A Checklist for Effective and Ethically-Compliant Checklists

By: Lauren D’Agostino

Ethical obligations should be on the radar of any law practice management technique. One routine law practice management technique, the checklist, can facilitate an attorney’s compliance with ethical obligations. Ethical obligations require an attorney to act diligently and competently, communicate effectively with his or her clients, and effectively manage his or her law practice.\(^1\) An attorney must manage complex and voluminous considerations to deliver advice and work product to clients. A checklist is one method to simplify complex processes, especially routine elements, to improve the consistency and correctness of results.\(^2\) Three items that should be on any (mental) checklist for generating an effective and ethically-compliant checklist include:

- Does the checklist facilitate accomplishing the particular task?
  - Diligence (Rule 1.3)
    - Contains routine elements?
    - Sequential logical order?

\(^1\) See ABA Model Rules of Prof’l Conduct 1.3, 1.1., 1.4, 5.1, 5.2, and 5.3 (1983).
Generating a checklist that helps to accomplish a task is the baseline consideration that can enhance diligence and competence. Checklists can be great tools to help many types of professionals to organize complex processes in a way that ensures that routine, but necessary, elements are not overlooked. For instance, the Checklist Manifesto explains how by adding hand-washing to surgical checklists, a mundane yet critical element of a task, medical professionals better ensure the health and safety of their patients. This concept is applicable to the legal profession. For instance, attorneys often review documents to ensure compliance with other materials (e.g., statutes and regulations). Examples include a general counsel’s contract review, a litigator’s review of materials received in discovery, a corporate counsel’s due diligence review, a judicial clerk’s review of proposed orders, and a regulatory attorney’s review of filings. A checklist of essential elements can aid an attorney to conduct a thorough review. Further, organizing the checklist to place elements in a logical sequential order can facilitate a steady and conscientious progress. Thus, a checklist is a great tool to help meet the duty of diligence.

Moreover, a checklist can facilitate competent work. Relying solely on a checklist, without allowing openings to consider other issues and complexities beyond the baseline, can narrow an attorney’s focus. However, a checklist, especially one in question format, can trigger more dynamic thought. By reducing the amount of brain power expended on recalling which baseline measures to fulfill, the attorney can devote more time to more complex questions. A checklist can not only be a review mechanism, it can also provide a template to generate the basic elements of routine filings and documents. So long as the checklist allows for appropriate customization, it can facilitate a lawyer’s diligent and competent work.

Besides the value to the client resulting from the attorney’s increased diligence and competence, a checklist can also facilitate an attorney’s communication with the client. A checklist’s simple format can help an attorney to better identify strengths and challenges. For
instance, a checklist of legal elements for a claim might help the attorney identify factual gaps and assess risk. The attorney may need to follow-up with the client to try to overcome the challenge or strategize ways to minimize the risk. In this way, the checklist can help the attorney to pinpoint the aspects of the matter that require the attorney to seek client input.

Finally, a checklist can facilitate law practice management. A supervisory attorney may use a checklist to draft a general strategic plan for medium to large projects or to specifically oversee discrete projects. At a general level, a checklist might contain the fundamentals of a project plan that identifies areas for delegation to other team members. For a more particular project, a supervisory attorney reviewing a subordinate attorney’s substantive legal memo with the aid of a checklist laying out the basic elements of the claims or defenses can give more meaningful feedback. Also, providing the subordinate attorney with a checklist may help that individual self-edit a draft document or manage a routine process. A checklist is particularly useful to issue-spotting, a key component of a subordinate attorney’s job. A non-legal assistant may also benefit from a checklist that organizes a routine process (e.g., providing a logical order to edit, cite-check, and format a document) or flags issues that must be escalated to a supervisor. Law practices management can thus harness the potential for a checklist to be general or specific in its application.

When thinking about techniques to simplify the increasing complexities of modern law practice in a manner that fulfills a lawyer’s ethical obligations, consider starting with a checklist.

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Constructive Criticism: It’s Supposed to be Helpful!

By: Ashley Rippolone

Receiving constructive criticism as a young associate or law student is not always a pleasant experience. Many lawyers have a “Type A” personality – competitive, self-critical perfectionists who are always striving to succeed. As you can imagine, this type of person may find it hard to handle criticism in the way it is intended, which is to encourage improvement. Most of us can relate to the sinking feeling you get when you receive a draft back covered in edits. You had spent so much time on the draft and genuinely believe you gave your best effort...but do these edits necessarily mean you did something incorrectly? No, not always. While your writing may need improvement, it is important to keep in mind that writing is a continually developing skill.

