



# The Accidental Lawyer: Terms of Engagement

## Practical Strategies to Avoid the Pitfalls of Private Conversations

- OCTOBER 30, 2018 - ASHEVILLE
- OCTOBER 31, 2018 - GREENSBORO
- NOVEMBER 8, 2018 - CLEMMONS
- NOVEMBER 9, 2018 - CONCORD
- JANUARY 11, 2019 - RALEIGH (AM & PM SESSIONS)
- JANUARY 30, 2019 - NEW BERN
- JANUARY 31, 2019 - GREENVILLE
- FEBRUARY 1, 2019 - WRIGHTSVILLE BEACH

## 2018 – 2019 CLE Series Speaker Biographies



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**ReelTime CLE** is a nationwide provider of dynamic, interactive workshops, conferences, retreats, and professional development training programs, committed to using the most proven and effective methods of adult learning to help professionals work (and interact with one another) more productively and sustainably. **Chris Osborn** and **Michael Kahn** began providing their innovative workshops on ethics, professional responsibility, diversity and inclusion and mental health/substance abuse awareness for lawyers in 2007. Since January 2010, their workshops have been enjoyed by hundreds of participants in 20 U.S. States, as well as throughout Australia and Canada. In August 2012, their program, “*Practicing Dirt Law and Keeping Your Nose Clean*”- *Stress and Ethical Decision-Making for Real Estate Attorneys*, received an **Award of Outstanding Achievement in Programming** from ACLEA, the Association for Continuing Legal Education Professionals.

In addition to his ongoing work with ReelTime CLE, **Chris Osborn** is the founding principal of *Osborn Conflict Resolution Services* in Charlotte, NC, through which he serves as a trained collaborative lawyer for both family law and other civil disputes, and also litigates and tries cases where necessary. Chris has been certified by the N.C. Dispute Resolution Commission as a Superior Court mediator since 2009 and has assisted the vast majority of his legal clients over the years to reach amicable resolutions in a wide variety of litigation matters, including business breakups, construction and employment law disputes, and will caveat disputes. From 2012-2015, Chris served as an Assistant Professor at the Charlotte School of Law, where he taught “Interviewing, Client Counseling, and Negotiations,” Civil Procedure, Contracts, “Problems in Practice: Commercial Transactions,” and “Intro to the Study of Law.” While on the faculty, Chris’ scholarly research focused on ethics and professional responsibility, and particularly the interrelationship of both with mental health and substance abuse issues. Upon graduating from the University of Virginia School of Law in 1995, Chris began practicing litigation in Charlotte. He served as a career law clerk to former U.S. Magistrate Judge Carl Horn III before joining Horack Talley Pharr & Lowndes, PA, in 2001. During his 11 years as an associate and a shareholder with the firm, Chris handled construction and real estate litigation, business litigation, and employment disputes in Superior and District Courts, as well as in all three North Carolina federal district courts.

**Michael Kahn** holds a J.D. from the Dickinson School of Law, and practiced law with the Attorney General’s Office for the State of New Jersey for 6 years. Although he left the practice of law in 1991, his work thereafter has kept him involved in the lives of lawyers in various capacities. Following a stint as Assistant Director of Career Services with the Tulane University School of Law, Michael obtained his M. Ed. in Counseling from UNC-Greensboro in 1994, and shortly thereafter became a Licensed Professional Counselor in the State of North Carolina. Michael’s areas of focus in his psychotherapy practice have included anxiety, depression, grief/loss, career satisfaction, and men’s issues, and he has worked with adolescents and adults in individual and group therapy settings. In 2012, he relocated to Oregon, where in addition to continuing his speaking career, he served as an Adjunct Professor at the Lewis & Clark Graduate School of Education & Counseling and co-facilitates grief groups for lawyers. He currently resides in Vancouver, BC, and he continues to present training seminars and workshops on ethics, grief, wellness, diversity and inclusion, and other topics for lawyers and mental health professionals throughout the U.S., Japan and Germany, including for the U.S. military.



