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"Ethical Considerations in Law Office Practice"

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If you've ever been the subject of a disciplinary complaint, chances are it was filed against you by your client. Of the nearly 3200 written complaints filed against attorneys annually with the Office of Disciplinary Counsel, the vast majority are lodged by disgruntled clients. Nearly 80% of complaints are found to be either without merit or lack 'clear and convincing evidence' of misconduct.

There are many things that the practitioner can do to reduce the chances of having a complaint filed against him/her. Here are a few 'tried and true' tips that have proven helpful:

- Try to avoid the *problem client.* Their presentation will vary from case to case, or practice area to practice area. Many have common traits that include:

- The client who has fired or terminated two or more lawyers before hiring you;
- The client with unreasonable expectations;
- The client who *knows* more law than you do;
- The client who is unreasonably 'needy';
- The client who wants to 'help' in his/her representation;
- The client who wants a 'loan' on his/her case early on in the representation;
- The client who lies to you—about anything!

- Competence: Rule 1.1(a) of the Rules of Professional Conduct provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

For the average solo or small firm member, a practice is often 'focused' on particular areas of the law, whether it be domestic, criminal defense, tort, maritime, bankruptcy, estate matters, real estate, or any number of other combinations. *Stay within your area of competence!* While each of us would like to think we can maintain a broad based 'general practice', the complex legal world we live in make that much less likely today than ever before. Where your experience is lacking in a field of law, do not be hesitant to refer the client to someone skilled in that area or, with client consent, to associate with that other lawyer on your case.

- Setting Client Expectations: Perhaps the single most overlooked way to avoid becoming the subject of a disciplinary complaint is when a lawyer fails at the inception of the attorney-client relationship to set the client's expectations *reasonably*; or worse, promises outcomes which none of us can guarantee.

  For many clients, your engagement will possibly be their first encounter with the legal system. Their expectations of you and the legal system are often unrealistic and predicated on what they've read, watched in popular television programming, or heard by word of mouth--none of which tends to paint an accurate picture of what lies ahead. This is ***your*** opportunity to set those expectations in a fashion that more accurately reflects reality.

  - Tell them how you practice—with professionalism and courtesy extended to the Court and to your opponent—and that so called 'Rambo tactics' are rarely successful.

- Explain the inherent delays in the system of justice with which you are familiar, but about which they probably know nothing.
- Advise the new client regarding your caseload; and that while their legal matter is important, so are the dozens of other legal matters you are already handling, and/or will also be handling, for others.
- Share your plans to keep them informed about progress on their case, forwarding copies of relevant correspondence or pleadings, and the scheduling of office visits or planning meetings.
- Reinforce the maxim that no result is <u>ever</u> guaranteed, taking time to highlight not only the positive facts of their case, but the negative ones as well.
- Acquaint them with your staff and the duties they have, while outlining the limits on your staff's authority and their role within your office.
- Acquaint them with how easy, or not so easy, it may be to speak with you when they want to or need to speak with you, depending upon your other client commitments, litigation schedule (i.e., when you're in court, in depositions, etc.), and your own personal life/private time (i.e., I am not generally available for client phone calls at 3 a.m. on Sundays, etc.).

- <u>Confirm Your Fee Arrangement:</u>

  Rule 1.5 of the Rules of Professional Conduct centers on fees charged by attorneys and, in general, requires that fees and costs shall be reasonable.

  Rule 1.5(b) provides:
  "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

Money issues are often at the root of many disciplinary complaints. While only contingency fee agreements must be in writing (see Rule 1.5(c)), the far better practice is to do so with all fee agreements —and, ideally, in a contract signed by the client at the outset and with a copy provided to the client. As legal matters proceed, the cost of representation can often create anxiety, frustration and anger, particularly when the proceedings drag out or outcomes are less than as hoped for/anticipated. It is here that the ODC sees many complaints emerge. Memorializing your fee arrangement removes the uncertainty of the financial relationship, and can diminish the chances of a client's 'fudging the facts' about your initial fee discussion.

- Handling Fees and Billing:

It is **not permissible** to provide for a *non-refundable fee* in any fee agreement with clients. The Rules of Professional Conduct and the Supreme Court jurisprudence make it abundantly clear that lawyers are permitted to charge, collect and/or retain fees only if they are earned. Provisions within a fee agreement which provide for a so called 'non-refundable fee' are not only unenforceable, but are violations of the Rules.

