ethics perspectives

by Jason C. Blackford

Avoiding Unintentional Grievances

The corporate fraud excesses that have come to light in recent years have raised the level of lawyers' concern with professional ethics. Congressional legislation has forced the Securities and Exchange Commission to set forth very strict guidelines for attorney conduct when representing publicly held companies.

Most of these complaints to certified grievance committees do not involve violations of the Code of Professional Responsibility but result from inadequate attorney-client communications, poor law office management and ignorance by the attorneys of their responsibilities. These problems can be easily avoided. Unfortunately, the grievance committees are still charged with the responsibility of investigating these complaints. The purpose of this article is to assist lawyers in avoiding unintentional breaches of the Code of Professional Responsibility.

1. Default Under A Child Support Order. An attorney admitted to practice in Ohio is subject to an immediate interim suspension from practice if there is a final and enforceable determination that the attorney is in default under a child support order. See, Rules for the Government of the Bar, Rule V, Section 5(A)(1).

R.C. §4705.021 requires the child support enforcement agency to advise disciplinary authorities of the attorney's non-support. A certified copy of the entry of default under a child support order is conclusive evidence of that default. Reinstatement is permitted when there is a certified copy of a judgment entry reversing the determination of default under a child support order or a notice that the attorney is no longer in default under the child support order. This reinstatement does not terminate any pending disciplinary proceeding.

2. Failure to File Income Taxes. The willful failure to file income tax returns is a violation of Disciplinary Rule 1-102(A)(6) and warrants a suspension from the practice of law (*Office of Disciplinary Counsel v. Bowen*, 38 Ohio St.3d 323, 528 N.E. 2d 172 (1988); *Office of Disciplinary Counsel v. Roetzel*, 70 Ohio St.3d 376, 639 N.E.2d 50 (1994)). In a more recent case, a lawyer was suspended for failing for 10 years to report and remit 941 liabilities owed on his secretary's earnings. He also filed fraudulent W-2 forms and did not report or pay amounts for the secretary's coverage by the Ohio Unemployment Compensation system. This constituted a violation of Disciplinary Rule 1-102(A)(3), (4) and (6). The Supreme Court concluded that the lawyer had basically converted over $40,000 that he should have paid on his secretary's behalf and had tried to conceal the theft with false documentation (*Office of Disciplinary Counsel v. Bruner*, 98 Ohio St.3d 312, 2003-Ohio-736). File those returns and pay those taxes!

3. Referral Fees. A lawyer who pays "kickbacks" or makes gifts to an in-house counsel in exchange for receiving work as the corporation's outside counsel is in violation of Disciplinary Rule 2-103(B) (*Ohio State Bar Ass'n. v. Zuckerman*, 83 Ohio St.3d 148, 699 N.E.2d 40 (1998); *Ohio State Bar Ass'n. v. Kanter*, 86 Ohio St.3d 554, 715 N.E. 2d 1140 (1999); *Office of Disciplinary Counsel v. Linick*, 84 Ohio St.3d 489, 705 N.E.2d 667 (1999)).

Disciplinary Rule 2-103(B) prohibits a lawyer from compensating a person or giving anything of value for the recommendation or the securing of employment as an attorney. Furthermore, Disciplinary Rule 2-107(A) prohibits a division of fees by lawyers not in the same firm without, *inter alia*, the written disclosure of the terms of division, the identities of the lawyers and the prior consent of the client. The division of fees should be in accordance with the services provided by each attorney. By written agreement with the client, all attorneys must assume responsibility for the representation. Disciplinary Rule 3-102 states, with limited exceptions, a lawyer should not share legal fees with a non-lawyer. For example, it is ethically improper under Disciplinary Rules 3-103(A) and 5-104(A) for a lawyer to accept a fee from a financial services group for referring clients in need of financial services (Board of Commissioners on Grievances and Discipline, Opinion 2000-1 (Feb. 11, 2000)).