As a 1L, I interpreted constructive criticism to mean that I did not meet someone’s expectations. By my 2L year, I had completed enough writing assignments to learn that constructive criticism is meant to help rather than hurt. The truth of the matter is that edits, critiques, criticism, and suggestions are all a part of how the legal profession works. Whether you are a 1L or a young lawyer, there is an unavoidable learning curve one must trudge through, and feedback is a great way to move you along. Carole Robin, lecturer at Stanford’s Graduate School of Business, stated, “In situations where we are not getting feedback, we are essentially flying blind, and I
believe that causes unnecessary stress.” Her solution: create a “feedback-rich environment” which in turn builds trust and respect.

So how can we fully utilize constructive feedback and how can others be effective at offering it?

**Receiving Feedback**

1. **Actively Listen**

   This may seem obvious, but don’t make it unnecessarily difficult for yourself by forgetting or not listening to your supervisor’s comments. We tend to plan our responses when we should actually concentrate on listening. If your feedback is about a draft, then take a copy of it into your meeting to discuss it with the person giving you advice. If the person is giving you verbal feedback, then take verbatim notes.

2. **Engage In Productive Dialogue**

   It is okay to ask questions, but first allow the person to offer their criticism without interruptions. At the conclusion, repeat back their comments and clarify any questions you may have. Partners and assigning attorneys often complain that young lawyers fear asking questions because they believe it makes them appear unintelligent or uninformed. This assumption, however, could not be farther from the truth. Engaging in productive dialogue allows the person offering feedback to understand that you are properly processing their suggestions. It is better to ask clarifying questions in the beginning of an assignment than an hour before its deadline.

3. **Don’t Make It Personal**

   The last thing you want to do is become too emotionally invested in someone’s feedback. Rather than becoming defensive, own their criticism and use it to your advantage. Leadership expert, John Maxwell, emphasizes the importance of analyzing the feedback you are given to determine if it is truly constructive or if it is meant to be destructive. For example, assessing whether the comments were given in a judgmental tone versus a genuine one may change your perception of how to implement the criticism. It is important to remind yourself that feedback is meant to improve the situation or performance, so stay positive and focused on your progress.

4. **How to Get the Feedback You Need**

   Identify the type of feedback you need in order to narrow who you should approach for advice. Do not hesitate to ask for feedback if you are not getting any. Author Sheila Heen of *Thanks for the Feedback: The Science and Art of Receiving Feedback Well*, says, “Do you have any feedback for me?” is a “terrible question” because the answer is usually that there is none. Tailoring your question to be more specific, like asking ‘how’ or ‘what’ questions will likely elicit more helpful responses. Heen also suggests to look beyond just asking your boss for feedback, but to ask colleagues for their input too.

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Giving Feedback

1. Keep Your Emotions In Check

Let’s say that a colleague or subordinate completely misunderstood your instructions and wasted hours drafting an argument you explicitly said you did not agree with. Let your feelings of frustration cool down before giving your feedback. Allowing your emotions to interfere with your thought process can cloud your judgment and deter from giving beneficial feedback to resolve the situation.

2. Praise-Improve-Praise

This is a popular method often used in Toastmasters as a way of giving feedback. First begin by focusing on the person's strengths – in the context of writing, make sure to include some positive comments so the writer understands what they are doing well. Second, provide comments in areas that need improvement. Last, provide the individual with a concluding comment reiterating the positive comments and the positive outcome that can be expected if your criticism is considered.

3. Give Detailed Feedback

Feedback should be clear, sincere, and straightforward. Detailed feedback allows the writer to learn and correctly implement your comments. Professor Thomas D'Aunno of Columbia University, has studied the process of feedback, and suggests laying out the topic you want to cover before actually giving your comments. For instance, “I want to give you feedback about line 20 on page 5 of this complaint.” By being specific and offering context, the listener will be better able to respond and process your comments.

4. Actively Listen

Giving and receiving criticism entails closely listening. Ask what the other person meant by something that confused you. This clarification may give you room to offer suggestions on how to improve that specific detail. Do ask the person to react to the feedback you give. Moreover, offer suggestions of how you would handle the situation or a solution to their problem.

5. Recap

At the end of your conversation, go over what was said. Make your expectations clear and ask whether you can answer any more questions. If time permits, follow up with the person to see if they are on the right track.

