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# **Everyday Ethics for Busy Lawyers**

**John M. "Jack" Tanner**



Author contact information:  
Denver, Colorado  
jtanner@fwlaw.com  
303-894-4495

## EVERYDAY ETHICS FOR BUSY LAWYERS

### Introduction Scope Comment [20]

A. In proper case, Rules can be directly admissible in matters other than a disciplinary proceeding.

### Rule 1.0 Terminology

A. “Confirmed in writing” means signed by client or you sent writing close in time to oral conversation.

B. Cannot be assumptive (*i.e.*, “If I do not hear from you, I will take that as a waiver of the conflict I have described above.”).

C. “Informed Consent” means the lawyer has to explain to the client the consequences of the action sought, the material risks, and the alternatives.

D. “Knows” denotes actual knowledge, which can be inferred.

### E. Rule 1.1 Competence

A. You have to be competent. Do not take on work you cannot and do not have anyone to train you to do.

B. If you “outsource” work, tell client.

### Rule 1.2 Scope

A. Client decides the aims; lawyer decides the means and methods.

B. Be very careful of “unbundling”; sometimes it cannot be done.

C. State court—you can “ghost write” pleadings as long as the *pro se* litigant discloses to court aid of lawyer.

D. Federal court—you cannot ghost-write pleadings.

E. Bankruptcy court—easier to unbundle than U.S. District Court.

F. Cannot give client advice on how to commit a crime, except okay under comment [14] regarding marijuana (still a federal offense) in state court; United States District Court has expressly rejected this comment.

### Rules 1.3 & 1.4 Diligence/Communication

A. It is a good idea to put everything on your calendar.

B. Keep your client apprized! Send copies of all pleadings, letters, emails in or out your office to your client. Return your clients phone calls and emails promptly (same day if you can). Besides complying with the Rule, this practice is a good idea:

1. It keeps client informed.
2. Client will know why when it gets a big bill.
3. If a dispute later arises, you can show client was apprized.

C. If you cannot contact your client, CBA Opinion 128 (copy attached).

Rule 1.5. Fees

A. Fee agreements with new clients need to be communicated in writing (do not have to be signed by the client except contingency fee agreements, which do have to be signed by the client and there is a whole special rule regarding).

B. Note and deed of trust for unpaid fees is business transaction with a client, which means it is prohibited by Rule 1.8 unless you go through the steps in CBA Formal Opinion 109.

C. Fees and costs have to be reasonable.

D. You cannot mark-up costs, except a nominal amount to cover administrative overhead relating to them.

E. You must return unearned fees immediately at end of engagement.

F. Do not move money out of your trust account into your operating account until you have earned it.

G. Promptly inform client of any change in fee amount. Put in your engagement letter that you can change your rates whenever you darn well please.

Rule 1.6 Confidentiality

A. Do not disclose “information relating to the representation of a client” absent client consent or other narrow exceptions.

B. This includes any client information, not just “confidential” information.

C. The rule bars disclosure of clients’ names to third parties.

D. It also prohibits disclosure of information in court pleading files.

E. Exceptions:

1. Former clients when representation is generally known;

2. To conduct conflicts check when changing firms.
- F. A few modest tips on how to avoid violating Rule 1.6:
1. Do not “drop names” of clients, especially on social media where, once it is out in cyberspace, you can never retrieve it.
  2. Do not discuss clients or matters in public places, including busses, airplanes, bars, restaurants, elevators, on social media, etc.
  3. Do not discuss client matters on cordless phones (cell phones are okay). (Ethics Committee revising Opinion 90.)
  4. Do not leave work unattended and in plain view in public places (*e.g.*, laptop screen, lying on table at coffee shop, or even face-up in a public hallway at your firm).
  5. Some matters may be so sensitive that you should not discuss them even within a large firm.
  6. All contemporaneous soft documents (not discovery production) going to the other side have to go through a meta-data scrubber.
  7. Use encrypted Ethernet connections when available.
  8. Make sure all devices are password protected.
  9. Close office door when discussing client matters on a speakerphone.

Rule 1.7 Conflicts of interest—general rule

A. Two types of conflicts: Directly Adverse (cannot be opposite your client) or Material Limitation (business conflict, personal conflict, etc.)

B. Material Limitation is just as real a conflict as a Directly Adverse situation, and the same steps have to be taken to avoid.

