THE SHELY FIRM, PC

# *TEN TIPS FOR ETHICS COMPLIANCE*

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*This article focuses on Arizona law, including the Arizona Rules of Professional Conduct ("ER"), Ariz. R.S.Ct. 42. If a firm has offices in other jurisdictions, check the rules of professional conduct, ethics opinions, and case law in those jurisdictions, as ethics advice unfortunately may vary state by state. Lynda is an active member of the Arizona and District of Columbia Bars. Reading this article obviously does not create an attorney/client relationship with Lynda.*

## 1. Know the *Arizona* Rules About Trust Accounts

Failing to maintain the records required by the Arizona Supreme Court for money held in a trust account, as well as failing to accurately describe in fee agreements that advanced fees must be deposited into trust while earned upon receipt fees must be deposited into a firm operating account, may result in suspension. *See Matter of Charlene Tarver, PDJ-2016-9067 (Ariz. 2017)(on appeal)(six month suspension).* Fee Agreements for earned upon receipt fees must clarify, pursuant to ER 1.5(d)(3) that even though the fee is characterized as earned upon receipt, the client always retains the right to terminate the services and in that event may be entitled to a refund. Such fees do not go into the firm trust account. However, if the firm bills against a sum of money, that generally is an advance fee deposit, not an earned upon receipt flat fee. *But see, Ariz. Op. 10-03(nonrefundable fee may be for a specified number of hours).*

Note that even if there is no misappropriation or missing funds, simply failing to maintain <u>*all of the records*</u> required by Supreme Court Rule 43(b)2 may result in probation, such as having to provide the Bar examiners with trust account records for a year or more. *See, e.g., Matter of Charles M. Dyer, PDJ-2017-9093 (Ariz. 2017); Matter of Barry S. Wagner, PDJ-2017-9038 (Ariz. 2017)(reprimand and probation for failure to follow trust account guidelines resulted in over-disbursement of funds for one client resulting in conversion of other client funds).*

What documents *must* be maintained for an Arizona trust account? Supreme Court Rule 43(b)2. Provides:

> *Trust Account Records.*
> A. Every active member of the state bar shall maintain, on a current basis, complete records of the handling, maintenance and disposition of all funds, securities and other property belonging in whole or in part to a client or third person in connection with a representation. These records shall include the records required by ER 1.15 and cover the entire time from receipt to the time of final disposition by the lawyer of all such funds, securities and other property. The lawyer shall preserve these records for a period of five years after termination of the representation.
> B. A lawyer shall maintain or cause to be maintained an account ledger or the equivalent for each client, person or entity for which funds have been received in trust, showing:
> (i) the date, amount and payor of each receipt of funds;
> (ii) the date, amount and payee of each disbursement; and
> (iii) any unexpended balance.

> C. A lawyer shall make or cause to be made a monthly three-way reconciliation of the client ledgers, trust account general ledger or register, and the trust account bank statement.
> D. A lawyer shall retain, in accordance with this rule, all trust account bank statements, cancelled pre-numbered checks (unless recorded on microfilm or stored electronically by a bank or other financial institution that maintains such records for the length of time required by this rule), other evidence of disbursements, duplicate deposit slips or the equivalent (which shall be sufficiently detailed to identify each item), client ledgers, trust account general ledger or register, and reports to clients.
> E. A record shall be maintained showing all property, other than cash, held for clients or third persons in connection with a representation, including the date received, where located and when returned or otherwise distributed.

In other words, a lawyer must supervise and assure the accurate preparation of the following documents: bank statements, duplicate deposit slips (or other evidence of deposits/transfers), cancelled checks, general ledger, individual client ledgers, administrative funds ledger, fee agreements, disbursement records (including electronic and wire transfers), and the monthly <u>three-way (not two-way) reconciliation.</u>

## 2. Have Written Communication Policies – and Follow Them

ER 1.4 requires that lawyers communicate certain information to clients to keep them reasonably informed about the representation and to respond to client requests for information *promptly*. Comment [4] to the Rule further explains:

> [4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

To comply with this Rule *and to manage client expectations* lawyers should inform clients how to communicate with the firm, how the firm will communicate with them, what is expected from the client (providing information to the firm when needed), and who at the firm may be able to answer client questions. Use vacation messages on email and change your voicemail message whenever you will be unable to respond within a business day – this will manage the client expectation of getting an immediate response.

