

Holland & Knight's Lawyer Ethics, Risk Management and Regulation Team provides the full range of services that lawyers, law firms, and corporate and governmental legal departments need to assure ethical and effective representation of their clients. As seasoned attorneys in our field, we are ready to respond, either in a preventative mode or when particular issues need immediate attention.

Team members have presented many hundreds of legal ethics and risk management CLEs throughout the country. Experience has taught us that the best and most effective way to make such presentations to lawyers in private practice is to do so on a single firm, or sometimes even single practice group, basis. This allows us to focus most directly and meaningfully on the issues of greatest concern to an individual firm or practice group and to do so confidentially. Since CLEs are presented in-house, we also keep lawyer travel time and disruption to a minimum. In addition, in-house CLEs make it easier to assess what has actually been learned.

Although we can and do customize our CLEs to fit a firm's needs, policies and practices, the subjects we address include but are not limited to those listed below. Some of these topics overlap with others. This is not the result of an oversight; it stems from the fact that different audiences may want different emphasis on the same subjects.

ATTORNEY-CLIENT CONFIDENTIALITY AND PRIVILEGE

A lawyer's duties of confidentiality are easier to state in the abstract than they often are to apply in real time. Moreover, this is an area of law which is not necessarily consistent from jurisdiction to jurisdiction and which is still in evolution. Topics that we regularly discuss in our CLEs include:

- Basic Attorney-Client Privilege and Work Product Questions
- Common Interest and Joint Defense Privilege
- Duties of Confidentiality beyond Attorney-Client Privilege and Work Product
- Expert Consultants and Privilege
- In-House Privilege at Law Firms
- Retention and Transfer of Privilege in Sale of Business Situations
- Self-Defense, Crime-Fraud and Other Exceptions to Attorney-Client Privilege
- Who Controls the Privilege in Entity Representations
- Who Controls the Privilege in Multiple Client Representations

COMMUNICATION WITH REPRESENTED PARTIES

Both business lawyers and litigators sometimes find themselves confronting the counterintuitive and, in the real world, counterproductive prohibitions on communications with represented individuals or entities. Unfortunately, this is also a frequent subject of bar disciplinary complaints. Our presentations on these issues regularly include:

- Limits on Communications with Former Officers, Managers and Employees
- Limits on Communications with Present Officers, Managers and Employees
- Modern Authorities on Advising Clients about Direct Communications with Represented Parties or Their Agents
- Strategic Upsides and Downsides Caused by Trying to Represent Too Many Clients

COMPETENT REPRESENTATION, LIMITING THE SCOPE OF REPRESENTATION AND UNBUNDLING

Actual or alleged failures of the duty of competent representation lead to both civil damage claims and bar complaints against lawyers. Moreover, these risks can be increased by the failure to limit the scope of representation to work that a firm or lawyer is well equipped to handle or intends to handle. Related topics that we address include:

- Contemporary Developments in the Law of Unbundling
- Documenting and Making Reasonable Limitations on Scope as a Means of Claims and Conflicts Avoidance
- Having Versus Acquiring the Skills Needed for Competent Representation
- Representations of Heightened Competence and Related Questions of Lawyer Marketing and Standards of Care for Civil and Disciplinary Liability
- Why Dabbling/Practicing Outside of One's Comfort Zone Can Be a Prescription for Disaster and What Firms Can Do About It

CONFLICTS OF INTEREST

Conflict of interest law is both nuanced and complex. Moreover, it is an area that lawyers often ignore as an impediment to business generation and out of a belief that nothing really bad will happen on their watch. Nonetheless, a solid understanding of conflict of interest law and the means to address or avoid conflicts can also provide substantial opportunities for increased firm revenue and decreased firm and lawyer risk. It should therefore come as no surprise that we present at least as many conflicts CLEs as CLEs on any other subject. The topics that we address include:

- Concurrent Client Conflicts, Both in General and in Specific Practice Contexts
- Former Client Conflicts, Both in General and in Specific Practice Contexts
- Identification and Treatment of Potential Clients as a Means of Avoiding Firm-Wide Disqualification
- Issue/Positional Conflicts
- Lawyers as Fiduciaries and as Counsel for Fiduciaries
- Lateral Hire and Screening-Related Conflicts
- Limiting Liability and Conflicts through the Prudent Use of End of Engagement Letters
- Personal/Business Conflicts
- Present and Future Conflicts Waivers: What Works, What Doesn't and Why
- "Thrust-upon" and "Hot Potato" Conflicts
- Unidentified and Unwaived Conflicts as a Source of Fee Disgorgement

ELECTRONIC ETHICS AND RISKS

Modern technological developments continue to change the way in which we practice law. They also require lawyers and their firms to play a continuing game of catch-up in order to stay even with client demands and technological risks. Related topics include:

- Data Privacy and Security for Law Firms and Clients
- Electronic Marketing and Unauthorized Practice
- Litigation Holds, Spoliation Claims and Document Retention
- Remote Lawyering and Centralized File Control
- Understanding and Reducing eDiscovery Risk
- Social Networking as a Marketing Strategy
- Understanding and Utilizing Social Networking as a Discovery Tool

ENGAGEMENT AND CONFLICTS WAIVER LETTERS

There is no point at which lawyers are more in control of their own fate than when new clients and new matters are undertaken. This is when lawyers can control almost every aspect of the representation. It is also the point at which lawyers can avoid future problems by saying "no" to a potential client that doesn't measure up and by procuring conflicts waivers now that may be difficult or impossible to obtain at a later time. Regular topics include:

- Drafting Engagement Letters as an Art and Science: What You Don't Ask for May Hurt You
- The Theory and Practice of Drafting Enforceable and Intelligent Conflicts Waiver Letters

ETHICS AND BIAS IN THE PROFESSION

Many jurisdictions now require diversity and elimination of bias training. We see a strong fit between these areas and questions pertaining to limitations on advocacy, client relations and professionalism in the practice of law. Topics include:

- Dealing with Biased Clients
- Dealing with Biases of Opposing Parties, Opposing Counsel and the Public
- Identifying Situations in which Issues of Ethnicity, Gender, Religion and Sexual Orientation May Be Present, and Figuring How to Handle Them Safely

HOW FAR CAN WE GO: SEPARATING PERMISSIBLE ADVICE TO CLIENTS ABOUT LEGAL CONSEQUENCES VERSUS IMPERMISSIBLE AIDING OR ASSISTING CLIENTS IN ILLEGAL CONDUCT

Lawyers know that they can broadly and generally advise clients about the legality or illegality of proposed courses of conduct without material risk to themselves. Lawyers also know that they cannot advise or assist clients in conduct that the lawyers know to be illegal. And since a lawyer's alleged knowledge of illegality is not infrequently judged with the benefit of 20/20 hindsight and what a lawyer allegedly must have known, drawing appropriate lines while meeting the demand of clients, if not also colleagues, can become extremely complex. Our topics include:

- Careful and Clear Documentation of Legal Advice as an Ethical Requirement and a Means of Risk Management
- Dealing with the Client Who Asks for Too Much
- Extra Risks Posed by Clients Who Ask You to Take Over in Mid-Matter and How to Avoid Them
- Understanding the Crime-Fraud Exception to Attorney-Client Privilege
- Weeding Out Clients at the Initial Interview Stage
- "We've Been Had": What to Do After the Fact if the Client May Have Involved the Lawyer in Questionable Behavior

IDENTIFYING, AVOIDING AND SAFELY DISCONNECTING FROM PROBLEM CLIENTS

This set of topics frequently overlaps with several others but can also be treated as a separate subject in and of itself. Topics include:

- Modern Client "Due Diligence" as a Part of the Intake Process
- Protection of the Firm through Clear Engagement Letters
- Timely Addressing and Resolving Problems with Clients Instead of Sweeping them Under the Rug
- When All Else Fails: Safe and Properly Documented Withdrawal

LAWYER MARKETING

Lawyer marketing of all kinds is as omnipresent now as it was absent half a century ago. Nonetheless, lawyer marketing remains limited by a series of seemingly over-technical rules that do not appear consistent with modern-day commerce and reality.

- Modern Content Limitations, Including What Can and Can't Be Included on a Firm Website or in Other Marketing Materials
- Limits on Electronic and In-Person Solicitation
- Prospective Client Interviews
- Risks and Incentives: Modern Approaches to the Payment of In-House and Third-Party Marketers, and the Use of Novel and Creative Forms of Market Development
- Searching for Common Denominators when Marketing in Multiple Jurisdictions
- Unauthorized Practice Issues

LAWYER MOBILITY

Lawyers change firms at unprecedented rates. Many firms therefore want to know what, if anything, they can do to reduce departures just as many others want to know how aggressive they can be in obtaining new talent. We have been asked to speak on topics including:

- Best Practices on Law Firm Breakups and Partner Moves
- Risk Management for the Acquiring Firm, or How Not to be Sued for the Lateral's Departure Conduct
- Impermissible and Permissible Limitations on the Solicitation of Clients by Departing Lawyers
- Impermissible and Permissible Limitations on the Solicitation of Associates and Non-Lawyer Staff by Departing Lawyers
- Indirect Restrictions or "Tolls" on Competition
- "Jewel" and Other Issues: Potential Continuing Duties of Departing Lawyers and Their New Firms to Former Firms and Former Clients
- Photocopy and Electronic Copy Costs When Lawyers Change Firms
- "Trade Secret" Claims in the Context of Lawyers Changing Firms

LEGAL FEES

Lawyers can be much more eager to take in new work than they are to take adequate care to protect their ability to be paid for what they do. Firms can therefore benefit from improved training and procedures on topics that include:

- Drafting Sound and Enforceable Fee Agreements
- Flat Fees
- Hourly Fees
- Hybrid and Alternative Fees
- Pros, Cons and Limitations on Arbitration, Choice of Law and Other Special Provisions
- Splitting Fees
- Trust Account and IOLTA Issues in Both One-State and Multistate Contexts

LITIGATION FUNDING

In a relatively small number of years, third-party litigation funding has become a multibillion-dollar industry.

