THE BAR PLAN FOUNDATION

The Lawyer's Duty of Communication

Indiana

- Christian A. Stiegemeyer | Director of Risk Management
- Whittney A. Dunn| Risk Manager

THE BAR PLAN FOUNDATION

A QUIZ

- Christian A. Stiegemeyer | Director of Risk Management
- Whittney A. Dunn| Risk Manager

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1. Your law firm website has a “Contact Us” page to allow visitors to send inquiries. The page has a “Comments” box which allows visitors to submit their information. On the page is a statement: “Please note: Sending us an e-mail will not make you a client of the firm. Do not send confidential or sensitive information using this form.” A visitor looks up your email on your Bio page and sends you information about her employment discrimination matter. The next month you enter your appearance for the adverse party and the visitor moves to DQ you and your firm because her email made her a prospective client. The motion:

A. Will be granted because the website solicits information on the “Contact Us” page.

B. Will be granted because the “Contact Us” page statement is insufficient to warn visitors about what is confidential or sensitive information.

C. Will be granted because displaying the email address on the Bio page without a warning is a solicitation.

D. Will be denied.

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2. During a bench trial in a dissolution matter there is a 30 minute recess. During that time you go across the hall to attend a hearing in an other matter then return as the judge takes the bench during the dissolution trial. Attending the hearing:

A. Permits you to charge travel time to both clients.

B. Is an appropriate use of efficiently leveraging your time on the two matters.

C. Violates Rule 1.4 as to the dissolution client.

D. Does not violate Rule 1.4 because the client said nothing when you told him you were going to the hearing, which is consent by silence.

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3. After a decade practicing in your area of law you thought you'd seen it all. But one day a client brings you a question of law and fact that leaves you stumped. While researching the answer you take a phone call from a different client, answer an email from adverse counsel in another case, mediate an intra-office dust-up between two staffers and check a text from your spouse asking about which holiday in-law gathering to attend. After each task the time spent getting your focus back to the research is:

A. 5 minutes.

B. 10 minutes.

C. 15 minutes.

D. 25 minutes.

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4. Your fee agreement contains a clause stating: "WITHDRAWAL OF ATTORNEY: Client understands and expressly agrees that Attorney may withdraw from representation of Client at any time if Client fails to honor the fee arrangement herein set forth including, but not limited to, payment of fees and expenses on a timely basis; fails to cooperate in the preparation of the case; or otherwise takes any action which impedes the ability of Attorney to provide adequate and ethical representation." This clause is:

A. Truthful and accurate if you really intend to withdraw for one of the stated reasons.

B. A permissible basis for you to stop working on the client's case if client doesn't timely pay your fee bills.

C. Untruthful and inaccurate after a petition is filed.

D. A permissible basis for the court to grant your Motion to Withdraw in the event of non-payment of your fees.

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5. You have a second home in Florida. Although you have no Florida law license you regularly conduct legal representations for Indiana resident clients with Indiana legal matters from Florida. This is:

A. The Unauthorized Practice of Law in Florida & Indiana.

B. Permissible with conditions.

C. The Unauthorized Practice of Law in Florida.

D. The Unauthorized Practice of Law in Indiana.

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6. During a video deposition in your conference room you and your client are masked. However, you are heard by adverse counsel providing an answer to your client. Adverse counsel later reviews the video recording and identifies more than 50 instances where she could hear you "surreptitiously provide" an answer to your client, who then repeated the same answer. The judge will:

A. Dismiss your client's case with prejudice.

B. Remove you from the case.

C. Dismiss your client's case without prejudice.

D. Award the deposition's costs and attorney's fees incurred to the adverse party.

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7. Attorneys who state they are satisfied with their career engage in how many hours of self-care per week:

A. 3.

B. 4.

C. 5.

D. 6.

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8. You post a comment to your personal social media that some people find objectionable. These people post “reviews” of you on Facebook, Yelp, Google Reviews and other Internet-based review sites giving you one-star ratings (out of five), despite not having any business-related contact with you and describing you as "unethical," "unprofessional," "chauvinist," "an embarrassment and a disgrace," "hypocrite," and "racist”. You sue them for defamation. These comments are:

A. Defamatory per se.

B. Statements of opinion and are not factually verifiable.

C. Both A & B.

D. Neither A nor B.

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9. The number of dimensions of lawyer well-being are:

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10. You have a second home in Florida and have made friends with a number of attorneys there. One of them refers to you an Indiana resident she knows who needs representation in a PI matter in Indiana. You all agree that the Florida lawyer will receive one-third of your one-third of any recovery. This agreement:

A. Is permissible if it complies will all requirements of IRPC 1.5(e).

B. Charges a presumptively excessive fee.

C. Is permissible if the Florida lawyer may ethically accept a referral fee.

D. Is permissible only if the Florida lawyer enters *pro hac vice.*

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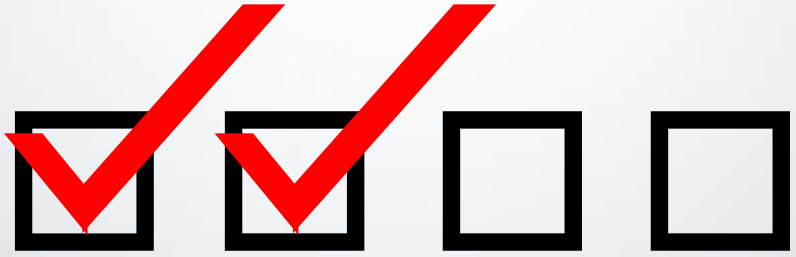
THE QUIZ ANSWERS



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When an e-mail is sent using a link on a law firm's web site, the firm has an opportunity to set conditions on the flow of information, e.g. require a prospective client to review and "click" his assent to terms of use before using an e-mail link. Such terms might include that any information communicated before the firm agrees to representation will not be treated as confidential, or that receipt of information will not prevent the firm from representing someone else in the matter. Mass. Ethics Op. 07-01.

ANSWER: D. Will be denied.

Mihuti v. Mid America Clinical Laboratories, LLC, 2019 WL 6468273, S.D.Ind. 12/2/2019.

[Visitor’s] initial communication with [Attorney] was not enough to be considered a “discussion” under Ind. R. Prof. Cond. 1.18. Therefore, she was not a prospective client within the meaning of paragraph (a), and she is not entitled to protection under this rule.

Also - Not significantly harmful/screened

ABA Form. Op. 10-457, 8/5/2010 – Lawyer Websites

If a lawyer website specifically requests or invites submission of information concerning the possibility of forming a client-lawyer relationship with respect to a matter, a discussion, as that term is used in Rule 1.18, will result when a website visitor submits the requested information.

If a website visitor submits information to a site that does not specifically request or invite this, the lawyer's response to that submission will determine whether a discussion under Rule 1.18 has occurred.

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Rule 1.18. Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

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Rule 1.18. Duties to Prospective Client

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent.

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Rule 1.18. Duties to Prospective Client

COMMENT

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

[10] Paragraph (d) also applies to other lawyers in the firm with whom the receiving lawyer actually shared disqualifying information.

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A. Permits you to charge travel time to both clients.

B. Is an appropriate use of efficiently leveraging your time on the two matters.

C. Violates Rule 1.4 as to the dissolution client.

D. Does not violate Rule 1.4 because the client said nothing when you told him you were going to the hearing, which is consent by silence.

