

# Top 10 Ethics issues for litigation and malpractice prevention

Gary Burger

Burger Law

BurgerLaw.com 314-542-2222

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# Two most often reported Rules

- **RULE 4-1.3: DILIGENCE**

A lawyer shall act with **reasonable diligence and promptness** in representing a client.

- **RULE 4-1.4: COMMUNICATION**

(a) A lawyer shall:

(1) **keep the client reasonably informed about the status of the matter;**  
(2) **promptly comply with reasonable requests for information;** and

(3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# RULE 4-1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in Rule 4-1.16(c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(3) **the lawyer is discharged.**

(b) a lawyer may withdraw from representing a client if: (1) **withdrawal can be accomplished without material adverse effect on the interests of the client;**

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a **fundamental disagreement;**

(5) the **client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;**

(6) the representation will result in **an unreasonable financial burden on the lawyer** or has been rendered unreasonably difficult by the client; or

(7) **other good cause for withdrawal exists.**(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation unless the lawyer has filed a notice of termination of limited appearance. Except when such notice is filed, a lawyer shall continue representation when ordered to do so by a tribunal notwithstanding good cause for terminating the representation.

**(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a 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. The lawyer may retain papers relating to the client to the extent permitted by other law.**

# Comments to Rule

- A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.
- A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.
- Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain items for which the attorney has paid out of pocket and has not been reimbursed but may not retain papers as security for a fee.

# Client fires you

- Law says that if you are fired from a contingency contract that you get the reasonable value (usually read as quantum meruit) value of your work. This often means your hourly fee but can be measured other ways.
- Many smart lawyers do not charge a client who terminates their representation. You invite an ethics complaint. Especially early on in the case.
- But if you do real work to advance a case, get a good offer on a case, and then the client fires you, you may want to assert a lien and get a reasonable fee. See atty lien statute below. You can keep the lien notice with the liable party and their insurance company. If they settle the case the old client and new lawyer will come to you wanting a release and then you can get your expenses paid back.
- It's the client's file. Give it to them and do not withhold it. Keep a copy of whatever you think is important. You can keep your expenses folder, notes, and contract.
- There is authority that you can keep the medical records until they pay you your expense for them. But the better practice is to give the whole file and the medical records. Then only release your lien when you are paid back your expenses.

# You fire client

- Give notice and reasons for termination. Give them time to get a new lawyer. If in suit, wait 30 days after letter then file a motion for leave to withdraw. **Do not say why in motion** or disclose attorney client communication. Ask court to give 30 days for client to obtain new counsel or proceed pro se (not dismiss).
- If pre suit, say why you are terminating representation, the statute of limitations and get a different lawyer. I always say: The Missouri limitations period for you to file a lawsuit in your case is five (two) years from the date of the incident. I strongly encourage you to find another lawyer who may have a different view of your case. Let me know if you would like your file, or any portions of it. ( I enclose the materials you provided me in your case). Please contact me if you have any questions or if I can assist you in any way.
- I sometimes say: I will charge no fee for my legal services. If you do recover from the liable party then I ask that you repay me for the out of pocket expenses I have paid on your behalf.
- Bad cases usually get worse so get out when you can.

## RULE 4-1.5: FEES

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Rule [4-1.5\(d\)](#) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:  
(1) any fee in a domestic relations matter the payment or amount of which is contingent upon the securing of a divorce or dissolution of the marriage or upon the amount of maintenance, alimony or support or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the association and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) When a fee dispute arises between a lawyer and a client, the lawyer shall conscientiously consider participating in the appropriate fee dispute resolution program. This does not apply if a fee is set by statute or by a court or administrative agency with authority to determine the fee.



# There are two attorney lien statutes:

- Section 484.130 is a general section which grants a lien from the time of commencement of a suit or counterclaim to cover compensation pursuant to an agreement, express or implied, which is not restrained by law.
- Section 484.140 is a special statute which is restricted to contingent fee contracts whereby compensation of an attorney is limited to a portion or percentage of recovery and is contingent on successful resolution of the client's claim by either settlement or suit.

# Enforcing an Attorney Lien

- Missouri courts have recognized that "an attorney is not restricted to any particular remedy for the foreclosing of his lien. He may proceed by an independent suit against the party who was the defendant in the original case.... Or he may proceed against the same party *by motion in the original case.*" [Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 56](#)(Mo. banc 1982) (citations omitted).
- We have briefs on these issues we can email you.

# § 484.140 – Asserting an attorney lien based on a contingent fee arrangement

- Attorney may contract for percentage of proceeds of claim--notice of lien to be given to defendant.
- In all suits in equity and in all actions or proposed actions at law, whether arising ex contractu or ex delicto, it shall be lawful for an attorney at law either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action, or at any stage after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or defendants, or proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service of said notice as a lien upon the claim or cause of action, and upon the proceeds of any settlement thereof for such attorney's portion or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the parties either before suit or action is brought, or before or after judgment therein, and any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as herein provided between such attorney and his client.

