THE SHELY FIRM, PC

Dealing With Difficult People…Ethically

Fall, 2022

By Lynda C. Shely[1]

The following are suggestions for ethically handling people who are belligerent, aggressive, not familiar with honesty, annoying, or simply non-communicative. Whether these people are clients, witnesses, vendors, opposing counsel, or even judges, lawyers have several ethical obligations to communicate with people in a professional and courteous manner.

- **Avoid Representing "Bad" Clients**

This is not a joke – this is important. A lawyer must speak with every potential client to review fee agreement terms and most importantly to gauge whether the person is someone the firm *wants* to represent. Avoid people who have completely unrealistic expectations, cancel several consultation appointments, cannot seem to get together the documents you asked to review, are rude to your staff, and/or have fired their last three (or more) lawyers. A prospective client may look great on paper but be impossible to manage. People with unrealistic expectations – either with the goals of the representation, the timing of the matter, or the amount it will cost – should be avoided. Irritating actions at the beginning of a representation never get better.

- **Communication Obligations – Manage Expectations**

Arizona Rule of Professional Conduct ("ER") 1.4 requires that lawyers communicate with clients to convey all material information about the representation in a timely manner. When an otherwise reasonable, *nice* client begins to get agitated/anxious (as demonstrated by, for example, repeated telephone calls/emails or raising their voice in a conversation) and/or angry with you or your staff, do not ignore the conduct – call them on it and ask what is troubling them. Frequently clients take out their anxiety about a legal/life issue on their lawyers – and they should not.

Listen to clients and inquire regularly about how they are doing. Really. This makes a difference. The biggest risk management goal to avoid the most common bar complaints is to manage client expectations. That means telling them what realistic legal goals could be, explaining how they should communicate with the firm (and your availability by email/cell phone), and setting realistic timelines. Never, for instance say it may take "5 days or 5 years" because the client will only remember you saying it will only take 5 days. Similarly, informing a client

[1] *©2022 The Shely Firm PC – all rights reserved.* ***This article is for informational purposes only and reading it obviously does not create an attorney-client relationship with Lynda.*** *Readers should consult their own counsel and should not rely on this article. Lynda is admitted to practice law in Arizona, the District of Columbia, and Pennsylvania.*

that possible settlement amounts could range from $5,000 to $50,000 means the client will only recall you guaranteeing you will get them $50,000.

Be patient and reassure clients through regular communication, including sending copies of documents electronically as they are received or prepared, and giving clients scheduled call times, so they know when you or your staff will be communicating with them. This provides the clients with some sense of “control” over an otherwise amorphous legal process. Also be careful about the tone of explanations – “teaching” a client should not be in a condescending or impatient tone. And never ever convey bad news by email. Warn clients at least telephonically, if not in person, when there is bad news.

- **Professionalism Obligations**

Arizona Supreme Court Rule 41prohibits engaging in “unprofessional conduct.” Rule 41(a) defines “unprofessional conduct" as:

> (a) Definition.
>
> "Unprofessional conduct" means substantial or repeated violations of the oath of Admission to the State Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona. Unprofessional conduct includes substantial or repeated violations of the Legal Paraprofessional's Creed of Professionalism.

Former Rule 41(g) became Rule 41(b)(7), which provides:

> (b)Duties and Obligations. The duties and obligations of members, including affiliate members, shall be:
>
> * * *
>
> **(7)** To avoid engaging in unprofessional conduct and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the duties to a client or the tribunal.

This means treating *everyone* with courtesy and respect. *See Comments to Rule 31.* Additionally, ER 4.4(a) provides:

> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.

Examples of Rule 41(b)(7) and ER 4.4 (conduct with no substantial purpose other than to harass or burden someone else) violations include:

- filing frivolous litigation to coerce an opposing party to settle a dispute (Matter of Devin Andrich, PDJ-2014-9029 (AZ May 2015 - disbarred),
- threatening opposing counsel and parties and lying to a witness (Matter of Scott A. Blair, PDJ-2013-9075 (AZ Jan. 2014 – suspended for six months and must retake the Professionalism course),
- failing to notify court that lawyer would be late to court (Matter of Parker Evan Bornmann, PDJ 2014-9069 (AZ Dec. 2014 – disbarred for multiple charges including failing to appear in court and failing to communicate with tribunal),

- threatening former employer firm and lying to tribunal about basis for his termination (Matter of Jerry D. Krumwiede, PDJ-2013-9084 (Feb. 2014 – one year suspension)
- Texting client "Would you rather have sex and not pay at all?" (Matter of Scott Lieberman, PDJ-2018-9007 (2018) – disbarred),
- Sexually explicit texting with client, requesting oral sex from another client, and requesting strip tease from another client (Matter of Robert C. Standage, PDJ-2015-9007 (June, 2015))
- Disparaging opposing counsel and a judge in pleadings. (Matter of S. Alan Cook – reprimanded and must attend CLE programs on civility, PDJ20221-9101 (March 9, 2022)

Do not respond to an opposing counsel's belligerence/obscenities/yelling in kind. First try to determine why the opposing counsel is attacking you personally – is it because they need to appear to be strong for their demanding client, because they have a weak case, or is it truly a fundamental character flaw. The last is rare – really. Ask to speak with opposing counsel one on one and if the vitriol continues, then it may be necessary to limit communications to writing. Frequently, though, if you ask a hostile opposing counsel what is going on – calmly – and try to speak with them as a professional, you will find that the opposing counsel is struggling with something completely unrelated to the case (a pet just died, their mother is sick, they're having marital issues, etc.) or did not realize that their tone/words were perceived as belligerent. Again, Rule 41(g) requires that we practice with integrity, which means treating everyone with courtesy and respect.

