

IOWA ETHICS OPINION

December 21, 2018

A “BEST PRACTICE” SYSTEMS-APPROACH TO CLIENT SELECTION,
AVOIDANCE OF CONFLICT OF INTEREST, AND CASE PROCESSING.

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IOWA ETHICS OP 18-01

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PREFACE

The Ethics and Practice Guidelines Committee was created at the request of the Iowa State Supreme Court to issue opinions regarding matters of ethics, and to give ethical guidance to the practicing Bar through practice guidelines. This is a practice guideline that

(1) implements the lawyer’s obligation to avoid creating a conflict of interest to existing and former clients under Iowa R. Prof’l. C. 32:1.7 and 32:1.7.9, that can arise by very act of interviewing a prospective client under Iowa R. Prof’l. C. 32:1.18;

(2) assists the lawyer in evaluating the client’s matter and providing competent representation required by Iowa R. Prof’l C. 32: 1.1; and

(3) facilitates the lawyer’s obligation to plan and advise the client regarding the goals of the representation as required by Iowa R. Prof’l C. 32: 1.2(a) and 2:1.4(a)(3).

A guideline or best practice is not mandatory, nor does it create a standard of care. Likewise, it may not be used in every case. Its use is left to the sole discretion of the lawyer.

INTRODUCTION

Most ethical issues arise not because of dishonesty or intentional misconduct, but because of inadequate client intake and errors in case processing. A study of lawyer discipline and professional negligence cases finds five areas of risk that can lead to a violation of an ethical rule or standard of care. Experience has shown that employing a systems approach for client intake, conflict avoidance, and case processing will help mitigate those risks. In this opinion we introduce, as a best practice, such a system.

CHELP: A SYSTEMS APPROACH

A system is a group of interacting, interrelated, or interdependent elements which form a complex whole. Sometimes, it is difficult to see the “complex whole” from the individual elements. We see the tree, but not the forest. It is when we analyze many disciplinary and malpractice cases, coupled with years of experience, that patterns emerge, and the metaphorical forest appears. At that point a system can be created which joins the seemingly unrelated elements to form a process which mitigates the risk of malpractice and possible violation of the Rules of Professional Conduct. That system is called CHELP. CHELP is an acronym for Conflicts, History, Evaluation, Limitations and Plan

CHELP reflects a process that starts with the initial meeting with the prospective client, grows and expands throughout the representation, and terminates at the end of the relationship. If followed, it can mitigate the risk in the six areas that form the basis for most lawyer discipline and professional negligence cases:

- *Failure to adequately identify and address areas of potential conflict of interest;*
- *Failure to obtain and understand facts relevant to the client's matter, discern the client's expectations and identify the client's goals;*
- *Failure to evaluate and analyze relevant legal issues pertaining to the matter;*
- *Failure to identify, address and protect deadlines and bar dates;*
- *Failure in the attorney-client engagement regarding scope of work and fees charged;*
- *Failure to create a strategic plan by which to achieve the client's goals.*

Failure in any one of the six areas could lead to adverse outcomes for the client and lawyer. Conscientious use of the CHELP system reduces that risk.

CONFLICTS

We introduce the system in the context of a prospective client interview. The term “prospective client” is a term of art, referring to one who seeks a lawyer’s legal services. Iowa R. Prof’l C. 32:1.18 addresses the lawyer-prospective client relationship. It is important to understand that a prospective client is entitled to the same degree of confidentiality and attorney-client protection as is a client who has been engaged by the lawyer. Iowa R. Prof’l C. 32:1.18(b) “Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as rule 32:1.9 would permit with respect to information of a former client.” Likewise, the prospective

client is entitled to the same degree of protection from conflict of interest as an engaged client. Conversely, an existing client's matter can be adversely affected by obtaining confidential information from a prospective client. For example, if a law firm is representing client A on a particular matter, and a member of the firm interviews prospective client B, who is adverse to A, and obtains confidential information from B that may be relevant to A's matter, the law firm may be conflicted from representing both A and B. In another variant, after thoroughly interviewing prospective client C, the lawyer decides not to accept the engagement. Later, new prospective client D is interviewed who is adverse C. Because of the previous interview with C, the lawyer is conflicted as to D. In both cases, the cause of the conflict is the receipt of relevant confidential information. By using a systems approach to client selection, conflicts can easily be avoided.

The first element or the "C" in CHELP is Conflicts of Interest. A prospective client must first be cleared for conflicts of interests before the lawyer proceeds to take a History from the client. By following the sequence, C before H, no confidential information is disclosed. Simply put, never start the interview with "tell me what happened."

Certain information must be obtained from the prospective client in order to address conflicts of interest, but the information must not be confidential. Iowa R. Prof'l.C 32: 1.18 comment [4] "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose."

