

Creating Realistic Expectations

Professionalism

Judge Danny Ellender
Louisiana Second Circuit Court of Appeal

Louisiana Rules of Professional Conduct (RPC)

- Read the Rules; Know the Rules; Follow the Rules; Re-Read the Rules
- Louisiana Attorney Disciplinary Board website is a good place to find them. <https://www.ladb.org> Has the most current version of RPC and recent decisions.
- Revisit and Re-Read the Rules Periodically

RPC, an Overview

Client-Lawyer Relationship

- Rule 1.1. Competence
- Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer
- Rule 1.3. Diligence
- Rule 1.4. Communication
- Rule 1.5. Fees
- Rule 1.6. Confidentiality of Information
- Rule 1.7. Conflict of Interest: Current Clients
- Rule 1.8. Conflict of Interest: Current Clients: Specific Rules
- Rule 1.9. Duties to Former Clients
- Rule 1.10. Imputation of Conflicts of Interest: General Rule
- Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees
- Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
- Rule 1.13. Organization as Client
- Rule 1.14. Client with Diminished Capacity

- Rule 1.15. Safekeeping Property IOLTA Rules
- Rule 1.16. Declining or Terminating Representation
- Rule 1.17. Sale of a Law Practice
- Rule 1.18. Duties to Prospective Client

Counselor

- Rule 2.1. Advisor
- Rule 2.2. (DELETED)
- Rule 2.3. Evaluation for Use by Third Persons
- Rule 2.4. Lawyer Serving as Third-Party Neutral

Advocate

- Rule 3.1. Meritorious Claims and Contentions
- Rule 3.2. Expediting Litigation
- Rule 3.3. Candor Toward the Tribunal
- Rule 3.4. Fairness to Opposing Party and Counsel
- Rule 3.5. Impartiality and Decorum of the Tribunal
- Rule 3.6. Trial Publicity
- Rule 3.7. Lawyer as Witness
- Rule 3.8. Special Responsibilities of a Prosecutor
- Rule 3.9. Appearance in Nonadjudicative Proceedings

Transactions with Persons other than Clients

- Rule 4.1. Truthfulness in Statements to Others
- Rule 4.2. Communication with Persons Represented by Counsel
- Rule 4.3. Dealing with Unrepresented Person
- Rule 4.4. Respect for Rights of Third Persons

Law Firms and Associations

- Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers
- Rule 5.2. Responsibilities of a Subordinate Lawyer
- Rule 5.3. Responsibilities Regarding Nonlawyer Assistance
- Rule 5.4. Professional Independence of a Lawyer

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

Rule 5.6. Restrictions on Right to Practice

Public Service

Rule 6.1. Voluntary Pro Bono Publico Service

Rule 6.2. Accepting Appointments

Rule 6.3. Membership in Legal Services Organization

Rule 6.4. Law Reform Activities Affecting Client Interests

Rule 6.5. Nonprofit and Court-Annexed Limited Legal Services Programs

Information About Legal Services

Rule 7.1. General

Rule 7.2. Communications Concerning a Lawyer's Services

Rule 7.3. [Reserved]

Rule 7.4. Direct Contact with Prospective Clients

Rule 7.5. Advertisements in the Electronic Media other than Computer-Accessed Communications

Rule 7.6. Computer-Accessed Communications

Rule 7.7. Evaluation of Advertisements

Rule 7.8. Exemptions from the Filing and Review Requirement

Rule 7.9. Information about a Lawyer's Services Provided upon Request

Rule 7.10. Firm Names and Letterhead

Maintaining the Integrity of the Profession

Rule 8.1. Bar Admission and Disciplinary Matters

Rule 8.2. Judicial and Legal Officials

Rule 8.3. Reporting Professional Misconduct

Rule 8.4. Misconduct

Rule 8.5. Disciplinary Authority; Choice of Law

CREATING REALISTIC EXPECTATIONS...

WHY?

- Core component of attorney professionalism, grounded in the RPC.
- Replaces a client's unrealistic desire for a certain outcome with sufficient information to make intelligent decisions.
- Avoids building false hope.
- Encourages civility, respect, and public trust in our legal system.
- Candor and honesty creates credibility with courts.
- Diminishes potential for discipline and professional liability.
- Reduces stress for counsel.
- Creates an atmosphere for clients to accept and be satisfied with final resolution of dispute.

CREATING REALISTIC EXPECTATIONS...

WITH THE CLIENT

Begins with Client solicitation

- RPC 7.1-7.10
- RPC 7.2(c)(1)...*a lawyer shall not make or permit to be made a false, misleading or deceptive communication about the lawyer, the lawyer's services or the law firm's services...*
- Can you deliver what you are selling?
- Don't "push the envelope".
- Public's perception of the legal profession is impacted by the nature and style of advertising.
- "Just because we can, does it mean we should?"
- What expectation is our solicitation creating?

Should I even take the case

- RPC 1.1. *Competence (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
- Consider the matter's complexity and specialized nature.
- Assess available time, staffing, preparation, and support.
- Identify foreseeable deadlines and financial demands.
- Decide whether consultation with or association of another lawyer is appropriate.
- Can prospective client afford my representation. If hourly work, require a sufficient retainer and do not undervalue the worth of your services.