Assure that all employees understand the importance of "acknowledging" a client communication (note, you should actually *think about your response* before just responding substantively) promptly, documenting the file to evidence all communications with clients, and send clients copies of all documents during the representation to keep clients informed.

### 3. Avoid "*Bad*" Clients

Oh if only prospective clients disclosed at the initial consult that they would be high maintenance, would demand your every waking hour, will lie to you, won't provide you with discovery responses, and then complain about your bill. Unfortunately, most prospective clients will not be that candid. But there are some basic tips that all lawyers (regardless of practice area or firm size) should consider when meeting with a prospective client:

- Have any other lawyers worked on the matter…and if so, who?
- Have they filed Bar complaints against other lawyers – or refused to pay their prior counsel?
- Does the client have unrealistic expectations?
- Did the client need to reschedule the consult more than once or miss the appointment?
- "Money is no object" is not a good mantra from any client…you will never satisfy their expectations.
- Will the client be difficult to reach to assist in the representation (overseas, only has a PO Box and no phone, travels for work a lot, etc.)?
- Is the prospective client rude to your staff?
- Does the matter sound 'too good to be true'?
- Can they afford your advance fee deposit?

### 4. Train Everyone on Timekeeping Requirements – Even Flat Fee and Contingent Fee Groups

Law schools usually do not teach students how to bill time – ethically. Train new lawyers, new paralegals, and all lateral hires on the firm's policies about timekeeping – including the fact that time must be entered on a daily basis. The very short list of requirements, in Arizona, to comply with ER 1.5(a) for time entries:

- No block billing – it is prohibited
- Use complete sentences
- Do not use acronyms unless they are defined.
- Do not use a minimum billing unit of .3 or greater for *everything*
- Send invoices regularly and it is recommended to send "activity" reports for flat fee and contingent fee matters.

Note that the State Bar recommends (as does Comment [7] to ER 1.5) that lawyers who charge a flat fee or even a contingent fee maintain *contemporaneous* time records – in case it is necessary to substantiate the reasonableness of the fee being charged.

*Reminder: Can a partner bill a client for time at the partner's rate if an associate actually did the work?*

No - do not ever do that. That is billing fraud.

### 5. Review Conflict-Checking Procedures With *Everyone*

No matter the size of the firm or the sophistication of the system, every firm must have a conflict checking system. This can be as simple as an excel worksheet with names of clients and opposing parties or you can invest in one

of the many software systems designed specifically to check for conflicts. Whatever the system, the most important rule is that the system must be used by everyone - all the time. Arizona Rule of Professional Conduct ("ER") 1.7 is the general conflict of interest Rule. Conflicts may be caused by many different people and situations, including the lawyers' own interests, other clients, former clients, witnesses, and vendors. Depending upon the practice areas of the firm, the system should include the following names:

- clients, relatives/subsidiaries, and aliases.
- primary contact persons at entity clients.
- opposing parties and opposing counsel (and their firm).
- all close family members of lawyers and staff who work at other law firms, legal departments, government agencies, and client offices. (See ER 1.10 imputation rule)
- expert witnesses and major fact witnesses
- non-parties at fault.
- former clients. (See ER 1.9)
- prospective clients (See ER 1.18).
- Individuals, entities, and insurance companies paying clients' legal fees.
- vendors to the firm (landlord, IT company, ethics counsel, cleaning service, insurance agent)

** Train staff to re-run a conflict check every time a new party, a non-party at fault, new counsel, or new expert/key fact witness is added to a proceeding or a new proceeding commences. Also re-run conflict checks when entity clients have changes in management or ownership.

Conflict systems can become unwieldy if too much information is entered in a disorganized manner. Confirm, regularly that: 1) categories of information still make sense (e.g., prospective clients, expert witnesses, etc.); 2) one lawyer and one staff person are responsible for reviewing and maintaining the system; and 3) that new conflict checks are run every time a new party/investor/participant is added to a matter or at least once a year.

### 6. Warn Attorneys to Enter "Prospective Clients" into Database…Including Brief Consults

*Attorney A consults with Prospective Pete on a possible divorce and has a thirty-minute conversation with Pete about how the process works and general information. Pete does not retain the firm. Later Attorney B, at the same firm, consults with Client Carey, married to Pete and Carey hires B to represent her in the divorce. Is the firm conflicted if Attorney A is still working at the firm?*

Law firms owe duties of confidentiality and avoiding conflicts with prospective clients. ER 1.18 establishes those obligations and in relevant part provides:

> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided

> in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

This means that Attorney A cannot represent Client Carey unless Pete waives the conflict. Assume that Attorney A learned "significantly harmful" information from Prospective Pete if they had a substantive conversation. The Firm cannot just screen A if that occurred – Pete would need to waive the conflict, if the Firm received "significantly harmful" information from Pete and Carey is retaining the Firm on the same or a substantially related matter to what Pete discuss with Attorney A.

