

# The Legal Intelligencer

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## Five New Year's Resolutions for a Successful and Trouble-Free 2008

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*Special to the Legal*

As we ring in our second year on this column, we thought it only fitting to reprise the theme of our very first column of last year — our New Year's resolutions to improve your professional health. So here they are — five practice pointers to help you start 2008 on the right foot:

- Representation agreements — in writing, at the outset, every time.

For starters, let's talk fee agreements. Rule of Professional Conduct 1.5(b) requires us to communicate to our clients "the basis or rate of the fee ... in writing, before or within a reasonable time after commencing the representation." Although the rule allows an exception for clients whom we "regularly represent," we strongly recommend that you prepare a written fee agreement for every client, and as to each new representation. Miscommunication concerning fees is an attorney-client relationship killer, not to mention a prime germinator for contentious and potentially embarrassing fee dispute proceedings.

In our view, the best fee agreement is actually a comprehensive "representation agreement," which clearly and accurately details not only our rates, but also the scope of the representation and, if appropriate, the various means by which we are authorized to pursue our client's objectives. It is our job to ascertain our client's objectives at the outset of the representation and define the scope. It is also our responsibility, pursuant to rules 1.2 and 1.4, to consult with our clients concerning the means by which we are authorized to pursue their chosen objectives. Barring a material change in circum-

stances or revocation of authority by the client, we are entitled to rely upon advance authorizations agreed upon and included in our representation agreements.

- Maintain the confidentiality of electronic client communications.

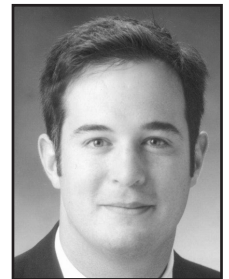
Take steps to ensure the confidentiality of your electronic attorney-client communications. As the use of e-mail and instant messaging becomes even more ubiquitous in our society, we must take precautions to maintain the privacy and privilege of our attorney-client communications. A recent decision out of New York highlights the dangers of electronic attorney-client communications. In *Scott v. Beth Israel Medical Center Inc.*, a client was found to have waived the attorney-client privilege, and the work-product privilege was found inapplicable to e-mail communications to and from the client's work e-mail address concerning his lawsuit against his employer. In *Scott*, the court relied on the fact that the employer had a "no personal use" e-mail policy combined with a policy for employer e-mail monitoring and that the client knew about both policies.

The use of a nonpersonal e-mail address is only one potential threat to the privilege. An inadvertent cc or bcc on an e-mail can destroy the confidentiality of an electronic communication. A shared e-mail address can do the same, as could the use of a public web page or instant messaging service. As the explanatory comment to Rule 1.6 makes clear, "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." To



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avoid malpractice and/or an ethical breach, take affirmative steps to ensure that the lines of communication with your clients remain private and privileged.

Talk with your clients about the potential disclosure issues surrounding the use of e-mail and instant messaging. Instruct your clients to only communicate with you electronically using personal and secure methods, addresses and services that you approve. Give the e-mail that you prepare the same careful eye that you apply to your written communications with opposing counsel and the court. And while the ease and speed of e-mail is a huge attraction, when you have something important to discuss - take your hands off the keyboard and pick up the phone.

- Respond to communications from clients and opposing counsel in a timely manner.

Next, consider whether, during the past year, you timely responded to communications from clients, co-counsel and opposing counsel. It is easy to fall into the habit of putting voicemail and letters on the back burner while you're putting out fires. Unfortunately, the back burner has a tendency to be overlooked, and failing to respond in a timely fashion can turn that back burner into a raging grease fire if you're not careful.

Disciplinary counsel often point out that so many disciplinary complaints would never have been brought if the attorneys were better communicators. If you are about to miss a deadline that you promised your client you would meet, call the client before the deadline passes and explain the situation. Give the client a reasonable expectation about when the work will be done. If you're too busy to return a call, have your secretary call the client or opposing counsel back and arrange an appointment to have a telephone conference.

Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." In addition, Rule 1.4 requires us not only to "promptly comply with reasonable requests for information" from our clients, but also to keep them "reasonably informed about the status of the matter" and to promptly inform them of any decision or circumstance with respect to which their informed consent is necessary. The explanatory comment to the rule explains that when a client makes a request for information, the lawyer must respond promptly if feasible and if not, then the lawyer must acknowledge the request and advise the client when a response will be forthcoming. As for opposing counsel, Article II, paragraph 17 of the Code of

Civility states that a lawyer should "respond promptly to communications from other lawyers."

When it comes to communication, use the golden rule as your guidepost: Call back others as you would have them call you back!

- Recommit to the Code of Civility.

While we're on the subject, renew your commitment to the Code of Civility. Appearing on two pages of the Pennsylvania Rules of Court, the Code of Civility is not a long read — and it is a more than worthwhile reminder of our obligations as members of a noble profession.

The principles set forth in the Code of Civility are designed to encourage civility and decorum in the profession on all sides and in every manner of controversy. Applying the principles of the code into your everyday practice will help to keep you out of ethical trouble, make you a better advocate for your clients and elevate your reputation among your peers and the bench.

- Reassess your caseload and personal health and well-being.

To round out our five tips for your professional health, we recommend that you take stock of your active caseload and your own physical and mental condition in order to make a reasoned assessment of your ability to competently and diligently advance the interests of your clients in the coming year.

As the old cliché goes, too much work is better than the alternative. At some point, however, too much work leads to dropped balls, missed deadlines and poor quality, none of which is in the best interests of your clients or your own professional health. If your plate is full and full and full again, you should strongly consider the alternatives available to you.

You may decide to decline potential representations until your active caseload is

back in balance. Depending on the client's wishes and the availability of those around you, you might also be in a position to take a backseat and pass on one or more of your representations to a colleague. If you are a solo practitioner or if none of your colleagues has the requisite expertise to competently carry the ball on behalf of an existing client, you might also consider referring the matter, with informed client consent, to a peer in the legal community.

Rule 1.16(a)(2) requires lawyers to take immediate steps to terminate a representation whenever their "physical or mental condition impairs the lawyer's ability to represent the client." This is a serious obligation, and one that you should not take lightly as you assess your practice for the coming year.

The rules also allow for permissive withdrawal from representation so long as it can be accomplished without materially adversely affecting the interests of the client and so long as the court approves the withdrawal. Upon termination of the representation, however, the lawyer must take reasonable steps to protect the client's interests, such as "giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred."

We hope that our tips prove informative and helpful as you reset the calendars and take stock of your practice. Happy new year to you and yours, and may the practice of law bring you increased personal and professional success and fulfillment in 2008!

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