Rule 1.5 sets out the types of fee arrangements which are ethically permissible and how such fees (and costs) are to be maintained. Generally, the ethics rules recognize the following types of fees and how they are handled:

- Retainers: A true retainer is one that purchases the lawyer's "general availability" and is not related to a particular representation. The funds may be placed in the lawyer's operating account, as they are considered fully earned when paid (assuming the lawyer's availability is preserved during the contracted for period). Rule 1.5(f)(1)
- Fixed Fee or Minimum Fee: When paid in advance for a particular, specific legal matter, the lawyer may treat them as property of the lawyer and the fee may be placed directly into the lawyer's operating account, so long as the legal matter for which the lawyer was engaged is completed. Rule 1.5(f)(2); but see Rule 1.5(f)(5) regarding subsequent fee disputes

- Advance Deposits for Future Fees/Costs: Typically used in hourly billing arrangements, this fee agreement provides the lawyer with assurances that legal efforts on the client's behalf will be paid for in a timely fashion as the fees are earned or as costs are incurred. These funds remain the property of the client and must be maintained in a trust account until earned.
- Contingency Fee Agreements: The payment of these fees is contingent on the outcome of a particular matter (but cannot be charged in criminal defense engagements, or in domestic relations cases where the fee is contingent on securing a divorce, amount of alimony or support, or property settlement in lieu of support). The corpus of funds received must initially be placed into the firm's trust account, and must be disbursed with a statement explaining the means by which the funds are being distributed. Rule 1.5(c).

Where the lawyer charges a fixed or minimum fee, be clear with the client as to the scope of the work to be covered by that payment. If the fee is 'large', it is often advisable to place the funds into the trust account and withdraw them in segments which reflect the same percentage of the whole fee paid as it bears to the percentage of the whole contracted-for representation, much like "progress payments" often used in construction contracts between contractors and property owners. This avoids the difficult problem lawyers face when they are discharged before the full representation is completed and they are called upon to refund the 'unearned' portion of the fee as required by Rule 1.5(f)(5).

In advance deposit representations (typically hourly billing), the far better (but sometimes impossible) practice is to require the client to replenish the exhausted advance deposit timely in order to prevent the client from 'getting into the pocket' of the lawyer. The accrual of large unpaid hourly fees, which are then demanded at critical junctures (such as before a crucial hearing or trial), or at the end of the representation (perhaps with a less than hoped for outcome), almost always results in the filing of disciplinary complaints. Make it clear to your client that prompt payment of the fee upon billing is the client's duty and responsibility, AND what your position/policy and response will be

regarding the continuation/termination of the attorney-client relationship if that duty is not honored by the client.

- Conflicts of Interest:
  You are THEIR LAWYER. Not unreasonably, they expect your undivided loyalty. Perhaps nothing spoils the nascent attorney client relationship so much as when doubts creep into the minds of clients that you are not 'in their corner' or that you've been favoring the interests of the 'other side'.

  Clearly, under Rules 1.7, 1.8, 1.9 and 1.10, a lawyer has obligations to avoid conflicts of interest which preclude loyalty to a client. It is NEVER permissible to represent opposing sides in the same litigation or legal matter; nor is it permissible to take on a representation against a current client, even when the matters are distinct, except where there exists a 'consentable conflict' and the affected client's consent is obtained in writing after securing informed consent. A quality, dependable conflict avoidance system is an absolute necessity for any practitioner, no matter the size of the office.

- Communication: The single most frequent complaint filed against lawyers by their clients is the alleged failure by attorneys to communicate with them. Rule 1.4 speaks to this ethical duty and provides:
  "(a)A lawyer shall:
  (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e) is required by these rules;
  (2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  (3) Keep the client reasonably informed about the status of the matter;
  (4) Promptly comply with reasonable requests for information; and

(5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

Recognize at the outset that, as a lawyer, YOU WORK FOR THE CLIENT. Keeping ones 'employer' informed and responding to inquiries are just as naturally components of the attorney-client relationship as they are in any other employment setting. And yet we, as lawyers, often fall short in carrying out that duty, or fail to 'meet the client's expectations' (see above!).

There are some things that we, as lawyers, can incorporate into our practice habits that will not only help to ensure that we are complying with our ethical obligations, but will reduce complaints and/or provide a quality defense to allegations that we've shirked our duty to communicate.

- Honor the commitment you made at the start of the representation. Whatever you've committed to do when you were initiating the attorney-client relationship, keep your word! Making reasonable commitments to your client is only the beginning—you have to see it through.
- Send clients copies of relevant correspondence and pleadings that will keep the client abreast of developments in the client's case.
- Return those phone calls! While not every phone call made to the lawyer by the client can be accepted on every occasion, RETURN THEM TIMELY! Where the phone calls become repetitive or excessive, call the client in to confront the issue right away.
- Make sure you identify decisions that are best left to the client and make the client take responsibility for a course of action to be taken in the client's case.
- Set up periodic in-person office consultations with the client to personalize the representation and to get a sense of client satisfaction or frustration; AND KEEP THE APPOINTMENT!

- Develop a habit of confirming in writing all meaningful conversations held with clients. Not only does it give you the opportunity to make sure that both you and the client are on the same page, but it provides a powerful collection of evidence for the lawyer when confronted with baseless allegations that communications did not occur.

