How To Be Nice and Still Get to the Top

Submitted Anonymously

I took on a case to help a woman build her retirement home. Ten years before she bought the property, a previous owner had gone through the permitting process and successfully got permits, but he never built a house. To get his permits, he had to file suit against the county. The permits were awarded as part of a settlement. After checking to make sure this litigation to get the permits strategy still had a
legal foundation, I moved forward. Before filing, I called the county’s legal office to speak with the attorney who I expected to be on the other side. We had shaken hands a few times, but we had no history together.

I was a year into practice, and he was close to thirty years in. He had bounced around top firms and went to the government for his last years of practice. In a litigator-versus-litigator fight, he’d have beaten me. Instead, he listened to me explain my case and said, “No problem. Here’s how we’re going to fix this thing.” The case was over before it began. He did his client a favor by sparing expensive, needless litigation. He made me look like a hero to my client. And he didn’t embarrass me in a public forum because I did not know how to proceed. He taught me that you can be a nice person and still get to the top. A sense of civility should be a basic requirement for a bar license.

Would You Lie If Your Boss Told You To?

By Matthew Bruce

Matthew Bruce is an associate attorney with Faruki Ireland & Cox PLL in Dayton, Ohio.

What would you do if you were hard at work in your office, your managing partner walked in and told you that opposing counsel just filed an ex-parte motion for temporary restraining order and preliminary injunction against your firm’s biggest client, and you needed to have an opposition brief prepared and ready to file first thing tomorrow morning? The caveat, however, is that your boss tells you to not only refute all the allegations but also to “be creative” and “invent” facts that would defeat the motion. When you question his instructions, he says, “Look, the facts of this case are terrible against us, but we can’t afford to lose this client. Just get us past this TRO.”

After wiping the sweat from your brow and taking a few deep breaths, it’s time to weigh your options: (1) you draft the opposition brief with invented facts that, if true, would defeat the opposing party’s motion; or (2) you refuse to follow your boss’s instructions and advise him that doing so could result in disciplinary action against both you and him. Option 1 may defeat the motion but, if discovered by the court, will most likely result in professional discipline by the bar, as well as permanent damage to your reputation. Option 2 keeps your license to practice secure but may leave you with a license and no job. Time’s ticking—what do you do?

As an ethical lawyer, you choose Option 2. As I’m sure you recall from law school, Rule 5.2(a) of the ABA Model Rules of Professional Conduct provides that, “A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.” Further, the Restatement of Law Governing Lawyers, § 12(1) explains that, “[f]or purposes of professional disci-
pline, a lawyer must conform to the requirements of an applicable lawyer code even if the lawyer acted at the direction of another lawyer or other person.” If you were to follow the managing partner’s instructions, then you will have knowingly violated the Model Rules of Professional Conduct. No amount of whining or hiding behind your boss’s demands will protect you. Not only did you make a false statement of fact or law to the court and offer evidence that you knew to be false in direct violation of Model Rule 3.3, but you also did so knowingly and with the intent to do so. Even those courts that have considered an associate’s reliance on their superior’s orders as a potentially viable defense do so only when reasonable, and it is never reasonable to believe that a lawyer may mislead the court.

The answer is clear, and now it’s time to let your boss know where you stand. When you tell him you cannot file the opposition brief that he wants, he storms out of your office screaming, “Fine, I’ll do it myself!” The next day you see that the managing partner has filed a response to the TRO, setting forth untruthful facts. Once again you find yourself bound by the Rules of Professional Conduct. This time, you must report your boss to the proper disciplinary authority, pursuant to Model Rule 8.3.

Model Rule 8.3 states, “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” You know that your boss filed a brief with the court that directly violated Model Rule 3.3. Thus, on the heels of directly disobeying your boss’s instructions, you now must report him for professional misconduct.