A lawyer has an obligation to existing and former clients to engage in a conflict-clearing process when interviewing prospective clients. Iowa R. Prof'l. C. 32:1.7 comment [3] "A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. *See also* comment to rule 32:5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 32:1.3 and Scope."

By following CHELP, confidential information is not obtained and the potential for conflicts resulting from the prospective client interview avoided. Furthermore, should the lawyer decide not to proceed with the interview, i.e. the lawyer does not proceed to take the History, confidential information will not have been shared and the potential for future conflict will not exist. However, do it the other way around, H before C, and the lawyer must either (a) include the prospective client when considering conflict of interest in all future cases, or (b) obtain a waiver from the prospective client under Iowa R. Prof'l C. 32:1.18 comment [5] " A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See rule 32:1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the

lawyer's subsequent use of information received from the prospective client."

1. Identity of the prospective client.

There is no expectation of confidentiality relating to the identity of the prospective client except in rare cases. Generally, confidentiality and the attorney-client privilege do not *per se* extend to the client's identity. State v. Bean, 239 N.W.2d 556 (Iowa 1976). However, identifying the prospective client can sometimes be difficult especially when the prospective client is an association, a corporation, partnership, limited liability company or a juridical entity such as a trust, estate or conservatorship, or when the potential client is a governmental entity or body politic. See Iowa R. Prof'l C. 32: 1.13. If the prospective client is anything but an individual, the lawyer must also identify the constituent members of the entity in order to properly analyze the potential for conflict of interests regarding the constituents.

2. Subject Matter of the Requested Representation.

Whether an expectation of confidentiality exists from the mere disclosure of the subject matter of the requested representation will depend upon the nature and scope of the disclosure itself. A disclosure of the subject matter in general non-confidential terms, e.g. automobile accident on a particular date and place, or the formation of an estate plan, is entirely different from the client's response to the lawyer's question: tell me what happened. At this stage of the process, counsel should only obtain general descriptions that do not involve confidential information and for which there is no reasonable expectation of privacy. Counsel should advise the potential client that the requested information will not be considered

confidential or protected by the attorney-client privilege. Iowa R. Prof'l C. 32:1.18 comment [5].

3. Identity of any adverse party, third party or witness.

The involvement of potential parties, third parties and witnesses can also create the potential for conflicts of interest. These individuals and entities should be identified so the lawyer can determine if a potential conflict exists under the “Material Limitation” prohibition of Iowa R. Prof'l C. 32:1.7(a) “[representation is prohibited if] there is significant risk that the representation of one or more clients will be materially limited...” See Iowa Ethics Op. 09-03 Conflicts: Material Limitation and Lawyer as Witness Rules.

4. Conflict analysis.

Once the information has been obtained, the lawyer should perform a conflict analysis to determine if:

- a) the prospective client and its constituent members are averse to
 - (i) a present client, Iowa R. Prof'l C. 32:1.7;
 - (ii) a former client, Iowa R. Prof'l C. 32:1.9;
 - (iii) an imputed client, i.e. a client of someone else in the law firm at a prior time within the meaning of Iowa R. Prof'l C. 32:1.10;
 - (iv) a governmental employee conflict, Iowa R. Prof'l C. 32:1.11;
 - (v) an ADR conflict, Iowa R. Prof'l C. 32:1.12; or
 - (vi) a prospective client, Iowa R. Prof'l C. 32:1.18; and
- b) the representation would involve the same or similar subject matter; and

c) the representation would involve risk of exposure of confidential data within the meaning of Iowa R. Prof'l C. 32:1.6.

If the potential for conflict exists, the discussion should go no further until the conflict is cleared by informed consent from all affected clients. Iowa R. Prof'l C. 32:1.7(b).

Some conflicts can be cleared by waiver, but to be effective the waiver must be in writing and four factors must exist:

(1) the lawyer must reasonably believe that the lawyer can provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

A lawyer intending to seek such informed consent must advise each consenting client of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the client's interests. [See, Comments to Rule 32:1.7].

Only after the prospective client has been cleared for conflicts can a detailed History be taken from the prospective client.

HISTORY

History is the prospective client's story involving the who, what, where, why, when and how of the event which has caused the client to seek legal advice and representation. In obtaining a History, the lawyer should

make liberal use of the tools of factual extraction: Who, what, where, why when, and how and, most importantly, “what do you want us to do about it.”

1. Facts and Background

History is the roadmap into the case. It should be detailed, thorough and most importantly, the client’s version of the facts, not the lawyer’s assumptions. The lawyer’s impression, interpretation or assessment will be the subject of the Evaluation segment of CHELP.