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**Warren Savage** joined Lawyers Mutual as claims counsel in 2005. He focuses on litigation, insurance law, appellate advocacy, criminal matters and professional responsibility in his work with Lawyers Mutual. A former partner with the law firm of Bailey & Dixon, Warren graduated from the University of Virginia and earned a Master of Arts in Teaching at the University of North Carolina at Chapel Hill before graduating magna cum laude from Campbell University School of Law. He spent several years as a high school English teacher and junior varsity basketball coach before entering the legal profession. Warren currently serves as an advisory member of the State Bar Ethics Committee and speaks frequently at CLEs around the state about professional responsibility and malpractice claims avoidance.

**Mark Scruggs** joined Lawyers Mutual in March 2001 as claims counsel. Formerly a partner with Spear, Barnes, Baker, Wainio & Scruggs, LLP in Durham, Mark has over 14 years' experience as a trial attorney concentrating in insurance defense litigation. For the last 12 years, Mark has worked with Lawyers Mutual primarily in the area of litigation-related claims, as well as workers compensation and family law matters. He is a 1986 cum laude graduate of Campbell University School of Law. Mark is a past chair of the Law Practice Management section of the North Carolina Bar Association and currently serves as an advisory member of the State Bar Ethics Committee. He also serves on the North Carolina Bar Association's "Retiring with Dignity Taskforce" working to address issues facing aging lawyers.



**“THE ACCIDENTAL LAWYER”: TERMS OF ENGAGEMENT**

Timed Agenda - 3.0 Hour Live Program\*

9:00 *Welcome, Introduction, & Ground Rules*

9:05 **Pitfall No. 1:** Public Places—When There’s No Escape  
First Vignette: *Flakes on a Plane*

Scene 1 & Discussion/Debrief  
Scene 2 & Discussion/Debrief  
Scene 3 & Discussion/Debrief

10:00 *Break*

10:15 **Pitfall No. 2:** Friends and Relations  
Second Vignette: *Guess Who Shouldn’t Have Come to (Thanksgiving) Dinner*

Scene 1 & Discussion/Debrief  
Scene 2 & Discussion/Debrief  
Scene 3 & Discussion/Debrief

11:05 *Break*

11:20 **Pitfall No. 3:** The On-Site Client Visit  
Third Vignette: *“Dude, Where’s MY Lawyer?”*

Scene 1 & Discussion/Debrief  
Scene 2 & Discussion/Debrief  
Scene 3 & Discussion/Debrief  
Scene 4 & Discussion/Debrief

12:10 **Accidents Don’t Have to Happen:** Practical Steps for Protecting Yourself  
from Perils, Pitfalls, and Problems

12:30 *Adjourn*



**“THE ACCIDENTAL LAWYER”: TERMS OF ENGAGEMENT**

Timed Agenda - 3.0 Hour Live Program\*  
AFTERNOON SESSION

1:30 *Welcome, Introduction, & Ground Rules*

1:35 **Pitfall No. 1:** Public Places—When There’s No Escape  
First Vignette: *Flakes on a Plane*

Scene 1 & Discussion/Debrief  
Scene 2 & Discussion/Debrief  
Scene 3 & Discussion/Debrief

2:30 *Break*

2:45 **Pitfall No. 2:** Friends and Relations  
Second Vignette: *Guess Who Shouldn’t Have Come to (Thanksgiving) Dinner*

Scene 1 & Discussion/Debrief  
Scene 2 & Discussion/Debrief  
Scene 3 & Discussion/Debrief

3:35 *Break*

3:50 **Pitfall No. 3:** The On-Site Client Visit  
Third Vignette: *“Dude, Where’s MY Lawyer?”*

Scene 1 & Discussion/Debrief  
Scene 2 & Discussion/Debrief  
Scene 3 & Discussion/Debrief  
Scene 4 & Discussion/Debrief

