

# New Jersey Law Journal

## Free Advice at the Holidays: Take It From Me

Heady with the joy of holiday giving, I gift you this—my inaugural column for the New Year. I call it a gift so that you will receive it smilingly. Had I dubbed it more honestly “free advice you probably don’t want to think about now,” there would be fewer smiles.

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[Legal Ethics and Attorney Discipline](#)

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Happy New Year! This is the time of year when people everywhere enjoy the pleasures of giving and of doing good unto others. The tradition of giving in connection with religious or social benchmarks seems to transcend culture, faith, geography, social strata, and even political party. Annually, at “the

holidays,” people become more empathetic, more understanding, more helpful to each other. We become more generous. We even give hefty tips to letter carriers and trash collectors and other people who serve us well all year long, whether or not we even see them. It has been said that the pleasure of giving can be intoxicating.

In this spirit, dear reader, heady with the joy of holiday giving, I gift you this—my inaugural column for the New Year. I call it a gift so that you will receive it smilingly. Had I dubbed it more honestly “free advice you probably don’t want to think about now,” there would be fewer smiles. So, please accept these words in the holiday spirit in which they are offered. If you are reading this journal online, please read this column to the end, as someone somewhere is counting how much time you spend reading it, and my journalistic future may hang in the balance. Thank you in advance.

Unwrapped, this is a whirlwind tour of the problems that bring lawyers to the attention of the Office of Attorney Ethics. It is about the stuff that gets good lawyers in trouble. Inspired by memories of gas stations giving out free road maps, this is a pocket guide through disciplinary quicksand. We’ll visit some common pitfalls, frequent danger zones and risky practices that sometimes get between good lawyers and an unblemished disciplinary history. It’s about tweaking what you do, to avoid trouble.

We begin with the three-way reconciliation of an attorney trust account, although many readers have no trust responsibility at all. Still, this information is so important for the others, and the penalty for not knowing it so severe, it belongs in the leadoff spot. Your books and records can come to the OAE’s attention in a variety of ways unrelated to any wrongdoing. Random audits alone focus on 700 law firms every year, a few resulting in

disbarment. In addition to a complete audit, typically with a two-year lookback, you will be interviewed concerning your knowledge of attorney banking and recordkeeping requirements, as well as your actual systems and practices. Read the rules.

Further tip: CPAs do not learn about NJ attorney trust accounting in CPA school, and banks don't care about trust accounts. Unfortunately, these truths do not mitigate your non-delegable obligation to prevent accounting errors and to discover them in the month they occur. If you are responsible for an attorney trust account, do not take your bookkeeper's opinion or your bank VP's assurances that your accounts and your accounting are in compliance. Determine that for yourself. It is not too late to get in compliance, and it will never get cheaper to do so.

Next gem: Get out of that bad case now. You will often hear attorneys complain that they should have gotten out of a matter sooner. You will never hear attorneys say they got out of a case too soon. Take another look at that case or client that really brings you down, and think about cutting the cord. If only the fee is keeping you in, expect sleepless nights.

How often we hear that "no good deed goes unpunished." This usually happens when attorneys handle a matter for free or at a discount, or out of kindness, or for a family member or friend. Since I don't want to be a Grinch at this time of year, I will not tell you to avoid taking these cases; just be aware that there are unnamed forces in the Universe which will begin to conspire against you the minute you take one on. Enough said.

Here is a stocking-stuffer for you. If you do not include a retainer agreement, signed by you and the client, in every file, you could come under criticism and maybe suffer discipline. The only exception is for matters in which you

have represented the same client or clients in similar matters with identical terms. That happens less often than most attorneys think, and discipline happens more frequently.

More on the subject of retainer agreements: There is no better place to protect yourself from clients who might misunderstand your assignment. It is the attorney's responsibility to define the scope of the representation. As you prepare the agreement, think about what you might get dragged into. If an appeal or litigation is foreseeable, and you do not wish to do it, or you would charge additionally for it, set that forth clearly in writing. If you don't, there's a good chance you will end up doing it for free.

Another piece of free advice concerns your communication with your clients. We all know that some clients will tell us, "Just tell me where to sign," and others want to know what's going on at every turn in the road. We also usually have systems or protocols that determine how frequently and how completely we inform our clients. Apparently, many of us assume that our clients all have the same tolerance for delay or will be satisfied with our selected level of communication. Remember that the client who is unreasonable and difficult in this regard will probably be the first to file a grievance. Talk to your clients about these things—it is easier than talking Ethics.

Finally, confidentiality. Remember two little rules: (1) There is no "famous client" exception to the proscription against discussing your client's business (even among lawyers); and (2) your website is a bad place to post something your client wishes to keep quiet. And while we are on this topic, another tidbit: Do not forget that the attorney-client privilege is really

the *client* privilege as attorneys may neither invoke it nor waive it. Don't ever count on it to save you.

Not only am I tired, I'm getting giddy with giving. It's a good time to stop. Happy New Year, everyone. Thanks for reading.

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