HAROLD R. KEMP LAW SYMPOSIUM
AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
OHIO CHAPTER

DEALING WITH DIFFICULT CLIENTS

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LOUIS I. WATERMAN
GOLDBERG SIMPSON, LLC
9301 Dayflower Drive
Prospect, Kentucky 40059
(502) 589-4440 - Office
(502) 589-1637 - Facsimile
***lwaterman@goldbergsimpson.com* - E-Mail**

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LOUIS I. WATERMAN
GOLDBERG SIMPSON, LLC
9301 Dayflower Drive
Prospect, Kentucky 40059
(502) 589-4440
lwaterman@goldbergsimpson.com

Louis I. Waterman is a Louisville, Kentucky native, a former Judge of Jefferson Circuit Court, Family Division Four (4), and a leading Family Law attorney in Kentucky. He is a graduate of the University of Louisville Brandeis School of Law (1986), a Fellow of the American Academy of Matrimonial Attorneys, and certified in Family Law by the National Board of Trial Advocacy. He is a past President of the Kentucky Chapter of the American Academy of Matrimonial Lawyers.

Mr. Waterman is also an influential civic activist in Louisville. He serves as a Trustee and Vice-Chair of the Board of Directors of the University of Louisville Healthcare. He is the past Board Chair of Jewish Hospital St. Mary's Healthcare, a non-profit corporation that operated 40 medical-related affiliates in Louisville and Southern Indiana. He is also The Chair-Elect of the Executive Board of Directors of the Kentucky Derby Festival, Inc. and and member of the Louisville Zoo Board of Trustees.

Mr. Waterman served as the Past Board Chair of the Jewish Heritage Fund for Excellence, The Bingham Clinic; the Vice-Chair of the Louisville Zoo Board of Directors, where he also served as the General Counsel; and the Official Host Program for Churchill Downs. Mr. Waterman is a graduate of Leadership Louisville (1990), Bingham Fellows III (1994), Bingham Fellows 2002, and a participant of Harvard Business School's Governing for Non-profit Excellence, Executive Education Program (2002).

Mr. Waterman has been recognized for his commitment to Louisville by being recognized as one of the Business First's 40 Under 40 (1997), The Kentucky Chapter of the America Academy of Matrimonial Lawyers Raising the Bar Award (2022), the Richard Revell Family Lawyer of the Year (2019), the recipient of the Louisville Bar Association's Distinguished Service Award (2002), the Legal Aide Society's Outstanding Volunteer Lawyer (2017 and 2000); the Louisville Bar Association's Outstanding Committee of the Year (Public Service 1998); Ballard High School Alumnus of the Year (2004), and, the 2003 Excellence in Community Leadership Award.

Mr. Waterman is 62 years old. He is married to Leah Waterman and the father and stepfather of four children, Mark JD, Kate, and Shane.

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WHAT TYPE OF CLIENT DO YOU WANT

Have you ever thought about what type of client you want to work with, or like most of us, do you take what comes in the door and gets assigned to you? What if you could control the types of clients you have? We all have clients we love to work with and others we would like to see boil in oil.

Consider those characteristics that you like about the clients who you enjoy working with and those characteristics that make you want to torture certain clients. Make a list of both the good and bad characteristics. When you (or the attorney you are working with) interview clients, seek only those with those characteristics you like; more importantly, avoid the clients who make your blood boil or to which you have a poor "gut" reaction.

HOW DOES A CLIENT BECOME DIFFICULT

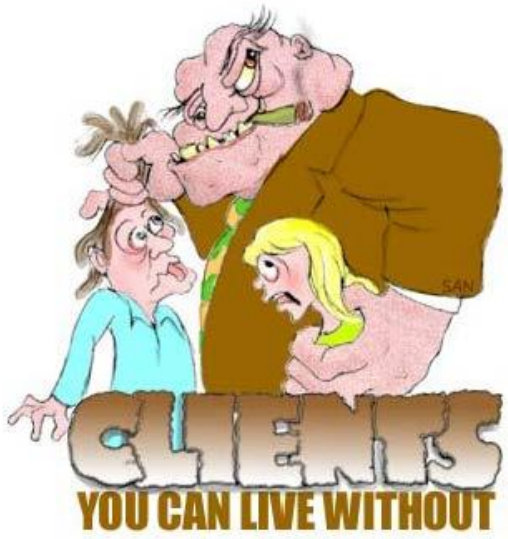
Are some clients difficult when they come in the door, or do they become that way? I will suggest that it's a little of both. We have to acknowledge that generally, clients are not coming to us when everything is rosy and wonderful. In most circumstances, by the time the client calls, something is difficult, bad, tragic, etc.

The real issue is how do we define difficult? Is it a client who is yelling at you? Is it a client that is overly demanding? Is it a client who has unrealistic expectations? Is it the one that drains you emotionally every time you talk? Is it a client who will not pay your bill in a timely manner? The answer is yes. Yes, to all of these. So, what do we do?

As we will discuss below, it is our job to remember that clients are humans and subject to all the human emotions of any person. Thus, while assisting in legal work is your stock in trade, dealing with a human being is necessary for every lawyer-client relationship.

Please consider why you "feel" (yes, I said feel...like what is your emotional reaction or your gut feeling") the client is being difficult. Perhaps it is you who is feeling uncomfortable with this client. In order to address difficult clients, one must be introspective. This means you need to be aware of what is causing you to feel the way you do with this client's issues.

