney, if discharged by the client, to retain the client's papers, property or money until a court, at the request of the client, requires the attorney to

deliver the retained items upon the client's furnishing of payment or security for the attorney's fees.

Ohio:

Smith v. Conley, 109 Ohio St. 3rd 141, 846 N.E.2d 509 (Ohio 2006) - The issue presented was whether the attorney-client relationship ended upon the client's firing of the attorney or upon the date which the attorney withdrew from the case. The majority opinion determined that the date the client fired the attorney was the date that the attorney-client relationship ended. A dissent argued that the date the court granted the motion to withdraw was the end of the relationship.

Texas:

Goggin v. Grimes, 969 S.W.2d 135, 137 (Tex. App. – Houston [14th Dist.] 1998) - The attorney-client relationship ends when the attorney withdraws.

Smith v. State, 490 S.W.2d 902 – Attorney was disciplined for retaining client papers as a possessory lien, when the attorney failed to make a demand for the debt owned by client.

ACTIONS TO SLEEP BY: THE 15 ACTION STEPS THAT YOU SHOULD TAKE

1. Visualize every client referral call as an ice cream cone melting on a 90 degree summer day. Eat it (take action) before it melts.
 - a. The outline suggests protocols.
2. Post referral and pre client hiring: DDD. Do due diligence.
 - a. Questionnaire
 - b. Interview referral source
 - c. Use social media.
 - d. Be honest—is this a client that will enhance my practice?
3. Understand that you will make more money each year by NOT TAKING BAD CLIENTS.
 - a. See Example 5. To assist in the process, have rote protocol for dismissal:
 - b. Example 3: “My schedule is really bad for the next month? I have to drill down and focus on my current clients and give them perfect service. Now that we have talked, I can tell that your matter needs immediate attention. Hence, let me suggest that you use _____.”
4. Reward Great Clients
 - a. See page 13
5. Set aside a day each week to work “away” (at home, in a conference room, etc.) and leave your phone and email turned off so that you can focus on getting the drafting/review work done.
6. Set aside time early in the month to start and finish client billing.
7. Designate a person in the office responsible for checking the calendar for appointments and pulling client files *before* the client meeting.
8. Consider taking an associate into client meetings so that:
 - a. you are actively training the associate;
 - b. the client has another contact in the firm if you are not available; and

- c. The associate (instead of you) opens the file and summarizes meeting notes.
- 9. Turn off email notification.
 - a. To do that, try going to Home, then Options, then Mail.
 - b. You will see the boxes to uncheck about notification of new emails.
- 10. Learn the Delay Delivery Option to teach clients that responses are not immediate.
- 11. Have dual desk and non-computer work station.
- 12. Save 41 hours per year by never opening an email, looking at it, closing it, and opening it later. That's a week-long vacation folk.
- 13. Plan for the client "divorce" in the engagement letter.
- 14. Life is short. Fire bad clients early so that their interests are not materially affected and to enhance the quality of your life.
- 15. Plan for, Value, Take, and Understand that a Protocol (Mental and Actual) is needed for your vacation time.

And, for another day, diet and exercise during the day will make your mood quite better. Stay tuned for this next year.