

An Ounce of Prevention
is Worth a Pound of Cure

Best Preventative

Practices

under the KRPC

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What Is Preventative Practicing?

Managing Your Practice In a Way
that Reduces Operational, Legal,
Regulatory and Reputational
Risks.

- **Choosing Your Clients and Cases**
- **Engagement Agreements**
- **Communications**
- **Billing**
- **Documentation**
- **The Difficult Client**
- **Terminating the Client Relationship**
- **Insurance Coverage**

Choosing Your Client

- You are interviewing the prospective client equally as much as you are being interviewed by the client
- Attorney-Client Personalities Mesh
- Client seems honest and forthcoming
- Client has reasonably attainable objectives / goals for outcome
- What if you're Court-appointed?

Accepting a Case

- Case is within sphere of competence (current competence or that which can be achieved with reasonable preparation)
- You can zealously represent the client free of conflicts
- Client has the financial wherewithal to pay your fees (non-contingency)
- You have the time to handle the case
- Decision to accept should not hinge on sense of obligation (i.e. friends, family, colleague, referral source, or former client)
- *Applicable KRPC: 1.1 Competence; 1.3 Diligence; 1.7 and 1.8 Conflicts; and Rule 1.5 Fees.*

Engagement Agreements

- When Required?
- When the lawyer has not regularly represented the client, the basis of the fee shall be communicated preferably in writing
- Contingency Agreement shall be in writing and include:
 - The method of determining the fee the event of settlement, trial or appeal
 - The litigation and other expenses to be deducted
 - Disclosure of payment of a referral fee or splitting of fees
- When Prudent? - Always
- *Applicable KRPC: 1.5 Fees*

Engagement Agreements

- Establishment of the Attorney-Client Relationship
- Scope of work
- The scope should be drafted with intentional focus
- May limit the representation if reasonable under the circumstances and the client gives informed consent in writing
- Fee structure
- Informed consent to communicate via email
- Expectations or Withdrawal

Client Communications

- What are the minimum required communications?
- Keep the client reasonably informed and respond to reasonable requests for information
- What is “reasonable”?
- Case and fact dependent
- Participation in setting objectives of representation
- Participation in the means to obtaining the set objectives
- Litigation should include discussion of strategy, prospects, and impact to others
- Informed consent before contracting with another lawyer to assist on case
- Settlement offers in civil cases; plea offers in criminal cases
- *Applicable Rules: 1.1 Competence ; 1.2 Scope of Representation; 1.4 Communication*

Client Communications

- Not Enough Communication

- Causes:

- Poor case selection
 - Paralysis
 - Depression / substance abuse
 - Too many cases
 - Attorney-Client Discord

- Prudent Practice Tips

- If the client asks for an update – provide it within a day or two
 - If the client (or former client) asks for file – provide it asap
 - If the client (or former client) asks questions about case or fees – answer the questions

Client Communications

- Communication Pitfalls
 - Beyond normal business hours may set unrealistic expectations
 - Communicating on the fly can may result in hasty advice
 - Communication via text messages-
- Setting boundaries may be necessary
- Can get too informal in nature
- Are difficult to incorporate in the file
- Communicating in right frame of mind (i.e. focused, not under the influence)

Billing / Invoices

- Detailed entries
 - Sent email to opposing counsel VS
 - Sent email to opposing counsel requesting additional discovery / proposed plea offer
- Serves to keep client updated regarding work on case and status
- Clients who sign an engagement agreement stating they are financially responsible for fees, don't want to be surprised by a bill
- Include time entries even if not billed to the client (everyone loves a discount)
- *Applicable Rules: 1.4 Communication; 1.5 Fees*

Document your File

- Regular status updates to client
 - If by phone – make a note of it
 - Correlate emails to the file (received and sent)
- Memorialize important advice to the client
- Memorialize important decisions made by the client
- File Storage – Secure / Backed Up / Electronic vs. Paper
- File Organization
- *Applicable Rules: No rule specific to minimum documentation requirements*
- *Retention Rules: KBA Ethics Op. 2015-01 (case dependent but generally 10 year retention period)*

Ethical Considerations of Remote Practice

- Technology Use – Expectation of Competence
- Continuity of Operations
- Supervision of attorneys and non-lawyer staff
- Confidentiality
- Security of Firm and Client Data
- *Applicable Rules: 1.1 Competence; 1.3 Diligence; 5.2 Subordinate Lawyers; 5.3 Non-Lawyer Assistance; 1.6 Confidentiality*

Cyber Security Concerns

- Department of Homeland Security
 - January 24, 2022
 - In light of the heightened tensions with Russia regarding the situation with Ukraine, DHS has issued ominous warnings about the risk of Russia employing denial-of-service attacks, or possibly more destructive attacks aimed at critical infrastructure.
- Recent attack against UG
- Are you using a firewall? Norton 360 / McAfee Total Protection
- Are you using a practice management service? What protection do they offer?

Withdrawing from a Case

- Termination of the Attorney Client Relationship
- Mandatory Termination
 - Client insists on lawyer engaging in conduct that is fraudulent, unlawful, in violation of an order or the rules of professional conduct
 - Lawyer's physical or mental condition is impaired
 - Lawyer has been terminated by the client
- Optional
 - Lawyer has option to withdraw if it can be accomplished without material adverse effect on the client's interests
 - If client suggests a repugnant or imprudent objective
 - Breach of agreement

Withdrawing from a Case – Practice Tips

- Provide notice of issues to remediate before termination occurs
- Terminating sufficiently in advance of significant court dates
- Provide sufficient notice to the client of termination
- Take steps to reasonably ensure receipt of notice by client
- Providing your file to the client or substitute counsel upon request
- *Applicable KRPC 1.16 Declining or Terminating Representation and Kansas Supreme Court Rule 117 for content of motion.*

The Difficult Client

- Common Difficulties in the Attorney-Client Relationship:
 - Non-responsive
 - Non-paying
 - Non-compliant
 - Filed ethics complaint
- Risks when attorneys do not terminate with the desire to improve the situation:
 - Financial
 - Ethical
 - Regulatory
- Get out of bad cases timely – don't hang on too long

Insurance Coverage

- Malpractice Insurance
 - General Liability Coverage
 - E&O
 - Cyber Liability (i.e. ransomware, other cyber intrusions)
 - PCI Liability Coverage (credit card transactions – breaches)