HOW AND WHERE TO DRAW THE LINE



Each of us has to determine where to draw the proverbial line in the sand with a client. We all practice in areas where the clients are subject to enormous pressure. These pressures are personally very difficult for the client, and the outcome can be financially disastrous or even life-threatening. Do these circumstances make a clients difficult in and of themselves? Is it the emotional pressure that we are under or the emotional pressure that our client is under causing the "difficulty"? Is it both?

To work in the law well with difficult clients, one must be able to measure one's self emotionally and physically. One must be willing to look into the mirror and honestly evaluate the person looking back at us. Most importantly, you must learn what you can tolerate and what you are willing to tolerate in dealing with a difficult client. Most importantly, you must put your ego aside and do your job as you believe it needs to be done.

THE INITIAL INTERVIEW

The ***prospective*** client is the most important time to assess a client and is the vital first step toward figuring out if the client is going to be "one of *those* clients."

TELEPHONE CONTACT

Generally, clients begin their relationship with an attorney through a telephone call or a referral. Many times, a paralegal will be tasked with taking this call. I advise having anyone make this initial contact. As a lawyer with experience, you have some "spidey senses" about these things, and many times, you will know immediately if the client is a problem. It is important to glean as much information as possible from the initial conversation, whether by telephone or from the referral source. While it is my habit to make no commitments regarding an attorney-client relationship over the telephone, I do try to obtain some basic information that will give me an idea as to whether I want to accept the client in my practice.

I generally find out exactly why the prospective client is seeking an attorney. If they tell me it is a "general divorce," I try to determine what issues they think will exist within the divorce and if there are emergency matters that need to be addressed. I also ensure I get their full legal name, address, and telephone number. Remember, much can be learned from addresses and telephone numbers, especially in a smaller

community. Once I have this information, I suggest that we schedule a face-to-face meeting to discuss my practice of law and their problems and to determine if we are going to establish an attorney-client relationship. Zoom or Teams meetings serve a purpose, but our skills are developed to be the most sensitive in face-to-face meetings.

I always ask about their referral source. If a former difficult client refers the prospective client, you can bet the prospective client will have some similarities with the referring party.

You must evaluate this information and listen to the prospective client. This cannot be repeated sufficiently. LISTEN to the prospective client during the initial call. Why bother asking the questions if you do not listen and process this information?

During this initial discussion, if I start having "those feelings," I end the conversation. It is much easier not to undertake representation than eliminate the client once they become difficult. It is better for you, your practice, and the prospective client.

Tell the prospective client if you do feel y ou can meet their goals. This is not a judgment statement but simply that people are different, and your practice is different (not good or bad…just different) than other lawyers who may be better suited to address the prospective client's needs as they see fit.

IN-PERSON INTERVIEW

Upon meeting a prospective client for the first time, it is important to ensure they understand that the interview process is a "two-way street." I make it very clear that while they may be interviewing me to determine if they want to hire me, I am also interviewing them to determine if I want to represent them. While it is very difficult for any of us to tell a prospective client we are not interested in taking their case, I have found over the years that some of my best decisions about clients have been when I said "no." If you are unwilling to reject a prospective client, why do you want to take your valuable billable time to interview them?

The initial interview is the attorney's first (and, in my opinion, the best) opportunity to control a difficult client. This is the opportunity to explain how you do business to prospective clients. This is the opportunity to educate the prospective client on how your practice works: what you will do and what you will not do; what you will expect of them and what they can demand of you; how you will communicate and how you expect them to communicate; what you will tolerate and what you will not tolerate. If done correctly, this either stops a difficult client in their tracks or allows you to say: "I told you so….". This includes setting expectations for paralegals and the entire office staff.

During the initial interview with *every* client, I explain to them that I insist they follow three (3) rules, all of which are reciprocal.

1. I insist upon the truth and nothing but the TRUTH; this includes the "Good, the Bad, and the Ugly." I explain to them that I must know the "good, the bad, and the ugly" about their case. I explain the consequences of not being truthful with me. I make sure they understand that I will, in return, provide them with honest, blunt analysis and advice. I make sure they understand that I do not "paint rosy pictures" or paint "gloom and doom" pictures. An attorney's job is to counsel them on the law. In a perfect situation, I hope I can provide a client with a series of options, an analysis of the "upside" and "downside" to each of the options, and provide them with my advice as to which option I believe best serves their interest. However, I also advise clients that I am <u>not</u> a perfect attorney. I explain that my advice is based on my experience before a particular judge. As we all know, judges can be unpredictable. Therefore, I explain to them that my advice is merely my "opinion" based upon my knowledge of the law and my experience and not, in any way, a guarantee.

   Tell every prospective client that the only person who gets "hurt" in a case when they do not tell the truth is them. There are 2 really good reasons for this: First, the judges and other lawyers know you and the attorney's propensity for truthfulness. Thus, if the client makes an untruthful statement, most judges and lawyers know you got the information from your client. Second, if they do not tell you the truth, you are caught off guard, usually in court, and have to "shoot from the hip" to address the issue. The attorney will not get hurt, only they are. Thus, their credibility is hurt.

   See the attached opinion by Judge Philpot (Ret.) on the definition of "the truth."