- Diligence:

When clients agree to hire us, they breathe a sigh of relief and are confident that their problems will be addressed professionally and timely. And they wait … and wait … and, then, wait some more. While some delay in the legal process is simply unavoidable, far too often we as lawyers simply fail in our obligation to act with reasonable diligence. Not only is unnecessary delay harmful to the relationship with our clients, but it may rise to the level warranting disciplinary action.

Rule 1.3 is a short rule and simply provides:
"A lawyer shall act with reasonable diligence and promptness in representing a client."

As previously discussed about complaints regarding a lack of communication, allegations of neglect and lack of diligence can be effectively minimized at the outset of the representation (by setting those expectations reasonably), and during the course of the relationship. A few helpful tips:

- Monitor your caseload to avoid an overload. In these often difficult economic times, the temptation often exists simply not to let any new client 'get away'. While sometimes difficult to embrace, it is often true that 'less is more'. Accepting fewer clients and performing a higher quality service for each typically will result in better outcomes, happier clients, and (ironically) a higher income for the lawyer.
- Develop, from the outset, a reasonable timeline to complete the representation, and periodically reevaluate the projection to assure not only that it remains realistic, but that you are on track to meeting deadlines.

- Avoid procrastination. Sounds simple enough, but in reality it is the single largest reason why lawyers (and most people) do not get things done in a timely fashion. Watch for the early warning signs of 'procrastination' and confront them head on.
- Touch every file in your office periodically which may mean once a week, once a month, or once every six weeks depending upon the nature of your practice. Review the file and if needed take some substantive action to move the matter on towards completion.
- Delegate to staff those support efforts that will assist you in the goal of a successful completion of the client's legal matter, mindful of the limits of those assignments lest the lawyer risk assisting in the unauthorized practice of law.

Completing Or Ending the Representation:

The termination of the attorney-client relationship can occur because the subject matter of the representation has come to an end, or because, before its completion, the attorney or client decides to cease the relationship. In both instances, certain duties exist and extend beyond the final date of active engagement. Rule 1.16 of the Rules of Professional Conduct speaks to the ethical duties associated with declining or terminating representation.

Some keys to avoiding a disciplinary complaint include:

- Funds representing fees not earned and costs not incurred must be returned promptly--ideally, at the time that the relationship ends and the file(s) is/are returned to the client. Nothing ensures the filing of a disciplinary complaint like holding onto the client's money while walking away from the engagement.
- Where the attorney and client disagree on whether or not a fee has been fully earned, the disputed portion must be placed in trust (or in the registry of the court) while/until the dispute is resolved. Suggest to the client that opting to use the LSBA fee dispute arbitration program is a quick, inexpensive means of resolving the matter.

- If possible, make the decision to terminate the relationship as early on in the representation as possible. If a client feels as though he/she is being 'abandoned' at the last minute without the opportunity to engage new counsel, the client may view the lawyer's conduct as unethical—and he/she could be right!
- No matter when or how the representation ends, always maintain client information as confidential, consistent with the lawyer's obligations under Rule 1.6. A client who learns that information provided to the lawyer has been disclosed to others will almost always file a complaint.
- Give them their file—all of it--immediately! Louisiana's rule does not provide for a "retaining lien" on the file to secure payment of fees or costs in favor of the lawyer [note: while perhaps permissible in other jurisdictions, this is not permitted within Louisiana]. It is not permissible to hold the file 'hostage' to secure and/or extract those payments. That includes the cost of copying the file which, even if agreed upon by the client in the attorney-client engagement agreement, must often still be borne, at least initially, by the lawyer. While the rule does not prohibit the lawyer from perhaps courteously/politely requesting payment from the client for those fees and costs, especially when agreed upon in the attorney-client contract, it does not permit the lawyer to insist/demand "ransom" from the client in exchange for the client's file(s).

Solicitation:

The Louisiana Supreme Court has spoken firmly regarding the evils of prohibited solicitation of clients in ways that violate the Rules of Professional Conduct and summarized those views in the matter of *In Re: Sledge* 2003-1148 (La. 10/21/2003) 859 So.2d 671 :

"The jurisprudence makes it clear that respondent's violation of Rule 7.3's prohibition on solicitation of clients constitutes serious misconduct. In *Louisiana State Bar Ass'n v. St. Romain,* 560 So. 2d 820 (La. 1990), we explained that "[s]olicitation is abhorrent to the legal profession and places lawyers in disrepute with

the public." See also *In re: D'Amico*, 94-3005 (La. 2/28/96), 668 So. 2d 730 ("direct solicitation of professional employment from a prospective client in violation of Rule 7.3 is a very serious disciplinary violation that undermines the reputation of lawyers generally and the public's attitude toward the profession"). These clearly indicate the baseline sanction for a violation of Rule 7.3 is disbarment."

