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60 Ethics Tips in 60 Minutes

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60 ETHICS TIPS IN 60 MINUTES

December 12, 2022

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60 ETHICS TIPS IN 60 MINUTES

Overview



Fasten your seatbelts and join Judge Gary Miller for **60 ethics Tips in 60 Minutes!** It's one hour of fast-paced ethics tips, just when you need it, towards the end of the CLE year.

Faculty

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Hon. Gary L. Miller, Marion Superior Court, Civil Division 3, Indianapolis



The *Hon. Gary L. Miller* is Judge of Marion County Superior Court, Civil Division #3 in Indianapolis. Previously, he was a Partner with the Indianapolis firm, MillerMeyer LLP. Gary has lived in Indianapolis all of his life. He is a 1974 graduate of North Central High School and a member of its Wall of Fame. He attended Indiana University in Bloomington and graduated in 1977. He is a 1980 graduate of the Indiana University School of Law at Indianapolis. While in law school, he worked as a bailiff in the Municipal and Circuit Courts. He joined the prosecutor's office as an intern and when he graduated law school was immediately offered a job as a Deputy Prosecuting Attorney. His assignments included stints in Juvenile court, the misdemeanor courts and felony division. He tried more than 30 major felony jury trials. Miller left the prosecutors office in 1983 to join the law firm of Hollingsworth & Meek. He worked there until 1986 when the Indiana Supreme Court appointed him as a Judge Pro Tem to serve in the place of a Judge who had become ill. In 1990, Gary ran for and won his first of three terms as Judge of the Marion Superior Court. For ten years Gary presided in Marion Superior Court, Criminal Division 5 where he presided over numerous high profile cases. In January 2001, he transferred to the Civil Division where, over the next 8 years, he presided over civil cases, including family law, contracts, medical malpractice and personal injury. Gary retired from the bench at the end of 2008 to open MillerMeyer LLP concentrating on mediation, civil and criminal litigation and advising attorneys on issues of legal ethics, attorneys' fees, attorney practice and malpractice avoidance. Gary has taught courses in Trial Practice and Professional Responsibility at the IU School of Law in Indianapolis since 1992. He has lectured throughout the United States and in Canada on issues including legal ethics, malpractice and trial tactics. Bar Admissions: State of Indiana, 1980 U.S. District Court Southern District of Indiana, 1980 Education: Indiana University School of Law, Indianapolis, Indiana, 1980 Indiana University, Bloomington, Indiana, 1977 Adjunct Professor of Law: Indiana University School of Law at Indianapolis Professional Responsibility, 1997- present Trial Practice, 1992-2007.

60 Ethics Tips in 60 Minutes

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- 1) Read the rules!

Preamble

IRPC 1.1 Competence

In re Castello, 273 Ind. 136, 141, 402 N.E.2d 970, (1980) A court cannot excuse an attorney from misconduct because of his unfamiliarity with the disciplinary rules, and being unaware of such rules would demonstrate his unfitness.

- 2) Re-read the terminology definitions

IRPC 1.0 Terminology

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

- 3) When confused, read the comments.
- 4) Trust the red flag
- 5) Always have a written fee agreement

IRPC 1.5

In re Johnston, 698 N.E.2d 313, 318 (Ind. 1998) Professional Conduct Rule 1.5(c) requires contingent fee agreements to be in writing and state the method

by which the fee is to be determined. The respondent's oral agreement with his clients was in violation of that rule.

- 6) Limit the scope of your representation when necessary

IRPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

- 7) Client must understand the limitations on representation

In re Maternowski, 674 N.E.2d 1287(1996) Meaningful consent to a limitation on a lawyer's scope of representation must be based on full, objective disclosure and unbiased advice, and respondents were not in a position to give such objective advice, where they had a policy of refusing to represent criminal defendants who indicated willingness to cooperate with the government, and there was a reasonable possibility that their attorneys' fees were being paid by defendant's accomplices.

- 8) Confirm client decisions in writing

IRPC 1.0(b) (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (n) for the definition of "writing." See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

- 9) "Screening" conflicts in a firm is difficult

IRPC 1.0(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

- 10) Think in terms of "What will the client think?"

- 11) Know when you aren't competent

In re Gibson, 444 N.E.2d 852, (Ind. 1983). When a lawyer undertakes to represent a client, he assumes a duty to put forth his most diligent effort and a duty to render competent services, regardless of the client's financial status. Failure to do so is misconduct.

In re Snyder, 428 N.E.2d 17, (Ind. 1981). Attorney was disciplined for failing to process a divorce for his client, who remarried on the day after the date she had been assured the divorce would be finalized, thus requiring additional legal expense to correct the problems created by the second marriage.

- 12) Don't give "advice" in areas you don't practice
- 13) Just because you attend a CLE doesn't make you competent
- 14) Use the written fee agreement to solve future problems
- 15) Do not change a fee agreement in the middle of a case

In re Hammerle, 952 N.E.2d 751 (Ind. 2011) Respondent was retained by a client charged with federal offenses. Respondent and the client entered into an agreement under which Respondent would represent the client for a "retainer/flat fee" of \$35,000, plus an hourly fee of \$250 if the trial lasted more than five days. Prior to this, the client had told Respondent he had no interest in a plea agreement, and the parties prepared for a multi-week jury trial. After seven months of work on the case, Respondent initiated discussions to revise the fee agreement. Respondent had concluded that the client was certain to be convicted after a lengthy trial and anticipated difficulty collecting the balance of his fee from an incarcerated client. The parties amended their fee agreement and agreed that the client would pay Respondent an additional flat fee of \$20,000 and, in exchange, Respondent would drop billing by the hour for all work done after five days of trial. Respondent believed the ultimate fee under this modification would be more beneficial to the client given everyone's anticipation of a lengthy trial, but Respondent now recognizes he should have considered the possibility that the fee modification would be more beneficial to Respondent if the case could be resolved before trial. Respondent did not advise the client to consult with another attorney about of the advisability of amending the fee agreement, and he did not obtain the client's written consent to modify the original agreement. Not long after the fee agreement was modified, the government offered a plea agreement, which the client accepted on Respondent's advice. Hammerle was given a public reprimand.

