

Consider a firm operations self-assessment

BY SUSAN 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.

Last month's column walked readers through a sample self-assessment of their trust account management practices. This month's column expands the approach to other areas of your legal practice. A few states have created practice self-assessments to help lawyers proactively create policies and procedures that enhance their ability to consistently meet their ethical obligations. Colorado has such a self-assessment, which is generously made available to the public.¹ We have permission to borrow from it to help lawyers in Minnesota who participate in our probation program to create enhanced office procedures. For this self-assessment, let's focus on a couple of areas of legal practice that give rise to ethics complaints.

Avoiding conflicts of interest

We see a lot of complaints involving conflicts of interest. When we dig into those complaints, we often find inadequate conflict management systems in place. There are several questions you can ask yourself to determine whether you have adequate conflict screening processes in place.

■ Have you clearly identified who is, and who is not, the client? This sounds simple but is often the source of issues, particularly if your client is a business entity. Do you include names of related parties and witnesses in your conflict management system? Do you include prospective clients whose representation was declined? Do you keep track of the type and scope of matters for which representation was undertaken? All this information is necessary to make screening effective.

■ Do you periodically rescreen when new parties, witnesses, or individuals are added to a matter?

■ Do you have a documented process (attorney-led, preferably by an attorney other than the originating lawyer) to review and sign off on matters that are flagged as potential conflicts?

■ Do you use engagement, declination, and closing letters regularly? Engagement letters can clarify the scope of representation and help you analyze conflicts. Closing letters help clarify if you are analyzing conflicts under Rule 1.7, Minnesota Rules of Professional Conduct (MRPC) (concurrent conflicts) or Rule 1.9, MRPC (former client conflicts).

■ Do you represent multiple clients in a single matter? Have you worked through potential joint representation issues?

■ Does your system capture personnel matters that might give rise to potential conflicts of interest, such as business transactions with clients, or community or volunteer activities?

■ If a conflict is identified, what is the process to determine if consent can be obtained? Do you understand what informed consent is? Hint: Consult Rule 1.0(f), Minnesota Rules of Professional Conduct (MRPC). Sometimes your confidentiality obligation to a current or former client makes it difficult to provide sufficient information to obtain consent. Do you have a process that is sensitive to ongoing confidentiality obligations?

■ How do you ensure that informed consent is obtained in writing and copies retained in every matter where it is applicable?

■ How do you capture changed circumstances in a matter to ensure any potential new conflicts are addressed?

■ If a conflict arises, do you have withdrawal procedures to ensure compliance with Rule 1.16, MRPC?

Ethical disengagement

Withdrawing ethically is a frequent area of inquiry on our ethics hotline as well as one of the areas where we see more discipline than we would like. Have you asked yourself the following lately:

■ Before you take on a matter, have you thought carefully about whether this is a good matter for you to undertake? This includes considering any potential red flags related to the client, your competency (and interest) in the matter under consideration, your current availability and capacity, and the ability of the client to pay for the representation.

■ Is withdrawal consistent with the ethics rules, if available or required?²

■ Do you have a standard procedure to address return of the client file (or file closing) and return of any unearned fees with the client upon withdrawal (or termination of the representation)? Recently we have had law firms state that they do not address unearned fees on flat fee engagements unless the client requests some form of refund. If you did not complete the flat fee representation, you need to make a refund of unearned fees and should have a process in place to do so automatically upon disengagement.

■ Do you have a procedure for collecting accounts receivable? Lawyers have been disciplined

for suing current clients as well as for disclosing confidential information related to the representation that is not necessary to collect the debt. Having a good policy and pre-approval process before becoming adverse to a former client can prevent self-inflicted errors en route to collecting your fee.

Charging appropriate fees

Fee agreement issues make up a good percentage of discipline. Some things to consider:

- Do you have a written fee agreement for every matter? If not, is there a good reason for this? Can you still demonstrate that you have clearly explained the scope of the representation and the basis for your fee?

- Are you providing limited scope representation? Remember, you are ethically obligated to get the client's informed consent to a limited scope representation, and the limitation must be reasonable. You cannot just tell the client what you are willing to do. *See* Rule 1.2(c), MRPC.

- If the matter is a flat fee engagement, have you complied with Rule 1.5(b)(1), MRPC?

- For contingency engagements, have you complied with Rule 1.5(c), MRPC?

- If the matter is litigated, do you have a process where you explain that courts can assess costs and disbursements against your client in certain circumstances?

- Do your clients understand what expenses they will be responsible to pay? How do you know this?

- Do you have policies in place to address how best to work on a file with lawyers who practice outside of your firm? This might include fee-sharing (*see* Rule 1.5(e), MRPC). Also, remember, you cannot fee-share with non-lawyers, nor can you pay finder's fees. *See* Rule 5.4, MRPC; Rule 7.2, MRPC.

- Do you have a process in place to alert clients to changes in key fee terms, such as annual rate increases? And are you billing your client regularly? I believe strongly that our communication obligations under Rule 1.4, MRPC, require us to

communicate rate and accounts receivable balances proactively and promptly as part of the client's ability to make informed decisions about the representation. Getting paid is important to you; ensuring your client understands what you are doing and what that is costing them is important to them. Remember that the ethics rules are client-centered and your customer service practices should be client-centered as well to ensure good risk management.

Other areas that can benefit from a self-assessment include ensuring competency in client matters; communicating in an effective, timely, and professional manner; ensuring diligent representation; protecting client confidences; law firm organization and personnel supervision; file management, retention, and security; and trust accounts and fiscal practices.

Resources

The above questions are just a few from Colorado's self-assessment, which cites to Colorado's ethics rules. Minnesota's ethics rules are similar in many respects to Colorado's rules since both are based upon the American Bar Association's model rules. If you are reviewing Colorado's self-assessment and have questions on application in Minnesota, review Minnesota's comparable ethics rule, and if you still have questions, give us a call. We are available every day to answer your ethics questions at 651-296-3952. I know there is never enough time in the day to do everything that needs to get done, but I hope that this column inspires you to invest some time to ensure you have in place good policies and procedures that support your ethical obligations. The time spent will pay dividends by elevating your professional development. ▲

NOTES

¹ Colorado Consolidated Lawyer Self-Assessment, <https://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp>.

² *See* Susan Humiston, *Withdrawing as counsel (ethically)*, Bench & Bar of MN (Nov. 2019).