Some may see this as a necessary evil but, in reality, it is a defining personal and professional moment. You’ve been asked to lie, to compromise your ethics, morals, and honor in the service of business. This should draw your ire—internally, of course; you should remain professional toward everyone involved in such a situation. But consider this the first inch of a very slippery slope. If you can recognize these moments early in your career, you will spot them from a mile away and always react ethically . . . hypothetically speaking, of course. Nobody ever said doing the right thing (or being a lawyer) was easy.

Hypothetically Speaking: The Buck Stops Here in More Ways Than One

By Michelle M. Jochner

Michele M. Jochner is a partner with Schiller DuCanto & Fleck in Chicago, IL.

All the long hours and hard work have finally paid off, and you’re a partner. But with this monumental recognition of your efforts comes new responsibility. And in more ways than one, the buck stops here.
As an associate you were supervised. Now, you’re the boss and probably have access to a pool of associates to help with your heavy caseload. So, what does this major career transition mean in terms of your day-to-day practice?

The business of law is like any other business including a team doing good work for clients. What’s different, however, is that in a law practice, there are rules that apply when supervising associates. So while delegating your discovery workload might be a key to future success, with a different kind of workload comes increased ethical obligations.

One of the first things you should do is check out Rule 5.1 of the Model Rules of Professional Conduct. You have a duty to supervise your associates’ conduct and you may even be held responsible for an associate’s violation of any of the Rules.

Rule 5.1, called “Responsibilities Of Partners, Managers, And Supervisory Lawyers,” lays out your responsibilities. It defines your duty to make sure that all lawyers in the firm conform to the Rules and also describes when you could be held responsible for an associate’s violation. Read the rule carefully.

Basically, you have to make reasonable efforts to ensure that another lawyer under your control conforms to the Rules. And if an associate violates a rule and you know about it, you have to take remedial action.

You should also read the Comment to Rule 5.1, which explains that lawyers with managerial authority are supposed to establish internal policies and procedures to help lawyers in the firm conform to the Rules. These policies should include making sure that inexperienced lawyers are properly supervised.

Handing off a routine discovery assignment to an associate may not seem like a big deal, but any time you assign work, Rule 5.1 comes into play. Here are four tips that can help you ensure your associates comply with the Rules of Professional Conduct:

1. When assigning tasks, state with specificity what you expect and make sure deadlines are clearly understood.
2. Encourage open and frequent communication regarding progress on the tasks assigned and encourage questions.
3. Review the associates’ handling of their assigned tasks for compliance with required firm procedures.
4. If there are long periods of communication silence, reach out and touch base.

Teaching new associates good business practices should not be too hard. After all, you likely can still remember the kinds of things you did to build your own ethical practice—back in your own days as a too-busy associate, before you mastered the game.
Know Thy Judge

You should want to know as much as possible about the person you are trying to persuade, so how do you, within the bounds of ethics, find out about the judge, and what can you do once you find out? The first step is to find out which judge is assigned to your case.

Call the judge. Go to the source. Some judges have their preferred procedures written out for distribution to counsel. If they don’t, in my opinion, there is absolutely nothing improper about an attorney asking, “Judge, I’ve never tried a case in front of you. Do you have any procedures that I should know about before I come to your court?”

Call other lawyers. “I try to tap into a small organization of local lawyers,” says Lorna G. Schofield.

Type the judge’s name into a legal search engine. Doing an Internet search should give you the judge’s opinions, if they have been appealed, but can also give you opinions on cases that the judge tried when he or she practiced.

Check past attorney directories and current judicial directories. Past attorney directories will give you the judge’s area of practice before taking the bench. Current judicial directories can tell you whether a state court judge was appointed or elected and, perhaps more importantly, when they are scheduled for reappointment or reelection.

Check local newspapers. If you are in a high-profile case that will be covered by the media, knowing whether your judge seeks or avoids publicity can be valuable.

Talk to court reporters. “I always try to obtain a transcript of a recent trial,” says Steven D. Susman. “You can tell what the judge wants, doesn’t want, how he or she conducts the trial and rules on objections.”