Thus, it is necessary to always include the names of prospective clients in the firm conflict-checking system, including who performed the consult, when, and about what.

### 7. Train All Nonlawyer Staff What Constitutes the "Unauthorized Practice of Law" – in Arizona

Only Arizona lawyers may "practice law" in Arizona – with a few very limited exceptions. This means that paralegals and secretaries *MAY NOT:*

- give legal advice
- prepare legal documents – unless they are reviewed by a lawyer
- negotiate legal matters for clients
- appear on behalf of a client in any tribunal or administrative proceeding.

These requirements are set forth in Arizona Supreme Court Rule 31, which is attached to this document. Staff may not enter into an attorney/client relationship for the firm; a lawyer must review the fee agreement with new clients. Lawyers cannot authorize staff to engage in the unauthorized practice of law.

Staff must identify yourself with your title whenever calling a client, opposing counsel, or a judge's office. Use your title when signing on firm letterhead and in ALL email signature blocks.

### 8. Review Advertising Rules With Everyone Who Mentions the Firm Name on Social Media

Seriously. Warn ALL EMPLOYEES – NOT JUST LAWYERS that ERs 7.1 through 7.5 may apply to their *personal Facebook accounts* if they identify the firm by name. This means that every time someone lists the firm as their employer, that employee's posts will represent the firm and may constitute advertising under the Ethical Rules. Ideally everyone will refrain from using the firm name on their personal social media accounts…or they will have to have the firm's general counsel (or outside ethics counsel) review the account for ethics compliance…

### 9. Do Not Disparage Judges in Pleadings (Or Anywhere…)

Arizona Supreme Court Rule 41(c) requires that lawyers "maintain the respect due to courts of justice and judicial officers" as do ERs 3.5 and 4.4(a). As previously noted, Rule 41(g) prohibits engaging in "unprofessional conduct" and Supreme Court Rule 31(a)(2)E. defines "unprofessional conduct" as:

> "Unprofessional conduct" means substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona.

Violations of these Rules would include, for example, stating in pleadings that a judge had "intellectual arrogance," "a disturbingly despotic display of judicial authority," "intentionally ignored relevant law," "smug arrogance," "repeatedly violated the rights of hundreds of other defendants," and intended to "warehouse defendants." *See Matter of Antonio R. Zuniga, PDJ-2017-9007 (Ariz. 2017)(attorney reprimand and two years probation along with mandatory CLE on courtroom courtesy).*

**10. Do Not Slap Clients**

Regardless of a client's comments or attitude, do not physically strike a client – particularly when they are in handcuffs. *Matter of Kent M. Nicholas, PDJ-2017-9010 (Ariz. 2017)(discipline of reprimand, 2 years of probation, and anger management monitor for slapping a restrained client across the face with a 33 page document and folder).*

**Lynda C. Shely**, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to over 1400 law firms in Arizona and the District of Columbia on a variety of topics including conflicts of interest, fees and billing, trust account procedures, lawyers changing firms, ancillary businesses, and ethics requirements for law firm advertising/marketing. She also assists lawyers in responding to initial Bar charges, performs law office risk management reviews, and trains law firm staff in ethics requirements. Lynda serves as an expert witness and frequently presents continuing legal education programs around the country. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona. Prior to moving to Arizona, Lynda was an intellectual property/antitrust associate with Morgan, Lewis & Bockius in Washington, DC. Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from Catholic University in Washington, DC.

Lynda was the 2015-2016 President of the Association of Professional Responsibility Lawyers and the 2008-2009 President of the Scottsdale Bar Association. She serves on several State Bar of Arizona Committees, and as a member of the ABA Standing Committee on Ethics and Professional Responsibility. She also is an Arizona Delegate in the ABA House of Delegates. Lynda has received several awards for her contributions to the legal profession, including the 2007 State Bar of Arizona Member of the Year award, the Scottsdale Bar Association's 2010 Award of Excellence, and the 2015 AWLA, Maricopa Chapter, Ruth V. McGregor award. She is a prior chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. She has been an adjunct professor at all three Arizona law schools, teaching professional responsibility.