

2023 RESOLUTIONS— ETHICS EDITION

BY SUSAN M. HUMISTON ✉ susan.humiston@courts.state.mn.us



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

The new year presents an opportunity to take a fresh look at many aspects of our lives and practices, which is why resolutions are so popular. I love resolutions but try not to leave them to the new year—every day is a new day, right? But if you enjoy reflecting and resolving to make some changes in your life at the start of this new year, might I suggest a few ethics-related resolutions to integrate into your practice?

No. 1: Read the ethics rules

When was the last time you pulled out the rules and looked at them? They do change periodically, you know. For example, I didn't even know there was a rule dedicated to prospective clients (Rule 1.18) until I was hired for this job and reviewed the rules. The rule was adopted in Minnesota in 2005, long after I graduated from law school and last really looked at the rules (except for occasionally reviewing the conflict rules). It's a handy rule to know, one that comes up frequently on our ethics hotline.

In 2022, the Minnesota Supreme Court made several changes to the advertising rules, including elimination of the requirement that advertising must be labeled "Advertising Material." Did you know that? Other changes included the ability to provide nominal gifts as an expression of appreciation for a referral or recommendation. Sometimes changes are permissive and something you long thought to be required or prohibited isn't anymore.

Other times, lawyers learn some of the finer points of the rules when they are responding to an ethics complaint. Trust me, one hour reading through the rules and comments is time well-spent. And remember to read Minnesota's rules, not the ABA model rules. There are differences and I'm still surprised by how many people cite to us the model rules. You can find Minnesota's rules on our website or in your Minnesota Rules of Court (if you like hard-copy rule books). Resolve to read the ethics rules.

No. 2: Update your retainer agreement

I'm sorry to report that too few lawyers are familiar with the ethics rules that apply to retainer agreements. Every month we issue discipline

for lawyers who are surprised to find that their retainer agreement (likely one they borrowed from a friend or pulled from the internet) is non-compliant. Does your agreement say that some form of payment is "non-refundable"? How about "earned upon receipt"? Both descriptions are prohibited under Rule 1.5(b)(3), Minnesota Rules of Professional Conduct (MRPC).

Do you accept flat fees? Do you always have a retainer agreement *signed by the client* (not the person who might be paying the flat fee) when you receive those funds? Is the retainer agreement compliant with the requirements of Rule 1.5(b)(1), MRPC? Do you know what the requirements of Rule 1.5(b)(1), MRPC, are? If you do not have a signed (and compliant) fee agreement, those unearned flat fees should be going into your trust account. The ethics rules (Rule 1.15(c)(5), MRPC) require that all funds received in advance of services being performed must go into trust—with only a limited exception for when you have a compliant and signed retainer agreement.

And those advance costs you get for filing fees or miscellaneous expenses? I cannot emphasize enough that those cost advances must go into your trust account. The ethics rules require you to safekeep other people's money that you hold (Rule 1.15(a), MRPC), and costs that are dedicated for use for a particular purpose are never the lawyer's money. Those dollars belong in trust until the expense is incurred.

Do you do contingency-fee work? If so, you must always have a written fee agreement in place, and you might want to look at it to make sure it clearly denotes whether expenses will be deducted before or after the contingency fee is calculated. Do you always issue written statements showing the outcome of the contingency matter, the recovery, and the method for determining the client's remittance? Rule 1.5(c), MRPC, explains these requirements.

What about fee-sharing with a lawyer who's not in your firm? There are specific requirements to follow in Rule 1.5(e), MRPC. Do you want to charge clients for copying their file? Make sure you include that in your retainer agreement. (See Rule 1.16(f), MRPC.) Resolve to review your retainer agreement and make sure it is easy to understand and compliant with the ethics rules.

No. 3: Talk to your team about ethics

Most lawyers work with some staff. Even many solo practitioners utilize non-lawyer staff periodically. Can you remember the last time you reminded everyone you work with of their obligation to comply with the ethics rules just as you do? As lawyers, we have a duty to make reasonable efforts to ensure we have in place measures to ensure lawyers and staff we work with know, and are complying with, the rules. (See Rules 5.1 and 5.3, MRPC.) If you really have your act together, you may have policies and procedures you can cite to your team about their obligations, but what if you don't actually do it? It is always a good idea to reiterate core precepts: confidentiality, honesty, communication and diligence, recordkeeping, dealing with unrepresented or represented parties, speaking up if you see an issue or make a mistake. Too often we assume that individuals understand the requirements because they work for a lawyer—but unless your team is taught and reminded, how can they really understand and comply with the various ethics rules that govern your practice? Resolve to talk to your team about ethics.

No. 4: Try to prioritize your well-being

This one is perhaps the most challenging. Being a lawyer is stressful. It demands a lot from us, and there is never enough time in the day to get everything done. Adding to the challenge, we also have high expectations for ourselves and others. Conflict is also often present.

I know you know this, but the law is also very enticing. Whether it's a matter of money or influence, the rewards can cause us to deprioritize family and ourselves. I have no magic solutions for this well-known and insidious aspect of our profession, but I do know that you will never regret taking small steps to refocus on yourself and those you love. Just before Christmas, a friend and mentor passed away. He was a talented and successful lawyer, but his superpower was the ability to be present for others, and to take time for family, friends, and activities he enjoyed. He found balance and encouraged others to do the same. Are there small ways that you can work in time for yourself, family, and friends into your day? It may be difficult to find balance, but small steps really do add up. Resolve to try to prioritize your well-being in 2023.

Conclusion

Resolutions may not interest you, but we all set personal and professional goals. My resolution (goal) for 2023 is remembering that small steps forward are the key to lasting change. Perhaps one of the above suggestions will help you take a small step toward including the ethics rules in your practice. And do not forget: We are here to help you answer your ethics questions, at www.lprb.mncourts.gov or 651-296-3952. Best wishes for 2023. ▲