4:40 **Accidents Don’t Have to Happen:** Practical Steps for Protecting Yourself  
from Perils, Pitfalls, and Problems

5:00 *Adjourn*



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## **THE ACCIDENTAL LAWYER: TERMS OF ENGAGEMENT** **Practical Strategies to Avoid the Pitfalls of Private Conversations**

- **Know the Factors Considered in Determining Whether an Attorney-Client Relationship Has Been Formed**

The ABA Model Rules of Professional Conduct<sup>1</sup> are silent, unfortunately, regarding the formation of an attorney-client relationship (outside the context of court-appointed representation). However, Section 14 of the *Restatement (3d) of the Law Governing Lawyers* (which summarizes the general approach followed in most states) indicates that a relationship of client and lawyer arises when: “a person manifests to a lawyer [his or her] intent that the lawyer provide legal services for the person,” and the lawyer either (a) manifests consent or (b) “fails to manifest lack of consent to do so” when the lawyer “knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.”

The most important thing to bear in mind is that the formation of a lawyer client relationship does not require that a formal agreement be entered by the parties. There need not have been a signed agreement, a handshake, a discussion of rates, or even an engagement letter. Rather, in determining whether a professional relationship has been formed in the absence of a written agreement, most courts or disciplinary tribunals will utilize an objective test. Because lawyers have specialized knowledge and experience concerning the formation of professional relationships that the average lay person does not possess, courts will often will examine the words and conduct of each party, *from the putative client's perspective*, to determine whether a reasonable person in his or her circumstances would conclude that a professional relationship was formed with the lawyer. In other words, if a person asks a lawyer a legal question, and the lawyer answers or even says he or she “will look into it,” an attorney-client relationship may result.

It is therefore crucial for lawyers to pay close attention to their words and actions in dealing with anyone who appears to be interested in seeking legal advice. The necessity of such vigilance is especially heightened when such communications occur outside the traditional law office setting. In determining whether a professional relationship has been implicitly formed, a court or tribunal will typically examine the totality of the circumstances, paying close attention to the words and actions of the lawyer, in particular. As the party with greater specialized knowledge of the practice of law, the lawyer has the

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<sup>1</sup> Because this program has been offered in multiple jurisdictions, this manuscript refers to the text of the ABA Model Rules of Professional Conduct. However, we will make specific note wherever the applicable North Carolina Rules of Professional Conduct are different in substance or format.



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duty to communicate clearly about the nature and scope of any relationship entered, however fleeting or seemingly trivial the interaction.

In “*Guess Who Shouldn’t Have Come to Thanksgiving Dinner*,” finding the establishment of an attorney-client relationship would be no difficulty at all. Stephanie explicitly asked Alec if she could discuss a legal matter with him. Alec not only listened to her description of the situation, but expressly told her to send him the original contract and any additional information she had, and that he and someone at his firm would get to work in the lawsuit. It is beyond dispute that Alec agreed to answer her questions, and in fact began giving her some legal advice in the course of the conversation (regarding the viability of a claim for breach, the applicable statute of limitations, and defendants who may be “judgment proof”). Any reviewing tribunal would conclude that both Alec and Stephanie intended to form an attorney-client relationship. This is so even though they failed to discuss a specific price or formula for compensation. Accordingly, Alec and his firm would have serious malpractice exposure for having missed the statute of limitations issue.

In “*Dude, Where’s My Lawyer?*” the situation involving Kyle and Jackie was somewhat murkier. It is not as obvious that Jackie was asking Kyle for legal advice, at least during their initial meeting. However, by the time they meet in the coffee shop, we learn that she provided Kyle with a draft letter to the partners stating her position, and Kyle has provided her feedback and guidance that he represents will help get the deal finalized. It is clear that Jackie subjectively believes that Kyle has been brought in to help her, and the only potentially open issue is whether he belief is reasonable under the circumstances.