It is up to you to embrace criticism and remember that it is meant to help you improve. Analogous to all situations in life, keeping a positive perspective is of upmost importance. By fostering this so called “feedback-rich environment” you will create a mutually beneficial relationship with your superiors and help further develop your lawyering.
Long considered a fringe notion, mindfulness—the simple yet profound and often difficult practice of bringing awareness to the present—has become a popular trend. Mindfulness meditation is more often being offered as a support tool for all those seeking to work more effectively in the world. Meditators have come out of the closet, and their numbers are growing. Reports of the benefits of mindfulness abound. This flurry of discussion has led to a deepening of the conversation among researchers, practitioners, advocates, and skeptics about the nature of contemplative practices and their benefits. If the purported benefits of mindfulness prove to be true, no profession is in greater need of them than lawyers.

And the legal profession is responding. Law schools, lawyers, and judges are reviewing the research detailing the benefits of mindfulness meditation: reduced stress, lower blood pressure, increased empathy, improved performance on exams and during arguments, more ethical decision-making, and more satisfying and effective client counseling conversations. More and more lawyers are practicing mindfulness to assist in handling the stress of legal practice and to improve performance.

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The New Jersey Supreme Court Permits Office of Attorney Ethics to Proceed in Prosecuting Attorney Misconduct for Facebook Contact with Represented Party

By: Meaghan Petetti Londergan and Erika Mohr

The New Jersey Supreme Court recently held that defense lawyers who allegedly ordered a paralegal to spy on a plaintiff’s Facebook page can face prosecution for attorney misconduct. While the Court’s holding only permits the New Jersey Office of Attorney Ethics (“OAE”) to prosecute the alleged misconduct, the implications of a ruling on the merits presents ethical and professional liability concerns for attorneys practicing nationwide.

In Robertelli, plaintiff attorneys challenged an ethics complaint filed with the District XIV Ethics Committee. The complaint relates to plaintiff attorneys representation of an Oakland Borough police officer in a 2007 automobile accident involving a pedestrian, Dennis Hernandez. The attorneys instructed their paralegal to obtain information about Hernandez for use at trial. The paralegal accessed Hernandez’s public Facebook profile and other public sources. Although Hernandez’s Facebook profile was “private,” the paralegal sent Hernandez a friend request that Hernandez accepted.

Hernandez learned of the attorneys’ conduct during discovery, objected, and subsequently filed a grievance with the District II-B Ethics Committee (the “Committee”). The Committee declined to docket the grievance after concluding that the alleged conduct would not constitute unethical conduct. Hernandez’s attorney then filed a grievance with the OAE, which conducted an

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investigation and filed the instant complaint. After the OAE declined to withdraw the complaint, the plaintiff attorneys sought to enjoin the complaint citing the Committee's decision not to pursue the grievance.

Both the New Jersey trial and appellate courts dismissed the attorneys' arguments holding that their Supreme Court and its associated ethics bodies held exclusive jurisdiction over attorney disciplinary matters. The Supreme Court affirmed the lower courts and granted the OAE authority to review the grievance de novo and proceed in prosecuting the attorneys’ alleged misconduct.

**Practice Note**

Although the New Jersey Supreme Court did not reach the merits, a subsequent ruling regarding such attorney conduct would likely have serious implications. First, the ruling presents several ethical issues including:

1. Whether a Facebook “friend” request constitutes communication with a person represented by counsel. RPC 4.2;
2. Whether such conduct is a violation or an attempt to violate the RPC, knowingly assist or induce another to do so, or do so through the acts of another. RPC 8.4(a);
3. Whether such conduct involves dishonesty, fraud, deceit, or misrepresentation. RPC 8.4(c); or,
4. Whether such conduct is prejudicial to the administration of justice in violation of 8.4(d).

Second, the Court's decision has the potential for professional liability exposure from such communication. Several authorities, including the Pennsylvania Bar Association have issued guidance regarding Facebook profiles. According to the PBA's Professional Guidance Committee, while accessing and viewing a represented party’s public social media profile is not improper contact, a “friend” request to gain access to private information is prohibited under Rule 4.2 and in violation of Rule 8.4(c).

This suggests that if a client is injured because of information gathered from a private social media account, the injury could give rise to an action against the attorney.

