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Personal Injury Ethics: Avoiding Malpractice on Tax, Government Benefits, and Other Specialized Issues

Addressing Non-Litigation Issues Under Model Rule 1.2 While Increasing Settlement Value

THURSDAY, JANUARY 13, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Anthony V. Alfieri, SVP, In House Counsel, **Settlement Professionals, Inc.**, Seattle, WA

Jeremy Babener, Special Tax Counsel, **Lane Powell PC**, Portland, OR

Joseph A. Di Gangi, Director of Planning, **Settlement Professionals, Inc.**, Easton, PA

Mary Ellen Murrah, Operations Consultant, **Vista Consulting Team**, Baltimore, MD

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Personal Injury Ethics: Addressing Non-Litigation Issues

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Today's Topics

SPI SETTLEMENT PROFESSIONALS INC.
INNOVATIVE & COMPREHENSIVE SETTLEMENT PLANNING

- Clients' Evolving Needs
- Lawyer's Evolving Duties
- Malpractice Claims
- ABA Model Rules
  - 1.1
  - 1.7
  - 1.9
  - 2.1
- Safeguarding on Specialty Subjects
- Other Steps to Protect a Practice

Plaintiff's Increasing Needs

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Tax Advice:

- Taxes on settlement?
- Deducting fees & medicals?

Financial Advice:

- Special needs trust?
- Structured settlement?

Medicare Advice:

- Settlement reimbursement?
- Future eligibility?

Evolving Duties

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A trial lawyer must…

Structures, Trusts, & Gov't Benefits

"[E]nsure his client is informed about the options of structured settlements, trusts and the effect of the judgment or settlement on the client's public benefits eligibility."[1]

Taxes

"[M]ake sure the client's interests are best served, for example, by considering the tax implications of [the client's] settlement."[2]

1. ALI-ABA, Krooks, Bernard, *Special Needs Trusts: The Basics, The Benefits, and The Burdens* (2009)
2. ABA, *Ethical Guidelines for Settlement Negotiations* (2002)

Narrow the Scope

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ABA Model Rule 1.2(c)

"A lawyer may limit the scope of the representation if…

- the limitation is reasonable under the circumstances
- and the client gives informed consent."

D.C. Ethics Op. 330 (2005)

"Because the tasks excluded from a limited services agreement will typically fall to the client to perform or not get done at all, it is essential that clients clearly understand the division of responsibilities under a limited representation agreement."

Lawyer Liability

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Tax Claims:

- Tax-free assumption
- Failure to allocate

Finance Claims:

- Lost gov't benefits
- Lost tax-favored earnings

Medicare Claims:

- Forced reimbursement
- Double damages

Liability Statistics

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3X OVER 30

65% 10 YEARS

Under 5 70%

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ABA's Model Rules

Rule 1.1

Rule 1.3

Rule 1.7

Rule 1.9

Rule 2.1

Rule 1.1 - Competence

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Rule: "…Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comment: "Perhaps the <u>most fundamental legal</u> skill consists of <u>determining what kind of legal problems a situation may involve</u>, a skill that necessarily transcends any particular specialized knowledge…."

Rule 1.1 - Competence

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Non-Conforming States

Arkansas – Emergency Addition
California – Alternate Version
D.C. – Comparable Addition
Georgia – Prior Version
Louisiana – CLE Addition
Missouri – Partially Updated Version
Nebraska – Minor Tweak
New Hampshire – Refined "Competence"
New Jersey – Alternate Version
New York – Protective Addition
North Carolina – Due Diligence Addition
Texas – Alternate Version

Rule 1.3 - Diligence

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Rule: "A lawyer shall act with reasonable diligence and promptness in representing a client."

Comment: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor… [A] lawyer should carry through to conclusion all matters undertaken for a client."

Rule 1.3 - Diligence

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Non-Conforming States

Alabama – Alternate Version

California – Alternate Version

D.C. – Zeal Addition

Georgia - Prior Version

Massachusetts – Zeal Addition

Minnesota – Partially Updated

New York – Neglect Addition

Oregon – Alternate Version

Texas – Omitted

Virginia – Intentional Addition

Rule 1.7 - Conflict

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Rule: "…significant risk that [a] representation of one or more clients will be <u>materially limited</u> by … a personal interest of the lawyer."

Comment: "…To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures…"

Rule 1.7 - Conflict

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Non-Conforming States

Alabama – Alternate Version
Arkansas – Diligence Addition
California – Alternate Version
Delaware – Alternate Version
Florida - Explanation Addition
Georgia – Comparable Version
Hawaii – Multiple Client Addition
Idaho – Personal Interest Addition
Illinois – In Writing Addition
Louisiana – Divorce Addition
Kansas – Language Tweak
Kentucky – Consequences Addition
Maine – Language Tweaks
Missouri – Partially Updated Version
Mississippi – Alternate Version
New Jersey – Public Entity Addition
New York – Alternate Version
North Dakota – Alternate Version
Ohio – Alternate Version
Oregon – Family Addition
Tennessee – Criminal Addition
Texas – Alternate Version
Virginia – In Writing Addition
Washington – Disclosures Addition
Wisconsin – Signature Addition
Wyoming – Signature Addition