Google the judge. This should give you everything else that is not covered by the legal search engines.

Go to court. “Go sit in the judge’s courtroom when she or he does a motion call,” advises Mark A. Neubauer. “You can learn a lot by watching how the judge handles different matters and different attorneys.”

Talk to present and former law clerks. Former law clerks can be a great resource in learning about the procedures of the judge.

Talk to and befriend courtroom personnel. One veteran trial lawyer once told me to show up at least a half or a full hour before trial. He told me that he learned volumes from off-hand comments, overheard comments, or comments made directly to him by courtroom personnel.
Remember, the bailiffs, clerks, and court reporters have had years of experience sitting in court with a variety of different judges. They know if the judge always requires that counsel stand, whether you must ask each time to approach the witness or the bench, and even the judge’s position on gum!

The full version of this article originally appeared in the Fall 2008 issue of Litigation News, volume 34, number 1. Reprinted with permission. 2008© by the American Bar Association. All rights reserved. Litigation News is a benefit of membership of the Section of Litigation. Learn more about the Section of Litigation at www.americanbar.org/groups/litigation.

Be Civil and Courteous to Other Lawyers

By Marian Lee

It should go without saying: Be civil and courteous to other lawyers, including opposing counsel. Most young lawyers intuitively know this, and they enter the profession with the best intentions. Then something happens, usually some combination of witnessing unprofessional behavior by their senior colleagues and getting frustrated with uncooperative opposing counsel over a particular communication or series of interactions. The young lawyer may be tempted to emulate more experienced lawyers, who should know better but still act unprofessionally.

Many lawyers who act this way will say they are being “zealous advocates,” which they claim is not only permitted but also required for competency under the ethics rules. However, many are not aware that Canon 7 of the Model Code of Professional Responsibility, which stated that “[a] lawyer shall represent a client zealously within the bounds of the law,” has been replaced by ABA Model Rule 1.3 of the Model Rules of Professional Conduct, which states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” This change was designed specifically to remove any suggestion that “reasonable diligence” includes offensive tactics or uncivil behavior. The comment makes clear that while a lawyer must act with commitment and dedication to the interests of the client, and “with zeal in advocacy on the client’s behalf,” a lawyer is not bound to press every advantage that might be realized for a client.

Some unprofessional lawyers truly believe that they are more effective when they act in an overly aggressive manner because, in the short term, they may win some small advantage (e.g., a concession in a negotiation or a decision in court, often obtained by simply wearing down the other side). In the long run, however, these tactics will get you nowhere at best and damage your reputation at worst. Gaining a reputation for incivility will cost you. There will be lawyers who won’t want to negotiate with you, settlements you won’t be able to obtain for your clients, and concessions that others will refuse to give you because you denied the same to them. Noted one senior associate:
You lose credibility by being nasty. Know the difference between being aggressive and being rude or unprofessional. Use the style that works for you; don’t be aggressive if that’s not your style. You can be very effective with a soft approach if you are firm in seeking your objectives and have a complete mastery of the facts.


Professional Responsibility is Every Lawyer’s Business: Ethics Resources for TYL Readers

Created in 1978, the ABA Center for Professional Responsibility provides leadership and guidance to the legal profession and the judiciary by developing, interpreting and promoting the implementation of policies and standards that govern the conduct and regulation of lawyers and judges. The Center houses five ABA standing committees: Ethics and Professional Responsibility, Professional Discipline, Client Protection, Professionalism, and Specialization.

The Center maintains an expansive website, with hundreds of documents related to ABA model rules and standards and other policies regarding professional responsibility; state implementation of those policies; and the history of the work of various commissions, committees and task forces, including their reports and the comments that helped inform those reports. The website also contains links to hundreds of pages containing information on professional responsibility from national organizations, law schools, regulators of the legal profession, and other ABA entities.

