

A Guide for the General Practitioner: Ethical Issues When Evaluating, Selecting and Handling Personal Injury Case

I. Finding the Case:

For the general practitioner of law, most personal injury claims come to your office through your current and prior clients. In all likelihood, if you handle divorces and family law cases, real estate issues, and other general legal matters, you will become a person's "personal lawyer." When these folks or their family and friends get injured by others, they will often turn to you to handle their personal injury claim.

Under our Rules of Professional Conduct, a "lawyer" can handle any legal matter for a client, provided he or she is licensed, in good standing and is competent to practice law. The practical question becomes, "what does it mean to be competent to handle a personal injury case under our ethics rules?"

When encountering a personal injury matter, or any other case outside your practice's comfort area, you will face ethical issues affecting your decision to handle that case for the client. When you get a call from a potential client requesting representation in personal injury matters, my suggestion is to consult the Pennsylvania Rules of Professional Conduct, use common sense and always have a policy of full disclosure with the prospective client.

If the case does not find you, should you actively look for personal injury cases if you do not concentrate on these matters? Can you advertise for personal injury cases?

A. Pennsylvania Rules of Professional Conduct, Rule 7.2: Advertising.

1. Rule 7.2(k): A lawyer shall not, directly or indirectly, advertise that the lawyer or his or her law firm will only accept, or has a practice limited to, particular types of cases unless the lawyer or his or her law firm handles, as a principal part of his, her or its practice, all aspects of the cases so advertised from intake through trial. If a lawyer or law firm advertises for a particular type of case that the lawyer or law firm ordinarily does not handle from intake through trial, that fact must be disclosed. A lawyer or law firm shall not advertise as a pretext to refer cases obtained from advertising to other lawyers.

B. Practice Tip:

Don't mislead. If you do not routinely handle injury cases, and specifically, if you cannot handle the case from intake to trial, do not say that you do. Disclosure of referral or outside trial counsel relationships is a must. Advertisements cannot be a pretext to a referral.

II. Can I actually accept this case?

A. Pennsylvania Rules of Professional Conduct, Rule 1.1: Competence.

1. **Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

B. If you have a law degree, have passed the Bar and are a member in good standing, you can technically handle a personal injury case—or any case for that matter. **True competence though, requires the ability to do the following:**

1. Understand and recognize major issues of law and fact:
 - a. Proving liability in:
 - i. Auto, premises liability, animal bites and others
 - ii. Products Liability
 - b. Research: statutes; case law; jury instructions
2. Understand and recognize collateral issues:
 - a. Basic Physics/Accident reconstruction principles
 - b. When to hire liability and damage experts
 - c. Multiple defendants/finding sources of liability insurance;
 - d. Recognizing Liens: Private; Medicare; Medicaid; Workers Compensation
 - i. Do you have a duty to put a lien holder on notice?
 - a. Statutory: “yes”
 - b. Private: likely “yes”
 - e. What is your duty?
 - i. Notify Lien holder
 - ii. After Notice, do you have an obligation to negotiate a reduction for client?
 - (a) If so, avoid conflict of interest of potential benefit to client vs. 33.3% fee from insurer for you.

(b) **Rule 1.8(f): Conflict of Interest.**

- a. **Rule 1.8 (f): A lawyer shall not accept compensation for representing a client from one other than the client unless:**
 - 1. **the client gives informed consent;**
 - 2. **there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and**
 - 3. **information relating to representation of a client is protected as required by Rule 1.6.**

C. Practice Tip:

Take CLE courses in areas such as auto insurance law, premises liability, dog bite cases, trial procedure, and medicine for lawyers and evidence. Talk to colleagues who routinely handle personal injury matters. Establish a referral relationship with a personal injury lawyer.

III. Must I have the ability to handle the case from start (intake) to trial (finish)?

- A. **Under Rule 1.1, you need the requisite basic legal knowledge, skill, thoroughness and preparation.** How does that language get interpreted in the real world private practice of, for example, a real estate lawyer? Can a residential real estate lawyer comply with the above and other ethical requisites sufficiently to handle a personal injury matter competently?