2. My second rule requires a MUTUAL COMMITMENT to their matter and legal work. I explain to my clients that if they want me to work on their case, then they must reciprocate by working on their case. I explain to them that it is imperative that they read ***<u>all</u>*** of the information I send to them, whether in letter form or simply by providing them with a copy of a particular document. I send ***<u>every</u>*** piece of paper, e-mail, note, and document that comes across my desk pertaining to their case. I explain to them that it is their responsibility to keep up with their case and, if they do not understand what they have received, they must communicate with me. I am very blunt about the fact that my staff and I cannot read their minds. Rather, they must contact me if they have a question or do not understand something having to do with their case. Once again, only one person gets "hurt" when they do not understand – not us.

   In return, I tell them that we will always return their calls in a timely manner. Remember that most Bar complaints occur due to failing to adequately communicate with clients. In my opinion, this is stupid! Communicating with our clients is the ***<u>only</u>*** area in which we, as attorneys, have total control. There is no excuse for not returning a client's call or working on a case in a timely manner.

You will be amazed at how a difficult client can be controlled and, in many cases, eliminated by returning telephone calls quickly and responding to e-mails and correspondence quickly. As you know, nothing is more frustrating than trying to reach an attorney or a judge who never returns your call. Why would you think it would be any different for a client?

3. Finally, I always discuss our fees with a prospective client. Want me to work for you…PAY ME! This is not a "dirty" subject. It is how we all make an honorable living. Disclose every aspect of your fees: the hourly rate, the time increments of billing, the retainer fee, the other out-of-pocket expenses for which you charge, and any additional trial preparation costs.

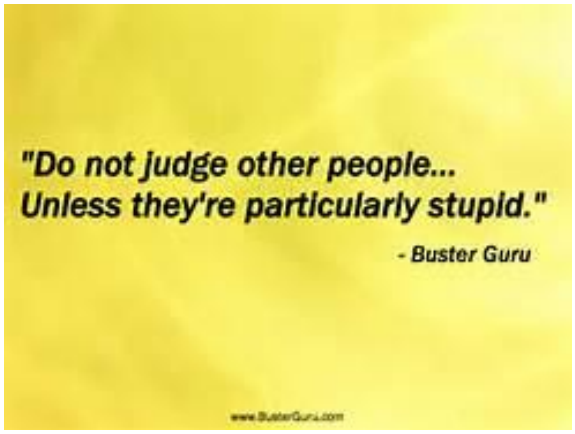
   Frankly, there is nothing different about how we make a living from our clients. The only difference is that we bill monthly (or should). If your clients' employers came to them and told them they were not going to receive a paycheck, they would be in a panic, as they have bills and other obligations. Our lives are exactly the same. If a client does not pay our bill in full when presented with a bill, then we can be in a panic. I am very blunt and direct with my clients in this regard. No payment, no work.

   I explain to every client that I will not work for them if they do not pay my bills in full. This is simply a necessity of the practice of law. I believe it is extremely important to have honest and direct communication with every client long before establishing an attorney-client relationship.

   I explain to each client that at the conclusion of our initial meeting, I will prepare and send them a Retainer Agreement in detail. In order to retain me, and before I do any work on their behalf, they ***must*** execute the Retainer Agreement and return it to me.

   The Retainer Agreement will be your ultimate device to control and manage a difficult client. It may also be your best protection from that same client.

DEVELOPING EXPECTATIONS



The best way to eliminate a difficult client is to set expectations immediately and stick to those boundaries. As you can see from the above, I begin doing this BEFORE I am even hired. Recognize that there are two (2) facets to every representation. There is the legal aspect of doing our jobs as an attorney; and the emotional aspect of what the client is facing or experiencing. There is always an emotional aspect! The vast majority of attorneys become experts in the

first aspect and tend to ignore the second. Clients ARE human beings. Treat them as such. The “Golden Rule” will never fail you: Treat your client exactly how you want to be treated.

EXPECTATIONS ABOUT THE WORK

I do not promise or guarantee my clients anything except that I will return telephone calls timely, work on their case diligently and bill them regularly. Make sure every client understands that they are not your only client. Explain how you prioritize your daily, weekly, or monthly work. Let them know that their case is not always your top priority. Explain that our jobs do not happen from 9:00 AM to 5:00 PM. In our world, emergencies do happen. Thus, we cannot always be able to react immediately.

You must be introspective here. What do you do when you are getting ready for a trial or a big hearing? What happens within your practice to the normal business routines for you, your Associate(s), and your staff during periods of high stress or important deadlines? Tell the client upfront. In order to do this, you must know yourself and your practice.

While you are comfortable within the practice of law, most clients are involved with the legal system for the first time in their lives. Remember, there is a great deal of misinformation about our jobs and how we do them. The internet, Google, and Hollywood are wonderful sources, but they are horribly inaccurate about our real world. You never know the client’s experiences or knowledge of the law and how the process works.

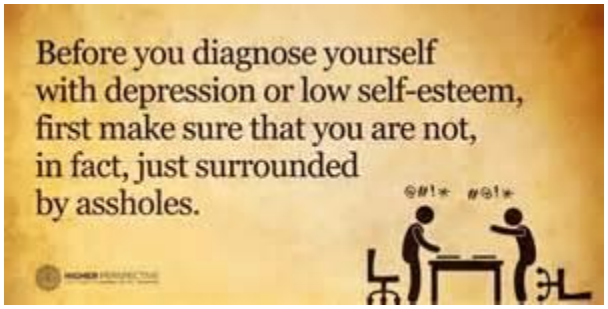
Most clients are under a great deal of stress when they appear in an attorney’s office. Make every client comfortable and welcome. Let them know that you will address their needs, how you will address their needs and that you will do your best to obtain the goals they seek. If their expectations are unreasonable, tell them so. This human connection will go further than any result you can obtain.