In addition to those public materials, center members have access to an online ethics opinion library and course materials from the Center’s annual National Conference on Professional Responsibility and are eligible to be appointed to internal Center committees. They also receive quarterly issues of The Professional Lawyer magazine, which features updates and analysis on professional responsibility law and which provides a possible outlet for those looking to make their mark writing in the area; new electronic editions of the Model Rules of Professional Conduct as they are issued; and discounts on all other Center publications and CLE programs.

The Center’s annual conference provides an incredible opportunity for a young lawyer to meet and network with the leaders in the professional responsibility field from around the country in an informative and friendly atmosphere. Anyone considering or already working in the area of professional responsibil-
ity, whether it be as lawyer for someone charge with violating the ethics rules; as general counsel, ethics counsel or conflicts clearance attorney at a law firm, large or small; or as a member of a hearing panel in your state’s lawyer disciplinary system, would be well-advised to attend the conference.

But the resources of the Center are not just for those who specialize in this area. Professional responsibility is every lawyer’s business. It impacts everything you do as a lawyer, from charging a fee to representing multiple clients with overlapping interests to conducting yourself before a tribunal to advertising your services.

Whether you become a member of the Center or not, as an ABA member you have free access to ETHIC-search, where you can speak with our lawyers on staff to help you find the resources you need to answer your ethics questions. Learn more about ETHICSearch and get the monthly “Ethics Tip” and other resources at www.ambar.org/cprethicsearch.

The Center for Professional Responsibility is dedicated to advancing the public interest by promoting and encouraging high ethical conduct and professionalism by lawyers and judges. Its members take pride in saying that they are part of that effort. More information about the Center is available at www.ambar.org/cprhome or contact us at cpr@americanbar.org.

Red Flags and White Whales: Beware of Problem Clients

By Peter Geraghty and Susan Michmerhuizen

Some years ago, never mind how long precisely, a man named Ahab appeared at my office asking if I would take over a personal injury matter for injuries resulting from an automobile accident. He walked with a limp and appealed to my sense of fair play and compassion and so I accepted the case, even though he brought it to me at the eleventh hour before a hearing was scheduled after the previous lawyer had withdrawn from the representation.

Ahab reassured me, asserting that he was being pressured to pay advance fees and that the lawyer may have had a discriminatory intent when he withdrew from the case.

He also enticed me with the promise of a large retainer if I would agree to use all means at my disposal to pursue the matter.
Soon after I agreed to accept the case, Ahab twice failed to appear for appointments to discuss strategy. He also failed to provide the retainer he promised me and only seemed to be interested in “making his point” to the opposing party, the driver of the vehicle that struck him. To make matters worse, after having reviewed the accident reports and other evidence, I was also beginning to have doubts about Ahab’s version of the accident.

I would have liked to withdraw, but since we were on the eve of trial the court would not grant me permission to do so.

Looking back, I wish I had quieted the impulse to take the case to gain business, and had looked a bit more carefully at Ahab’s story.

Many legal ethicists and legal malpractice lawyers agree: the ideal response to a problem client is to just say no, right at the outset. This is optimal but difficult, since the ability to evaluate and decide on going forward with a new client is an acquired skill. Commentators and legal advice columnists also agree: Trust Your Gut! But the quantity and quality of bad client stories available from lawyers lets you know that the gut is fine-tuned over time. However, being aware of certain warning signs can shift the odds against taking on a problem client. While welcoming new business, keep an alert and evaluative frame of mind.

Some possible signals of trouble are as follows:

A client who requires constant assurances and predictions about the cost of the legal services, and who continually manifests concern around the fee issue. Cost containment is all fine, but the basic fact is that the lawyer is selling services for money. If the transactional element of the lawyer-client relationship does not sit well, it could well lead to micro-managing down the road or to problems getting paid. An overly tight focus on cutting fees and costs will impact whether the lawyer can provide the appropriate representation at a rate that fairly compensates her for her work. Make sure the client can agree to a realistic timetable for work and a reasonable fee. A bad credit report or bad reputation for paying bills should tip this one into the “don’t take” pile.