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2. During a bench trial in a dissolution matter there is a 30 minute recess. During that time you go across the hall to attend a hearing in an other matter then return as the judge takes the bench during the dissolution trial. Attending the hearing:

ANSWER: C. Violates Rule 1.4 as to the dissolution client.

***Disciplinary Board of the Supreme Court of the State of North Dakota v. Matson*, 869 N.W.2d 128 (N.D. 2015).**

[Attorney] arrived for the trial seconds before it began, and attended a hearing in another matter during a recess. Therefore, the client was uninformed about [Attorney's] thoughts regarding the trial or about the next steps during the trial.

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In 2005, research carried out by Dr. Glenn Wilson at London's Institute of Psychiatry found that persistent interruptions and distractions at work had a profound effect. Those distracted by emails and phone calls saw a 10-point fall in their IQ, twice that found in studies on the impact of smoking marijuana.

Be Here Now

The Spider Technique

Worry Time

ANSWER: D. 25 minutes

The Cost of Interrupted Work: More Speed and Stress; Gloria Mark, Department of Informatics, University of California, Irvine

"Surprisingly our results show that interrupted work is performed faster. We offer an interpretation. When people are constantly interrupted, they develop a mode of working faster (and writing less) to compensate for the time they know they will lose by being interrupted."

"[P]eople in the interrupted conditions experienced a higher workload, more stress, higher frustration, more time pressure, and effort."

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4. Your fee agreement contains a clause stating: “WITHDRAWAL OF ATTORNEY: Client understands and expressly agrees that Attorney may withdraw from representation of Client at any time if Client fails to honor the fee arrangement herein set forth including, but not limited to, payment of fees and expenses on a timely basis; fails to cooperate in the preparation of the case; or otherwise takes any action which impedes the ability of Attorney to provide adequate and ethical representation.” This clause is:

A. Truthful and accurate if you really intends to withdraw for one of the stated reasons.

B. A permissible basis for you to stop working on the client’s case if client doesn’t timely pay your fee bills.

C. Untruthful and inaccurate after a petition is filed.

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"In the event I desire to change attorneys, then the attorneys shall be paid all cost[s] then expended and the agreed upon aforesaid percentage of any offer of settlement obtained or, if no offer of settlement has been made, then all cost [s] expended and one-half of the aforesaid percentages upon all monies subsequently obtained by ourselves or any representative in our behalf." Court enforced Mich. atty's. 1/3 contract fee against Ind. clients after discharge. *Plummer v. Gittleman*, 821 N.E.2d 825 (Ind. Ct. App. 2004).

ANSWER: C. Untruthful and inaccurate after a petition is filed.

In re Bulen, 375 B.R. 858 (Bankr. D. Minn. 2007).

Court says - "A provision in a retainer purporting to give the attorney the right of withdrawal and nonappearance is at best misleading, intimidating, and it works to prevent a [client's] objection to a motion to withdraw or to a failure to appear."

Attorney's New Fee Agreement, written by Court, says: - "WITHDRAWAL OF ATTORNEY. Attorney reserves the right, upon nonpayment by Client of any fees or costs incurred pursuant to this agreement, to request that Client obtain alternative counsel and, if Client fails to do so within a reasonable time, to apply to the Bankruptcy Court for permission to withdraw. Until substitute counsel or Bankruptcy Court permission to withdraw is obtained, Attorney will continue to provide legal services to Client in connection with Client's bankruptcy case to the extent required by Local Bankruptcy Rules…"

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An attorney filing a motion to withdraw from representation shall certify the last known address and telephone number of the party, subject to the confidentiality provisions of Sections (A)(8) and (D) above, and shall attach to the motion a copy of the notice of intent to withdraw that was sent to the party.

A motion for withdrawal of representation shall be granted by the court unless the court specifically finds that withdrawal is not reasonable or consistent with the efficient administration of justice.

ANSWER: C. Untruthful and inaccurate after a petition is filed.

In re Bulen, 375 B.R. 858 (Bankr. D. Minn. 2007).

IN ST TRIAL P Rule 3.1(H) Withdrawal of Representation.

An attorney representing a party may file a motion to withdraw representation of the party upon a showing that the attorney has sent written notice of intent to withdraw to the party at least ten (10) days before filing a motion to withdraw representation, and either:

(1) the terms and conditions of the attorney's agreement with the party regarding the scope of the representation have been satisfied, or

(2) withdrawal is required by Professional Conduct Rule 1.16(a), or is otherwise permitted by Professional Conduct Rule 1.16(b).

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(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the Rules of Professional Conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

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5. You have a second home in Florida. Although you have no Florida law license you regularly conduct legal representations for Indiana resident clients with Indiana legal matters from Florida. This is:

A. The Unauthorized Practice of Law in Florida & Indiana.

B. Permissible with conditions.

C. The Unauthorized Practice of Law in Florida.

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See also, ABA Formal Opinion 498 3/10/2021 – Virtual Practice: Commonly Implicated Rules.

Best: Request an ethics opinion from the Indiana Supreme Court Disciplinary Commission AND research Florida law and ethics opinions.

https://secure.in.gov/courts/discipline/guidance/

ANSWER: B. Permissible with conditions.

ABA Formal Opinion 495, 12/16/2020. – "invisible as a lawyer"

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted **if:**

1) the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law **and;**

2) they do not,

hold themselves out as being licensed to practice in the local jurisdiction,

advertise or otherwise hold out as having an **office** in the local jurisdiction, and

provide or offer to provide legal services in the local jurisdiction

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A. Dismiss your client's case with prejudice.

B. Remove you from the case.

C. Dismiss your client's case without prejudice.

D. Award the deposition's costs and attorney's fees incurred to the adverse party.

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IRPC 1.1 Competence

Maintaining Competence - *COMMENT [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.*

ANSWER: B. Remove you from the case.

Weiss, Debra Cassens. "Lawyer accused of feeding answers to his client in Zoom deposition faces possible sanction". ABA Journal, 10/11/2021. https://www.abajournal.com/news/article/lawyer-accused-of-feeding-answers-to-his-client-in-zoom-deposition-faces-possible-sanction.

Bostrom, Brian, Director of Information Systems. "Best Practices For Attorneys When Using Videoconferencing". The Bar Plan. https://www.thebarplan.com/online-videoconferencing/

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A. 3.

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7. Attorneys who state they are satisfied with their career engage in how many hours of self-care per week:

Your Evening Routine Starts at 5:00

At the end of the workday Plan your next day - Choose 1-3 “most important tasks” for tomorrow.

Do a “brain dump” - Write down tasks or ideas you don’t want to forget about. This closes the “open tabs” in your mind so they’re not running in the background.

Have a simple end-of-workday ritual (when working from home) - Change clothes/Take a “commute” (a.k.a. a walk around the block)/If your living situation permits, have a separate “work area” you leave at the end of the workday.

ANSWER: D. 6.

Bloomberg Law Attorney Workload and Hours Survey asked 559 attorneys about their job satisfaction, workload, and general well-being over the third quarter.

As hours spent per week engaging in self-care went up, so did job satisfaction scores. Satisfied attorneys spent an average of six hours per week on self-care, while unsatisfied attorneys spent only three and a half.

- **Physical Self-Care Examples:**
- Eat a healthy meal.
- Engage in exercise.
- Go for a walk.
- Drink water.
- Practice good sleep habits
- Have a cup of tea.
- Sit in the sunlight.
- Take a shower or bath.

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A. Defamatory per se.