HELPING CLIENTS UNDERSTAND THEIR OPTIONS – EDUCATE YOUR CLIENTS

I believe the most critical aspects of the client relationship and eliminating or dealing with a difficult client are solely within our control. Educate the client. This is done through open and frank communication from the beginning. Remember, most of us are no smarter than our clients; while we could talk in legalese, this will not result in good communication and leave us exposed to complaints. The most difficult part of being a lawyer is communicating complex issues (to clients and the courts) in simple terms. There are no extra points for using "big words."

There is a "method to the madness": the more information you give your clients about the law and the process, the more able they will be to give you facts and information that is relevant to the case; thus, the better advice your team can give. You see, the attorney-client relationship is truly a partnership.

WHEN YOU HAVE A DIFFICULT CLIENT



What happens when the good client turns into a nightmare? Generally, after I spend some time evaluating and identifying the "difficulty," I have a face-to-face meeting with the client. I have been very successful in talking with clients and bringing them back from that "Snickers moment" when they are acting like Dr. Jekyll.

Identify the difficulty. Is the issue something you did or didn't do? Is it something the client has done or not done? Has the client had a previous bad experience that they are foreshadowing on you? If you have made a mistake, tell the client you made a mistake. While this takes guts, it is the best way to deal with a client. Apologize for the mistake and tell the client your plan for fixing the error. I have been in practice for more than 39 years, and I assure you I have made some whopping mistakes. Luckily, I have never been sued nor had an ethical complaint brought against me by my clients. I attribute this in part to honesty and saying the magic words: "I am sorry; I made a mistake."

Is the issue that the client is behaving poorly? Why? What if we assume the client's behavior toward us is driven by some other primary emotion or fact(s)? Fear can do a lot to people. Does reframing *our* analysis give us a broader insight into their behavior? If so, does that provide us with a way to address the behavior?

Using the advice above, you now have the tools to go back to the client and say: let's talk about what we discussed BEFORE you hired me. Remember: "I told you so"…. are very powerful words.

Listen! I always talk with my client and discuss what I think the issue is, then I listen. What do they think the issues are? I try very hard not to get defensive or react but let them say everything the client needs to say. I then repeat the issues back to them as they have framed them to ensure we are communicating, not just talking to each other.

Draw the line. What can you accept, and what can you not accept? I will never tolerate a client mistreating my Associates, Paralegals, or staff. I tell this to every prospective client, and I tell them a story about a client that I terminated because he yelled at my secretary. I insist those who work with me treat our clients as royalty and insist they do the same. I understand clients get scared, angry, hurt, frustrated, and experience a bevy of other emotions. I tell each client they may come vent to me any time (I might vent back at them). They cannot vent to others in my firm.

WITHDRAWAL FROM REPRESENTATION

Did you know that an attorney can terminate a client? Surely, we all learned this in our ethics classes in law school. Then why do we not exercise this right more often?

Attorneys are subject to the Rules of Professional Conduct that require or allow us to withdraw from representing a client in several circumstances, including:

* Circumstances where we discover that a client seeks our assistance to engage in criminal or fraudulent conduct;

* Circumstances where our continued representation of the client will result in violation of the Rules of Professional Conduct;

* Circumstances where the client fails to fully cooperate by honestly and fully providing us with records, information, documents, or their inappropriate interaction with your team.

* Circumstances where our client insists on pursuing an objective that we consider repugnant or imprudent;

* Circumstances where a client fails substantially to fulfill an obligation to us regarding our services (including prompt payment of fees and other charges); and,

* Circumstances where our continued representation of the client will result in an unreasonable financial burden on us or has been rendered unreasonably difficult by the client.

I encourage my team to tell me when they think it is time to cut the cord.

Tell your prospective clients that the termination of your representation will not affect their responsibility for paying fees and other charges incurred before the notice of termination is given or in connection with an orderly transition to successor counsel, if

necessary. Upon request, I will return all of their papers, property, and funds promptly upon your payment of those fees and other charges. You should always retain your files pertaining to the matter but make copies for the client at their request and cost.