Additionally, counsel should explore facts that would relate to setting a statute of limitation, determining federal or state jurisdiction, venue, the scope of relevant evidence, and the potential for vicarious or third-party involvement, etc. One should explore hidden issues, such as contractual time limits on bring suit, mandatory ADR provisions, limitations or exclusion of damages, mandatory notices, insurance involvement and coverage, exclusions, contractual and statutory deadlines and notification provisions. Likewise, attention should be paid to third-party indemnification and fee shifting agreements.

2. Client’s Expectations

Finally, the History should end with an exploration of the client’s expectation and goals. Iowa R. Prof’l. C 32:1.2(a). Counsel should explore the client’s criteria in making a decision regarding the goal. For example, is the matter time sensitive; are there economic constraints; are there concerns regarding privacy, market competition, third parties, etc. These criteria will become important in assisting the client’s decision-making process.

3. Limitation on Attorney Authority.

The lawyer should explore any limitations the client wishes to place on the attorney's authority to act. For example, the client may want, or not want, certain entities or witnesses to be contacted, or certain claims brought, or actions taken that would expose the client to discovery; or that family members not be informed of the client's actions, etc. Or the client may have an existing law department or law firm with whom it requires coordination and communication. Once the limitation is disclosed, the lawyer can determine if the limitation creates an impermissible ethical restraint on the independence of the lawyer.

4. Form of the History

The client's oral History may be written or transcribed by the lawyer, or with the client's consent, electronically recorded. See Iowa Ethics 83-16 and ABA Formal Ethics Op. 01-422. The goal is thoroughness and accuracy. In complex matters, the lawyer may consider transcribing the History and submitting it to the client for revision. A roadmap is only as good as it is accurate.

5. Expanding and Augmenting the History

History is an expanding concept. As the matter progresses additional facts and documents will be acquired. Because a History is a "snapshot in time" it is important to note when and why the History expanded.

EVALUATION

After the History has been obtained, the lawyer can proceed to an Evaluation or analysis of the options relevant to client's matter. In evaluating options, a lawyer may consider using a method of differential

analysis that accepts some options that arise from the History, but eliminates others and evaluates them in relation to the client's goals.²

In a transactional matter, for example, the lawyer could identify the relevant provisions of the UCC or Internal Revenue Code or other statutory law that could impact the transaction. In a litigation matter, jurisdiction (state or federal) or venue should also be addressed.

If a claim is not supported by the History, but the lawyer may consider assigning it for further research or investigation.

In more complex cases the initial evaluation will be preliminary and will change as the History expands and additional facts are acquired. Remember CHELP is a process, and not just a document.

LIMITATIONS

Most legal matters will be subject to time constraints which must be identified. Time limitations come in various forms, e.g. tax filing deadlines, contractual closings, option-triggers; or statutes of limitations, court ordered deadlines, etc. When taking the History, the lawyer should elicit facts which are necessary to determine the Limitations. For example, if one intends to resort to the "discovery rule" to extend running of the statute of limitations, facts must be elicited to support when the client knew, or in exercising reasonable care should have known, that a mistake or error had occurred which resulted in damage or injury.

² For example, in a potential litigation matter, the lawyer is aided by referencing the Iowa State Bar Association's Uniform Jury Instructions. One need only identify the various claims supported by the History, incorporate the relevant jury instructions and evaluate whether the History supports the claim. In an equity matter, the lawyer would reference the relevant "maxims of equity," which are equity's corollary to law's jury instructions.

If there is insufficient information upon which to determine a deadline or statute of limitations, that fact should be noted, and the client advised in writing that there is a risk of time bar. Lawyers are cautioned that they can easily leave the impression that they will protect against the deadline. If they do not wish to undertake that burden the client should be so advised – in writing.

PLAN

The Plan answers the client’s question “where do we go from here?” First the lawyer must be engaged and second, and a Plan must be created to achieve the client’s goals.

1. Terms of Engagement

The terms of engagement, the fee charged and responsibility for expenses to be incurred must be agreed upon by the lawyer and client. While terms of engagement are beyond the scope of this opinion, counsel should be mindful that the scope of work could expand in relation to the expansion of the History and Evaluation. Iowa R. Prof’l C. 32:1.5 addresses Fees, as does Iowa Supreme Court Rules 45.7 “Advance fee and expense payments; Rule 45.8 General retainer; Rule 45.9 Special Retainer; and Rule 45.10 Flat fee. Contingency fees must be in writing, Iowa R. Prof’l C. 32:1.5 (c) “...A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined,” and in some cases they must be approved by the court, i.e. medical negligence cases Iowa Code sec 147.138 “..., the court shall determine the reasonableness of any contingent fee arrangement between the plaintiff and the plaintiff’s attorney” and state tort claims cases, Iowa Code sec. 669.15 “The court ... shall determine and allow reasonable attorney fees and

expenses. The attorney fees and expenses shall be paid out of but not in addition to the amount of judgment or award recovered, to the attorneys representing the claimant. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be guilty of a serious misdemeanor.”