B. Statements of opinion and are not factually verifiable.

C. Both A & B.

D. Neither A nor B.

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Answer: C. Both A & B.

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Law Offices of David Freydin PC v. Chamara **, 2022 BL 31114, 7th Cir., No. 18-3216, 1/28/22 .**

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9. The number of dimensions of lawyer well-being are:

A. 3.

B. 4.

C. 5.

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ANSWER: D. 6.

Occupational

Satisfaction 1—2—3—4—5

Growth 1—2—3—4—5

Financial Stability 1—2—3—4—5

Occupational: Satisfaction, Growth, Financial Stability

Emotional: Manage Emotions & Protect Mental Health

Physical: Healthy Lifestyle, Help-Seeking When Needed

Intellectual: Learn, Pursue Challenge, Keep Developing

Spiritual: Meaning & Purpose

Social: Connection, Belonging, Contributing

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A. Is permissible if it complies will all requirements of IRPC 1.5(e).

B. Charges a presumptively excessive fee.

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What about a Kansas Attorney who tells you to just send him a referral fee?

KRPC 1.5(g) A division of fee, **which may include a portion designated for referral of a matter**, between or among lawyers who are not in the same firm may be made if the total fee is reasonable and the client is advised of and does not object to the division. (Emphasis added.)

IRPC 7.2(b) A lawyer shall not give anything of value to a person for recommending or advertising the lawyer's services…

ANSWER: B. Charges a presumptively excessive fee.

FRPC 4-1.5(f)(4)(D)(ii) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) must be on the following basis: To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% will be presumed to be clearly excessive.

"Under Indiana law, fee-sharing agreement between out-of-state and in-state attorneys was not objectionable merely because it involved lawyers from different states."
Freeman v. Mayer, 95 F.3d 569 (7th Cir.1996).

TREND - See also Illinois Professional Conduct Advisory Opinion 21-04.

An Illinois lawyer may enter into a fee-sharing agreement with an out-of-state lawyer who refers a personal injury case to the Illinois lawyer so long as the agreement complies with the applicable Illinois Rules of Professional Conduct and the corresponding rules of the foreign jurisdiction.

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A Lawyer's Duty of Communication

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A Lawyer's Duty of Communication

"Almost all disciplinary proceedings alleging violations of Rule 1.4 also involve violations of several other ethics rules; the other violations often explain what the lawyer has failed to tell the client."

Bloomberg/BNA; Lawyer-Client Relationship, Communication, 31:501.20.60.

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A Look at Rules…

A Lawyer's Duty of Communication

1.4. Communication

1.0(e). Terminology-Informed Consent

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RULE 1.4. COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).*

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

A Lawyer's Duty of Communication

**Lawyer argued she had no duty to communicate with client in writing, as opposed to orally. However, lawyer knew client had trouble understanding and retaining spoken information. Held – Lawyer's failure to put her advice in writing violated Rule 1.4(b).

Maryland Att'y Grievance Comm'n v. Framm, No. 73, 2016 BL 274737 (Md. Aug. 24, 2016).

*[Attorney] guilty of professional misconduct under Rule 4-8.4(a) by violating Rule 4-1.4 in that he failed to tell [Client] of the limitations on his conduct when [Attorney] knew [Client] expected assistance not permitted by the rules of professional conduct. *In re Zink,* 278 S.W.3d 166 (Mo. 2009).

Inform

Consult

Explain

Respond

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A Lawyer's Duty of Communication

*Lawyer hired by client's girlfriend to represent client was fired by girlfriend. Lawyer failed to contact client to communicate discharge or confirm it was client's decision. *People v. Rivers*, 933 P.2d 6 (Colo. 1997)

RULE 1.4. COMMUNICATION

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take.* For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

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A Lawyer's Duty of Communication

*Dividing phone message slips among non-lawyer staff and telling them to "handle it" is not this. *In re Farmer*, 950 P.2d 713 (Kan. 1997)

RULE 1.4. COMMUNICATION

COMMENT

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.*

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

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A Lawyer's Duty of Communication

RULE 1.4. COMMUNICATION

COMMENT

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

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.

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A Lawyer's Duty of Communication

RULE 1.4. COMMUNICATION

Opinion 1 of 2005 (undated) – Indeminification Clause

Except for indemnity obligations that may be imposed as a matter of federal law regarding Medicare and Medicaid claims, a lawyer representing a plaintiff may not agree to indemnify the defendant as part of the settlement of the suit.

The indemnity constitutes financial assistance to the client beyond mere advancement of costs and expenses of the litigation.

In addition, the lawyer's interest in avoiding personal financial responsibility may be opposed to the client's interest in settling and so may materially limit the representation, compromise the attorney's obligation to abide by the client's decision regarding settlement, and compromise the attorney's ability to exercise independent professional judgment. Rules 1.2(a), 1.7(a)(2), 1.8(e), 2.1(a), 1.15(d), 1.16.

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A Lawyer's Duty of Communication

RULE 1.4. COMMUNICATION

Opinion 1 of 2014 (undated) - Nondisparagement Clause

In negotiating to settle a civil matter, defense counsel asks plaintiff's lawyer to agree to be bound by the same nondisparagement clause plaintiff is signing.

To the extent the clause would apply to the lawyer's statements in advocating on behalf of a future client, or to the lawyer's private statements to clients or prospective clients, the agreement violates Rule 5.6(b).

To the extent it would prevent the lawyer from voluntarily giving evidence to someone investigating or litigating a claim or defense, the agreement violates Rule 3.4(f).

The lawyer may make such an agreement only if it is limited to the lawyer's public statements made other than in the course of client advocacy, e.g., advertising and promotional materials. Rules 1.6, 3.4(f), 5.6(b); ABA 93-371, 00-417, 06-444.

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A Lawyer's Duty of Communication

RULE 1.4. COMMUNICATION

•Missouri Informal Opinion 2020-07

QUESTION: May Attorney comply with a protective order or participate in a settlement agreement requiring return or destruction of documents produced during discovery?

ANSWER: Documents in Attorney's possession acquired during discovery are part of the client file. The file belongs to the client, with limited exception. Formal Opinion 115, as amended. Upon termination of the representation, Attorney is obligated to surrender papers and property "to which the client is entitled," but may "retain papers and property to the extent permitted by other law." Rule 4-1.16(d). Rule 4-1.15(d) requires Attorney to deliver promptly to the client any property that the client is entitled to receive, "except as … otherwise permitted by law or by agreement with the client." Rule 4-1.22, Retaining Client Files, permits a lawyer to destroy a client file, or portions of the file, prior to the expiration of the six-year or ten-year default retention period, but only if the client grants informed consent, confirmed in writing; the items are not of intrinsic value; and none of the conditions in paragraphs (a) through (d) of Rule 4-1.22 exist. *See* Rule 4-1.0(e) (defining "informed consent") and Rule 4-1.0(b) (defining "confirmed in writing").

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A Lawyer's Duty of Communication

Tenn. Op. 2019-F-167 Ethical propriety of settlement agreement requiring destruction of product in a products liability case.

It is improper for an attorney to propose or accept a provision in a settlement agreement, in a products liability case, that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney's representation of other clients.

RULE 1.4. COMMUNICATION

Missouri Informal Opinion 2020-07

QUESTION: May Attorney comply with a protective order or participate in a settlement agreement requiring return or destruction of documents produced during discovery?