Rule 1.9(c) – Former Clients

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Rule: "A lawyer who has formerly represented a client…shall not thereafter (1) use information relating to the representation to the disadvantage of the former client… or (2) reveal information…"

Rule 1.9(c) – Former Clients

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Non-Conforming States

Arkansas – Language Tweaks

Arizona – Past Firm Change

Georgia – Disbarment Maximum

Iowa – Prosecutor Restriction

Maine – Definition Addition

Massachusetts – Language Tweaks

Minnesota- Partially Updated Version

Mississippi – Prior Version

Nebraska – Multiple Additions

New Jersey – Primary Counsel Addition

North Dakota – Related Matter Addition

Oregon – Definition Addition

Pennsylvania – Writing Subtraction

Tennessee – Revelation Addition

Texas – Alternate Version

Wisconsin – Signature Addition

Wyoming – Signature Addition

Rule 2.1 – Duty of Referral

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Rule: "…[A] lawyer may refer to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. "

Comment: "…Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."

Rule 2.1 – Duty of Referral

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Non-Conforming States

Colorado – Litigation Addition

Georgia – Negative Advice Addition

Safeguard Your Practice

Safeguard Your Practice

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1. Narrow your scope
2. Identify impact of the case
3. Refer to qualified specialists

SETTLEMENT PLANNING EXPERTISE

Life Plan Funding Analysis

Lien Resolution
- Private Medical Liens
- Medicare Statutory Liens
- Personal/business liens

Trust Services
- Asset Management
- Distribution Monitoring
- Special Needs Trusts (SNTs)
- Pooled Special Needs Trust
- Settlement Trusts

Medicare
- Secondary Payer Compliance
- Medicare Liability Reduction
- Post-Settlement Eligibility

Structured Settlement Annuities

Qualified Settlement Funds

Mediation/Negotiation Strategies

Sudden Wealth Counseling

Insurance Counseling

Protection Packet

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1. Engagement Language
2. Informational Disclosures
3. Specialist Recommendations

"I can't recommend this Packet enough. Perfect for every personal injury lawyer."

– Leland Dempsey, Former AAJ Board Member

"Useful and easy to implement. I immediately updated our engagement agreement."

– Brent Barton, Co-Chair of OTLA's Professional Negligence Section

Other Steps to Protect

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1. Intake Assessment
2. Case Management
3. Outsourcing Legal Work
4. People & Technology

Intake Assessment

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- Setting expectations
- Checking for conflicts
- Drafting engagement letters
- Auditing client calls

Case Management Assessment

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- Communicate effectively
  - Proactive and scheduled
  - Reminders/reinforcement
- Assign the right team
- Select the right software
- Conduct client surveys

Outsourcing Legal Work

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Center on Ethics and the Legal Profession

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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 08-451 **August 5, 2008**
Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services

A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them.
In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.[1]

Many lawyers engage other lawyers or nonlawyers, as independent contractors, directly or through intermediaries, on a temporary or an ongoing basis, to provide various legal and nonlegal support services. Outsourced tasks range from the use of a local photocopy shop for the reproduction of documents, to the retention of a document management company for the creation and maintenance of a database for complex litigation, to the use of a third-party vendor to provide and maintain a law firm's computer system, to the hiring of a legal research service to prepare a 50-state survey of the law on an issue of importance to a client, or even to the engagement of a group of foreign lawyers to draft patent applications or develop legal strategies and

- Obtain consent
- Require confidentiality
- Check for conflicts
- Review the work
- Confirm billing practices

People & Technology

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- Information Technology
- Human resources

Settlement Triage Service

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DISCOVER THE BIG UNKNOWN
that can cost your client after settlement

PROTECT your client

REDUCE your liability

SPOT every issue

Triage Topics

Reduce Plaintiff Taxes
- Increase exempt damages
- Enable future deductions
- Shift the burden of proof

Protect Medicare Benefits
- Maintain eligibility
- Avoid pay-back liability
- Maximize coverage

Protect Plaintiff Winnings
- Decrease liens
- Identify missed damages
- Plan to avoid dissipation

Avoid Law Firm Liability
- Narrow your engagement
- Avoid Medicare liability
- Make compliant referrals

Profit More from Legal Fees
- Defer and reduce taxes
- Invest for retirement
- Protect client deductions

Learn New Strategies
- Increase net settlements
- Unblock Medicare delays
- Reveal defense tactics

"After the first call, I know what the problems are, and I know SPI will solve them."
– Mark Bocci, Member, Inner Circle of Advocates

"Settlement Professionals is a pioneer of the settlement planning profession."
– Arthur Johnson, Past President, Oregon Trial Lawyers Association

"I simply will not deal with anyone else. Too much is at risk for each of my clients."
– Randy Bishop, Past President, Montana Trial Lawyers Association

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PI Firm Business Service

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"I can't imagine Vista not being able to improve even the best run firms."

– Jerry Parker, AAJ Leader's Forum

"Hiring Vista is one of the best business decisions I ever made. I HIGHLY recommend a consultation."

– Jim Reed, NY Super Lawyers List

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Questions?

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