In determining whether Jackie had a reasonable expectation that Kyle was serving as her lawyer, the following factors would likely be given significant weight by a reviewing court:

- Stanley essentially told Jackie that she was “in good hands” with Kyle, and that he was “the best.”
- In their initial meeting, Kyle said, “I am really sorry that all this happened, but I am on the scene and I am confident that I can bring this to a resolution.”
- Jackie said in one of her “confessional” sequences, “When I first met Kyle I was under the impression that he was representing me because he was offering his help and advice and was introduced as someone who can help me. I didn’t know having someone represent both myself and the company was an issue. I don’t know how it works.”
- Kyle never clearly explained that he represented the company, the intended limited scope of his involvement, or the purpose of his meetings with Jackie.





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- Kyle later met with Jackie offsite, one-on-one, to discuss her concerns, which would further make it reasonable for her to believe that she has a confidential relationship with Kyle.
- Kyle continued to avoid defining his role even after Jackie got more upset and confrontational.

Kyle's failure to clearly identify himself and demarcate the limits and purposes of his interaction with Jackie is further problematic in light of Rule 1.13, which governs the representation of an organization as a client. Rule 1.13(a) provides that "[a] lawyer employed or retained by an organization *represents the organization* acting through its duly authorized constituents." Since a lawyer engaged in representing an organization will necessarily have to interact with individuals associated with the organization in a number of different capacities and roles, Rule 1.13(f) sets forth that "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a *lawyer shall explain the identity of the client* when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing" (emphasis added). Kyle should have realized that Jackie and the company had adverse interests, by virtue of their continued protracted negotiations over the terms of her employment agreement, and that should have triggered him to be very up front in identifying the company as his actual client, and the only entity to whom he owed any duties or obligations.

To guard against the accidental formation of a lawyer client relationship, then, a lawyer must define his or her role up front and immediately make clear who he is paid by, what specific services he has been engaged to provide, and whose interests he is charged with representing. For example, in "*Dude...*," Kyle could have said, "I need to let you know that I represent the company, and I want to make clear that I do not represent you. I am paid by the company, and I am ethically bound to look after its interests. My role is to assist the company in reducing to writing any agreement you may reach with it. And please know that I cannot give you any legal advice, except to consider that you may want to consult with an independent lawyer of your own choosing."

In "*Flakes on a Plane*," a court might not find that Alfred and Barry entered an attorney-client relationship. Alfred in fact ultimately told Barry that he would not be the best person to help him, and the two made no further plans for communication or other interaction. However, as discussed below, even if a court or disciplinary tribunal concludes that no professional relationship was formed, Alfred would still likely be found to have undertaken certain ethical duties to Barry as a result of their conversation.





- **Remember that Certain Duties May Be Assumed Even *Without* Formation of an attorney-client Relationship**

North Carolina RPC Rule 1.6 provides that “(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”<sup>2</sup> This duty to protect confidential information is, of course, quite obviously applicable whenever an attorney-client relationship has been expressly or impliedly formed.

However, Rule 1.18 makes clear that the duty to maintain information communicated in confidence is even more broadly applicable. That rule begins by defining a “prospective client” as “[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.” The Rule then expressly provides in subparagraph (b) that “[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.”

This is where our friend, Alfred, got himself into trouble. Although Barry would not likely be able to establish that he reasonably believed Alfred would be representing him in an action against the airline, he would not have difficulty showing that he communicated with Alfred for the purposes of seeking his professional knowledge and advice. Barry asked Alfred multiple times whether he was a lawyer, and Alfred replied in the affirmative each time. Barry then proceeded to ask very specific legal questions regarding whether he could sue the airline, whether the McDonald’s hot coffee case was similar to his, and whether any previous injuries or lawsuits could be used against him in a lawsuit against the airline. Although Alfred seemed to have some hesitation about continuing the conversation with Barry, at every juncture he nevertheless continued the conversation, and in fact ultimately even provided opinions in response to each of Barry’s legal questions. And finally, Alfred later confided to Rachel that he could tell that Barry was treating him “like I was his lawyer or something.” Barry was therefore indisputably seeking Alfred’s professional opinion, as a lawyer, about multiple points of law, and Alfred’s willingness to answer each question would render quite reasonable Barry’s perception that Alfred was communicating with him in a professional capacity.

