

Lawyers' Lawyer Newsletter – Recent Developments in Risk Management - Halloween 2021 Edition

Lawyers' Lawyer Newsletter | 4 min read

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Before you pack up your pumpkin-spiced lattes and bring out your Holiday decorations, we have a ghoulish edition of the *Lawyers' Lawyer Newsletter* for you. We start with some Tricks for effective communication. Spoiler alert - the trifecta duties of competence, communication, and informed consent are essential to clear client communication. We then close with some Treats – a survey of ethics opinions that help lawyers mitigate the risk of claims due to poor communication.

- [What Does an Attorney Need to Know about Competence, Communication, and Informed Consent?](#)
 - [What do Formal Bar Ethics Opinions Have to Say on Communication and Informed Consent?](#)
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The *Tricks* – What Does an Attorney Need to Know about Competence, Communication, and Informed Consent?

The [Model Rules of Professional Conduct](#) (Model Rules) serve as the foundation for ethical lawyering. Consult the professional conduct rules of your state to determine whether and to what extent your rules differ from the Model Rules.

Start with Model Rule 1.1 (Competence). “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” For our purposes, a competent lawyer must be able to identify what facts, law, and issues should be communicated to the client. For example, a lawyer must know when and how to communicate their mistakes to current clients. American Bar Association Formal Opinion 481 offers guidance about a lawyer’s duty to inform a current or former client of the lawyer’s material error.

Another example is that a competent lawyer “should keep abreast of the changes in the law and its practice” (Comment [8] to Model Rule 1.1), which includes continuing education and study to understand the subject of the

representation. Monitoring case alerts and appellate reports is a good start.

Next, a lawyer shall comply with Model Rule 1.4 (Communications). As a refresher, this rule requires a lawyer to:

- Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is necessary;
- Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- Keep the client reasonably informed about the status of the matter;
- Promptly comply with reasonable requests for information; and
- Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

This significance of the duty of communication cannot be understated. "Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." Comment [1] to Model Rule 1.4. Setting the client's expectations and viewing the matter from their lens is of paramount importance. "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." (Comment [5] to Model Rule 1.4).

Finally, consistent with Model Rule 1.4, as well as Model Rules 1.2 (Scope of Representation), 1.6 (Confidentiality), 1.7 (Current Client Conflicts), and others, a lawyer shall "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This is where Model Rule 1.0(e) (Informed Consent) comes into play. "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Stated another way, a lawyer should communicate and explain "(i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct." See California Rules of Professional Conduct, Rule 1.0.1(e). The nature and extent of this communication will vary depending on the Model Rule implicated as well as the facts and circumstances of the matter. A one size fits all approach will not work.

At the most basic level, a lawyer communicating with the client should:

1. Understand the client's perspective and motivation,
2. Listen to the client (and we mean *really* listen),
3. Don't assume anything – always ask,
4. Identify risks, benefits, and potential alternatives, and
5. Confirm that the client agrees with the plan, when appropriate.

The *Treats*: What do Formal Bar Ethics Opinions Have to Say on Communication and Informed Consent?

Here are a few ethics opinions that offer guidance on the duty to communicate with and obtain informed consent from clients, in an effort to mitigate the risk of claims due to poor communication.

- ABA Formal Opinion 500 – Language Access in the Client-Lawyer Relationship
- ABA Formal Opinion 481 – A Lawyer’s Duty to Inform a Current or Former Client of the Lawyer’s Material Error
- [Arizona Opinion 07-04](#) – Joint Representation; Conflicts; Communication; Informed Consent
- [California Formal Opinion 2021-206](#) – Colleague Impairment
- [Colorado Opinion 143](#) – Foundations of a Fee Agreement
- [DC Bar Ethics Opinion 353](#) – Whether a lawyer representing a client with diminished capacity can seek the appointment of a substitute surrogate decision-maker when the current surrogate decision-maker is making decisions for the client against the advice of the lawyer
- [Nevada Formal Opinion 58](#) – What must a prospective conflict waiver contain to be effective and avoid running afoul of the Nevada Rules of Professional Conduct?
- [New Hampshire Advisory Opinion 2014-15/10](#) – Joint Representation of Clients in Estate Planning
- [Oregon Formal Opinion 2019-195](#) – Communication; Delegation of Settlement Authority to Lawyer
- [Pennsylvania Formal Opinion 2016-200](#) – Ethical Considerations Relating to Participation in Fixed Fee Limited Scope Legal Services Referral Programs