# 4-1.155 Keep your IOLTA Account

(a) IOLTA accounts **shall be maintained** in compliance with the following provisions:

- (1) **no earnings from such account** shall be made available to the lawyer or law firm, and the lawyer or law firm shall have no right or claim to such earnings;

- (2) a lawyer or law firm shall deposit in an IOLTA account all funds of clients and third persons from whom no income could be earned for the client or third person in excess of the **costs incurred** to secure such income, and all other client or third person funds shall be deposited into a non-IOLTA trust account;

- (3) in determining whether client or third person funds should be deposited in an IOLTA account or non-IOLTA trust account, **a lawyer shall take into consideration the** following factors.

- (A) the **amount of interest** that the funds would earn during the period they are expected to be deposited;

- (B) the **cost of establishing and administering** a non-IOLTA trust account for the benefit of the client or third person, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to the benefit of a client or third person;

- (C) **the capability of financial institutions or lawyers** or law firms to calculate and pay interest to individual clients or third persons;

- (D) **any other circumstance** that affects the ability of the client or third person funds to earn income in excess of the costs incurred to secure such income for the client or third person;

- Bottom Line: Don't comingle.
- Put retainers in your IOLTA and bill against them later.

# RULE 4-4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

**In representing a client**, a lawyer **shall not communicate** about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

- Rule 4-4.2 applies even though the represented person initiates or consents to the communication. A **lawyer must immediately** terminate communication with a person if, after commencing communication, **the lawyer learns** that the person is one with whom communication is not permitted by this Rule 4-4.2.
- **The prohibition on communications** with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. **This means** that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances.

- Rule 4-4.2 applies **even though** the represented person initiates or consents to the communication. **A lawyer must immediately terminate** communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule 4-4.2.
- Rule 4-4.2 does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.
- Nor does this Rule 4-4.2 preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule 4-4.2 through the acts of another.

- In the case of a represented organization, Rule 4-4.2 prohibits communications with a constituent of the organization who supervises, directs, or **regularly consults** with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. **Consent of the organization's lawyer** is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule 4-4.2.



## RULE 4-7.1: COMMUNICATION CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.

A communication is false if it contains a material misrepresentation of fact or law.

A communication is misleading if it:

- (a) **omits a fact as a result** of which the statement considered as a whole is materially misleading;(b) is likely to create an unjustified expectation about results the lawyer can achieve;
- (c) **proclaims** results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;
- (e) **compares the quality of a lawyer's** or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;
- (g) **indicates an area of practice in which the lawyer routinely refers matters to other lawyers**, without conspicuous identification of such fact;
- (h) **contains any paid testimonial about or endorsement of the lawyer**, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;
- (i) **contains any simulated portrayal of a lawyer**, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;
- (j) **provides an office address for an office staffed only part-time or by appointment only**, without conspicuous identification of such fact; or
- (k) **states that legal services are available on a contingent or no-recovery-no-fee** basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case.

# RULE 4-7.2: ADVERTISING

- (a) **Subject** to the requirements of Rule 4-7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, or television, or **through direct mail advertising** distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.
- (b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. **The record shall include** the name of at least one lawyer responsible for its content unless the advertisement or written communication itself contains the name of at least one lawyer responsible for its content.
- (c) A **lawyer shall not give anything** of value to a person for recommending the lawyer's services, except that:
- (1) **a lawyer may pay the reasonable cost** of advertising or written communication permitted by this Rule 4-7.2;
  - (2) a lawyer may pay the reasonable cost of advertising, written communication, or other notification required in connection with the sale of a law practice as permitted by Rule 4-1.17; and
  - (3) a lawyer may pay the usual charges of a qualified lawyer referral service registered under Rule 4-9.1 or other not-for-profit legal services organization.

(e) A lawyer or law firm **shall not advertise the existence** of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three days a week, or (2) the advertisement states:

(A) the days and times during which a lawyer will be present at that office, or (B) that meetings with lawyers will be by appointment only.

(f) **Any advertisement or communication** made pursuant to this Rule 4-7.2, other than written solicitations governed by the disclosure rules of Rule 4-7.3(b), shall contain the following conspicuous disclosure:

**“The choice of a lawyer is an important decision and should not be based solely upon advertisements.”**

"Conspicuous" means that the required disclosure must be of such size, color, contrast, location, duration, cadence, or audibility that an ordinary person can readily notice, read, hear, or understand it.

(g) The disclosures required by Rule 4-7.2(e) and (f) need not be made if the information communicated is limited to the following:

(1) the name of the law firm and **the names of lawyers in the firm**;

(2) **one or more fields of law** in which the lawyer or law firm practices;

(3) **the date and place of admission** to the bar of state and federal courts; and

(4) **the address, including e-mail and web site address**, telephone number, and office hours.

(h) **Any words or statements** required by Rules 4-7.1, 4-7.2, or 4-7.3 to appear in an advertisement or direct mail communication must appear in the same language in which the advertisement or direct mail solicitation appears.

## RULE 4-7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

Applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment.

(a) **In-person solicitation.** A lawyer may not initiate the in-person, telephone, or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend, or relative.