Protective Orders: In the event a client refuses to grant informed consent, confirmed in writing, to Attorney's handling of file documents in accordance with a protective order, Attorney should seek to modify the order if Attorney can do so in compliance with Rule 4-3.1, Meritorious Claims and Contentions. If unsuccessful, Attorney is permitted by Rules 4-1.15(d) and 4-1.16(d) to comply with the terms of the protective order. See also Rule 4-3.4(c). Attorney must deliver to the client the remainder of the file or maintain the remainder of the file in accordance with Rule 4-1.22.

Settlements: A lawyer is to abide by a client's decision whether to accept an offer of settlement, subject to the limits imposed by the lawyer's professional obligations. Rule 4-1.2(a) and Comment [1]. A lawyer is prohibited from participating in a settlement agreement restricting the lawyer's right to practice. Rule 4-5.6(b). If Attorney obtains the client's informed consent, confirmed in writing, to destroy portions of the file, or obtains the client's agreement to return to another party portions of the file, in accordance with the proposed settlement agreement, Attorney may participate in the settlement agreement on behalf of the client. *See* Rules 4-1.22 and 4-1.15(d).

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RULE 1.0. TERMINOLOGY

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

A Lawyer's Duty of Communication

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.

THE BAR PLAN FOUNDATION

RULE 1.0. TERMINOLOGY

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

A Lawyer's Duty of Communication

Informed Consent

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b).Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

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RULE 1.0. TERMINOLOGY

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

A Lawyer's Duty of Communication

Rule 1.4 ties the duty of communication to the definition of informed consent in Rule 1.0(e).

"Every attorney practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have **consented** to the reporting and production requirements mandated by this Rule."
Ind.Admis.Disc.R.23.sec.30(f)(3)

Rule 1.4(a)(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules:

1.2. Scope of Representation, etc;
1.4. Communication of Information;
1.6. Confidentiality of Information;
1.7. Conflict of Interest: Current Clients (16X);
1.8. Conflict of Interest: Prohibited Transactions (16x);
1.9. Duties to former Clients;
1.10. Imputation of Conflicts of Interest: General Rule;
1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees;
1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral;
1.17. Sale of Law Practice;
1.18. Duties to Prospective Client;
2.3. Evaluation for Use by Third Persons;
3.7. Lawyer as Witness;
4.2. Communication with Person Represented by Counsel ("consents")
5.4. Professional Independence of a Lawyer;
6.5. Nonprofit and Court-Annexed Limited Legal Services Programs;

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A Lawyer's Duty of Communication

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

(a) Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

- (b) Notwithstanding the existence of a concurrent conflict of interest under Rule 1.7(a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

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RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

COMMENTS & INFORMED CONSENT & WAIVERS in Theory

A Lawyer's Duty of Communication

Personal Interest Conflict – 10-12

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RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

COMMENTS & INFORMED CONSENT & WAIVERS in Practice

A Lawyer's Duty of Communication

Statement and Waiver of Conflict of Interest

The undersigned individual, [defendant's name], hereby acknowledges that he [she] has been advised of the existence of a potential conflict of interest between his [her] codefendant [codefendant's name], and that should an actual conflict of interest arise, it would place [Attorney] as his [her] attorney in an ethical dilemma, as previously discussed, in that if [Attorney] represents both defendants and if either is offered a disposition that would harm the other's position or require testimony against the other.

The undersigned acknowledges further that he [she] is aware that he [she] can freely accept such an offer, if made, with such other attorney as he [she] may choose, but that [Attorney] will be forced to withdraw from his [her] representation and that of his [her] codefendant if he [she] chooses to do so.

The undersigned defendant hereby states that it is not his [her] intention to cooperate in any way whatsoever with the prosecution to do anything that would adversely affect the interest of the other defendant. Further, the undersigned defendant acknowledges that he [she] has been advised that [Attorney] will not represent any individual who, while represented by [Attorney], cooperates with the police or prosecution against the interest of any other individual regarding any victimless crime allegedly committed by any other individual.

By signing this document [defendant's name] agrees to waive such potential conflict and specifically requests that [Attorney] to represent both him [her] and his [her] codefendant [codefendant's name.]

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RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

COMMENTS & INFORMED CONSENT & WAIVERS in Practice

A Lawyer's Duty of Communication

In re Viets, 2021 WL 4784945 (Mo. 2021).

Brief of Office of Chief Disciplinary Counsel

The Waivers did not constitute "informed consent".

[Attorney] did not advise the [Clients] that they should consult with another attorney before signing the Waivers.

The [Clients] did not "know" when conflicts might arise in their cases. They had no legal training, little experience with the criminal justice system and little to no experience in hiring an attorney.

The Waivers did not disclose that different levels of culpability or group plea offers create conflicts.

The Waivers did not address the pitfalls that occur with joint representation or address possible effects on loyalty, confidentiality, or the attorney-client privilege.

The Waivers only reference testimony against the other codefendant or cooperation with the police or prosecution as creating conflicts. In addition, the letter [Attorney] sent with the Waivers led the [Clients] to reasonably believe that no conflict would develop unless they decided they wanted to turn on each other.

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A Lawyer's Duty of Communication

WARNING AND DISCLAIMER: The following information was prepared by The Bar Plan for general information purposes, and should not be construed as legal advice or legal opinion with regard to any specific circumstance or set of facts. This list is not inclusive of all the possible or required contents for such letters, and each attorney preparing such a letter must make an independent evaluation of the necessary and required contents, given the circumstances of the representation.

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

COMMENTS & INFORMED CONSENT & WAIVERS in Practice

ELEMENTS OF A CONFLICT OF INTEREST/INFORMED CONSENT WAIVER

Because of the unique nature and discrete facts of conflicts of interests a "form" waiver could not adequately address the issues in any single representation. Accordingly, rather than try to "form" through a conflict of interests situation, lawyers must instead understand what is needed to make waivers effective generally, and then apply that understanding to the specific conflict issues being addressed. A conflict waiver is effective only if the client or potential client gives informed consent. This is a two-step process of first informing the client of the facts and consequences of the conflict, and then obtaining the client's consent.

A lawyers' conduct in dealing with Conflicts of Interest is governed by Rules of Professional Conduct 1.7-1.14. The definition of "Informed Consent" and "Consent Confirmed in Writing" can be found in Rule 1.0(e) and (b), respectively. A lawyer dealing with a conflicts of interest scenario should carefully review these rules and their comment, when attempting to obtain a waiver.

The "consent" portion of Informed Consent is the easiest to obtain, perhaps requiring only a statement above the client's signature such as, **"I, CLIENT, having been fully informed by LAWYER of the proposed course of conduct, and after having been given adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct, do hereby consent to the proposed course of conduct."** SEE, Indiana Rule of Professional Conduct 1.0(e).

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A Lawyer's Duty of Communication

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RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

COMMENTS & INFORMED CONSENT & WAIVERS in Practice

ELEMENTS OF A CONFLICT OF INTEREST/INFORMED CONSENT WAIVER

The "informed" portion of Informed Consent, is much more difficult to achieve, resting as it does on the particular facts of any one representation or potential representation.

1. The first step in analyzing any conflict of interest is to determine the identity of the clients whose interest may conflict.

2. Under Rule 1.7 the lawyer must conclude that the representation would not be materially limited by the lawyer's responsibilities to the client OR the lawyer's own interests. Accordingly, if that limitation exits, the lawyer would then have to conclude reasonably that there would be no adverse affect on the client and obtain client consent. Whether any particular representation presents such a conflict is very fact dependent. However, courts and ethics authorities have concluded that when a lawyer has, believes he has, or reasonably should believe he has, committed an error in a representation that could possibly implicate the lawyer's own interests, a conflict of interests exists, and before taking further action on behalf of the client, the lawyer should obtain a written, signed conflict of interest waiver.