4. Legal Malpractice Protection. Disciplinary Rule 1-104 requires attorneys who do not maintain legal malpractice insurance in the minimum amounts of $100,000 per occurrence and $300,000 in the aggregate to inform their clients in writing of this fact. Further, they are to secure their client's written acknowledgment of this fact and maintain a copy of the written signed notice for a five-year period after the termination of the representation of the client. The Disciplinary Rule specifies the exact language that must be used in notifying the client and the client acknowledgment. Any lawyer failing to maintain the minimum legal malpractice insurance must follow through with the requirements of Disciplinary Rule 1-104(A)-(C). There are exceptions for government attorneys and house counsel.

5. Threatened Criminal Action. A

lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter (Disciplinary Rule 7-105(A)). Such conduct not only can be a violation of the Code of Professional Responsibility but can also lay the basis for civil action against the lawyer making the threat.

6. Competence. It may surprise many lawyers that the Code of Professional Responsibility requires a level of legal competence. Canon 6 provides that "a lawyer should represent a client competently." Disciplinary Rule 6-101(A) states that a lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle without assistance from a lawyer who is competent to handle it.

Ethical Consideration 6-2 urges that a lawyer keep abreast of current legal literature, participate in continuing legal education programs and concentrate in particular areas of the law. Ethical Consideration 6-3 permits a lawyer to accept employment if in good faith he expects to become qualified through study and examination, so long as the "preparation would not result in an unreasonable delay or expense" to the client. The requirement of competency will be enforced by the Board of Commissioners on Discipline and Grievance and the Ohio Supreme Court. See, *Cincinnati Bar Association v. Harmon*, 17 Ohio St.3d 69 (1985).

7. Communication. One of the major problems for lawyers in their dealings with their clients is the failure to communicate. Laymen inexperienced with the judicial process are concerned about the status of their cases and require frequent updates and explanations. While a client's case may be just another matter to the attorney, the client's lack of knowledge regarding the status of the case may create uncertainty and undermine the attorney-client relationship. Unfortunately, grievance committees are inundated with calls from clients complaining that their attorney does not reply to their telephone calls. When the grievance committee or Disciplinary Counsel contacts the lawyer, the lawyer is incensed that the client has gone to the bar association or to Disciplinary Counsel.

The two simplest things a lawyer can do to forestall such an unwelcome call from a bar association or Disciplinary Counsel is to 1) return all phone calls from the client and 2) keep the client advised with routine written status reports. There is dicta in *Disciplinary Counsel v. Mauk* (1987), 32 Ohio St.3d 164, requiring a lawyer to provide the client with the attorney's address and telephone number.

8. Surreptitious Recordings of Conversations Without Notification or Consent. How often have you thought how helpful it would have been to have recorded that conversation with opposing counsel? The act of recordings by attorneys of clients, witnesses and opposing counsel without their consent or notification may violate Disciplinary Rule 1-102(A)(4). The only exception is when the context of the circumstances does not rise to the level of dishonesty, fraud or deceit.

The burden is on the attorney to justify the surreptitious action on a case-by-case basis (Board of Commissioners on Grievances and Discipline, Opinion 97-3 (June 13, 1997). See also, American Bar Association Formal Opinion 337 (1974)). The only exception noted was for federal or state prosecuting attorneys acting within strict limitations conforming to constitutional requirements. Recordings can be made with the consent of all parties to the communication.

9. Failing to Have a Trust Account and Commingling of Funds. There are few breaches of conduct which receive more consistent penalties from the Supreme Court than lawyers who fail to establish a separate escrow account for their clients' funds and property. Disciplinary Rule 9-102 requires a lawyer to deposit all clients' funds in one or more identifiable bank accounts in which no funds belonging to the lawyer are deposited.

Where a lawyer uses his trust fund to receive personal as well as client funds and to pay personal bills and business expenses, Disciplinary Rule 9-102 is violated (*Ohio State Bar Ass'n. v. Kanter*, 86 Ohio St.3d 554, 715 N.E.2d 1140 (1999); Dayton *Bar Ass'n. v. Rogers*, 86 Ohio St.3d 25, 711 N.E.2d 222 (1999); *Disciplinary Counsel v. Phillips*, 81 Ohio St.3d 80, 689 N.E.2d 541 (1998)). The recent U.S. Supreme Court decision in *Brown v. Legal Foundation of Washington* (2003) has upheld the IOLTA trust account system and eliminated any argument to the system's validity.