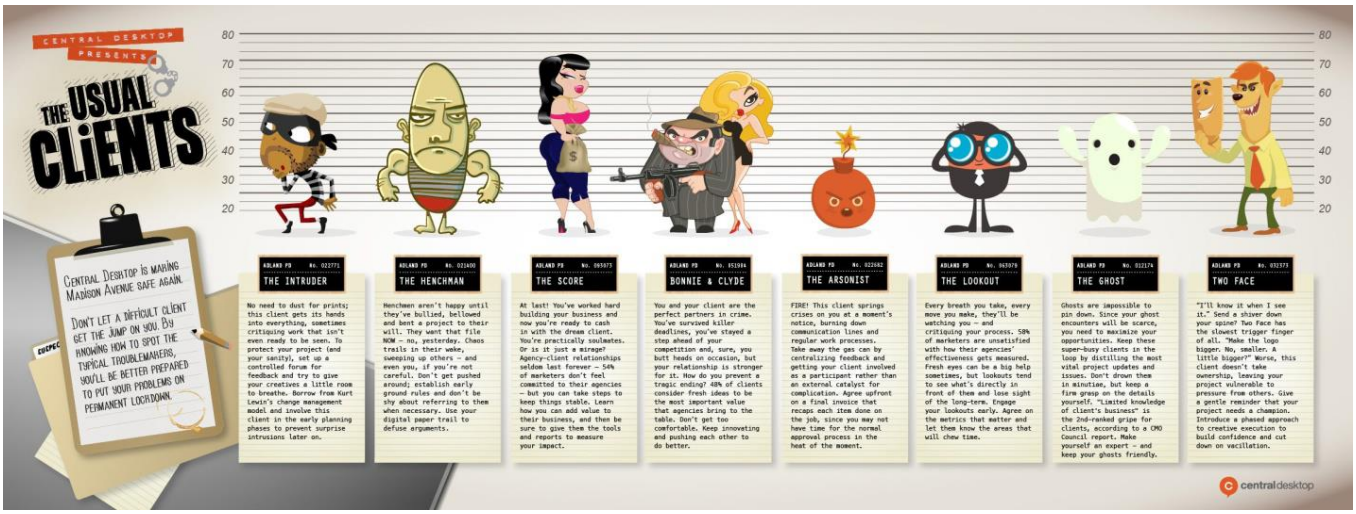
We tell every client that my office will, as a matter of course, withdraw as counsel at the conclusion of your case. Obviously, if any post-representation issues arise, we will be pleased to re-enter our appearance upon mutually acceptable terms.

There are times when a client simply "wears you out." When this happens, talk with the client and then withdraw. Remaining in such a case will only lead to a Bar complaint. NO rule says you have to continue to represent a client. You have to be judicious when you withdraw so as not to harm the client.

THE RELATIONSHIP AFTER THE CASE

Remember that clients are our best form of advertising. They are the ones who will tell others about the work we did and how we did it. My experience has been that regardless of the outcome, most clients will quickly refer others to you if you have treated them with dignity, respect, honesty, and professionalism.

Louis I. Waterman
October 14, 2024


CENTRAL DESKTOP PRESENTS
THE USUAL CLIENTS
CENTRAL DESKTOP IS MAKING MADISON AVENUE SAFE AGAIN.
DON'T LET A DIFFICULT CLIENT GET THE JUMP ON YOU. BY KNOWING HOW TO SPOT THE TYPICAL TROUBLEMAKERS, YOU'LL BE BETTER PREPARED TO PUT YOUR PROBLEMS ON PERMANENT LOCKDOWN.
80
70
60
50
40
30
20
ADLAND PD No. 022771
THE INTRUDER
No need to dust for prints; this client gets its hands into everything, sometimes critiquing work that isn't even ready to be seen. To protect your project (and your sanity), set up a controlled forum for feedback and try to give your creatives a little room to breathe. Borrow from Kurt Lewin's change management model and involve this client in the early planning phases to prevent surprise intrusions later on.
ADLAND PD No. 021400
THE HENCHMAN
Henchmen aren't happy until they've bullied, bellowed and bent a project to their will. They want that file NOW – no, yesterday. Chaos trails in their wake, sweeping up others – and even you, if you're not careful. Don't get pushed around; establish early ground rules and don't be shy about referring to them when necessary. Use your digital paper trail to defuse arguments.
ADLAND PD No. 005073
THE SCORE
At last! You've worked hard building your business and now you're ready to cash in with the dream client. You're practically soulmates. Or is it just a mirage? Agency-client relationships seldom last forever – 54% of marketers don't feel committed to their agencies – but you can take steps to keep things stable. Learn how you can add value to their business, and then be sure to give them the tools and reports to measure your impact.
ADLAND PD No. 051984
BONNIE & CLYDE
You and your client are the perfect partners in crime. You've survived killer deadlines, you've stayed a step ahead of your competition and, sure, you butt heads on occasion, but your relationship is stronger for it. How do you prevent a tragic ending? 48% of clients consider fresh ideas to be the most important value that agencies bring to the table. Don't get too comfortable. Keep innovating and pushing each other to do better.
ADLAND PD No. 022682
THE ARSONIST
FIRE! This client springs crises on you at a moment's notice, burning down communication lines and regular work processes. Take away the gas can by centralizing feedback and getting your client involved as a participant rather than an external catalyst for complication. Agree upfront on a final invoice that recaps each item done on the job, since you may not have time for the normal approval process in the heat of the moment.
ADLAND PD No. 042979
THE LOOKOUT
Every breath you take, every move you make, they'll be watching you – and critiquing your process. 58% of marketers are unsatisfied with how their agencies' effectiveness gets measured. Fresh eyes can be a big help sometimes, but lookouts tend to see what's directly in front of them and lose sight of the long-term. Engage your lookouts early. Agree on the metrics that matter and let them know the areas that will chew time.
ADLAND PD No. 011174
THE GHOST
Ghosts are impossible to pin down. Since your ghost encounters will be scarce, you need to maximize your opportunities. Keep these super-busy clients in the loop by distilling the most vital project updates and issues. Don't drown them in minutiae, but keep a firm grasp on the details yourself. "Limited knowledge of client's business" is the 2nd-ranked gripe for clients, according to a CMO Council report. Make yourself an expert – and keep your ghosts friendly.
ADLAND PD No. 032373
TWO FACE
"I'll know it when I see it." Send a shiver down your spine? Two Face has the slowest trigger finger of all. "Make the logo bigger. No, smaller. A little bigger?" Worse, this client doesn't take ownership, leaving your project vulnerable to pressure from others. Give a gentle reminder that your project needs a champion. Introduce a phased approach to creative execution to build confidence and cut down on vacillation.
centraldesktop