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A Lawyer's Duty of Communication

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RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

COMMENTS & INFORMED CONSENT & WAIVERS in Practice

ELEMENTS OF A CONFLICT OF INTEREST/INFORMED CONSENT WAIVER

3. There is no "how-to" list of issues that must be covered by the lawyer when informing a client about the material risks of and reasonably available alternatives to the proposed course of conduct." However, common issues that should be considered by the lawyer, and the affect on them by the conflict and its waiver, include:

- The loyalty of the lawyer to the clients' interests;
- A description of the representation and the status of the representation;
- An admonition that it is appropriate for the client to seek independent representation, an acknowledgement that the client understands the admonition, has had a reasonable period of time to seek independent representation before consenting to the waiver and has either obtained independent representation or has independently concluded not to seek independent representation;
- A description of the proposed conduct or acts to be taken by the lawyer;
- The material **benefit** to the client of the lawyer's proposed conduct or acts;
- The material and reasonably foreseeable ways that the proposed conduct or acts to be taken by the lawyer could **adversely** affect the client's interests;
- Contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or less readily available by the lawyer's proposed conduct or acts;
- Any material reservations that a disinterested lawyer might reasonably have about the arrangement if such a lawyer were representing the client;
- **A statement of facts that clearly and unambiguously describes why the waiver is in the client's best interests;**
- Any other facts, statements, advice, consultation, etc. necessary to meet the lawyer's duty of fully informing the client.; and
- The affect of the joint representation on the attorney-client privilege and confidential information.

THE BAR PLAN FOUNDATION

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

A Lawyer's Duty of Communication

IRPC Rule 1.8 COMMENT [14] This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.

COMMENTS & INFORMED CONSENT & ARBITRATION AGREEMENTS in Practice

Missouri Informal Opinion 990130 - Rule Number: 4-1.4(b); 4-1.7(b);

QUESTION: Attorney would like to put a binding arbitration provision in Attorney's fee agreement providing that all disputes between Attorney and Attorney´s client would be arbitrated. Is this prohibited?
ANSWER: Attorney may include a binding arbitration agreement in Attorney´s fee agreements without violating Supreme Court Rule 4. However, under Rules 4-1.4(b) and 4-1.7(b), Attorney has an obligation to orally point out this provision and to explain it, to the extent necessary for the individual client.

MRPC 4-1.7(b)Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), [significant risk…representation…will be materially limited by…a personal interest of the lawyer] a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

THE BAR PLAN FOUNDATION

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

A Lawyer's Duty of Communication

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Delaney v. Dickey, 242 A.3d 257 (N.J. 2020).

COMMENTS & INFORMED CONSENT & ARBITRATION AGREEMENTS in Practice

[Attorney's] retainer agreement stated that "any dispute (including, without limitation, any dispute with respect to the Firm's legal services and/or payment by you of amounts to the Firm), ... will be submitted to and finally determined by Arbitration" and "[a]ny disputes arising out of or relating to this engagement agreement or the Firm's engagement by you will be conducted pursuant to the JAMS/Endispute Arbitration Rules and Procedures."

A link to the JAMS Rules was provided in the agreement

Neither the retainer agreement nor the lawyer advised the client that:

In arbitration a single arbitrator presides over the disputed issues. In a trial a malpractice lawsuit could be filed in Superior Court in the county where [Client] resides or where [Attorney] maintains its offices, and have a jury representing a cross-section of the county's citizens sit in judgment of the case;

In a future malpractice action against the firm, costs and expenses of arbitration could be awarded against the plaintiff (which would be contrary to Rule 1.8(h)(1));

The advantages and disadvantages of arbitrating a malpractice claim;

- In the judicial forum client would have access to broad discovery,
- The right to a jury trial in an open courtroom,
- The right to speak freely on the subject matter without confidentiality restrictions,
- The right to appeal an erroneous ruling
- No high filing fees or payments for the services of the judge.

THE BAR PLAN FOUNDATION

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENT

COMMENTS & INFORMED CONSENT & ARBITRATION AGREEMENTS in Practice

A Lawyer's Duty of Communication

Client signed a contingent fee agreement providing a one-third fee of any and all amounts recovered prior to the first pre-trial conference, with escalating percentages if the case progressed thereafter. "Amounts recovered" was defined as "gross sums actually collected, including but not limited to sums attributable to interest, punitive damages or attorneys' fees (whether such collection is on account of a judgment or by way of compromise, settlement, or otherwise)."

Client agreed to a $12,000 settlement. Insurance medical liens totaled $5,000. Attorney deducted $4,000 as his fee. He then paid 2/3 of liens and retained 1/3 as fee pursuant to his interpretation of then applicable statute. Attorney did not explain in fee agreement or settlement statement his retention of the med pay amounts.

HELD - Ordinarily, negotiation of a fee agreement is not a conflict that carries any implications for Prof.Cond.R. 1.7(b). However, in this case the record does not indicate that [Attorney] discussed the legal issues raised by [Attorney's] view of the fee arrangement. His failure to explain this issue was affected by his self-interest. Therefore, [Client] had not consented after consultation to the alleged tainting self-interest.

In re Lehman, 690 N.E.2d 696 (Ind. 1997).

THE BAR PLAN FOUNDATION

RULE 1.4. COMMUNICATION

A Lawyer's Duty of Communication

INFORMED CONSENT & FEE AGREEMENTS

Clients fired [Attorney] by email and requested a full refund of fees paid and their file. Attorney replied by email that he would send a copy of their file within ten days and would review the time he spent on the file regarding her refund request. That evening, Attorney sent Clients a second email stating:

"My contract allows me 10 business days to return your file and bill. I am glad I returned to my office as you were taking advantage of my new secretary."

Clients never received their complete file or the return of any unearned fees. Respondent contended he was generous in not charging Clients for their numerous calls to his legal assistant.

Rule 1.4 (a)(4) - Promptly comply with reasonable requests for information;

In re Jeffries, 104 N.E.3d 567 (Ind. 2018).

THE BAR PLAN FOUNDATION

RULE 1.4. COMMUNICATION

A Lawyer's Duty of Communication

INFORMED CONSENT & FEE AGREEMENTS – When Attorney fails to comply with contract terms

Attorney's fee agreement stated:

Fees shall be based on time ... No substantial work shall be performed before payment of a deposit ("retainer") toward fee (refundable if not earned) of $1,500.00, plus a non-refundable initial consultation fee of (N/A), payable prior to said consultation. Client understands that substantial Attorney time input, and therefore fees, must be expended as and when necessary. **Therefore, it is agreed that Client shall pay the Attorney those monies necessary, on a 30–day, as-billed basis to maintain the retainer at its original level.**

HELD - In the present case, [Attorney's] failure to provide an invoice both when requested by [Client] and when he requested replenishment of the retainer, in derogation of the terms of his fee agreement, violated Rules 1.4(a) and 1.5(a).

BTW, Attorney's fee agreement ALSO stated:

Statement for services performed and costs advanced are due when rendered and Client agrees that in the event a statement remains unpaid for thirty (30) days, the Attorney shall be under no obligation to take any action on behalf of Client and may take action to withdraw his appearance from any court action and proof of nonpayment shall represent Client's consent thereto.