Our current rule against solicitation is found in Rule 7.4 and provides:

RULE 7.4. DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) **Solicitation**. Except as provided in subdivision (b) of this Rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior lawyer-client relationship, in person, by person to person verbal telephone contact, through others acting at the lawyer's request or on the lawyer's behalf or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this Rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this Rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of Rule 7.6. For the purposes of this Rule 7.4, the phrase "prior lawyer-client relationship" shall not include relationships in which the client was an unnamed member of a class action.

One recurring area of concern, particularly for the maritime practitioner, is the efforts by out-of-state attorneys who improperly solicit employment by Louisiana residents through improper means. Where possible, the ODC initiates the investigative process and will institute disciplinary action within our own system. Where the witnesses are out of state or when the misconduct occurred out of state, we frequently refer the allegations to the disciplinary authority where the respondent/out-of-state attorney is licensed.

Currently pending are (public) formal charges filed by ODC against Newton Schwartz, a Texas lawyer not licensed in Louisiana but who nonetheless solicited professional employment and engaged in the unauthorized practice of law. See *In Re: Schwartz, 11-DB-075.* (Filed 7/19/2011) While the hearing committee found violations of the rules, because he has no Louisiana license, they pondered the appropriate sanction and recommended a reprimand. ODC has objected and the matter has been argued at the Board.

This matter will squarely present for the Supreme Court's consideration the actions that may be taken against out of state attorneys, not licensed here, but who commit misconduct here in violation of Louisiana's Rules of Professional Conduct.

Investigative Interviews:

A recurring question, particularly in maritime matters, often fielded by the LSBA Ethics Advisory Committee and their counsel asks who, within an organization likely to be named as a defendant, can be interviewed without running afoul of Rule 4.2. That Rule provides:

RULE 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order, a lawyer in representing a client shall not communicate about the subject of the representation with:

(a) a person the lawyer knows to be represented by another lawyer in the matter; or

(b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization **and**

(1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;

(2) who has the authority to obligate the organization with respect to the matter; or

(3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

A careful review of Rule 4.2 shows the limited number of employees (or others) who would be considered "off limits" to counsel seeking to take a statement or otherwise satisfy their ethical obligation of investigating a matter to insure it has merit before filing suit. Moreover, *former employees* are not included within the scope of Rule 4.2 unless they are specifically represented by counsel.

Sharing/division of fees with lawyers not in the same firm

If you are hired to represent a client and you intend to involve another lawyer in the representation who is not in the same firm, your client must agree and you must comply with the specific requirements of Rule 1.5 (e) as follows: 1) The client must agree **in writing** to the representation by all of the lawyers involved; 2) The client must be advised **in writing** as to the share of the fee each lawyer will receive; 3) The total fee must be reasonable; and 4) Each lawyer must render meaningful legal services for the client in the matter.

Advise your client in advance regarding the timing and availability of his portion of settlement funds

We all know how rewarding it can be when a client is happy about the settlement/conclusion of a personal injury matter and when the settlement funds are on the way. It is important to fully explain to the client **in advance** what he/she should expect when the settlement check arrives at your office. The client should be told that he or she will be asked to come to your office to endorse the settlement check and sign the receipt and release and disbursement sheet. Upon endorsing the settlement check and signing the release and disbursement documents, the client

should already expect that he will leave your office without his portion of the funds in hand. If you fully explain and set these expectations in advance, the client will not be surprised and disappointed that he will not have access to the funds before the settlement check clears your trust account. The settlement funds should be fully credited to your trust account before the client receives a check for his portion. Do not let a client pressure you into giving him a post-dated check. If a trust account check written to the client is presented to the bank for payment before the settlement funds are credited to your trust account, this will inevitably result in an ethics violation. Potential consequences include an NSF or overdraft of your trust account with notification to the ODC, conversion of funds belonging to other clients or third parties or the check will be paid only because you engaged in "commingling" by keeping a cushion of your own funds in your trust account in violation of the rules.

Tips for Analyzing the Duty to Report Another Lawyer's Misconduct

Tip #1 – Read Rule 8.3(a)

The current version of Rule 8.3(a), effective March 1, 2004, states:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the ODC.

The prior version of Rule 8.3(A) stated:

A lawyer possessing unprivileged knowledge of a violation of this Code, shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Tip #2 – Read the *Riehlmann* Decision

The Louisiana Supreme Court was first presented with the opportunity to illustrate the scope of a lawyer's duty to report the misconduct of a fellow lawyer in the case of *In Re: Riehlmann,* 891 So.2d 1239 (La.2005) (per curiam). When formal charges of misconduct were filed against Riehlmann, the previous version of Rule 8.3(a) remained in effect. The pertinent facts are as follows:

Riehlmann, a criminal defense attorney and former assistant district attorney, met his friend, Gerry Deegan at a bar in April 1994, where Deegan told Riehlmann that he was dying of colon cancer. During the same conversation, Deegan told Riehlmann that he had suppressed exculpatory blood evidence in a criminal case that he had prosecuted while an Assistant District Attorney. According to Riehlmann he encouraged Deegan to disclose this information to the appropriate people. Thereafter, Mr. Deegan died in July 1994, without disclosing the matter. John Thompson had been prosecuted by Deegan in 1985 for armed robbery and was set to be executed by lethal injection on May 20, 1999. In April 1999, Thompson's appellate lawyers learned of a crime lab report that proved he could not have committed the crime. During the prosecution, Deegan never disclosed to Thompson's defense counsel the crime lab report which showed that Thompson was not the same blood type as the perpetrator. In April, 1999, when Riehlmann realized this was the same case he had discussed with Deegan in 1994, he executed an affidavit and testified at a hearing for a new trial on Thompson's behalf disclosing his conversation with Deegan and reported Deegan's misconduct to the ODC.

The ODC filed charges against Riehlmann alleging that his earlier failure to report Deegan violated Rule 8.3(a). The hearing committee of the disciplinary board that heard the matter found that Riehlmann did not violate Rule 8.3(a). The hearing committee explained that Riehlmann's statements at most suggested a potential violation of the Rules and declined to construe Rule 8.3(a) to require a lawyer to report a potential violation of the Rules by another lawyer. Upon review of the committee's recommendation, the Board and the Court disagreed with the hearing committee's interpretation, finding that Riehlmann was in violation of Rule 8.3(a).

Tip #3 – Consider What "Knowledge" Triggers the Duty

In *Riehlmann,* the Court said:

> It is clear that, absolute certainty of ethical misconduct is not required before the reporting requirement is triggered. The lawyer is not required to conduct an investigation and make a definitive decision that a violation has occurred before reporting; that responsibility belongs to the disciplinary system and this court. On the other hand, knowledge requires more than a mere suspicion of ethical misconduct. We hold that a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question. *Id.at p. 1247.*

Tip #4 – Consider When the Duty Must be Discharged

Riehlmann reported Deegan's misconduct to the ODC five (5) years after he learned of the violation which was determined by Court to be unsatisfactory. In *Riehlmann,* the Court said:

> Once the lawyer decides that a reportable offense has likely occurred, **reporting should be made promptly** . . . The need for prompt

> reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented *Id.at p. 1247.* [**emphasis** added].

Tip #5 – Consider to Whom the Report Must be Made

The current version of Rule 8.3(a) specifically requires that the report be made to the ODC. Therefore, a report to a judge, supervising attorney or member of a Lawyer's Assistance Program is not sufficient to discharge the lawyer's obligation to report.

Tip #6 – Consider the Policy Reasons Behind the Obligation to Report

The Court in *Riehlmann* noted the reasons behind the obligation to report, stating:

> Reporting another lawyer's misconduct to disciplinary authorities is an important duty of every lawyer. Lawyers are in the best position to observe professional misconduct and to assist the profession in sanctioning it. While a Louisiana lawyer is subject to discipline for not reporting misconduct, it is our hope that lawyers will comply with their reporting obligation primarily because they are ethical people who want to serve their clients and the public well. Moreover, the lawyer's duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public. *Id. at p. 1250.*

Tip #7 – Read the LSBA Public Ethics Advisory Opinion

The Rules of Professional Conduct Committee of the Louisiana State Bar Association published an ethics advisory opinion on the reporting obligation in Louisiana the year after the *Riehlmann* decision. The committee reiterated that " … an absolute certainty of ethical misconduct is not necessary to trigger the reporting requirement; yet, a lawyer must base his report on more than a mere suspicion of improper behavior..." The committee further stated:

> In some cases, a lawyer will not have clear and convincing evidence of a colleague's wrongdoing. The Rule relaxes the standard of certainty to one in which a reasonable lawyer could infer that improper behavior more than likely occurred. It is important to keep in mind, however, that a report of misconduct should not be based on a mere suspicion. A lawyer should have a legitimate degree of knowledge of another's misconduct in order to file a report with the Office of Disciplinary Counsel...
>
> LSBA-RPCC Public Opinion No. RPCC-010 (06/01/2006) pp. 2-3.

Tip #8 – Be Familiar with Confidentiality Exceptions to the Rule

Rule 8.3(c) states as follows:

> *This rule does not require the disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program or while serving as a member of the Ethics Advisory Service Committee.*

The Rule 1.6 confidentiality exception applies where the lawyer, during the course of client representation, learns from a client about the misconduct of another lawyer. Rule 1.6 is itself subject to a number of exceptions, including an exception for

disclosure made with the consent of the client. If one of the exceptions to the confidentiality rule is applicable, the lawyer is not bound by the duty of confidentiality. If the lawyer is not bound by the duty of confidentiality, the confidentiality exception to Rule 8.3 does not apply. If the confidentiality exception to Rule 8.3 does not apply, and if the lawyer has knowledge of misconduct that comes within the scope of Rule 8.3, the lawyer is obligated to report the misconduct. *See Maraist, Smith, Daley & Galligan, Louisiana Lawyering §10.4 (2007).*

Tip #9 – Consider the Efficacy of Self-Reporting

The current version of Rule 8.3 does not require a lawyer to report his own misconduct. However, self-reporting misconduct may serve as a mitigating factor which may ultimately warrant a decrease in the level of any ultimate disciplinary sanction.