The only remaining question is whether Barry communicated confidential information to Alfred in the course of their conversation. It is clear from Barry’s actions and choice of words that he intended certain of the comments he made while pestering Alfred to be

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<sup>2</sup> Subparagraph (b) lists a number of special circumstances, none of which is applicable in any of our three scenarios.



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confidential: he leaned in closer to Alfred when disclosing his previous lawsuits and injuries, as well as when essentially confessing that the present injury was not all that bad. Likewise, Barry looked around to make sure that no one was within earshot before making certain of his comments, and he even held off speaking further once when the flight attendant approached with additional towels. Given that the pieces of information he disclosed—previous injuries and prior successful claims—are of a nature that one might ordinarily want to keep confidential, and might only disclose to a lawyer for the purpose of seeking legal advice about their impact on a subsequent claim, the reviewing court would have no trouble finding Alfred bound to maintain Barry’s communications in close confidence.

Alfred therefore violated his duty of confidentiality to Barry by sharing with Rachel information about Barry’s history of prior injuries and lawsuits. That act alone was enough to risk serious disciplinary sanction by a reviewing court or disciplinary body. But the exchange of confidential information proved to be problematic in a different respect as well. Had he said nothing to Rachel about the conversation with Barry, Alfred still might have been identified as a witness to the incident giving rise to the claim. Had either party sought his testimony regarding what he saw and heard regarding the spill, he would likely have been permitted to testify on that limited basis. He would have been barred, however, from testifying about the confidential communications he received from Barry, by the attorney-client privilege, which prevent a lawyer from being compelled to testify about confidential communications from a client. This privilege belongs to the client, and is his to invoke or waive. Thus, even though Alfred would like to have testified regarding what Barry told him, he was foreclosed from doing that as well (irrespective of whether he had previously passed the information on to Rachel).

In “*Dude...*,” Kyle ran into difficulties regarding maintaining confidential communications as well. Once it was determined that Jackie had a reasonable belief that Kyle was acting as her lawyer, he would not be permitted to divulge any information she communicated to him in the course of their confidential communications. We can see that he belatedly realized this fact when he catches himself just as he is about to tell Stanley that Jackie has been seeing a psychiatrist.

Even more problematically, Kyle’s communications with Jackie had even greater consequences, both for his law firm and its former client. Based on his having received confidential information from Jackie (such as the fact of her past mental health conditions and treatment, as well as her particular points of emphasis and desires regarding the contract), Kyle was ultimately disqualified from representing Stanley’s company in



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further litigation of Jackie’s claims.<sup>3</sup> Under Rule 1.10, even an inadvertent lawyer-client relationship would be imputed to the lawyer’s firm, not just to the lawyer. Kyle’s lack of care in communicating with Jackie likely ended up costing Kyle and his firm a potentially lucrative piece of business for a significant client (and may have irretrievably soured the client relationship altogether).

- **Discover the Value of Setting Boundaries and Saying “No”**

Turning down a lay person’s request for legal advice can be challenging and uncomfortable. None of us wants to appear rude, of course, and sometimes we might like to leave the door slightly open for a more lucrative or interesting matter the person may have in one of our actual areas of expertise. But turning a person down is often not only in your own best interest, it may also be the best thing you can do for them, providing them with an opportunity to find a lawyer with greater expertise in the relevant area of the law.