A FIELD GUIDE TO THE WONDERFUL WORLD OF CLIENTS

EVERY FIRM HAS THAT ONE CLIENT—THE ONE WHO MONOPOLIZES YOUR TIME, FRUSTRATES THE ENTIRE STAFF, AND MAKES UNREASONABLE DEMANDS. BUT THE CUSTOMER IS ALWAYS RIGHT. RIGHT?
HERE ARE A FEW TIPS TO RECOGNIZE WHEN YOU'VE GOT ONE OF THESE CHALLENGES ON YOUR HANDS AND HOW TO DEAL WITH THEM.
(Hint: Say "No" A Lot More.)

KEY — *Identifying characteristics* | *Care and feeding instructions*

Mr. I'm Not Really Sure What I Want

Constant change of heart; says one thing on a call but has a completely different opinion in an email an hour later.

Get everything in writing once an approach is decided upon; reject major course-correction after the fact.

Mr. Hey What's That Over There, aka, Mr. I Assumed This Was Included

Insistence on getting a little bit more out of your team each time you talk; frequent requests to expand the scope of the project.

Agree to do out-of-scope work only at an added upfront cost.

Mr. I Needed This Done Yesterday

General lack of awareness of the space-time continuum; belief that simply having ideas means work is completed.

Be straightforward—if they expect the impossible, educate them to reality.

Mr. Everything's an Emergency

Firm belief that he is the only client you could possibly have and therefore is deserving of 100 percent of your time.

Establish clear time tables and meet all deadlines so you can show the client everything is on track. Remind them that you do have other clients.

Mrs. We Don't Have a Deadline—Oh, Wait, Yes We Do and It's Tomorrow

Flightiness, often in terms of being out of the corporate loop.

Agree on a timeline as soon as possible, and remain confident in rejecting requests that will endanger deadlines or projects for other clients.

Mr. I Don't Really Care; Just Do Whatever You Want

Completely hands-off approach, lack of key information even when pressed for it.

Take advantage of the freedom this client provides, but always require client buy-in at critical stages to head off major reworking.

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FIRST DIVISION
CASE NO: 07-CI-04247

CARLIE SIMONE SCHINDLER (NOW AMBROSE) **PETITIONER**

VS. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

CHARLES JOSEPH SCHINDLER, II **RESPONDENT**

On December 4, 2015, a series of events occurred which ultimately resulted in this action being transferred to the First Division of the Fayette Circuit Court, after the recusal by the Sixth Division.

The Petitioner and her counsel seek sanctions and attorney's fees against Crystal Osborne, who was the Respondent's lawyer at that time.

This Petitioner's Motion has been presented in terms of Contempt of Court or Sanctions under CR 11. The issue was set for hearing on December 16, 2016, at 10:00 a.m. Ms. Osborne appeared with her counsel, James Deckard, and appeared personally. The Petitioner appeared through her counsel, Michael Davidson. Ms. Osborne filed a brief setting forth her defense to the Motion for Sanctions, originally filed over a year ago on December 7, 2015. The Petitioner filed a Reply to that brief.

The Motion for Contempt and/or Sanctions under CR 11 is **OVERRULED.** The Court does not believe that Ms. Osborne's conduct was a willful disobedience of or open disrespect of the Court's orders or rules. The Court also does not believe that Civil Rule 11, even if applicable, needs to be applied.

The Court, however, does believe that attorney's fees should be paid under KRS 403.340 (6) which supplies a sufficient remedy for motions in Divorce cases. The word that is used in KRS 403.340 (6), which seems to apply in this matter, is "vexatious".

> *"Attorney's fees and costs shall be assessed against a party seeking modification if the Court finds that the modification action is vexatious and constitutes harassment". (emphasis added).*

The heart of the Petitioner's Motion can be summarized with a question: When do arguments or statements of lawyers to a Judge become a lie, which is contempt, subject to sanctions?

In this case, just a few days prior to December 4, the Family Court Judge had ordered that the Father, represented by Ms. Osborne, would begin to establish visitation after a long interval of no contact. The statute does not define vexatious, but the dictionary says legal actions "instituted without sufficient grounds and serving only to cause annoyance". The Court finds that Ms. Osborne's primary mistake was not in filing a motion to protect the interests of her client, but in doing so in an "*ex parte*" fashion. There have been no reasonable grounds given for her failure to give some proper notice to the Mr. Davidson. On December 4, 2015, little to no effort was given to notify counsel. The resulting action to change custody to the Father was severe. Filing the Motion *ex parte* was "vexatious and constitutes harassment".

Ms. Osborne testified that because of her failed relationship with Mr. Davidson, she did not pick up the phone and call him. If she was not in a position to have reasonable communication with another professional, she should not have been the attorney in the case, and for sure should not have filed "*ex parte*" motions to avoid contact with him.

The following will explain some of the Court's reasoning.