B. Pennsylvania Rules of Professional Conduct, Rule 1.3: Diligence.

- 1. **Rule 1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client."**
- 2. Complying with the language in this rule sounds simple. In a personal injury claim, time is often of the essence though. In evaluating any case, you will need to quickly assess statute of limitations and liability problems, the severity of the injuries, the potential value of the case, and possible insurance coverage exclusions—likely in that priority. To competently represent an injured client, your practice must be set up to move ahead with the investigation of the claim immediately. To comply with the rule, a lawyer must know the SOL in injury cases in Pennsylvania,

or know where to find it (42 P.S.C.A. Section 5524 (2)). I also suggest you have the ability to do the following at a moment's notice:

- i. Visit the scene and preserve accident scene evidence;
- ii. Hire liability experts;
- iii. Hire a private investigator to interview witnesses;
- iv. File emergency petitions, e.g., appoint a personal representative in a wrongful death case;
- v. Finance all costs associated with prosecuting the claim.

C. Pennsylvania Rule of Professional Conduct, Rule 1.4: Communication.

1. Rule 1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

2. As lawyers, we must be able to communicate clearly. Of course, you do not have to immediately possess all the answers to all the questions that could arise in the case, but you do have to be able to advise the client properly at every stage of the case, from intake, to settlement negotiations, to litigation. The relevant inquiry under the ethical rules is can you explain the matter to the client competently so the client can make an informed decision?

3. Communicating with the client about his or her expectations regarding: the potential outcome, value, claims and litigation processes and the ability to properly advise him or her about options are all required under a reading of the Rules of Professional Conduct we've reviewed thus far.

D. Other Factors When Deciding to Accept a Case: Pennsylvania Rules of Professional Conduct, Rule 1.16: Declining or Terminating Representation.

1. Rule 1.16: (a) Except as stated in paragraph (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;

(b): Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(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;

(7) other good cause for withdrawal to exists.

(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.

2. Must have the financial ability to advance costs in complex cases.
 - i. Need access to money for costs of investigating and prosecuting the case. A products liability case with serious injury can incur expert costs exceeding \$100,000.00.
3. Do your other areas of practice allow you to spend the time on this case to handle it competently? Practically speaking, you cannot be a criminal lawyer, family lawyer and personal injury lawyer simultaneously.
4. What if a client wants you to pursue a case that you know you will lose or what if the client wants you to advance a meritless claim?

E. Practice Tip:

Everyone with a valid cause of action is entitled to legal representation. Avoid problems though by consulting Rule 1.16(a)-(d). The best advice is to reject the “problem” case at the initial client meeting, and do so in writing.

IV. Accepted Cases: Avoiding Ethical Pitfalls

A. Pennsylvania Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients.

1. Rule 1.8(g): A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

2. Representing more than one injured client: Aggregate settlements and other potential problems.

3. Representing the Spouse: loss of consortium claims

i. Who is the client?

ii. Effect of divorce during the representation?

4. Representing Minors: See Rules of Civil Procedure 2026, et seq.: Minors as Parties.

i. Who is the client?

ii. What is your duty? Best interest of the child is the standard

iii. Guardian ad litem?

a. When necessary?

b. How?

iv. Settling Minor’s Claims: See Rule of Civil Procedure 2039: Compromise, Settlement, Discontinuance and Distribution.

a. Fees: When to reduce?

5. Handling Wrongful Death and Survival Claims: See Rule of Civil Procedure 2201, et seq.: Actions For Wrongful Death.

- i. Who is the client?
- ii. What is your goal and obligation?
- iii. Beneficiaries' interests: who do you represent? What if they are minors?
- iv. Settlement: See Rule of Civil Procedure 2206.

B. Handling Settlement Proceeds:

1. **See Rules of Professional Conduct, Rule 1.15: Safekeeping Property.**
2. Due diligence to disburse/duty to distribute.

V. Final Thoughts

People with legal problems do not always realize how concentrated the practice of law has become. Generally speaking, it is not ethical to advertise or claim to be a "specialist." Most non-lawyers really don't understand what we do as lawyers. In fact, if a person knows you are a lawyer, it is reasonable to expect that he or she feels that you can help them with any kind of legal problem. The public perception of how legal professional, vis a vis medical professionals function, certainly differs in this way, as most people certainly would not see a cardiologist for treatment of a common cold. The bottom line, therefore, is that clients expect that you can get them the best result possible and that you have the knowledge, skill, ability and resources to do so. In today's practice of law, that may not be a realistic expectation. However, if you consider representing a client in a personal injury case, you really have to possess more than basic competence. If that is all you have, disclosure of that competence level to the client is vital. Alternatively, the best and most ethical option may be to refer the case to a personal injury lawyer.