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The Ten Commandments of Defensive Lawyering

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Years ago, I wrote a book for new attorneys embarking on solo practice with no legal experience, a phenomenon which terrified state bars from coast to coast who were fearful of unleashing a slew of untrained lawyers on an unsuspecting public. In the book is a chapter, "Ten Commandments," which contains information every practicing lawyer eventually discovers, but which newbies might not yet know. That chapter became popular among state bar associations, and I was invited by state bars from coast to coast to bring my gospel to their newly admitted attorneys.

In this season of giving, I wanted to bring you, dear reader, the Word according to me, retooled for you. This advice is not just for newbies. It pertains with equal import to attorneys with great experience and ability for whom this should be a mere reminder. These "commandments" do not cover the entirety of attorney behavior. Lawyers don't need reminders to not steal or to keep honest books. We know to not bear false witness or suborn perjury. What follows are reminders, suggestions and pointers to help lawyers navigate the perilous waters of practice, avoiding malpractice claims and ethics problems.

I. Know thy stuff and know thy depths.

The RPCs require us to be competent and diligent. Failure to meet those seemingly simple standards exposes us to discipline. Remember that while our license to practice is plenary, our skills sets are not. Avoiding incompetence and other ethical issues while expanding our legal horizons or handling increasingly complex matters can be tricky, and most lawyers can't exactly "fake it till they make it." Understand when it is time to "refer out" a case, to bring a better-qualified colleague on board, or to take more CLE. If you're self-employed, your role as an administrator/businessperson may also test your limits.

II. Seek colleagues to help thee.

Lawyers need never screw up a case or expose themselves to discipline for inexperience or ignorance. There are colleagues out there who will gladly spot the problems and help resolve them. Attorneys are usually too glad to share resources, briefs, practice forms, professional contacts and personal opinions with any colleague who asks. Also, there are mentors available through bar associations and specialty practice groups. Professional networks and blawgs can also connect attorneys with colleagues for a second opinion or to ride shotgun. Reach out to your alma mater, your state, county or local bar association, and you should be able to find all the help you need.

III. Recognize and avoid conflicts of interest.

Conflicts of interest are like poisonous snakes—we know we must avoid them, but we are not always sure what they look like. It is our obligation to recognize them. Conflicts may arise out of our dealing with clients, out of relations we have had with third parties, and out of information we may have obtained in some other connection. To make it worse, recognizing a conflict usually ends up costing us money. Still, the rules that pertain are simple and few, and most conflicts may be consented to (not technically "waived") by the client and other concerned parties. Know the conflict rules and be quick to withdraw from a matter or to obtain consent, in order to avoid costlier disqualification down the line, or perhaps even an ethics inquiry or grievance. Lawyers moving from one large firm to another and those practicing in a small pool of specialists may find a host of disqualifications awaiting any change of employment. The conflicts people in each firm may have issues to address.

IV. Confirm thy understandings in writing.

Miscommunication may be the commonest cause of client dissatisfaction and the most avoidable source of conflict between counsel. As to clients, most disputes involving such misunderstandings are resolved in the client's favor, so the lawyer must avoid all ambiguity, actual or contrived. Writings protect us. Written confirmation keeps other people from denying a conversation or event. It also prevents differences of recollection that may arise over amounts, deadlines, guarantees or some other term. Requests, adjournments, confirmations and denials usually demand a writing. In this day of form letters, emails, text messages, digital speech recognition, Twitter and Instagram (not recommended), every significant conversation with clients, courts, adversaries and bureaucracies can be reduced to writing virtually effortlessly. Just do it!

V. Manage thy clients' expectations.

Many grievances reveal that some attorney failed to meet some client's expectations—expectations often created by the lawyer. Sometimes the client misunderstood a limitation on the representation, the time frame involved, the attorney's fee or the cost of litigation. Sometimes the client is listening to poorly-informed third parties. Sometimes the client's expectations are unreasonable. Reasonable or not, failure to meet a client's expectations can get you before the OAE in a hurry. It behooves us to know what our clients expect. Try to keep your finger on your client's pulse.

VI. Keep thy confidences.

"Loose lips sink ships." Nowhere is this truer than in the ethics arena. The new age of data mining and computer security has made confidentiality a dangerous legal frontier. The so-called attorney-client privilege is really the client privilege, as only the attorney is bound by it, and only the client can waive it. Note also that there is no special exception for attorneys sharing confidences among themselves. "We were all attorneys" will not save you from discipline for talking out of school. Remember also grandma's wisdom that the close friend who tells you someone else's secret should never be trusted with yours.

VII. Get out of thy bad cases early.

Attorneys often complain about having hung on too long to a troublesome case or client. We rarely hear regrets from attorneys who got out too soon. Many attorneys who have received their first grievance say that the underlying case was one they originally didn't want to take; they took it for the wrong reason. They felt obligated, it was for family, they really needed the fee at the time, the client

promised better cases in the future. Most of them say they should have tried to "get out while the getting was good." Withdrawing from a case is usually easy if it can be done without prejudice to the client. If the case is in litigation, quick action is imperative. Once you decide that you're better off without it, check the RPCs and make your escape.

VIII. Organize thy practice defensively.

Read a book and take a class on law office management. Obtain retainer agreements on all your matters. Maintain frequent contact with your clients, if appropriate, and take notes so that you know who they are. Familiarize yourself with attorney bookkeeping rules, and personally assure compliance. Consider outsourcing your bookkeeping or hiring a clerk to keep tabs on your files. Maintain docket and calendar control measures that will force you to review your files regularly and prevent you from missing dates. Adopt and formalize conflict-prevention measures; if your practice requires, consider a conflict-control program. Use standardized forms, approved systems and technology to improve your efficiency. Arrange with at least one colleague to help you out or cover for you when needed.

IX. Be civil in all thy dealings.

Across the country, there has been a steady decline in civility between people, especially strangers. It has long been gone from the sports arenas and the public meeting places. Civility is increasingly rare on the highways and in line at the supermarket. Civility doesn't capture headlines or win votes. It should, however, characterize the practice of law. The seemingly universal assault on civility does not change our rules. Lawyers are expected to treat each other, the court, the client and third parties with respect and dignity. The courts and the practice do not tolerate breaches of decorum or arguments ad hominim. This has not changed. Moreover, we must always be fair in all our dealings. If it goes against your nature to be nice to those around you, consider this: many grievances would have never been filed had the respondent attorney treated others with dignity and respect. That alone should make you nicer.

X. Maintain adequate malpractice insurance so that ye may sleep.

Malpractice insurance is not mandatory in New Jersey. Still, you probably need it. Coverage will help prevent sleepless nights ruminating on actual or potential claims. It will also protect you against unfounded suits and those in which you are joined for reasons of association. Where a lawyer's malfeasance also results in discipline, lack of insurance may result in the lawyer's ruin. Moreover, the lawyer's license may be conditioned upon compensation or reimbursement, and the lawyer's personal assets may become fair game for judgment creditors. Riding bareback can be deadly. Have adequate insurance. You'll sleep better. Glad I could help.

Happy holidays, dear reader. See you next year. •

Next Week...

Health Care Law

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