Clients who are out for revenge, “justice at last” or a big payday. Revenge and retribution may induce tactics that are not approved by the rules of professional conduct, and actions aimed mainly at upsetting or antagonizing the other side can violate the ethics rules. See, e.g. Rules 3.1 Meritorious Claims and Contentions and 4.4 Respect for Rights of Third Persons. Furthermore, to the extent that such a client does not feel vindicated by the court system, he could seek vindication against the lawyer.

A big payday is a goal that should be evaluated realistically, taking into account the twists and turns of a matter and the unforeseeable factors that can alter the end result. If you don’t think the likely outcome to a case will satisfy the individual, you may want to reconsider having them for a client. A client who ultimately feels wronged by the representation may take it out of the lawyer’s fee.
A client who presents a matter that is outside your usual area of expertise. Commercial real estate may not sound that far-removed from traditional residential closings, but there will be a learning curve and you must account for it. Moving to a slightly less familiar practice area is best accomplished with the advice of a mentor or acquaintance who can level the playing field for you. See Rule 1.1 Competence. “Dabbling” in related or distant areas is a practice that brings malpractice or ethics claims against attorneys.

A client who has changed lawyers more than twice. There are bad lawyers out there. You can’t automatically fault a client for leaving one. But this can be part of the problem for you. The former lawyer may have made mistakes or damaged the potential of the case beyond repair. At a minimum, such a case can require extra work. And clients who continue to shop attorneys and second-guess throughout the case are more likely to sue for legal malpractice. You are offering services that are a blend of education and experience, and if the client can’t seem to settle down and receive your advice then he may never be happy. An ethics complaint or unpaid fee could follow.

Potential clients with a history of alcoholism, DUIs, drug use, gambling, a weak job history or financial problems including bankruptcies should cause the lawyer’s antennae to twitch. More than two of these factors call for a close evaluation of the person and the matter.

A client who exhibits pronounced lack of coherence in communicating to you about the matter, and who engage in fast, pressured speech, run-on speaking or present an incoherent garbled story of events, without allowing you to comment or question. Conversely, beware of clients who are overly passive, and do not volunteer specifics without the use of constant pointed questions. These individuals may not be capable of assisting in their case and may not be providing you with all the necessary facts.

Potential clients who want to impress you with their legal acumen, gained mostly from TV and the Internet. At a certain level they never trust their lawyer’s expertise and want to second guess and direct how the case is handled, the legal theories to be used and often turn into micro-managers, making you take more time to get anything done. Some will redraft a contract until the original provisions are lost. This can be extremely aggravating and stressful.

Clients who, after having hired a lawyer nonetheless tend to ignore his advice, fail to timely provide information and documents and fail to appear for depositions. They also form an unwarranted belief that they own the lawyer and that no amount of twists and turns to his schedule and the legal process are too many. This undermines the climate of civility and mutual respect that are important harbingers for a lawyer/client relationship that is both beneficial to the client and workable for the lawyer.

***************
Problem clients can run the ship aground or at the very least take it off course. For further information on this topic, see the chapter entitled “Avoiding Malpractice” (last updated in 2013 as it appears at page 301:1001 of the ABA/BNA Lawyers’ Manual on Professional Conduct. Other articles of interest include “The Bad Clients You Don’t Take Will Be the Best Money You Never Made” and “Five Legal Clients from Hell.”

This article—and many others like it, as well as many other member benefits—are available through the ABA Center for Professional Responsibility. This article was reprinted with permission from the Center’s monthly online Ethics Tip column, available through ETHICSearch. Copyright 2015 by the American Bar Association.

Privacy Settings and Postings on Social Media: Etched in Plastic or Carved in Stone?

By Peter Geraghty and Susan Michmerhuizen

Set Them and Forget Them? Not if the Lawyer is up to Speed.

