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Legal ethics – not just for ethicists

By Joel A. Osman

MCLE SELF-ASSESSMENT TEST

Osman

How many attorneys, after passing the Multistate Professional Responsibility Examination portion of the bar exam, give little thought to legal ethics? Alarmingly, I'm afraid the answer is far too many.

While the general public gives little thought to legal ethics and has little notion of what legal ethics require, that's no excuse for attorneys to ignore these rules. If we are going to improve the standing of the profession in the eyes of society and serve our clients well, we must do better. This article is for those who don't consider themselves legal ethicists to brush up on the basics.

California is singularly unique among the 50 states: Its ethics rules are not modeled on the ABA Model Rules of Professional Conduct, although certainly there are similarities between the Model Rules and California's Rules

The Rules of Professional Conduct are "intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted … to protect the public and to promote respect and confidence in the legal profession." But the Rules of Professional Conduct are not exclusive. Members of the bar are also bound by applicable law, including the State Bar Act (Business & professions Code §6000 et seq.) and opinions of California courts. Per the Rules of

Professional Conduct, members should also consult opinions of ethics committees in California for guidance on proper professional conduct, although they are not binding.

In addition to its role enforcing the Rules of Professional Conduct, the State Bar provides various resources and sponsors activities designed to increase awareness of the Rules of Professional Conduct both within and outside the profession. The Committee on Professional Responsibility and Conduct (COPRAC) is a standing committee of the State Bar Board of Trustees. The committee's primary charge is the development and issuance of advisory ethics opinions to assist attorneys in understanding the professional responsibilities under the Rules of Professional Conduct. COPRAC also does outreach to the profession by providing speakers to various bar organizations on legal ethics, providing Minimum Continuing Legal Education (MCLE) training and publishing monthly articles on legal ethics such as this one.

A key purpose of this outreach effort is to persuade members of the bar that ethics is not a one-and-done activity which ends on admission. Members of the bar should consider ethics an ongoing, everyday factor in their practice. Viewed from this perspective, the Rules of Professional Conduct are not a list of disciplinary no-no's – they become instead an indispensable "how-to" manual for doing our jobs right and possibly, as a byproduct of doing this, improving the general public's perception of our profession.

To illustrate this consider the following hypothetical. Keep in mind this hypothetical is a hyperbole intended to illustrate the number of ethical rules involved in the daily decisions of a typical attorney. It is an extreme example for illustrative purposes only. It is not intended nor is it recommended as a course of conduct that anybody should follow. The reason for this should be obvious when you look up the many rules implicated in this hypothetical.

A potential client walks into Lawyer A's seeking to engage his services. The client explains that she is involved in a long-running, very acrimonious dispute with her next-door neighbor which she wants to take to the next level based upon her belief that the neighbors' fence encroaches on her property.

In describing this dispute, the client reveals to Lawyer A that her acrimonious relationship with the neighbor is based in part on her feelings regarding the neighbors' ethnicity. She wants Lawyer A to litigate her property line dispute and specifically instructs Lawyer A to do so in a way which inflicts the maximum possible vexation and annoyance upon her hated neighbor. Lawyer A has never done a property dispute case. Lawyer A doesn't tell the potential client this. Instead Lawyer A accepts the engagement and tells the client that he'll have his "associate" get right on it. Lawyer A does not inform the client that the associate is serving a six-month suspension of his law license. The client hands Lawyer A her $25,000 "retainer" check and walks out the door. Lawyer A deposits the check in the office operating account.

The first thing the associate does is to have the client's property lines surveyed. Rather than front the cost of the property survey, the associate offers the surveyor a percentage of the fees to be earned in the prosecution of this case. The survey reveals that the neighbor's fence does not encroach on the client's property. Lawyer A promptly reports this fact to the client, who instructs Lawyer A to proceed anyway. Lawyer A decides that pursuing a nonmeritorious case is not for

him and tells the client that he is withdrawing from the representation. But in an act of charity, he refers the client to a law school classmate who is desperate for business. The client hires the classmate and instructs Lawyer A to send her file to the new lawyer. Lawyer A does, but does not include the property line survey in the material, which could blow the client's case out of the water. The classmate proceeds with the property line dispute on behalf of the client.

How many different ethics rules are involved in the hypothetical above? Let's count them down:

1. Lawyer A has agreed to take on a case that may be beyond his competence, as he has never previously handled a property line dispute. This implicates Rule of Professional Conduct 3-110 which prohibits a lawyer from failing to act competently.

2. Rule of Professional Conduct 2-400 states that a member of the bar shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in accepting or terminating representation of any client. It's unclear whether this prohibition precludes acceptance of an engagement motivated in part by discriminatory intent. It is, however, apparent that Lawyer A did not consider this rule or its potential effect in accepting this engagement.