(b) **Written Solicitation.** A lawyer may initiate written solicitations to an existing or former client, lawyer, friend, or relative without complying with the requirements of this Rule 4-7.3(b). Written solicitations to others are subject to the following requirements:

- (1) any written solicitation by mail shall be plainly marked “ADVERTISEMENT” on the face of the envelope and all written solicitations shall be plainly marked “ADVERTISEMENT” at the top of the first page in type at least as large as the largest written type used in the written solicitation;(2) the lawyer shall retain a copy of each such written solicitation for two years. If written identical solicitations are sent to two or more prospective clients, the lawyer may comply with this requirement by retaining a single copy together with a list of the names and addresses of persons to whom the written solicitation was sent;

(3) each written solicitation must include the following:

“Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri;”

(4) written solicitations mailed to prospective clients shall be sent only by regular United States mail, not registered mail or other forms of restricted or certified delivery;(5) written solicitations mailed to prospective clients shall not be made to resemble legal pleadings or other legal documents;

(6) any written solicitation prompted by a specific occurrence involving or affecting the intended recipient of the solicitation or family member shall disclose how the lawyer obtained the information prompting the solicitation;

(7) a written solicitation seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the client’s legal problem;

(8) if a lawyer knows that a lawyer other than the lawyer whose name or signature appears on the solicitation will actually handle the case or matter or that the case or matter will be referred to another lawyer or law firm, any written solicitation concerning a specific matter shall include a statement so advising the potential client; and

(9) **a lawyer shall not send a written solicitation** regarding a specific matter if the lawyer knows or reasonably should know that the person to whom the solicitation is directed is represented by a lawyer in the matter.

(c) **A lawyer shall not send**, nor knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, the lawyer's partner, an associate, or **any other lawyer affiliated** with the lawyer or the lawyer's firm a written solicitation to any prospective client for the purpose of obtaining professional employment if:

(1) it has been made known to the lawyer that the person does not want to receive such solicitations from the lawyer;(2) the written solicitation involves **coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence**;

(3) the written solicitation contains a **false, fraudulent, misleading, or deceptive statement** or claim or makes claims as to the comparative quality of legal services, **unless the comparison can be factually substantiated**, or asserts opinions about the liability of the defendant or offers assurances of client satisfaction;

(4) **the written solicitation concerns an action for personal injury** or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person if the accident or disaster occurred less than **30 days prior to** the solicitation or if the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person solicited makes it unlikely that the person would exercise reasonable judgment in employing a lawyer; or

(5) the written solicitation vilifies, denounces or disparages any other potential party.

Unfortunately **1 in 5** of the people in this room have addiction problems

### **Rule 16.01. Purpose and Intent**

(a) The intervention committee is established to encourage the identification of substance abuse in the legal profession so that:

(1) Through the assistance of committee members and its volunteers, lawyers or judges **who may have a substance abuse or addiction problem** are able to identify and address that problem through an appropriate course of treatment and thereby **reduce the potential for engaging** in behavior that could result in disciplinary complaints or grievances being filed against that lawyer or judge; and

(2) **When referrals are made by the office of chief disciplinary counsel,** investigations and interventions can be conducted and rehabilitation programs may be imposed to reduce potential harm or injury to the public and to the practice of law in Missouri.

- Rule 15 has been now changed to encourage substance abuse education in CLEs.

## **Missouri Lawyers' Assistance Program (MOLAP)**

The Missouri Lawyers' Assistance Program is a **professional, confidential counseling program** for members of The Missouri Bar, immediate family members who reside with them, and law students. Through a variety of free services, MOLAP helps individuals overcome personal problems such as depression, substance abuse, stress, and burnout.

Services include:

- Counseling.** All Bar members have unlimited, 24/7 access by phone to a licensed clinical social worker (call **(800) 688-7859**). MOLAP also makes referrals to professional resources as indicated.
- Crisis intervention.** MOLAP coordinates crisis intervention services for individuals and law firms.
- Education and Prevention.** MOLAP offers educational programs and articles on topics such as stress, substance abuse, depression, and quality of life. In addition, a series of questionnaires helps members screen themselves for a variety of problems.

All MOLAP services are free of charge and **strictly confidential**.



### **16.03. The Intervention Committee, Membership and Tenure**

There is hereby established a committee known as “The Intervention Committee,” which shall be composed of nine members of The Missouri Bar, four members to be appointed by the Executive Council of the Judicial Conference and five members to be appointed by the Board of Governors of The Missouri Bar. **Each member shall serve a term of four years and may be reappointed for additional terms of four years.** Each member shall serve until a successor is appointed and qualified.

### **16.10. Records**

No member of the committee, no members of the committee’s staff or investigative personnel, **no witness and no other person shall disclose the existence or contents of any committee investigation or proceedings or any records accumulated by the committee.** Records maintained by the committee shall be destroyed two years after the substance abuser completes an approved treatment program. Except as herein provided, all members of the committee and the committee’s records shall be subject to the confidentiality provisions of [Rule 5 or Rule 12](#), as the case may be.