A. Improperly Settling a Client's Claim for Legal Malpractice

***In re: Newman*, 2012-0259 (La. 3/30/12), 83 So. 3d 1018**

Newman was charged, among other things, with settling a client's potential legal malpractice matter without complying with Rule 1.8(h), which provides that a lawyer shall not settle a claim or potential claim for malpractice liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

The circumstances were that Newman had filed a lawsuit on behalf of two clients, Vital and Patterson, for claims arising out of an automobile accident. Although Vital was the driver, and Patterson was a passenger, Newman did not discuss the possibility

of a conflict of interest between them. He settled Patterson's claim and closed the file, without pursuing Vital's claim, which was eventually dismissed as abandoned. Vital filed a complaint against Newman. Once Newman was notified of Mr. Vital's disciplinary complaint, he arranged for them to meet at his office. During the meeting, Newman informed Mr. Vital that he wanted to pay the value of Mr. Vital's claim, and he gave him a check for $3,000. Newman did so without advising Mr. Vital in writing that he should seek the advice of independent counsel.

In addition to violating Rules 1.8(h) and 8.4(d), by failing to adequately supervise his staff, which resulted in Mr. Vital's file being closed while his case was still pending, Newman violated Rule 5.3. Newman was also found to have violated Rules 1.1(a), 1.3, 1.4, and 3.2 with respect to the Vital matter because he abandoned Mr. Vital's claim after Mr. Patterson's claim had been settled. Newman also failed to communicate with Mr. Vital, who made numerous requests for information regarding his case. Although Newman was additionally charged with violating Rules 1.5 and 1.7 in the Vital matter, the committee and the Board concluded that the evidence was insufficient to prove these violations.

Newman was also found to have mishandled another client's matter in violation of Rules 1.1(a), 1.3, 1.4, 1.5(c), 1.16(d), and 3.2. According to the record, Newman filed a lawsuit two years after he was hired, naming improper parties as defendants. Thereafter, he failed to take any steps to remedy his error, and his client ultimately lost her claim. The client made numerous attempts to contact him, to no avail. Additionally, although the matter was taken on a contingency basis, Newman did not have a written contingency fee agreement with his client. He also failed to promptly release her file after his services were terminated, despite multiple requests from her new attorney.

Under the circumstances, Newman was suspended for 90 days, with all but 30 days deferred, and was placed on probation for a year.

B. Fees & Conversion

***In re: Walter Brent Pearson*, 2012-0940 (La. 10/16/12) 100 So.3d 313**

Pearson, a reputable tax attorney and partner in a well-known Alexandria law firm, was solely responsible for handling the firm's finances. The firm discovered various accounting discrepancies, including 18 unauthorized withdrawals from one of the firm's accounts totaling $133,489.75, all of which were made payable to Pearson or to persons or companies affiliated with or controlled by him.

After his law partners confronted him on various accounting discrepancies, Pearson admitted that he intentionally converted more than $133,000 in funds belonging to the firm to pay expenses relating to his personal business ventures. Pearson resigned from the firm and self-reported his misconduct to ODC. After his departure, the partners discovered that, in addition to converting over $133,000 over a span of two years, Pearson used his firm credit card for personal expenses which he then allocated to the firm without their knowledge or consent. Consequently, ODC charged Pearson with two counts of misconduct, each alleging violations of Rules 8.4(a)(b) and (c).

The hearing committee concluded that Pearson violated the Rules as charged with respect to his conversion of law firm funds, but that there was not enough evidence to clearly and convincingly establish that he engaged in additional misconduct with respect to his firm credit card. Based upon testimony and mitigating evidence presented at the hearing, the committee recommended a downward deviation from the baseline sanction of disbarment to a three-year suspension.

The Board rejected the committee's conclusion that Pearson did not also engage in misconduct with respect to his firm credit card. The documentary evidence established that Pearson's firm credit card had a separate billing statement from the rest of the attorneys, and the balance was occasionally paid from an account other than the firm's operating account. Consequently, Pearson's credit card was not subject to the same level of scrutiny as the other attorneys' and was frequently used to

cover personal expenses, many of which were passed off to the firm as business-related. It appears as though Pearson enjoyed unparalleled freedom with regard to his firm credit card and had the authority to unilaterally decide which expenses he would account for personally and which he would pass off to the firm.