Atty Grievance Comm. v. Rand, 128 A.3rd 107 (Md. 2015).

THE BAR PLAN FOUNDATION

RULE 1.4. COMMUNICATION

INFORMED CONSENT & FEE AGREEMENTS – Attorney's Consent to the Relationship

A Lawyer's Duty of Communication

Did Attorney Consent to an A/C Relationship with Grandparent?

Attorney represented Client in dissolution in which Grandparent (GP) was named custodian of child. GP paid Client's fees. In post-dissolution matters GP again paid Client's fees until Client moved from GP's house with child. GP then filed claim for legal custody and parenting time of child and moved for DQ of attorney arguing CoI based on A/C relationship created during dissolution matter.

Fee Agreement with Client - [Client] employs [Attorney] to take such action as deemed necessary, to represent me in a contempt, parenting time, possible custody matter action.

Guarantee with GP – I personally guarantee the performance of the client, to the above terms. I understand that [Client] is the person to whom [Attorney] will answer and by whom she will be instructed. This guarantee does not create the attorney client relationship between [Attorney] and me. I will only receive such information regarding this case as the client should approve. I understand that [Attorney] will rely on this guarantee in extending credit to the client.

THE BAR PLAN FOUNDATION

RULE 1.4. COMMUNICATION

INFORMED CONSENT & FEE AGREEMENTS

A Lawyer's Duty of Communication

Court Found –

1 - Attorney represented Client in his dissolution proceedings;
2 - When post-dissolution issues arose, Attorney and Client entered into a written Fee Engagement Agreement;
3 - Grandparent entered into a Guarantee agreeing to guarantee Client's payments to Attorney;
4 - the Guarantee specifically provided that no attorney-client relationship existed between Attorney and Grandparent;
5 - Grandparent was never a party to the dissolution or post-dissolution proceedings prior to intervening;
6 - correspondence from Attorney was addressed only to Client;
7 – Attorney's bills were sent to Client and paid by Grandparent;
8 - Attorney's bills clearly identified Client as the client;

Held – NO DQ - Attorney-client relationship need not be express, but may be implied by the conduct of the parties. The relationship is consensual, existing only after both attorney and client have consented to its formation. The mere provision of nominal legal advice is not automatically dispositive where the existence of an attorney-client relationship is disputed. Citing *Matter of Kinney*, 670 N.E.2d 1294, 1297 (Ind. 1996).

Townes v. Long, 139 N.E.3d 718 (Ind.App. 2019) (noncitable).

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

A Lawyer's Duty of Communication

ABA Op. 500, 10/6/21, Language Access in the Client-Lawyer Relationship

A. Evaluating Whether an Interpreter or Translator Is Required

A lawyer may not, however, passively leave the decision to the client or thrust the responsibility to make arrangements for interpretation or translation entirely upon the client. [T]he lawyer must take steps to help the client understand the need for and purpose of an interpreter or translator, and, when reasonably necessary, take steps to secure such services.

[I]t is the lawyer's affirmative responsibility to ensure the client understands the lawyer's communications and that the lawyer understands the client's communications. In situations where there is doubt about the efficacy of client-lawyer communication, that doubt should be resolved in favor of engagement of an interpreter, translator, or an appropriate assistive or language-translation

B. Qualifications of Person Providing Translation or Interpretive Services

[A] lawyer should verify that the individual is skilled in the particular language or dialect required. [T]he lawyer should confirm that the individual has the expertise needed to comprehend the legal concepts/terminology at issue so that the legal advice being provided is communicated accurately in a language or format accessible to the client.

[I]f obtaining necessary services would place an unreasonable financial burden on the lawyer or the client or if necessary services are unavailable, the lawyer should ordinarily decline or withdraw from the representation or associate with a lawyer or law firm that can appropriately address the language-access issue, such as a multilingual lawyer.

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

A Lawyer's Duty of Communication

ABA Op. 500, 10/6/21, Language Access in the Client-Lawyer Relationship

C. Supervisory Duties When Engaging or Directing the Work of a Translator or Interpreter

[T]he lawyer must make reasonable efforts to ensure that the interpretive or translation services are provided in a manner that is compatible with the lawyer's ethical obligations, particularly the Rule 1.6 duty of confidentiality.

[The] arrangement…should address the protection of client information, and when retaining or directing the work of an interpreter or translator, the lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the interpreter or translator understands the lawyer's ethical duty of confidentiality and agrees to abide by it.

D. Guidance Regarding Social and Cultural Differences

Beyond language differences, the ability to understand, effectively communicate, gather information, and attribute meaning from behavior and expressions are all affected by cultural experiences. Competently mediating these differences to achieve the ends of the representation for the client requires: (i) identifying these differences; (ii) seeking to understand them and how they bear upon the representation; (iii) paying attention to implicit bias and other cognitive biases that can distort understanding; (iv) adapting the framing of questions to help elicit information relating to the representation in context-sensitive ways; (v) explaining the matter in multiple ways to promote better client insight and comprehension; (vi) "allow[ing] for additional time for client meetings and ask[ing] confirming questions to assure that information is being exchanged accurately and completely"; and (vii) conducting additional research or drawing upon the expertise of others when that is necessary to ensure effective communication and mutual understanding.

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

Practical Language Access in the Attorney-Client Relationship

A Lawyer's Duty of Communication

In re Welke, 131 N.E.3d 161, 163 (Ind. 2019).

Client was charged with murder after fatally stabbing a man. Client, whose English language skills were extremely poor, maintained he acted in self-defense. An experienced public defender initially represented Client, assisted by an interpreter.

Attorney's nonlawyer assistant (NA) ingratiated himself with Client's family, told them the public defender would "sell out" Client, and – together with Attorney – persuaded them that Attorney and NA could either successfully pursue a self-defense argument or obtain a better plea deal. Client's family hired Attorney and paid him a $6,000 retainer, $1,000 of which was earmarked for an interpreter.

Attorney did not have a defense interpreter on hand to communicate with Client at trial. During a recess, using Client's friend as an interpreter, Attorney communicated the State's latest offer (murder plea/fixed term of 45 years) to Client and advised Client to take the deal.

HELD – Attorney violated Rule 1.4(a)(2): Failure to reasonably consult with a client about the means by which the client's objectives are to be accomplished, and 1.4(b): Failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions.

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

A Lawyer's Duty of Communication

Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 Val. U. L. Rev. 1143 (2011).

Title III of the ADA

Client, a deaf woman, hired Attorney to represent her in her divorce. Client communicated with American Sign Language and lip-reading. The matter involved sensitive issues including domestic violence, child custody and a restraining order. Attorney failed to provide an interpreter during several meetings and instead chose to communicate using pen and paper, fax, lipreading, the NRS when using the phone and Client's sister.

In her claim to the DOJ for violation of Title III Client claimed she did not always understand Attoreny's communications and Attorney's use of the alternate communications resulted in additional time and fees.

Attorney stated he represented Client adequately and professionally, communicated effectively with her, believed Client always understood him, and he zealously represented Client within the bounds of the law and procured a favorable result for her.

The DOJ concluded that Client's allegations were meritorious. In a settlement with the Government Attorney agreed to pay Client $2,200 and forfeit any money she still owed him. The DOJ.'s findings included a determination that it was inappropriate to use a family member as a sign language interpreter when the matter involved domestic violence and further that Client's sister was not qualified to interpret because she had no specialized training in interpreting legal terms.