10. Improper Advertising. The Ohio Code of Professional Responsibility regulates lawyer advertising in Disciplinary Rules 2-

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101 through 2-105. In advertising legal services, it is improper for an attorney or a law firm to list settlements or verdict amounts obtained in past cases. Statements such as, "Trip/fall sidewalk-brain injury, a One Million Dollar verdict" or "Dog bite, $50,000 settlement" are misleading, self-laudatory and may be unfair (Board of Commissioners on Grievances and Discipline, Opinion 2002-7 (June 14, 2002)). A list of *settlement and verdict amounts lacks information* as to the strengths and weaknesses of cases, severity of damages, information as to credibility of witnesses, availability of insurance coverage, or other factors that would influence the settlement or verdict amounts.

Board of Commissioners on Grievances and Discipline, Opinion 2002-6 (Dec. 1, 2002) found it was improper for a law firm's web site home page to include quotations from clients describing the nature of the legal services provided, responsiveness of the law firm and other non-substantive aspects of the firm's representation. Such client quotations are client testimonials prohibited by Disciplinary Rule 2-101(A)(3). Furthermore, these may be misleading to the public under Disciplinary Rules 2-101(A)(1) and (C) depending upon the content of the quotation.

11. Advancing Expenses. A lawyer, while representing a client in contemplated or pending litigation, shall not advance or guarantee financial assistance to the client (Disciplinary Rule 5-103(B)). There are exceptions which permit a lawyer to advance or guarantee expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence. The repayment of these costs of litigation may be contingent upon the outcome of the matter.

12. Continuing Legal Education. A lawyer may be suspended from the practice of law for failing to meet the continuing legal education requirements (*In re Report of the Commission on Continuing Legal Education* (2000), 88 Ohio St.3d 1468, 726 N.E.2d 1006). The failure to meet the continuing legal education requirements also violates Rule X of the Rules for the Government of the Bar. See also, *Office of Disciplinary Counsel v. Richardson*, 95 Ohio St.3d 499, 769 N.E.2d 824, 2002-Ohio-2484 (2002).

13. Contingent Fee Agreements. Revised Code Section 4705.15 requires that all contingent fee contracts must be in writing and signed by the attorney and the client. The attorney must provide a copy of the signed contingent fee agreement to the client.

Furthermore, R.C. 4705.15(C) requires that if the attorney is entitled to compensation under a contingent fee agreement, a signed closing statement shall be prepared and provided to the client at the time of or prior to the receipt of the compensation under the agreement. This closing statement must specify the manner in which the compensation of the lawyer was determined together with any costs and expenses deducted by the attorney from the judgment or settlement involved and any proposed division of attorney's fees, costs and expenses with referring or associated counsel. A failure to memorialize a contingent fee arrangement in writing may subject the attorney to discipline (*Office of Disciplinary Counsel v. Richardson*, 95 Ohio St.3d 499, 969 N.E.2d 824, 2002-Ohio-2484 (2002)).

A lawyer will violate Disciplinary Rule 2-106(A) if he enters into a contingent fee agreement with a client and then attempts to obtain a fee based on an hourly rate (*Office of Disciplinary Counsel v. Watson*, 95 Ohio St.3d 364, 768 N.E.2d 617, 2002-Ohio-2222 (2002)). In that same case the Supreme Court found that the lawyer violated Disciplinary Rule 1-102(A)(4) and (5) when he filed a civil suit against the client and did not disclose the contingent fee arrangement.

In the field of legal ethics the attorney is his own client. The bar associations make available avenues to answer a lawyer's questions concerning professional ethics in a real world setting. Too few lawyers take advantage of this service.

It is also advisable to request another lawyer to review one's office procedures to see if there is any inadvertent violation of the Code of Professional Responsibility. With increasing professional liability premiums, an audit of one's practice may not only be an ethical responsibility but an economic necessity. Many bar associations, including the Cleveland Bar Association, have ethics committees to assist lawyers in handling ethics questions in their practice. ■

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