3. There is no indication in the hypothetical whether Lawyer A undertook any sort of conflict check before initially agreeing to undertake this engagement. Rule of Professional Conduct 3-310 states that absent written disclosure and consent, a member shall not accept or continue representation of a client whose interests are adverse to those of another client. As a practical matter, law office risk management requires that a conflict check be performed before the acceptance of any new representation. In the context of large firms, conflict checking can be a significant process. In the context of small firms it can be more informal. In this instance there is no indication whether the potential for a conflict even entered into Lawyer A's mind.

4. Lawyer A employs as an "associate" an attorney whose license to practice law has been suspended. Rule of Professional Conduct 1-311 allows a member to employ or associate professionally with a disbarred, suspended, resigned or involuntarily inactive member of the bar if, but only if certain preconditions are complied with. These preconditions include providing written notice of same to the State Bar and to "each client on whose specific matter such persons will work, prior to or at the time of employing such person to work on the client's specific matter." In this hypothetical Lawyer A did neither.

5. In the hypothetical, the client instructs Lawyer A to inflict the maximum possible vexation and annoyance upon her hated neighbor throughout the litigation. Lawyer A

does not object to this instruction. In doing so, Lawyer A fails to take in consideration Rule of Professional Conduct 3-200 which prohibits a member from accepting or continuing employment if the member knows or should know that the objective of such employment is to bring an action or a certain position in litigation without probable cause and for the purpose of harassing and maliciously injuring any person. (See also Business & Professions Code Sections 6068(c) which enjoins counsel to "maintain those actions, proceedings or defenses only as appear to him or her legal or just" and 6068(g) which requires "Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.) It is unclear whether Lawyer A knew or should have known that the claim was meritless at the beginning of the engagement but he should have pointed out to the client the inappropriateness of her instruction with respect to maximizing vexation and annoyance to her opponent.

6. The hypothetical does not describe that Lawyer A and the client enter into a written retainer agreement for this engagement, which we can reasonably presume to be intended as an hourly engagement. Further, given the size of the "retainer," we can presume that it was reasonably foreseeable that the total fees would exceed $1,000. Business & Professions Code §6148 prescribes written retainer agreements in such situations and provides that if no such agreement exists or if the conditions set forth in the section are not complied with, the retainer is "voidable" and the attorney may only collect a reasonable fee.

7. Lawyer A put the $25,000 "retainer" into his law firm's general operating account in violation of Rule of Professional Conduct 4-100, which requires that all funds received or held for the benefit of clients including advances for costs and expenses shall be deposited in one or more identifiable trust accounts.

8. The associate's deal to pay the surveyor a percentage of the fees to be earned in the prosecution of this case violates Rule of Professional Conduct 1-320, which regulates financial arrangements with non-lawyers (and also perhaps provides us with a clue as to how/why the associate got suspended in the first place).

9. In promptly reporting the results of the survey, Lawyer A did exactly the right thing. Rule of Professional Conduct 3-500 requires that a member keep a client reasonably informed about significant developments relating to the employment or representation. Occasionally, questions arise as to whether any particular development is "significant" enough to violate this rule. Obviously, the results of the survey were a significant development and were required to be reported under this rule.

10. In deciding to withdraw from the engagement after receipt of the surveyors report, Lawyer A gets another one right. As discussed above, Rule of Professional Conduct 3-200 prohibits a member from continuing employment if the member knows that the objective of such employment is to bring an action without probable cause for the purpose of harassing or maliciously injuring any person.

11. Lawyer A's "charitable" act in referring the client and her nonmeritorious action to harass and annoy her neighbor to his desperate law school classmate violates both Rule of Professional Conduct 3-200 and Rule of Professional Conduct 1-120 by knowingly assisting in, soliciting or inducing his classmate to violate Rule of Professional Conduct 3-200.

12. Lawyer A's withdrawal from his engagement by the client is governed by Rule of Professional Conduct 3-700. If Lawyer A has already filed an action, he must seek permission from the tribunal to withdraw pursuant to Rule 3-700(A). Under Rule 3-700(B), Lawyer A is required to withdraw because he knows that the client is asserting a position without probable cause for the purpose of harassing or maliciously injuring her neighbor.

13. Lawyer A may not withhold the surveyors report from the client or successor counsel. Rule of Professional Conduct 3-700 (D) states that a member whose employment has terminated shall, at the request of the client, promptly released to the client or her designee all the client papers and property. Client papers and property are defined to include expert reports such as the survey report.

Obviously, this hypothetical situation is an exercise in hyperbole. It does, however, clearly demonstrate the central point that ethics are not just for ethicists. They are, of necessity, a central part of every lawyer's day-to-day practice. Lawyers who fail to conduct themselves accordingly not only put themselves at risk but also perpetuate the negative reputation of our profession as a whole.

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