Stories about oversharing or self-sabotage on social media have become a passé feature of lawyer advice columns. See, the April 2013 ETHICSearch Tip of the Month, “Is that Egg on Your Facebook?”. But what about clients who have left an open door to damaging information via their social media sites? Or, what about advising your client to adjust the privacy settings on their sites? Given laws against spoliation of evidence and Model Rule 3.4 Fairness to Opposing Party and Counsel what advice may a lawyer give regarding potentially damaging or embarrassing material on social media?

Ethics committees have begun to weigh in on this question. At current writing there are four state bar ethics committees on record with Florida Proposed Advisory Opinion 14-1 [PDF] poised to join them.

Removal or Alteration of Social Media Postings
In Opinion 2014-5 (2014), the North Carolina State Bar Ethics Committee stated that advising a client about social media postings that are relevant and material to the representation is required under Rules 1.1 and 1.3 Diligence. Note that in 2013, the ABA Ethics 20/20 Commission added Comment 8 to the Rule mandating that a lawyer keep abreast with current technology and its implications. Paragraph 8 states:

Maintaining Competence
To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

(For further information on a lawyer’s duty to keep abreast of the benefits and risks associated with relevant technology, see the November, 2014 Eye on Ethics column entitled, Competence: Acquire it or hire it!)

One of the questions considered by the North Carolina Committee was the extent to which a lawyer could advise clients to remove certain postings from their social media websites. The Committee stated that in the event that removal of such postings could be considered to be spoliation of evidence, the lawyer should advise the client to preserve them electronically:

...If the lawyer advises the client to take down postings on social media, where there is a potential that destruction of the postings would constitute spoliation, the lawyer must also advise the client to preserve the postings by printing the material, or saving the material to a memory stick, compact disc, DVD, or other technology, including web-based technology, used to save documents, audio, and video. The lawyer may also take possession of the material for purposes of preserving the same. Advice should be given before and after the law suit is filed.

The consequences for violating Rule 3.4 and the laws prohibiting the spoliation of evidence can be severe. Philadelphia Bar opinion 2014-5 [PDF] (2014) cites to In Re Matthew B. Murray, VSB Nos 11-070-088405 and 11-070-088422 [PDF] (June 9.2013) in which a lawyer was suspended for 5 years for advising a client to delete damaging photographs from his social media site and for withholding the e-mails instructing the client to do so. The lawyer was also sanctioned by the trial court in the amount of $722,000.

The New York County Lawyers’ Association Ethics Opinion 745 (2013) [PDF] permits a lawyer to advise his client to remove such postings from his social media website so long as the lawyer follows the law and ethics rules in regard to spoliation of evidence:

... Under some circumstances, where litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence, there is no ethical bar to “taking down” such material from social media publications, or prohibiting a client’s attorney from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user’s computer. – New York County Bar Opinion 745
See Also Pennsylvania State Bar Opinion 2014-300 (as a matter of competence, and lawyer should advise the client on the postings on their social media pages and the effects the information is likely to have on the client’s legal matter) and Philadelphia Bar Ethics Committee 2014-5 (2014). (stating that competence extends to advising and reviewing a client’s social media account and settings as they relate to legal matters and litigation. The lawyer must preserve a copy of postings that are relevant to litigation.)

Privacy Settings

Philadelphia Bar Opinion 2014 300 stated that a lawyer does not violate the rules of professional conduct when he advises his client to change the privacy settings on his social media website, noting that the main effect of such a change is to make it more difficult for the opposing party to gain access to it, but noting that the materials that are now privacy protected are still subject to discovery.

See Also New York County Lawyer’s Association Opinion 745:

There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client’s social media pages, requiring adverse counsel to request access through formal discovery channels.

For further information on this topic, See The Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (2014). Guideline No. 4.A. states:

A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be “taken down” or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information. Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.

This article—and many others like it, as well as many other member benefits—are available through the ABA Center for Professional Responsibility. This article was reprinted with permission from the Center’s monthly online Ethics Tip column, available through ETHICSsearch. Copyright 2015 by the American Bar Association.