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

A Lawyer's Duty of Communication

[I]f obtaining necessary services would place an unreasonable financial burden on the lawyer or the client or if necessary services are unavailable, the lawyer should ordinarily decline or withdraw from the representation or associate with a lawyer or law firm that can appropriately address the language-access issue, such as a multilingual lawyer. ABA Op. 500, 10/6/21, Language Access in the Client-Lawyer Relationship

Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 Val. U. L. Rev. 1143 (2011).

Title III of the ADA

Client's six-year-old son was admitted to the hospital for three days. Client was deaf and used American Sign Language to communicate. Client alleged the hospital failed to utilize a qualified sign language interpreter as required by law. Client retained Attorney to pursue her claim against the hospital. Client repeatedly asked Attorney to provide a qualified interpreter for their meetings. Attorney failed to do so and instead relied on Client's son to interpret their meetings. Attorney ultimately withdrew from the representation. In a letter to Client upon withdrawal Attorney stated:

> "It is my understanding that you refuse to cooperate unless I provide you with an interpreter, which will cost me approximately eighty dollars an hour. I have never had to pay to converse with my own client. It would be different if you did not have anyone to translate for you. However, you have a very intelligent son who can do it for you…I believe that you should find another attorney as I am going to withdraw from this case."

Attorney's withdrawal resulted in the dismissal of her claim for failure to respond to discovery.

The DOJ concluded that Attorney failed to provide Client with effective communication. Attorney agreed to pay Client $1,000 in settlement.

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

The Five Habits: Building Cross-Cultural Competence

A Lawyer's Duty of Communication

Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L Rev 33, 2001.

Guiding Principles

All lawyering is cross cultural - Lawyers who explicitly examine the cross-cultural issues in a case will increase client trust, improve communication and enhance problem solving on behalf of clients.

A non-judgmental approach towards yourself and client promotes learning and good lawyering – Evaluating and examining cultural assumptions, stereotypes and biases without shame, judgment or self-condemnation, but with an eye towards understanding them and, where necessary, rectifying or eradicating them. To understand our clients, we need to use the same kind of nonjudgmental approach;

Remaining present with the individual client is an essential part of cross-cultural competence – Respecting the client's dignity, voice and story allows lawyers to avoid stereotyping. This can be especially difficult to attain in high-pressure, high-volume practices, where the "efficiency" of categorizing and generalizing, and severe time and resource constraints can lead the lawyer away from an individualized understanding of each client.

Knowing yourself as a cultural being is an on-going and necessary process for cross-cultural competence - The lawyer must also accept that his or her culture may create roadblocks to understanding others. Our experiences and our cultures create strong categories of in-group and out-group and cause us to stereotype the "other."

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

A Lawyer's Duty of Communication

Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L Rev 33, 2001.

The Five Habits: Building Cross-Cultural Competence

Habit 1 – Degrees of Separation and Connection

Analyze questions regarding how similarities and differences between the lawyer and client may influence lawyer-client interactions, especially information gathering. List and diagram similarities and differences between you and the client and then study how the similarities and differences may be significant. Differences lead to possible cultural misunderstanding, bias and stereotyping. Similarities lead to connections with clients.

Differences and Similarities can dictate the inquires made when lawyers seek information from the client. That is, questions are asked when a client makes choices the lawyers would not have made. Questions are not asked when a client made a choice the lawyer would have made, the assumption being that the client's reason and the lawyer's reason for the choice are the same.

Habit Two: The Three Rings – The Client, the Legal Decision-Maker, and the Lawyer

First, identify the differences and similarities between the client and the legal system and between the lawyer and the legal system.

Two, assess the legal claim (How large is the area of overlap between the client and the law?), assess credibility (How credible is my client's story? Does it make "sense"?), develop legal strategies (Can I shift the law's perspective to encompass more of the client's claim?).

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

A Lawyer's Duty of Communication

Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L Rev 33, 2001.

The Five Habits: Building Cross-Cultural Competence

Habit Three: Parallel Universes

Explore alternative explanations for a client's behavior before reaching a conclusion about the client's behavior. Don't assume - perhaps on limited information – that you understand the reasons for a client's' behavior. Cross-cultural inquiries can help develop additional information.

Habit Four: Pitfalls, Red Flags and Remedies

The more lawyers practice in a particular area of law, the more likely they are to have a "script." For example, a script for the opening interview, explaining privilege and confidentiality, building rapport, explaining the legal system, etc. Rather than scripts, orient the conversation to the client's world, understandings, priorities, narrative. Red flags - indications the client is disengaged, angry, uncomfortable or borrowing the lawyer's terminology. The main problem in developing a remedy is the increased use of the approach that caused the initial problem. Don't double-down on it. Direct approach not working? Try indirect. Narrative approach not working? Use more specific questions.

Habit Five: The Camel's Back

Innumerable factors interact with bias and stereotype. Just one more can be the straw that harms an attorney-client interaction. Hard Part - recognizing the reaction may stem from bias rather than justified anger. Research indicates that we fall back on stereotype when feeling stress and are unable to monitor ourselves for bias. Short term, take a break from the situation, eat and or hydrate if needed, use the break to identifying what is creating the tension. **Long term, practice healthy lawyering.**

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

Bias in Client Communication – Legalese?

A Lawyer's Duty of Communication

In re Lauter, *933* N.E.2d 1258 (Ind. 2010).

Fee Agreement provided for a contingency fee based on the amount recovered (one-third if settled prior to trial, 40% otherwise)

It included an "engagement fee" of $750, which the client paid.

It also contained a hand-written notation, initialed by the client, calling for an "additional retainer fee payable if client and firm agree to file federal court litigation" The client and [Attorney] agreed to leave this amount undetermined until [Attorney] completed his due diligence and decided whether to advise the client to proceed to federal court

Court - The term "retainer" might imply to a lawyer that it is to be in addition to the contingent fee, and this is way [sic] Respondent treated it. But one purpose of this rule is to protect the lay client who is unfamiliar with the legalese and industry standards regarding attorney fees. Because the Contract fails to disclose adequately the method by which the contingent fee was to be calculated, we conclude that Respondent violated Rule 1.5(c).

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

Bias in Client Communication – Legalese?

The 10 Principles of Plain English

A Lawyer's Duty of Communication

David Hricik, Karen J. Sneddon; The 10 Principles of Plain English; The Maryland Bar Journal; 2 No. 1 MDBJ 84, 2020.

Include a Table of Contents, Outline, or Roadmap - Up-front organizational information and within the document with topic sentences.

Use Descriptive Headings - Move the reader from one topic to the next and find a particular subject.

Embrace Short Sentences - Our brains best process sentences that are less than 20 to 30 words.

Leverage Subject-Verb-Object Sentence Constructions - Meets the reader's expectations forces the writer to use active voice/shorter sentences.

Favor Active Voice The email was written by Chris. Chris wrote the email.

THE BAR PLAN FOUNDATION

Bias & A Lawyer's Duty of Communication

A Lawyer's Duty of Communication

David Hricik, Karen J. Sneddon; The 10 Principles of Plain English; The Maryland Bar Journal; 2 No. 1 MDBJ 84

Bias in Client Communication – Legalese?

The 10 Principles of Plain English

Feature Positive Forms – Do not use weak sentences. Use strong sentences.

Use Parallel Constructions - *When calculating the appropriate child support award, the court considers the financial costs of maintaining, caring for and education of the child*. W*hen calculating the appropriate child support award, the court considers the financial costs of the child's maintenance, care and education*.

