Everyday Ethics: the Real Word Dilemmas They Didn't Teach about in Law School

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I. Confidentiality: What Is and Isn't Confidential.

In general terms, confidential information is "information relating to the representation of a client." Different States, and different versions of the Model Rules, contain different exceptions to that general principle. The trend in the Model Rules has been to expand the circumstances where a lawyer may or should reveal information which otherwise could not be revealed.

Many lawyers spend more time talking about the exceptions, rather than talking about the actual scope of what constitutes "confidential information." A threshold distinction should be made between confidentiality under Rule 1.6 and the attorney-client privilege. The attorney-client privilege also has a number of exceptions, some of which address the same policy considerations

as the exceptions set out in Rule 1.6. However, the scope of the respective rules is decidedly different.

Confidential information under Rule 1.6 is defined in broad terms, i.e., "information relating to the representation of a client." For the purposes of Rule 1.6, the source of the information is not relevant. On the other hand, the attorney-client privilege is generally confined to confidential communication between the lawyer and the client, thereby making the source of the information particularly relevant.

Additionally, the lawyer's obligation to maintain the confidentiality of information protected by Rule 1.6 is always present during and after the period of legal representation. Whether the legal matter is transactional work such as the preparation of contracts or deeds, or is litigation work, the lawyer has a constant duty to remain vigilant to maintain the confidentiality of confidential information. The lawyer must be sure that his or her staff maintain that same high standard. Never count on support staff to care more about your license than you care.

On the other hand, the attorney-client privilege is a matter of evidence law, and would only apply in those situations where the attorney or the client is called to testify about confidential communications between the attorney and the client.

Another distinction between confidentiality of information under Rule 1.6 and the attorney-client evidence privilege is in the manner the respective confidentiality or privilege may be lost. The confidential nature of information which would preclude an attorney from revealing same is subject to numerous exceptions, which have increased with the most recent changes to the Model Rules by the American Bar Association. Those changes have already been adopted by a number of jurisdictions around the United States.

Although Rule 1.6 may be breached for a number of stated reasons as set out in the Rule, any permitted breach under Rule 1.6 should only be as broad as is necessary to address the goal or reason behind a particular exception. Many attorneys feel the need to go beyond the limited matter at issue which provides the exception, such as self-defense of an attorney disciplinary complaint, and reveal confidential information way beyond that necessary to defend yourself. For example, if the allegation is that you did not diligently represent your client, you would not want to include in your response that the client is a drug addict. If you did include such information, you are probably outside the scope of what is permitted under Rule 1.6. Fight the urge to attack the client outside the scope of the matters at issue.

II. Conflicts of Interest.

The one portion of lawyer ethics rules which most attorneys are familiar with concern conflicts of interest. Most attorneys also know that there is a difference between a conflict of interest concerning a current client and a conflict of interest concerning a former client.

Understandably, the Rules are designed to cast a wide net over attorney conduct and client conduct so that all potential conflicts of interest are subject to disciplinary review. The problem for lawyers seeking to conform their conduct to the particular Rules, such as Rule 1.7 and 1.9, is that the Rules are rife with broad language. These Rules contain such phrases as "reasonably believes," "materially limited," "adversely affected," "substantially related," "materially adverse," etc. Additionally, there is judicial gloss on the Rules. As we know, a Rule only means what the Court says it means in its last Court decision. For example, in my state of Kentucky, the Supreme Court, in 1989, adopted the 1993 version of the Model Rules. Although the Model Rules expressly deleted reference to the "appearance of impropriety" standard, the Kentucky Supreme Court, in

Lovell v. Winchester, Ky, 941 S.W.2d 466 (1997), judicially re-introduced the appearance of impropriety concept back into the standards governing the ethical conduct of attorneys.

To a certain degree, the Rules concerning conflicts of interest approach the imprecision of Justice Potter Stewart's definition of obscenity in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964). In that case, Justice Stewart, in his Concurring Opinion, simply stated that his definition of obscenity was, "I know it when I see it."

Conflicts of interest are matters which should be anticipated by a lawyer at the beginning of the representation and guarded against during the representation. However, the litigation surrounding conflicts of interest does not generally come from an attorney's sua sponte recognition that a conflict exists. Most of the litigation concerning this issue comes from Motions made by opposing counsel on behalf of a former or current client seeking to disqualify an attorney in a particular case.

Motion to Disqualify opposing counsel are inherently manipulative since the Motion seeks to deprive the opposing party of his or her counsel of choice. Additionally, I have always been of the belief that opposing counsel only seek to disqualify other counsel if the other counsel is competent. If the opposing counsel in a particular case is not up to the task or is otherwise incompetent, one would have to question whether opposing counsel would be so quick to seek the disqualification of that attorney.

A Motion to Disqualify an attorney based on the ground that the attorney has committed a conflict of interest violation prohibited by Model Rule 1.7 or 1.9, may, in certain circumstances, run afoul of Model Rule 3.4(f) as to the attorney seeking the disqualification. That Rule states that an attorney may not threaten to pursue a disciplinary charge against another attorney

to gain an advantage in a civil suit. The Rule states that such a threat must be "solely" to obtain an advantage in a civil or criminal matter. As a result, if there is a good faith basis for seeking the disqualification of the attorney, there would probably not be a violation of Rule 3.4(f).