C. Always run a conflicts check before having even the briefest conversation about a case.

D. If you have a conflict, you can still represent if:

1. You reasonably believe you can do a good job; and
2. The representation is not prohibited by law; and
3. You are not suing a client; and

4. Each affected client gives informed consent confirmed in writing.

Rule 1.8 Conflicts—current clients—specific rules

- A. Getting paid in anything other than fees is a “business transaction” with a client and you have to go through the steps in CBA Formal Opinion 109.
- B. No sex with a client unless you had a sexual relationship first.

Rule 1.9 Duties to former clients

- A. If new matter is unrelated to matter with former client, no conflict waiver necessary, but you still cannot use Rule 1.6 information against your former client (which may beg the question as to whether it is a truly “unrelated” matter).
- B. If new matter is related to matter with former client, Rule 1.7 conflict analysis required.
- C. Extremely difficult, if not impossible, to use information gained during representation against client [including former client] without violating Rule 1.6.

Rule 1.10 Imputation of Conflicts of interest—general rule

- A. Typically, if one person at a firm is disqualified for business reason, then the whole firm is generally disqualified. If one person is disqualified for a personal reason (*e.g.*, a personal relationship with opposing counsel, giving rise to a material limitation conflict), then the entire firm is not usually disqualified.
- B. This rule expressly applies to in-house departments.
- C. “Confidentiality Walls” do not always work—depends on whether attorney came from government work (confidentiality walls can work) or not (confidentiality walls do not unless involved lawyer did not “substantially participate,” *i.e.*, the “big firm associate exception”).
- D. “Confidentiality Walls” should be in place before the first day of the conflict.
- E. These conflicts can be waived as per Rule 1.7.
- F. “Firm” that is disqualified can include in-house legal department.

Rule 1.13 Organization as client

- A. Obligations are to the organization itself.
- B. If your contact at the organization is violating his duty to the organization, or if the organization is pursuing a criminal course of action, then you generally have a duty to report “up the ladder.” This does not apply to past conduct.

- C. If you are fired for reporting up, you have to report that.

Rule 1.14 Client with Diminished Capacity.

A. If you develop a “reasonable belief” that the client has diminished capacity or is otherwise at risk of physical, financial, or other harm, you can share information otherwise to protected by Rule 1.6 to get the client help.

B. Until you develop such a reasonable belief, you cannot violate Rule 1.6. *See* CBA Opinion 126.

C. If the entire point of the representation involves diminished capacity (such as adult protective proceedings), *see* CBA Opinion 130.

Rule 1.15 Safekeeping property

A. Do not move money out of trust account and into operating account until it is earned.

B. Do not let trust account go below zero (no excuses).

C. No such thing as an “earned retainer.”

D. Use of credit cards complicated—*see* CBA Formal Opinion 99.

E. Return unearned fees promptly at end of representation.

Rule 1.16 Declining or terminating representation

A. In litigation, you are in until court lets you out. You cannot “go on strike” because you are not getting paid. *See also* C.R.C.P. 121.

B. Do not say more than necessary in motion to withdraw. “Client has failed to abide by retainer agreement” is usually enough.

C. File belongs to the client and must be returned upon request. You can keep your notes or your own firm’s internal administrative processes (such as conflicts check). *See* Ethics Opinion 104. It is a good idea to keep for your own copy, but you have to pay for it.

D. Attorneys’ lien can allow you to keep file until you are paid.

E. When a matter is over, send a letter saying so, or you may still be client’s attorney. *People v. Bennett*, 810 P.2d 661 (Colo. 1991).

F. When you turn down an engagement, send a letter saying you are not the potential client’s lawyer, and mentioning that there could be statute of limitations or other delay-related issues, and urge the potential client to find a lawyer promptly.

Rule 1.16A File retention

- A. Civil cases—can destroy after 10 years or, with notice, 30 days.
- B. Criminal cases—depends on length of sentence.

Rule 1.18 Duties to prospective clients

- A. You owe most of the same duties regarding confidentiality to a prospective client that you owe to an actual client.
- B. “Cocktail party” exception.

Rules 3.1 & 3.2 Meritorious claims and contentions/Expediting litigation

- A. Cannot litigate nor delay just for its own sake.

Rule 3.3 Candor to the tribunal

- A. Must reveal to court adverse controlling authority. Court will appreciate it if you say, “this appears to be controlling, but here is why it is not.”
- B. If witness or client offers false information (Ethics Opinion 123):
  - 1. Try to get them to withdraw evidence;
  - 2. If that fails, you can notify court (Rule 3.3 trumps Rule 1.6).