Select Concise Phrasing - at that point in time/when; due to the fact that/because; despite the fact that/despite; in order to/to.

Choose Simple Words – addressees/you; assist, assistance/aid, help; commence/start; implement/start; https://www.plainlanguage.gov/guidelines/words/use-simple-words-phrases/

Prefer Precise Words – Don't turn a verb into a noun. *The attorney made a recommendation that the client consider mediation. The attorney recommended that the client consider mediation*.

WARNING AND DISCLAIMER: The following information was prepared by The Bar Plan for general information purposes, and should not be construed as legal advice or legal opinion with regard to any specific circumstance or set of facts. This list is not inclusive of all the possible or required contents for such a checklist, and each attorney preparing such a checklist must make an independent evaluation of the necessary and required contents, given the lawyer's circumstances.

After Disaster Strikes: A Checklist

1. Begin the assessment process. Photograph or videotape all damage for claim documentation purposes. To avoid flash fires, make certain that all containers to be examined (file cabinets, etc.) are cold to the touch and safe to open. Start a diary or log of the ways in which the office has been affected by the disaster.

2. Contact all employees to first ascertain their health & safety and current home address and contact information. Provide them with a status report and assign tasks. Be mindful on their family obligations at this time. As needed, appoint liaisons from your office to work with each of the following entities:

- Building management
- Fire department
- Police department
- Health department
- Emergency Management Agencies – Indiana Department of Homeland Security/Emergency Management and Preparedness Division – See Also the Federal Emergency Management
- Utility companies, including electric, gas, water, phone
- Insurance agent
- Banker
- Key vendors
- Post office
- Other vital services

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After Disaster Strikes: A Checklist

3. If you are unable to access your electronic calendar begin to re-establish your calendar focusing on upcoming CRITICAL dates, i.e., dates on which tasks are due that if not met will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position and which are not subject to being continued by consent of the parties or court order. Formulate a written plan for addressing how to meet CRITICAL deadlines tasks.

4. Establish an emergency communication system to help the firm communicate with the courts, other lawyers, staff, clients, and vendors. This could involve setting up an emergency hotline and recorded message, or arranging for a forwarding number. Keep in mind that after a disaster, it is often easier to make outgoing calls than to receive incoming ones. Therefore, it may be necessary to designate a contact outside the disaster zone who can act as a clearinghouse for information.

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After Disaster Strikes: A Checklist

5. If you cannot occupy your office, consider alternate working arrangements for you and your staff until safe, permanent office space becomes available again. Work from home capabilities may already be in place following COVID lockdowns. If remote work is not feasible for your office staff, arrange for temporary office space. Depending on the size and location of your firm, possibilities include hotels, motels, trailers, recreational vehicles, space in other law firms with which you have reciprocal agreements, space in your satellite office(s), or other suitable space in your existing building or home. If temporary office space is needed, ensure appropriate office supplies are provided.

Post a sign at your old office directing people to your temporary location, if one has been created. If attorneys and staff are working remotely, designate a specific individual as the contact person for inquiries and provide that person's name and contact information at your old office with any other instructions clients or vendors might need to make contact.

Consider using social media and the local newspaper and broadcast media to advertise your office's current working arrangements and encourage clients to contact you to touch base. Be sure that anyone answering the phone informs all callers of your office's changed circumstances, including the location of a temporary office if one has been arranged.

Contact your property manager and determine your obligations under the existing lease during the time your space cannot be accessed or used. If necessary, make arrangements for security protection for your damaged space. Get office supplies for your temporary office, including stationery, business cards, legal pads, and pens.

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After Disaster Strikes: A Checklist

6. Contact vendors to lease equipment or permanently replace damaged items (computers, network servers, printers, fax machines, copier, postage meter, desks, chairs, dictation equipment, typewriters, etc.)

7. Locate the off-site copy of your active client list and start contacting clients. Make appointments for those whose records you must recreate.

8. If you don't have an off-site client list, write down the names of all the clients and pending matters you can remember before too much time passes. Home computers, personal digital assistants (PDAs), and personal calendars may help you recreate this information. Have all staff do the same thing -- and update the list as new names are remembered over the next few days. Start keeping a phone log of all incoming calls and use this as a source to help rebuild your client list.

9. If you can't access an off-site backup of your calendar, start a fresh one. Begin filling in important appointments and deadlines as they become known. If possible, review the physical court dockets or other appropriate on-line court dockets and match this information against your client list.

10. Contact the courts and opposing counsel as needed for continuances, postponements, and the like. If you have moved to a temporary location, send out postcards or similar announcements with your new address, telephone, and fax numbers. Notify the state bar and your malpractice carrier.

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After Disaster Strikes: A Checklist

11. To ensure the financial health of the office, give priority to collecting outstanding accounts receivable. Until the office is fully up and running, expect to have ongoing work disrupted and to have difficulty bringing in new clients.

12. Contact the post office about an alternate delivery location.

13. Access extra checks stored off-site. Contact your bank for replacement checks.

14. Contact your payroll service regarding continuation of service and issues related to employees not utilizing direct deposit and their receipt of pay if they have been dislodged.

15. Subject to your duties per Indiana Rule of Professional Conduct 1.6, get immediate professional assistance to help in the recovery and repair of your computer system. Make it clear that your top priority is the data, not the equipment itself. A reputable repair shop can clean and test the system and, if necessary, use a software package designed to recover your data. Keep in mind that while motors and circuitry in your system may have been damaged by the elements, the hard drive itself is likely vacuum-sealed. More likely than not, the data stored on the drive can be recovered. If the above efforts are not sufficient, it may be necessary to send your drive to a data recovery company.

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After Disaster Strikes: A Checklist

16. Subject to your duties per Indiana Rule of Professional Conduct 1.6, gather up all available paper records and begin the process of assessing damage, sorting, and prioritizing restoration. Paper records damaged by water will begin to deteriorate within two to three hours; mold, fungal, and bacterial growth will occur within 24 hours. Specific procedures must be followed in order to properly dry or freeze documents. Consider bypassing restoration if back-up records are available.

17. Subject to your duties per Indiana Rule of Professional Conduct 1.6, keep an inventory of anything that must be destroyed or removed from the premises for drying by a commercial service. For client documents, track:

- Client/matter name
- Client/matter number
- Items destroyed
- Inclusive dates
- Reason destroyed

18. Subject to your duties per Indiana Rule of Professional Conduct 1.6, begin replacing lost paper records and client documents. Besides clients, other sources for reconstructing records include the courts, opposing counsel, administrative agencies, and the firm's CPA and payroll service.

19. Repair, sterilize, and dry the areas where records are to be stored -- shelving, cabinets, desks. (Carpet, carpet padding, or liners must be dried and treated for mold and mildew or replaced.) Investigate tile or other flooring for similar damage. Continue inspecting damaged areas for mold, mildew, and other damage for at least one year.

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After Disaster Strikes: A Checklist

20. Exercise case and client control. Resist the urge to take on all new matters that may come to you until you can adequately screen for conflicts.

21. Submit an insurance claim for the damages your office sustained.

22. Determine your eligibility for other forms of emergency relief and submit a claim if appropriate.

23 Contact JALAP as appropriate for counseling and support resources for you and your employees.

THE BAR PLAN FOUNDATION

Thank You

The Bar Plan Mutual Insurance Company

Christian A. Stiegemeyer
Director of Risk Management

Whittney A. Dunn
Risk Manager