**Meaghan Petetti Londergan, Esquire** is a partner with Freeman Mathis & Gary, LLP, in Pennsylvania and New Jersey offices. Meaghan devotes a significant portion of her practice to the defense of professional liability matters. **Erika Mohr** is a third-year law student at Drexel University, Thomas R. Kline School of Law, graduating May 2016. She is currently externing with Freeman Mathis & Gary, LLP in their Philadelphia office.
Note from the Editor

In the Winter Newsletter, Model Rule 1.5 (b) was misquoted in the article entitled “Preemptive Strategies Young Attorneys Can Take to Avoid Being the Target of a Malpractice Action.” Model Rule 1.5(b) reads in relevant part, as follows “[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or with a reasonable time after commencing the representation....” The article was missing a few words which may have been confusing or misleading. Thank you to Regina V. York, a 2L at Howard University, School of Law, for identifying this mistake so that it may be brought to the attention of our readership.

- MML

NEWS AND ANNOUNCEMENTS >>

2016 YLD Spring Meeting

May 5-7, 2016
St. Louis, Missouri

The 2016 Spring Conference will be held May 5-7, 2016 in St. Louis, Missouri. Don’t miss out on this chance to network with other young lawyers, earn CLE credits, and hear from well-known speakers. It’s important that we have a wide range of voices, experiences, and opinions at the meeting where young lawyers come to share ideas. We hope you can be part of that discussion.

Special Note: The Committee on Ethics and Professionalism is sponsoring a program entitled “Let the Ethical Games Begin!” The program will take place on May 6, 2016 at 9:00 a.m.

2016 Affiliate Leadership Training

Each Spring, the ABA YLD hosts a collaborative training session for current and incoming bar leaders. This year’s will be held from 12:00 p.m. to 2:00 p.m. on Thursday, May 5, 2016, as part of the 2016 Spring Conference in St. Louis. The program will include speakers, round-table discussion, and topics of interest to young lawyer leaders, including encouraging accountability, getting the most out of finances and sponsorship, and succession planning. Please contact Jenna Overmann (jovermann@dofamilylaw.com) and Alia Graham (alia.graham@americanbar.org) if you plan to attend.

2016 Spring Affiliate Showcase

The 2016 Spring Affiliate Showcase will take place at the Spring Conference on Saturday May 7, 2016, from 8:30 a.m. to 9:30 a.m. (breakfast included). This is a great opportunity to showcase your affiliate and preview programs from other affiliates that you can apply back home. Our format in the Fall was really well received, so we’re going to do it again: A TEDx format where each affiliate is given 90 seconds to present on any topic they like (the affiliate, a particular project, a series of projects, etc.) using 1-3 slides.
If you or your affiliate is interested in participating, please contact logan.murphy@hwhlaw.com no later than 7 days before the Conference.

Awards of Achievement

The ABA YLD Awards of Achievement program is up and running! Applications are available now and information can be found here. This program is an opportunity for young lawyer organizations to submit their best projects for evaluation and recognition by a jury of their peers. Categories for awards include (1) Public Service Projects; (2) Bar Service Projects; (3) Diversity Projects; (4) Comprehensive Programming; and (5) Outstanding Newsletter.

Information about the winners will be disseminated widely and the winners will be recognized during the YLD Assembly at the ABA Annual Meeting in San Francisco! The deadline to submit your application is Wednesday, June 15, 2016. Please send any questions to logan.murphy@hwhlaw.com and tara.blasingame@hwhlaw.com.

ABA YLD Scholars Program

The YLD Scholarship Program is designed to encourage the participation of minority, solo/small firm, government, public sector, and military service attorneys in the ABA Young Lawyers Division. The program consists of funding to attend the ABA YLD Fall Conference, the ABA Midyear Meeting, and the ABA YLD Spring Conference, as well as appointment to and active participation in one of the YLD Boards or Teams. Information is here, and the application is here. Please contact the ABA YLD Diversity Director, Collin Cooper (l.collincooper@gmail.com) with any questions.

ABA Everyday Initiative

The ABA Everyday Initiative provides daily podcasts, publications, webinars, CLE and resources. Check out the calendar here: http://www.abaeveryday.org

CALL FOR ARTICLE SUBMISSIONS

We are accepting articles for publication in our quarterly newsletter on an on-going basis on a wide variety of topics and subject matters. It is an easy way to get your work published and build up your reputation. Please submit submissions or inquiries to Melissa Lessell, Newsletter Editor, mlessell@deutschkerrigan.com. The next newsletter will be issued in July 2016.