In this case, perhaps it would help to have a philosophical discussion about the simple question, "*What is truth*?" to quote Pontius Pilate. Almost from the time of birth, human beings learn that the full and complete truth will simply get you in trouble. Children learn very early that small lies work to our benefit. This human nature to tell something less than the truth continues until finally, some people become lawyers (some would argue professional liars). If one was to take the position that everything less than the perfect truth is a lie, then indeed the accusations are not totally without merit.

The Oath: Witnesses in a courtroom are sworn in to tell the "Truth, the whole truth, and nothing but the truth, so help me God". Why? The law presumes that people will always say <u>less</u> than the truth, if not under oath. Lawyers are <u>not</u> sworn in, but nevertheless, the lawyer's code of conduct, both written and unwritten, states that lawyers, as Officers of the Court, are sworn to tell the truth in the same way that witnesses raise their right hand and swear to tell the truth under oath in the courtroom.

The Dilemma: There is often a dilemma for lawyers. A lawyer is required to represent his or her client to the utmost. By definition, at least in the minds of most lawyers, that means that something <u>less</u> than the <u>whole</u> truth is necessary. That certainly means that leaving out some of the story is usually a good idea, or so most lawyers would agree. This is a very real dilemma.

As an example from routine law practice, a lawyer may interview the client, develop information and facts, and then go to court hoping and praying that the "whole truth" never comes out. The lawyer hopes that the other attorney doesn't ask the right questions. Or that the Judge himself, as likely happens in Family Court, doesn't ask the right question. Clients are coached to <u>not</u> tell the whole

truth. Lawyers contain information in their brain (and sometimes their confidential files) which is clearly part of the truth, and yet that "truth" is never relayed to the Court because it would be detrimental to the interests of their client. The dilemma in representing the client to the fullest extent possible while at the same time keeping the duty to the court to speak total truth is a dilemma indeed.

One of the problems in this Schindler case is that the attorney's failure to speak the whole truth was created by her genuine belief that her actions were justifiable because of the potential tragedy of what she believed would happen. This attorney believed that the Mother in this case was in the process of "kidnapping" the child and moving to Australia. In hindsight, based on the passport application, it was an erroneous belief but not a ridiculous irrational belief. That belief led to her willingness to convey to the Judge something less than, "the truth, the whole truth, and nothing but the truth". The desire to 'win' leads to a compromise of pure truth when the stakes are high.

Clearly, in hindsight, the communication between the attorney and the Judge at the bench on December 4, 2015, was not the whole truth. Regardless of what Kay Hubbard actually said (and that will always be a matter of some dispute), the fact is that the information conveyed to the Judge (that Kay Hubbard was one of the persons who was blowing the whistle on the situation and was absolutely certain that the Mother was on the run out of the country with the child) was not "the whole truth". Ms. Osborne's mistake was a belief that perfect truth might not lead to justice.

It should be stated that virtually every lawyer in America would be guilty of contempt of court and subject to CR 11 sanctions if subjected to the same scrutiny as this case. The reason that this case has taken on a life of its own is that the end result was a legal disaster. A child was supposed to go to see her father in an orderly process around the Christmas holiday, an event which should have been

joy and the beginning of a new relationship between daughter and father. Instead, the father absconded to Mississippi with the child under the guise of taking her to a therapy session.

Perfect Truth: There is a phrase in the study of language we often use to compliment someone from another country. They "speak perfect English", and we are so impressed that they do. As a poor student who made a D in French, I have always appreciated persons who are able to speak "perfect anything".

But the truth is, who speaks "perfect truth"? Anyone? Is there any lawyer who speaks perfect truth? This case is actually a wonderful opportunity for the lawyers to reflect on the responsibilities of all lawyers to speak the whole truth.

And without a doubt, both parents in this case bear some blame in this situation. When the custody and timesharing hearing commenced on October 31, 2016, there were eight (8) lawyers in the room, all necessitated by contentious and damaging litigation between parents over their rights and responsibilities with a little girl who is now twelve years old. Thousands of dollars are spent every hour in and out of court. This child's college education money is being spent on lawyers.

These lawyers would not exist if the Mother and the Father had not hired them and decided that it was worth every penny they have. It all sounds so laudable, spending every dollar you have "for your child". In the Mother's case, she believes it is justified because this father abandoned the child for many years and she is now protecting the child from a bad father, she believes. In the Father's case, he is doing the same, believing genuinely that this little girl is damaged by his absence.

Without a doubt, the lawyers stretch the truth because the clients themselves have been doing that from the very beginning. Both the parties

exaggerate their claims. Instead of trying to speak the perfect truth, the parties dig the hole deeper and deeper until neither one of them even knows what that truth is.

So, the bottom line becomes this: "When does something less than perfect truth spoken by a lawyer actually become contempt of court or sanctionable under CR11, or at least vexatious or harassment? "

Frankly, if the Petitioner in this case was unrepresented by counsel or otherwise completely innocent of all untruthfulness or wrongdoing, it would be easier to make a finding that Ms. Osborne was in contempt of court or should be sanctioned for knowingly making false statements under CR11. However, in this case, the beliefs of Ms. Osborne were partly created, even if erroneous, by misleading information that actually came from the Mother and her attorney. Therefore, it seems somewhat unjustified to find the misstatements of one lawyer contemptuous while the other advocate is patted on the back. It should not go unspoken that every lawyer in this case has probably said something less than the truth in the course of the litigation. Lawyers who insist that the other side speak perfect truth need to be prepared to speak that same perfect truth for themselves. Very few are willing to do that.