Saying “no” may become less difficult if you are able to re-frame the situation: you are not so much rejecting the person or refusing to help them, but, rather, making sure that you steer them to the best possible person to handle their legal matter efficiently and effectively, even if that person is unfortunately not you at this time. Make it clear that you are putting him/her first. You can even state your intentions just that succinctly, by saying something like, “I’m not in a position to provide the assistance you need at this time, but I will find you someone who is. I want to make sure **you** get the best advice, and the most competent representation available for such an important matter.”

In “*Guess Who...*,” turning down Stephanie’s request for legal services would have benefitted Alec’s firm, primarily by saving it a hefty malpractice settlement (not to mention the likelihood of a premium increase). But more importantly, he could have provided Stephanie and William with excellent service by referring them to a lawyer who had the right expertise. The good will created by doing so might then have led to referrals for the firm, down the road. (Think about the effect, in the classic Christmas movie, *Miracle on 34<sup>th</sup> Street*, when the Macy’s Santa Claus sent shoppers up the street to a rival department store for better deals or to find items that Macy’s didn’t have in stock. The

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<sup>3</sup> The same result would likely occur even if Jackie is somehow characterized as a “prospective client.” See Rule 1.18 (c): “A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter... If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).”



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store manager initially grew irate, but ultimately saw the greater value derived from providing excellent customer service, and the profits reaped were measurable.)

The following are other examples of gentle ways to “call the question,” and steer the person towards either officially hiring you at a time and place when you can employ the usual protocols (such as a conflicts check, a written fee agreement, or a consultation fee), or politely declining representation:

- “If you are interested in forming a lawyer client relationship, please contact my office and make an appointment during office hours. I need the time to research this. While I am not your lawyer now, I could be in the future.”
- In *“Flakes on a Plane,”* Alfred could have said: “I’m preparing for a hearing tomorrow. I don’t have time to discuss this with you. When you land you should seek out the advice of a personal injury lawyer who will be able to help you, but I can’t be that person.”
- In *“Guess...,”* Alec could have said: “That’s not my area of practice.” Or “Look, we are having a fun family holiday gathering. I have had a glass of wine and I am not sure it is the best time to talk about this right now. Let’s set up a meeting in my office on Monday. We can go through all the issues and you can choose how to proceed.”
- “It’s Not You... It’s Me.” As human beings, when we are just not interested in a person who has expressed romantic intentions, or when we find ourselves in a relationship that we no longer want to continue, eventually we find ways to communicate our lack of desire or disinterest. It may help to draw upon whatever motivations or internal self-talk one relies on in those kind of situations, and adapt them for this kind of scenario.
- Remember that it is perfectly okay to say “I don’t know,” or, “I am so sorry, but I cannot help you with that.” A lawyer’s desire to appear to “have all the answers” often overrides his or her willingness to say “I don’t know.” But all kinds of experts, if they are honest, have to answer in such fashion at some point in time.

And it is always a good idea to follow up with a letter or email documenting the fact that you have declined representation and referred the matter elsewhere.



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- ***Recognize that Protecting Against These Kinds of Pitfalls is More than a Matter of Mere Knowledge or Committing to “Best Practices”***

With the benefit of objectivity, we can all identify where each of our cinematic lawyers went astray and can likely identify things they could have done to avoid trouble. For example, Alfred could easily have said, “I don’t do personal injury work,” or found another polite way to brush Barry off. Or he could have just been rude and not given him the time of day. Alec similarly knew, in hindsight, that Stephanie might try to take advantage of their relationship and seek legal advice without obligating herself or her husband to pay for it. And he likely knew enough litigation principles to know that any time multiple years have passed since the factual scenario described by a potential client, a lawyer has to be super-careful about identifying any potential statute of limitations issues. And in “*Dude...*,” Kyle even admitted that he knew it was best practice to be very clear about representation of a company when interacting with an employee or principal of that company. But as he candidly admitted, he “just wasn’t thinking.”