Once engaged, define scope

- RPC 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.*
- Written engagement.
- State what the representation includes.
- State what it excludes.
- Identify any related matters the lawyer is not handling.
- A limited scope must be reasonable and supported by informed consent.
- Should include fee schedule identifying hourly rate, if applicable, or contingency arrangement, also including who is responsible for litigation expenses, retainer replenishment, responsibility for experts and vendors.
- Should identify the primary contact, approved communication methods, expected update frequency, reasonable response times.
- Don't give out your personal cell phone if you want to maintain a work/life balance.

Once Engaged, What can I Promise

- Knowledge of the Law.
- Preparation.
- Diligence.
- Candor.
- Honesty.
- Communication.
- Zealous Advocacy.
- Integrity.
- Independent professional judgment.
- Timely reassessment.

What I cannot promise

- A verdict or ruling.
- A particular settlement.
- The conduct of an opposing party.
- A specific hearing date.
- A special relationship with the judge/court.
- The duration of litigation.

Importance of RPC 1.4

- Failure to adequately communicate is one of the most frequent complaints with the Louisiana Attorney Disciplinary Board.
- *Rule 1.4. Communication*
(a) *A lawyer shall:*
(1) *promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;*
(2) *reasonably consult with the client about the means by which the client's objectives are to be accomplished;*

- (3) *keep the client reasonably informed about the status of the matter;*
- (4) *promptly comply with reasonable requests for information; and*
- (5) *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.*
- (b) *The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.*
- (c) *A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).*

Reset Expectations at Every Case Inflection Point

I. Intake and Initial Assessment

- A. Define the client's objectives.
- B. Identify practical constraints.
- C. Address immediate deadlines.
- D. Identify missing information.

II. Strategy

Compare available approaches by:

- A. Potential benefit.
- B. Expense.
- C. Duration.
- D. Risk.
- E. Effects on business or personal relationships.

III. Discovery or Investigation

Explain how expectations may change because of:

- A. New documents.
- B. Witness testimony.
- C. Expert analysis.
- D. Unavailable evidence.
- E. Credibility issues.
- F. Previously unknown facts.
- G. Financial constraints.

IV. Negotiation

Discuss:

- A. Settlement authority.
- B. Leverage.
- C. Alternatives to settlement.
- D. Difference between a negotiating target and a guaranteed result.

V. Hearing or Trial

Explain:

- A. Procedure.
- B. Burdens of proof.

- C. Evidentiary uncertainty.
- D. Judicial discretion.
- E. Limits of predicting a ruling.

VI. Closure

Confirm:

- A. The result.
- B. Remaining obligations.
- C. Appeal or review deadlines.
- D. Enforcement considerations.
- E. File disposition.
- F. Termination of the representation.
- G. Moving past the dispute.

CREATING REALISTIC EXPECTATIONS...

WITH THE COURT AND OPPOSING COUNSEL

- Ensure your filings comply with La. C.C.P. art. 863 and are grounded in fact, warranted by existing law or a good faith legal argument, are not presented for an improper purpose, and are not intended to cause unnecessary delay or needless expense.
- Use appropriate language in your pleadings and ensure they are grammatically correct. “A picture paints a thousand words.”
- Use of AI, does it even sound like me.
- Credibility with the court and is built before the hearing.
- Advocate for your realistic points supported by the law and evidence, and concede those that have little merit.
- Treat opposing counsel, and the court, as you would want to be treated, in both written and oral communication.
- Remember you will have many more cases before the court, and likely with opposing counsel. “Don’t win the battle, but lose the war.”
- “An unfavorable reputation is much harder to overcome than a good reputation is to uphold.”
- **Rule 3.3. Candor Toward the Tribunal**
 - (a) *A lawyer shall not knowingly:*
 - (1) *make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;*
 - (2) *fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or*
 - (3) *offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A*

lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

- **Rule 3.4. Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client, and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

- **La. Code of Civil Procedure Art. 371**

Treat the court, court personnel, jurors, witnesses, opposing parties, opposing counsel with dignity and respect:

“Forceful advocacy remains compatible with civility. Deception and personal attack do not.”

CREATING REALISTIC EXPECTATIONS...

WITH ONESELF

Work/Life Balance

- RPC 1.3 *A lawyer shall act with reasonable diligence and promptness in representing a client.*

- Reasonable diligence and promptness require workload control.
- Overcommitment may produce a missed deadline, an unanswered communication, inadequate preparation, neglecting a matter.
- Overcommitment results in being on the “defensive” in the practice of law and not the “offensive”.
- “Only the squeaky wheel will get the grease.”
- RPC 1.16(a)(2) *...a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: ... (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client;*
- Mental health crisis is real in our profession: 38% of lawyers experience depression; 71% anxiety; 63% worsening mental health.
- Suicide among lawyers is 3.6 times greater than the general population.
- Bad physical health can lead to bad mental health.
- Job is very demanding.
- There is help through: JLAP www.louisianajlap.com
- Remember being an attorney or a judge is what we do, not who we are.
- The law is our profession; our character is our legacy.
- Develop worthwhile hobbies and passions.
- Find meaning and purpose outside of the law.

CREATING REALISTIC EXPECTATIONS...

TO MOVE PAST THE DISPUTE

- At some point, the case is over, the dispute is resolved.
- Win, lose, or draw, move past the dispute.
- Wounds need to heal.
- What role, if any, do we play in creating an environment to “move on”.
- What role, if any, does forgiveness play.
- Creating realistic expectations throughout assists in moving past the dispute.