2. The Plan

There is no one-size-fits-all plan by which to obtain the client’s goal, but all plans have a common denominator: preparation for client decision-making.

Iowa R. Prof’l. C. 32:1.2(a) provides: “(a) ... a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by rule 32:1.4, shall consult with the client as to the means by which they are to be pursued.” Consultation and advice form the basis for the planning requirement. Iowa R. Prof’l. C., 32:1.4(2) “ a lawyer shall “reasonably consult with the client about the means by which the client’s objectives are to be accomplished” and Iowa R. Prof’l C. 32:1.4(b), “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” A lawyer can comply with the rules by adopting the following three-step process:

a) Analysis: Initially the lawyer will identify the legal options that are supported by the History and law. Likewise, analysis may be deferred until additional facts have been acquired and research concluded. The analytical stage usually concludes with a preliminary legal opinion on liability and damages in a law case or availability of remedy in equity

matter, or in a transactional or business matter, a certain procedure or form of transaction can be accomplished.

b) Decision Making: Once the analytical stage has concluded, the Plan progresses to decision-making as to how best achieve the client's goal. The process judges the client's expectations, as identified in the History, against the various options identified in the analytical stage to determine the best way to obtain the client's goal.³

Use of a method or process is important because it provides the lawyer with the benefit of the attorney-judgment rule. Martinson Mfg. Co. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984) "In professional malpractice cases the law does not impose an implied guaranty of results. [Internal citations omitted] Moreover: If an attorney acts in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client, he is not held liable for a mere error of judgment."

c) Strategic Planning: After a decision has been made, the focus turns to Strategic Planning as to how to put the decision in play. It is the forward-thinking process that takes into consideration time, resources, risks, and benefits in relation to actions to be taken by which to achieve the client's goals. Iowa R. Prof'l. C., 32:1.4(2) requires that the client be

³ For example, a typical decision-making technique is the four-factor tool known as BOB, WOB, BOW, WOW which stands for the best-of-best outcome, worst- of- best outcome, best- of- worst outcome, and the worst- of- worst possible outcome. (The Committee recognizes the assistance of Atty. Joseph Peiffer of the Linn County Bar for this strategic planning contribution.) Another commonly used decision-making tool is SWOT, an acronym for strength, weaknesses, opportunity or threats. And yet another more evaluative tool is known as the Analytic Hierarchy Process (AHP) which ranks each of the client's criteria for decision-making in order of importance, and weighs each option against each criteria. It is a matter of judgment between the lawyer and client as to which, if any, method is used.

involved in the strategic planning process. Tactical decisions, or how to carry out the plan, are usually the province of the lawyer.⁴

Strategic Planning is distinguished from tactical decisions which are the decisions made by the lawyer, without client input, regarding the method or process used to accomplish the strategic plan.⁵

A good plan changes when History is expanded, or options are added or eliminated, and it changes rapidly once an opponent is involved. Planning is always a work in progress and counsel has an obligation under Rule 32:1.4(a)(3) to keep the client reasonably informed about the status of the matter. CHELP provides a method by which to continually engage the client in the planning process. Counsel is cautioned that some clients confuse Plan with guarantee. The lawyer must educate the client on these winds of change and that a good Plan is a flexible Plan.

CONCLUSION

CHELP is offered as a “best practice” designed to protect the client and the lawyer from the risk of inadvertency. By employing a systems approach like CHELP, to client selection, avoidance of conflict of interest and case processing, the lawyer is in a good position to answer the question why did you do what you did” and have evidence to support the application of the mere error of judgment rule.

⁴ See Restatement 3d of the Law Governing Lawyers, (3rd 2000) “ Authority Reserved to a Lawyer”.

⁵ . Nelson v. Quarles & Brady, LLP, 2013 IL App (1st) 123122, ¶ 31, 375 Ill. Dec. 561, 570, 997 N.E.2d 872, 881 (“As one author has noted: “[T]he 'attorney judgment' defense [is] also commonly referred to as 'judgmental immunity' or the 'error of judgment' rule. Whatever the label, at its core, the rule dictates that attorneys do not breach their duty to clients, as a matter of law, when they make informed, good-faith tactical decisions.” J. Mark Cooney, *Benching the Monday-Morning Quarterback: The "Attorney Judgment" Defense to Legal-Malpractice Claims*, 52 Wayne L. Rev. 1051, 1052 (2006).”