The failures of our protagonists to do the obvious things that they themselves likely knew they should to protect themselves should serve as a warning to all of us. For a variety of reasons, not one of them was able to do the right thing in “the heat of the moment,” regardless of how obvious it might have been. The problem for each of these lawyers was not lack of knowledge about their duties and ethical obligations. What, then, happened? Each of them reacted emotionally, carried away by something he wanted or desired out of the situation. The trouble is that being driven by what we want to get or accomplish in a given situation can often lead to faulty thinking and poor decision-making.

Consider the following ideas for protecting yourself against the accidental slip ups that we saw Alec, Kyle, and Alfred make:

- **Identify and Take Stock of Your Core Values**

*In “Dude...”* Kyle’s ego and desire to please Stanley may have led to the trouble he found himself in at the end. It is clear that Kyle really likes being thought of as knowledgeable and helpful, and of course he places a high value on bringing in new business for his law firm. Who wouldn’t like to hear an important client say you are “...one of the finest lawyers in the business.” Or “Don’t worry you are in good hands with Kyle. He is the best.”

But Kyle’s desire to maintain his “image” as a competent lawyer leads him to neglect to communicate basic information that would have established what kind of professional capacity in which he would be working with Jackie. It is not a bad thing to want to be helpful, to be liked, and desire to be seen as competent. The problem





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occurs when those things become more important than one's ethical or professional responsibility. To be fair, Kyle did not have a lot of direction from Stanley. He was put in a difficult spot and should have requested more information, or at least expressed concerns about the potential conflict. But it is quite likely that being seen as the dependable, knowledgeable lawyer was so important to Kyle that it blinded him to the potential for misunderstanding.

Similarly, Alfred might have steered clear of getting tangled up with Barry on the plane, but he was unwilling to be rude; more importantly, his own beliefs about justice and lawsuits led him to communicate with Barry more than he should have, telling him to “document his injuries” (knowing that Barry likely would not be able to do so). Unfortunately, by sharing opinions that sounded like legal advice, Alfred unwittingly stepped into a heap of trouble. Then, even more problematically, Alfred failed to recognize that he was disclosing potentially confidential information in the coffee shop with Rachel—largely because he appeared to have amorous intentions towards her, and was so caught up in the flirtatious conversation that he never paused to think about whether Barry might have considered their communications confidential.

In “*Guess Who...*,” Alec could have easily and honestly told Stephanie that he was unfamiliar with the law regarding her case; however, he liked being the guy with the answers. Ultimately, he got overly wrapped up in another person's perception of him, and that outweighed his responsibility to be cautious whenever discussing a statute of limitations.

Much like Alfred, Alec, and Kyle, we lawyers have core values as well. What we desire (or expect, or demand) from the practice of law (or from life in general) has a big impact on how we act, and the choices that we make in any given situation. Any “core value” that we hold stronger than our commitment to ethical integrity may end up “driving the train” of our decision-making. Thus, it is essential that we stop and evaluate our most deeply held desires and motives, and give serious thought to how they might be in play with any decision we face.

It takes determination and reflection to discern what one is really after in a given situation, however. Consider the following questions (and if you are brave, talk through them with a trusted friend or mentor):

- What are my *real* “core values”? What overall goal or purpose is informing--or even dictating--my day to day professional choices? Is it getting (or saving) money? Reputational status? Comfort or ease? A sense of control? Approval in relationships? Or something else?





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- What principle, or object, or goal, is so important in my life that, when I fear losing it, I am more liable to lose my ethical moorings? (Or, put another way, “What makes me angry?”)
- What am I living for? Why do I get up every morning and do what I do? Why am I in the practice of law in the first place? What do I truly need to be happy, fulfilled, or OK with myself?
- What is my definition of “success”? Of “happiness”? Are these goals defined in such a way that I can still pursue and maintain them even amidst the inevitable ups and downs of practicing law?

The point here is not to criticize your core values, or to suggest that you adopt new ones. It is, rather, to suggest that each of us would benefit greatly from examining our core values and motivations, regularly and often, in order to give them no more role than they deserve in our everyday ethical decision-making, and to identify the particular ones that could cause us to lose sight of our ethical obligations.