In the very rare situation where opposing counsel truly cannot be polite about anything, it may be necessary not only to limit communications to writing but to bring the matter to the court's attention (if in litigation), to seek an impartial arbiter of the dispute – if the situation begins to affect representation of the client and falls within the ER 4.4(a) area.

Train employees to notify a responsible attorney if the employee is concerned about a client's well-being or if threats are made against the firm or others. Do not minimize such threats and assure that all employees understand that if a client (or someone else) threatens bodily harm, that must be addressed immediately by an attorney and may require calling police and/or even obtaining a protective order. The duty to notify others about a credible threat of physical harm – in order to try to prevent the harm – overrules a lawyer's ethical obligation of confidentiality.

- **Reporting Misconduct of Opposing Counsel**

Reporting professional misconduct of an opposing counsel requires consulting with your client. Really. If you learn that an attorney has violated a Rule of Professional Conduct that raises a substantial question as to their honesty, trustworthiness or fitness, you must report it to the State Bar. ER 8.3. *However,* if you learned the information because you were representing a client, it is technically "confidential" information about the representation under ER 1.6 and requires client consent before disclosing anything to the Bar. Obviously the information is not privileged, but it *is confidential*. Plus a lawyer must consult with the client regarding the timing of a report. The State Bar will not remove an opposing counsel from a case and a discipline investigation may take months or even years to process. Therefore consult with the client regarding timing of a report to the Bar – or whether seeking sanctions in the underlying case might be another option.

Before reporting anything at least try to consult with opposing counsel to assess whether their isolated outburst or belligerence in a deposition was due to something else – give opposing counsel the opportunity to explain and possibly even apologize for unprofessional behavior.

- **Don't hide mistakes**

ABA Op. 481 (2018) confirms what most lawyers already appreciate – when you make a mistake, miss a deadline, or something else occurs that is a "material error" for which the client is entitled to be informed, the lawyer must tell the client. The Opinion defines a "material error" as: "if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice." These obligations arise under at least ERs 1.4 (duty to communicate), 1.7 (conflicts of interest), and 1.8(h)(specific conflict situations). Note that a lawyer is *not* obligated to inform a former client of an error learned after the representation concludes.

While making a mistake may not seem like a situation where a lawyer is dealing with a difficult client, the mistake can cause clients to become angry/anxious. Anticipate this and do not communicate a mistake by email or letter – call the client and better yet, ask the client to come to the office for a meeting to discuss how the firm can or cannot continue to represent them so that you can assess the client's reaction to the situation.

- **If all else fails, GET OUT!**

Clients sometimes lie. They also sometimes intentionally engage in fraudulent behavior. The ethics and practical standard is that clients should go to jail, not their lawyers. In all seriousness, client fraud and misrepresentations may cause claims for a firm if the firm does not promptly extract itself once the lie is discovered. In all civil matters a lawyer is obligated to correct misstatements of facts (including material omissions) made to a tribunal. ER 3.3(a) requires:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

At least in Arizona, the standard is that a lawyer must correct the record before the tribunal – even if the client does not consent. It is not sufficient to merely withdraw from the representation.

Even if the matter is not before a tribunal but is a transactional matter, lawyers still cannot lie. ER 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

This standard is more difficult to apply than ER 3.3 – besides the fact that lawyers cannot *knowingly* lie to someone else. ER 4.1(b) must be read in conjunction with ER 1.6, the confidentiality Rule. There are several *permissive* reasons when a lawyer *may* disclose confidential information without client consent, including to alert someone to a client's intent to commit a crime, to mitigate or rectify financial harm to someone due to the client and lawyer's conduct, and to comply with a court order. If ER 1.6 would *permit* the disclosure of information, then ER 4.1(b) will *require* the disclosure of the information to avoid assisting a client's crime or fraud. For instance, if a lawyer is representing a client in selling a business and the lawyer learns that the client had the lawyer prepare financial statements that contain false information about the company's financial health, ER 1.6(d)(2) permits the disclosure of the falsity to mitigate financial harm to the buyer and ER 4.1 then will require the disclosure to avoid assisting the client's fraud.

From a risk management perspective, lawyers must remember that once they make the disclosures necessary to avoid being a co-conspirator with a client, the lawyer must withdraw from the representation.

ER 1.16(a)(1) *requires* a lawyer to withdraw from a representation if the continuation in the matter will violate the Rules. So, for instance, if a client threatens you with a malpractice claim or a bar complaint or continually harasses you/your staff, there is a possible conflict of interest in continuing to represent that client. As such, the lawyer should consider withdrawing. When a firm withdraws from a litigation matter, the firm *shall not* disclose the details of why the firm must withdraw – if the withdrawal is due to a client's belligerence/threats/lies (assuming no pleadings include the lies). A motion to withdraw should ONLY cite to ER 1.16(a)(1) and that a conflict of interest has arisen that requires the withdrawal.

Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to lawyers and law firms. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona. Prior to moving to Arizona, Lynda was an attorney with Morgan, Lewis & Bockius in Washington, DC. Lynda is chair of the ABA Standing Committee on Ethics and Professional Responsibility, an Arizona Delegate in the ABA House of Delegates, and volunteers with several other nonbillable groups involved in legal ethics matters, including as a member of the Arizona Supreme Court's Alternative Business Structures Committee. She is a past president of the Association of Professional Responsibility Lawyers and the Scottsdale Bar Association and has been an adjunct professor at all Arizona law schools, teaching professional responsibility. Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from Catholic University in Washington, DC.