Clearly, Pearson engaged in a pattern of deceitful accounting practices to disguise what he actually owed the firm for his personal expenses. For example, he bought a new set of automobile tires with his firm credit card but never allocated the $1,028.31 expense to himself. He also paid his personal income taxes with his firm credit card, which totaled $4,200, but only allocated $2,200 to himself. At times, Pearson even used his firm credit card to fund trips taken in connection with his personal ventures. Although these trips had nothing to do with firm business, Pearson allocated the expenses to the firm through clever accounting. Based on his testimony, Pearson truly believed he was entitled to offset personal expenses as a form of additional compensation, since his fellow partners often went to lunch on the firm's dime when he was unable to join them. Based upon this additional misconduct and Pearson's refusal to acknowledge same, the Board rejected the committee's recommendation of a three-year suspension in favor of disbarment.

Respondent filed an objection to the Board's recommendation and the case was docketed for oral argument before the Court. The Court adopted the committee's findings as modified by the Board and rejected any suggestion by Pearson that his intentional misconduct warranted a sanction less than disbarment. In prior cases, attorneys have been disbarred for intentionally converting funds belonging to their law firms in amounts far less than that at issue here. *See In re: Sharp,* 09–0207 (La.6/26/09), 16 So.3d 343, and *In re: Bernstein,* 07–1049 (La.10/16/07), 966 So.2d 537. Furthermore, the significant and compelling mitigating factors present in cases such as *In re: Kelly,* 98–0368 (La.6/5/98), 713 So.2d 458 (in which the Court was persuaded to impose a lesser sanction upon an attorney for conversion of law firm funds) were not present in this instance. Here, Pearson suffered no mental impairment or condition that could have caused or contributed to his misconduct. Accordingly, the Court found the weight of the mitigating circumstances in this case was simply insufficient to warrant a downward deviation and disbarred Pearson.

C. Criminal Conduct:

***In re: Paul S. Minor*, 2012-1006 (La. 10/16/12) 100 So.3d 319**

In 2005, a federal grand jury in the Southern District of Mississippi returned an indictment charging Minor with participating in a bribery scheme in which he provided two Mississippi state judges with money and other things of value in return for favorable rulings in cases he filed in their courts. In 2007, a jury found Minor guilty of conspiracy, mail fraud, wire fraud, honest services fraud, racketeering, and bribery charges arising out of the schemes. He was sentenced to serve eleven years in a federal penitentiary, fined $2.75 million, and ordered to pay $1.5 million in restitution.

On December 11, 2009, the United States Court of Appeals for the Fifth Circuit reversed Minor's conviction of one count of conspiracy to commit bribery and two counts of bribery but affirmed his conviction on all other counts. *United States v. Minor,* 590 F.3d 325 (5th Cir. 2009). The sentence was vacated, and the case remanded to the district court for resentencing on the remaining counts of the conviction. On October 4, 2010, the United States Supreme Court denied Minor's petition for writ of certiorari. *Minor v. United States,* 131 S.Ct. 124, 178 L.Ed.2d 33 (2010).[1]

ODC filed formal charges against Minor alleging that he violated Rules 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a

[1] In December 2010, while the matter was pending for resentencing, Minor filed a motion to vacate his conviction in light of *Skilling v. United States*, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) which narrowed the scope of the honest services fraud statute. His motion was denied, and Minor was resentenced to serve eight years in federal prison. The district court also imposed a $2 million fine and ordered restitution in the amount of $1.5 million. On August 14, 2012, the Fifth Circuit affirmed the judgment on remand. *United States v. Minor*, 691 F.3d 578 (5th Cir.2012).

lawyer), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The disciplinary matter was held in abeyance pending the finality of Minor's criminal conviction.

Following the Fifth Circuit's ruling in December 2009, the matter was set for hearing. After one continuance while Minor's writ for certiorari was pending, the parties agreed to submit the disciplinary matter to the hearing committee on documents alone. The committee issued its report on December 13, 2011, rejecting Minor's argument that his conviction was not final, citing *In re: Dillon,* 11–0331 (La.7/1/11), 66 So.3d 434. Based upon the documentary evidence submitted by the parties, the committee made the following findings:

1. On December 6, 2005, Minor was indicted on eleven counts by a federal grand jury.
2. On March 30, 2007, he was convicted by a jury on all eleven counts.
3. On December 11, 2009, the United States Fifth Circuit Court of Appeals reversed his convictions as to Counts Two (conspiracy to commit federal program bribery), Twelve (federal program bribery), and Fourteen (federal program bribery) and affirmed respondent's conviction as to all other counts; namely: Counts One (conspiracy), Three (racketeering), Four (mail fraud/honest services), Five (mail fraud/honest services), Six (mail fraud/honest services), Eight (wire fraud/honest services), Nine (mail fraud/honest services), and Ten (mail fraud/honest services). The court of appeals remanded the case to the United States District Court for the Southern District of Mississippi for resentencing purposes only.
4. On October 4, 2010, the United States Supreme Court denied Minor's petition for writ of certiorari.
5. On February 11, 2011, the Mississippi Supreme Court permanently disbarred Minor from the practice of law in Mississippi.
6. On June 8, 2011, the United States District Court for the Southern District of Mississippi denied his motion to vacate his convictions.