## ○ **Practice Self-Awareness and Mindfulness**

When approached by someone asking a legal question, pay attention to how you are feeling and what you are thinking at any given moment; doing so will better enable you to deal with the situation with a clear head and to set appropriate boundaries. It is crucial that a lawyer in such a situation be thoughtful and deliberate about his or her communication, and wherever possible, acutely aware of his or her potential habitual tendencies or areas of vulnerability.

Mindfulness is also of practical benefit, in that it keeps a person open to other options on how to behave or communicate in a given situation. Had Alfred been more mindful and self-aware during his plane trip, he might have been firmer with Barry about not representing him. And better yet, had he noticed he was feeling irritable or “keyed up” by Barry’s desire to manipulate the legal system, he might have had the presence of mind to get up from his seat and returned with a better plan.

As Stephanie said, family members often have expectations that they can seek free legal advice from a lawyer family member. In addition, a lawyer frequently may feel a strong “pull” to help a family member. To complicate the issue, the lawyer’s guard could be down due to alcohol, fatigue and/or emotional triggers. Be extremely wary, particularly if you are tempted to delve into an area of law outside your expertise.



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## ○ Pursue Effective and Regular Self-Care

Lawyers can often get into ethical or professional trouble by disregarding aspects of their personal lives outside of work. By paying better attention to one's social life, intellectual development, family commitments, physical condition, and spiritual needs, and with the increased self-awareness described above, a lawyer can more likely avoid the problems experienced by Alfred, Alec, and Kyle.

Some level of stress is to be expected in the practice of law, as in most any professional job. But attorneys are especially prone to experiencing a chronically high level of stress, and doing nothing (or worse yet, extremely unhealthy things) to cope with it. The trouble is that not only does chronic stress lead to debilitating health effects, but beyond a certain level, stress impairs our higher ordered reasoning processes. When we are in “survival mode,” and “flight” or “fight” feel like the only options, we are in particular danger of making short-sighted decisions—and possibly disastrous ones. It is therefore crucial for attorneys to pay attention to the sources of stress, fear, pressure, or compulsions that may affect our ethical decision-making. Towards that end, consider the following questions:

- What are the warning signs that I am under stress, pressure, anxiety or fear? What do I do with these emotions or sensations when I realize that they are at work? Is there anyone helpful I can talk to about it?
- Which sources of stress are legitimate, and to be expected in my practice?
- Which ones should not be permitted to exercise such control over my life or work?
- How do I maintain my sense of ethics, integrity, and presence of mind, in the face of regular or ordinary stress? What about in the face of *extraordinary* stress?

On the final page of this handout, you will find some helpful specific questions to help you to identify any particular areas of vulnerability or exposure that you may have. We would encourage you to spend a few moments with these questions, and then to choose a couple of actions steps for protecting yourself against these potential pitfalls and perils. Even better, if you are really committed to being proactive on these issues, find a colleague with whom you can talk about your areas of risk and ask to keep you on track with your action steps. And remember, “be mindful out there!”



## ***“The Accidental Lawyer” - Engaging with Yourself to Avoid the Pitfalls***

1. When people ask me to provide my opinion on a legal matter, I typically feel:

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2. The recurring situations where I am most likely to be caught off guard by a request for legal services or advice are:

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3. Given my personality, current employment, and type of practice, I am most vulnerable to forgetting, neglecting, or compromising my ethical principles for the sake of:

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4. The three things most important to me in life are:

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How does my current allocation of time, money, and energy match up to these most important parts of my life?

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5. In a typical week, how often do I take time to care for my mental well-being (e.g., exercise, reading for pleasure, socializing, arts & entertainment, spiritual/religious activities, hobbies)? Is this enough?

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6. One thing I may need to change about my life or my law practice based on what I have learned in this program is:

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