Rule 3.4 Fairness to opposing party and counsel

- A. Cannot prevent other’s access to evidence (including by destroying it);
- B. Cannot tell a witness not to cooperate unless client or family member of client

Rule 3.6 Trial publicity

- A. Do not try the case in the press.
- B. If other side does, you can respond.

Rule 3.7 Lawyer as witness

- A. Cannot do this with three exceptions (uncontested issue, value of services, or disqualification would work a substantial hardship on the client).
- B. Others at lawyer/witness’ firm can be trial counsel.

Rule 4.1 Truthfulness in statements to others

- A. Generally, you must. *Cf.* Rule 8.4(c) (cannot lie).
- B. Okay to lie when no one believes you anyway (negotiations).

Rule 4.2 Communication with person represented by counsel

- A. Do not do with without other counsel's consent.
- B. Where organization involved, representation of organization covers:
  - 1. one who supervises, directs, or regularly consults with lawyer regarding the matter;
  - 2. one who can bind the organization regarding the matter; or
  - 3. one whose acts are attributable to the organization regarding the matter. *Also see* CBA Ethics Opinion 69 (revised 2010).
- C. Does not matter who initiates the conversation.
- D. Okay to go around outside counsel to in-house counsel (ABA opinion and case law on point).
- E. Okay to inform client that this is ethical rule for lawyer and client can directly contact other side, but be careful.

Rule 4.3 Dealing with unrepresented person

- A. Be very careful not to even come close to giving legal advice. Remind other side often and in writing that you are lawyer for your client.

Rule 4.4 Respect for rights of third parties (Ethics Opinion 108)

- A. If you receive what appears to be privileged document, only duty is notice to other side.
- B. If you get such notice run, do not walk, to court to get some kind of order.
- C. Use of social media, see Opinion 127 (copy attached).

Rule 4.5 Threatening prosecution

- A. Cannot threaten criminal prosecution or grievance to get advantage in a civil case.
- B. Can simply inform other side that its conduct may violate this rule.



Rule 5.1 Responsibilities of supervising lawyer

- A. Managing partners: have protocols in place so all lawyers in the firm comply with Rules.
- B. Any supervising attorney: make sure subordinate attorneys comply with the Rules.

Rule 5.2 Responsibilities of subordinate lawyer

- A. Ultimately, you are responsible for your ethical violations, even if partner tells you that you have to do it.

Rules 5.3 Supervisory duties to non-lawyers

- A. Make sure you have protocols in place consistent with the Rules, particularly confidentiality and conflicts.

Rule 5.4 Professional Independence of a lawyer

- A. Generally cannot share legal fees with a non-lawyer.
- B. Generally cannot partner with non-lawyer.
- C. Generally cannot report to a non-lawyer, except at the client level.

Rule 5.6 Restrictions on right to practice

- A. Unethical to sign a covenant not to compete except as part of retirement.

Rule 5.7 Responsibilities regarding law-related services

- A. When not acting as a lawyer, you have an ethical duty to inform customer that you are not acting as a lawyer and that the attorney-client privilege does not apply.
- B. If you do not separate your law practice from your “law-related” practice, all Ethical Rules likely apply.

Rules 7.1, 7.2, 7.3, & 7.4 Advertising

- A. Always must be truthful.
- B. Do not hold yourself out as an “expert” or “certified” with a few exceptions.

C. Okay to pay for advertising, not okay to pay for referrals—*see* CBA Ethics Opinion 122 for distinction.

D. Not okay to “cold call” lay person you do not know to get their legal work, unless you do it in writing and put “Advertising Material” on the writing.

E. Good idea to keep a copy of every advertisement you make.

Rule 8.3 Reporting misconduct

A. Only required when reflects on fitness to practice law—this is generally viewed as substance abuse issues, serious crimes, or misuse of client funds.

B. If not required, generally a bad idea while litigation is pending.

Rule 8.4 Deceitful conduct

A. This rule always applies—even if you are not acting as a lawyer.

B. Lawyers have been disbarred for deceitful conduct that had nothing to do with their work as a lawyer.

C. Recent change allows lawyer to direct subordinates to engage in deceitful conduct in connection with “lawful investigative activities.”

D. Do not secretly tape conversations, CBA Opinion 112 notwithstanding.

E. Per CBA Opinion 124, not an ethical violation to use marijuana if it does not interfere with your practice.

Resources: [www.cobar.org](http://www.cobar.org) has links to both the Rules of Professional Conduct and all the ethics opinions the CBA Ethics Committee has issued.

Questions? Contact me ([jtanner@fwlaw.com](mailto:jtanner@fwlaw.com); 303.894.4495) or CBA calling committee (303.860.1115).