- Advising and Assisting Clients in Obtaining Third-Party Funding
- Attorney-Client Privilege, Control of Litigation, Fee Splitting Issues in Third-Party Funding
- Third-Party Funding as a Potential Source of Conflicts of Interest

MULTIJURISDICTIONAL PRACTICE

Even though lawyers now have an unprecedented ability to move their practices without having to retake a bar exam, there are still states where this is not possible and still lawyers who do not wish to go through the reciprocal admission process. This creates a series of problems for lawyers and firms as they attempt to work through issues including:

- How to Market and Employ Lawyers Who Have Moved to a New State in which They are Not Yet Admitted
- Unauthorized Practice Issues and Related Marketing Concerns
- Understanding and Working with Temporary Practice Rules

NEGOTIATION AND MEDIATION ETHICS

Under this topic, we explore the strain that can exist between the role of lawyers as client advocates and the role of lawyers as truth-telling "officers of the court," even in out-of-court settings. Our topics include:

- The Line between Permissible Puffing and Impermissible Misrepresentations of Material Fact
- "Noisy Withdrawal" and Other Means of Extrication from Unacceptable Situations
- Subsequent Duties to Correct Statements Believed to be True When Made but Subsequently Determined to be Untrue
- Working With and Around Mediation Privilege

OUTSOURCING

Lawyers not infrequently wish to reduce client costs through the outsourcing of work that might previously have been performed in-house, and clients have sometimes been known to force lawyers to do so even against the lawyers' better judgment. Issues here include:

- Due Diligence in Outsourcing
- How to Bill Outsourced Work
- How to Monitor Outsourced Work
- Reducing Outsourcing Risk through Well-Drafted Engagement Letters

PROFESSIONAL RESPONSIBILITY AND RISK MANAGEMENT BY PRACTICE AREA

As noted at the beginning of this list, we often find it most useful to make presentations to a firm at a practice group level rather than to the firm as a whole. This is especially so for larger firms with multiple practice areas in which lawyer and law firm interests and risk may vary widely. Practice areas in which we make presentations include:

- Civil Litigation
- Class Actions
- Corporate and Securities Counsel
- Criminal Defense/Prosecution
- Domestic Relations/Family Law
- Employment Law
- Immigration
- Insurance Coverage and Defense
- Intellectual Property: Patent, Trademark and Copyright
- Mass Torts
- Real Estate
- Taxation
- Trusts & Estates/Wealth Management
- Administrative Law

SUPERVISORY RESPONSIBILITIES AT LAW FIRMS

Both common sense and ethical obligations require those in charge of a firm to make sure that the firm behaves ethically and in a way that will likely allow the firm to be paid for the work it does and then avoid claims that may impair or destroy the firm. Topics include:

- Dealing with Problem Lawyers
- Duties to Assure Appropriate Firmwide Behavior
- Duties to Report Internal Misconduct to the Bar
- How to Surface and Address Problems on a Timely Basis
- Minimizing the Risk of "Vicarious" Discipline and Liability
- Promotion of a Positive Law Firm Culture
- Red Flags: Lessons from Recent Law Firm Failures
- Risk Management and Ethics Training for Paralegals, Legal Assistants, Secretaries and Other Support Personnel

TOP TEN RECENT DEVELOPMENTS IN LAWYER ETHICS AND DISCIPLINE/TOP TEN RECENT DEVELOPMENTS IN WHY LAWYERS ARE SUED

At times, our law firm clients simply want to have us discuss issues about lawyers and their firms that may recently have been in the media – from "pretexting" to the detection and avoidance of scams aimed at lawyers, to the latest national or local disqualification motion or disciplinary case and beyond. We are happy to comply.

ZEALOUS REPRESENTATION AND ITS LIMITS

Elihu Root is supposed to have said that "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." Nonetheless, clients not infrequently wish to forge ahead and to insist upon lawyers who will help them do so. Even though the dividing line between the impermissible and the permissible may move back and forth to a degree over time, this is an ages-old question that lawyers will always have to confront. Our issues include:

- Contemporary Conceptions of Lawyers as Gatekeepers versus Lawyers as Advocates
- Gatekeeper Exceptions to Confidentiality and Loyalty
- Lawyer Liability for Aiding and Abetting Client Breaches of Fiduciary, and Non-Sometimes Even Non-Fiduciary, Duties
- The Old Standard of "Zealous Representation Within the Bounds of the Law" versus the Newer Standards of Competence and Diligence: Does the Change in Wording Reflect a Change in Result?
- When, How and Why Lawyers May or May Not Advise or Assist Clients in Undercover/Sting Operations

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