Without a doubt, Ms. Osborne could have given better legal notice to the Mr. Davidson. Due to a total breakdown in a basic professional relationship, Ms. Osborne knew that she would not be able to call Mr. Davidson to work out exactly these types of problems and issues. This should have happened. The chaos of the December 4 and following is an example of why not every lawyer should represent every client. Once again, the lack of perfect honesty and perfect truth led to the result of the case. It was not just the mere words that were spoken from the lawyer to the Judge at the bench, it involved everything that happened thereafter. Yes, the Judge paid a price for which she has personally taken responsibility. But there

is also responsibility on the parties and attorneys who took actions which were less than truthful, resulting in the necessity of this Order.

The Whole Truth: In Court, we ask people to not just tell the truth. We also ask them to tell the "whole truth". If taken technically, every simple statement should be fully explained. But then again, seldom does a Judge want to hear the "whole truth". Every answer to every question would be more like a novel, with all the psychological and emotional background of the players, trying to explain the so-called "whole truth".

This is a common problem among lawyers. A judge may ask a lawyer a simple question like "When did you file your response?". It would be the 'truth' to say "Monday", but that would not be the whole truth. The whole truth would be that it was filed Monday at 4:00 p.m., but not emailed or faxed to opposing counsel until late that evening, or hand delivered to opposing counsel's office on Monday evening, sliding the copy of the document under the lawyer's door. And so, when opposing counsel says they never received anything until Tuesday, they are being completely accurate, and rightfully upset that opposing counsel, while they may have spoken the "truth", did not speak the "whole truth". For many lawyers in Fayette County, this is routine business.

Or perhaps a better example is a Family Court case where the lawyer tells the Court that the client is "married", trying to convey to the Court that the client has shown a degree of stability inferring that the client is not one to have serial relationships, even though the client may be the father of nine children by seven different women. All the Judge is told is that Mr. Jones is married and a so-called "good father". The whole truth might be that he has never married any of the mothers of his children, and that he only got married this time two days earlier for the express purpose of trying to impress the Judge. These kind of things happen routinely in Family Court. It is all considered part of being a good lawyer, to

accentuate the positive and ignore the negative. The "whole truth" is seldom spoken.

Nothing but the Truth: This phrase speaks to the fact that many lawyers will speak the truth, but instead of letting the truth speak for itself, they add information that is irrelevant and oftentimes deliberately intended to distract the Court or the listener from the real truth. Not speaking the "whole truth" means leaving out useful information but the "nothing but the truth" phrase speaks to adding information to cloud the decision maker's ability to make good decisions. Often the truth is there but covered up by so many other facts that the concept of real truth is muddy and confusing at best.

So Help Me God: And last, the traditional oath adds the concept of "So help me God". This just makes the point that there is indeed a Higher Power in more than just A.A. meetings. Lawyers and judges are accountable not only for reasons of legal and judicial ethics, but also subject to a judgment from this Higher Power for the words we speak. Fortunately, this Higher Power is more merciful than most judges and far more merciful than most lawyers are to each other.

So, perhaps it would help to re-define language itself when the oath of witnesses and the obligations of lawyers are considered. Thus, exaggerations are not really exaggerations but a small lies. And arguments are not just arguments, but can be small lies.

It is the duty of every good lawyer to not only convince his or her client to tell the whole truth, but also to do the same themselves. If a lawyer cannot do that, a lawyer should not accept an appointment as an attorney in the case. That principle applies whether the client is indigent and the work is pro bono, or in a case like this where multiple lawyers are being paid $350.00. No lawyer should take a case unless he or she can make a commitment to the <u>whole</u> truth, and when

it becomes apparent that he or she cannot do that, a Motion to Withdraw should happen immediately.

Therefore, this Court finds as a matter of law that, pursuant to KRS 403.340 (6), Attorney's fees should be paid by Crystal Osborne to the Law Office of Michael Davidson, PLLC, on behalf of the Petitioner. An Affidavit of Attorney's Fees has been presented by the Petitioner's counsel, and a Response thereto shall be filed no later than January 4, 2017. In light of this Order, the parties should discuss an appropriate sum of fees to be paid. It they are unable to agree on a sum of attorney's fees, the Court will hear the matter on **January 12, 2017, at 10:30 a.m.** at the end of the regular Motion Hour docket.

Entered this 29 day of December, 2016.

JUDGE, FAYETTE FAMILY COURT

A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT
BY _____ DEPUTY

CLERK'S CERTIFICATION

I hereby certify that a true and correct copy of the foregoing was mailed on Dec. 29, 2016, to the following:

Michael Davidson
139 West Short Street, Suite 100
P.O. Box 2185
Lexington, Kentucky 40588-2185
Counsel for Petitioner

Andrew Stephens
107 Church Street, Suite 200
Lexington, Kentucky 40507
Counsel for Petitioner

Kate L. Green
302 West High Street
Lexington, Kentucky 40507
Counsel for Respondent

Louis T. Waterman
First Trust Centre, Suite 700 North
200 South Fifth Street
Louisville, Kentucky 40202
Counsel for Respondent

James L. Deckard
127 West Main Street
Lexington, Kentucky 40507
Counsel for Crystal Osborne

Helen L. Bongard
2659 Regency Road
Lexington, Kentucky 40503-2933
Guardian Ad Litem

Vincent Riggs

CLERK, FAYETTE CIRCUIT COURT