- 16) Make certain your client knows any of your limitations on their work
- 17) Pick up the phone
- 18) Be wary of client with "diminished capacity"

IRPC 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

- 19) Be careful of withholding information from a client

IRPC 1.4 comment Withholding Information [7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

- 20) Don't get non-refundable retainers

- 21) Be careful with credit card payments

- 22) You can divide fees with other lawyers outside your firm

IRPC 1.5 (e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

- 23) Confidentiality begins immediately

IRPC 1.6

- 24) Confidentiality applies to ANY "information"

IRPC 1.6(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

- 25) Confidentiality applies to public and wrong information

In re Goebel, 703 N.E.2d 1045, (Ind. 1998). An attorney showed confidential information about another client of his law firm to a criminal client, not to prevent the commission of a crime, but rather based on the criminal client's forceful demand, the confidentiality requirements of this rule were violated.

26) Confidentiality is different than privilege

27) IRPC may conflict with your oath

Ind. R. Admis. B. & Disc. Att'y 22 "I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself;..."

28) You can be disciplined for non legal conduct

29) Keep records

30) Analyze conflicts by loyalty and confidentiality

31) JLAP is available

Ind. R. Admis. B. & Disc. Att'y 31. Section 2. Purpose. The purpose of the Judges and Lawyers Assistance Program is assisting impaired members in recovery; educating the bench and bar; and reducing the potential harm caused by impairment to the individual, the public, the profession, and the legal system. Through the Judges and Lawyers Assistance Program, the Committee will provide assistance to judges, lawyers and law students who suffer from physical or mental disabilities that result from disease, chemical dependency, mental health problems or age that impair their ability to practice; and will support other programs designed to increase awareness about the problems of impairment among lawyers and judges.

32) Always give duplicate receipts for cash

33) Avoid taking other property as a fee e.g. car, jewelry, mortgage

34) Business transactions are always a red flag

IRPC 1.8(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

35) Avoid taking fees from 3rd parties

36) Don't try to kiss your client

IRPC 1.8 (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

In re Hollander, 27 N.E.3d 278, Attorney who attempted to patronize a prostitute in exchange for providing legal services to her committed professional misconduct warranting a suspension from practice for not less than one year.

37) When you are fired, you may still have to work

38) Get help with social media

An Illinois Review Board for Attorney Registration and Disciplinary Commissions upheld a five-month suspension against a criminal defense lawyer who posted a police video depicting his client's alleged role in criminal activity on YouTube and on Facebook. The lawyer received the video from the prosecutor prior to the preliminary hearing. The lawyer allegedly informed the client that the lawyer was going to "pre-jury" the video to get opinions as to whether the video revealed entrapment. The client testified that she did not give permission for the lawyer to post the video on YouTube and Facebook. Although there was conflicting testimony at the disciplinary hearing, the Illinois Review Board concluded that the lawyer did not properly consult with his client, did not discuss with his client the possible repercussions of the posting of the video on the Internet, and therefore did not receive informed consent. The Illinois Board found that there is nothing unconstitutional about Rule 1.6's confidentiality requirement and further that there was no adverse publicity about the client that might have justified releasing the video in accordance with the pretrial publicity provisions of Rule 3.6.

39) Be careful safekeeping property of other persons

40) IOLTA accounts must be monitored

In re McLin, 644 N.E.2d 100, (Ind. 1994). Where attorney completely failed to maintain a clear demarcation between his funds and those of his clients and

used funds properly belonging to others in satisfaction of personal obligations, he engaged in serious misconduct and was disciplined with a 30-day suspension.

- 41) Its ok to decline representation
- 42) Its ok to withdraw in the middle of a case but...
- 43) Disqualification is possible for conflicts – sword AND shield
- 44) Cocktail conversation may create “client attorney” relationship
- 45) Representing clients means more than just giving legal advice
- 46) Don’t abuse the discovery process
- 47) Don’t lie

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

- (a) make a false statement of material fact or law to a third person; ...
In re Steele, 45 N.E.3d 777, (Ind. 2015). Attorney was disbarred for violating this rule by frequently lying to his clients, office staff, and third parties and also the lawyer instructed his staff to lie to client and opposing counsel regarding respondent’s whereabouts and other matters.

- 48) Puffing is not a lie
- 49) Beware the perjury trap
- 50) Be civil
- 51) Ex Parte is bad

In re Shepard, 850 N.E.2d 909, (Ind. 2006). A lawyer did not timely appear in court to represent a client, as a result of which a default judgment was entered against the client, and the lawyer then engaged in ex parte communications with the court, resulting in the default judgment being set aside, he violated R.P.C. 8.4(d), prohibiting him from engaging in conduct prejudicial to the administration of justice.

- 52) Don’t talk to the media about your pending cases
- 53) Avoid making yourself a witness
- 54) Plan ahead for inadvertent disclosures

55) IRPC applies to all members of a firm

IRPC 5.1 (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct

56) Find a mentor and ask questions

57) Use opinion letters

58) You have a duty to report misconduct

Rule 8.3. Reporting professional misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

59) A priest, a judge, and a rabbit walk into a bar

IRPC 8.4 (g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

60) Don't tell the judge to f**k off