7. On June 13, 2011, the United States District Court for the Southern District of Mississippi resentenced Minor.

Based upon these findings, the committee concluded that Minor violated the Rules as charged. The committee determined and recommended that he be permanently disbarred from the practice of law in Louisiana.

Minor filed an objection to the committee's report, once again asserting that his criminal conviction was not final. He also argued that permanent disbarment was too harsh a sanction, and the committee erred in failing to give appropriate consideration to the mitigating circumstances. The Board found Minor's conviction final for purposes of Rule XIX, since his writ was denied on October 4, 2010. Furthermore, the Board concluded that the relief sought was actually "post-conviction relief" according to *In re: Dillon* and did not affect the finality of his conviction for purposes of lawyer discipline. The Board reviewed Minor's misconduct in light of the permanent disbarment guidelines and agreed with the committee's recommendation of permanent disbarment as the appropriate sanction.

In rendering its opinion, the Court noted that in disciplinary proceedings in which an attorney who has been convicted of a crime, the conviction is conclusive evidence of guilt and the sole issue presented is whether the crimes warrant discipline and, if so, the extent thereof. Supreme Court Rule XIX, § 19(E); *In re: Boudreau,* 02–0007 (La.4/12/02), 815 So.2d 76; *Louisiana State Bar Ass'n. v. Wilkinson,* 562 So.2d 902 (La.1990). The Court also cited Rule XIX, Appendix E, Guideline 2, which states that "[i]ntentional corruption of the judicial process, including but not limited to bribery, perjury, and subornation of perjury" is the type of conduct which might warrant permanent disbarment.

The record in this matter established that Minor secured bank loans for two Mississippi state court judges, purportedly for campaign expenses. Thereafter, in an effort to conceal the fact that he was paying off the loans himself, Minor used cash and third-party intermediaries to disguise the true source of the loan payments. In exchange for this financial assistance, Minor subsequently received extremely favorable rulings from the judges in cases he filed in their courts. The Court found

such conduct to be blatant corruption of the judicial system and accepted the recommendation of the committee and the Board, ordering Minor permanently disbarred.

D. **Unauthorized Practice of Law:**

***In re: James David Turnage*, 2012-2008 (La. 11/16/12) 104 So.3d 397**

Turnage was disbarred in 2002 for abandoning the legal matters of his clients, failing to communicate with his clients regarding the status of their cases, and commingling and converting a substantial amount of client and third-party funds. *In re: Turnage,* 01–2585 (La.9/13/02), 826 So.2d 546 ("*Turnage I* "). He had not sought readmission and, therefore, remained disbarred from practicing law in Louisiana at the time of these proceedings.

According to the deemed-admitted facts, Turnage was employed in Mississippi by WorldCom in a non-attorney capacity in 1999. In 2001, he was promoted to Associate Counsel II, an attorney position. At that time, he was licensed in Louisiana. Although Turnage was disbarred in September 2002 pursuant to *Turnage I*, he did not inform his employer and continued to work at WorldCom as an attorney. WorldCom was eventually acquired by Verizon, and, despite having been disbarred, Turnage was promoted to Associate Counsel III in August 2003 and then to Assistant General Counsel in February 2007. He continued to work as in-house counsel for Verizon, thereby falsely representing himself as an attorney duly licensed and authorized to engage in the practice of law, until his termination in February 2011.

ODC filed formal charges against Turnage in September 2011, alleging violations of Rules 1.4 (failure to communicate with a client), 4.1 (truthfulness in statements to others), 5.5(a) (engaging in the unauthorized practice of law), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Turnage failed to answer the charges, and the factual allegations were deemed admitted. Based on

these facts, the committee concluded that Turnage violated the Rules as charged. The committee determined that his conduct was knowing and intentional and resulted in substantial harm. Accordingly, the committee recommended that Turnage be permanently disbarred, and the Board agreed.

Citing its decision in *In re: Jefferson,* 04–0239 (La.6/18/04), 878 So.2d 503 (in which an attorney was permanently disbarred for engaging in the unauthorized practice of law) the Court stated:

> [Turnage] has flouted the authority of this court by practicing law after being prohibited from doing so. In the face of this indisputable evidence of a fundamental lack of moral character and fitness, we can conceive of no circumstance under which we would ever grant readmission to respondent. Accordingly, he must be permanently disbarred.

In re: Turnage, 2012-2008 (La. 11/16/12), 104 So. 3d 397, 400. Accordingly, Turnage was permanently disbarred from the practice of law.