III. Fee-Splitting.

Fee-splitting comes in three general categories:

(1) Referral fee to referring attorney without referring attorney doing any work or assuming any responsibility;

(2) Referring attorney and referred attorney each work on the case and are paid in proportion to the work each performs; and

(3) Referring attorney performs no work on the case, but assumes joint responsibility with the referred attorney, and generally keeps aware of the progress of the case.

Very few States permit the first category. The Model Rules expressly permit categories two and three. However, as a practical matter, most fee-splitting is going to fall into the third category.

Model Rule 1.5(e) addresses the issue of dividing fees between attorneys who are not in the same firm. Members of a firm may divide up a fee in any manner they wish, and client consent for that division is not required.

The three criteria which a proper fee-split must satisfy are as follows:

(1) Fee division is in proportion to the services performed by each lawyer or by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) Client is advised of and does not object to the participation of the lawyers involved; and

(3) Total fee is reasonable.

The third criteria concerning the reasonableness of the fee may seem obvious to you. However, many clients think that if one attorney is working on the case on a contingent fee of one-third of the total recovery, and another attorney comes in on the case, the second attorney is going to take an additional one-third, leaving only one-third for the client. Of course, that is not the case, and a sixty-six percent contingent fee would have to be presumably unreasonable. Typically, the fee subject to a fee-split is no greater than the initial contingent fee agreed to by the client. However, there is case law which has approved an increase of the contingent fee when the additional attorney working on the case was more experienced than the original attorney. McNeary v. American Cyanamide Co., 712 P.2d 845 (Wash. 1986).

Client consent does not require that the client be fully advised of all aspects of the referral, such as the division of particular labors, the precise fee-split, etc. The primary concern of the client should be that the fee is of a known amount. Of course, in the case of a contingent fee arrangement, Model Rule 1.5 requires that the particular percentages of the attorney's fee be set out in the agreement. The language of Model Rule 1.5(e), regarding fee-splitting, requires written agreement in which the client acknowledges that other attorneys may work on the case, and that the client does not object to the participation of the attorneys involved.

The duties of the referring attorney, beyond the language of the Rule requiring the assumption of "joint responsibility," are not that onerous. The Commentary to Model Rule 5.1 states that the responsibilities of a referring attorney are akin to the oversight responsibilities of a partner or supervising lawyer in a law firm setting. In general practice, a senior partner in a law firm does not become involved in making tactical decisions in a case referred to an associate attorney, nor is the partner required to actually render legal services in a particular case in order to satisfy the

supervisory duties under Model Rule 5.1. Generally being aware of what is going in the case would typically satisfy the obligation. As a practical matter, if the referring attorney is going to get in trouble, it will occur at the beginning of the representation by having made a negligent referral of the client's case to an attorney who was not competent to handle the case.

Occasionally, two lawyers, who were apparently on good terms at the beginning of the case, may not be on such good terms at the conclusion of the case. In those instances where the fee-splitting agreement did not properly comply with the fee-splitting Rule, i.e., Model Rule 1.5(e), the attorney who stands to financially gain in the absence of a fee-splitting agreement may seek to challenge the validity of the fee-splitting agreement.

Courts are split on how this situation should be addressed. Some Courts are of the belief that a non-compliant fee-splitting agreement is unethical per se, and may not be enforced by either lawyer. An example of such a Court decision is Peterson v. Anderson, 745 B. 2d 166 (Ariz. App. 1987). In such an instance, the attorney who had no valid contractual relationship with the client would probably be left with seeking a quantum merit recovery. Such a recovery would be based on the various factors set out in Model Rule 1.5(a) concerning the reasonableness of a fee.

Other Courts have held that the attorney seeking to attack the sufficiency of the fee-splitting agreement is estopped from attacking the validity of the agreement. The general reasoning of this line of authority is that if the fee-splitting agreement does not comply with Model Rule 5.1, each attorney involved is somewhat at fault. Therefore, neither attorney may set up as a defense an alleged violation of the Rule. An example of this line of reasoning is in Mark J. Kaufman, P.A. v. Davis and Meadows, P.A., 600 So.2d 1208 (Fla. 1992).

The first category listed above, i.e., a pure referral fee in which the referring lawyer does no work and assumes no responsibility, is a clear minority position among the various States. Nine States permit such referral fees, i.e., California, Connecticut, Kansas, Maine, Massachusetts, Michigan, Oregon, Pennsylvania and Texas.

Multi-jurisdictional practice is becoming more commonplace. However, in the area of fee-splitting, if you are not licensed in the jurisdiction where the referred attorney is located and the case is going to be litigated, you will have a problem in collecting a referral fee. Since you are not licensed in that other jurisdiction, and therefore cannot practice law in that jurisdiction, you could not assume the necessary "joint responsibility" in order to satisfy the fee-split requirements of Model Rule 5.1. Of course, if you were admitted pro hac vice in that case, that should not be a problem.

IV. Client Perjury.

Client perjury comes in several forms. However, whatever form the client perjury takes, the issue presents an apparent conflict between your duty of confidentiality under Model Rule 1.6 and your duty of fairness to an opposing party or counsel under Model Rule 3.4 and your duty of candor to the Court under Model Rule 3.3.

Client perjury may occur in sworn written discovery responses, pretrial depositions, or trial testimony. Client perjury generally falls into two categories:

(1) When either you know or the client tells you that the client intends to commit perjury before the actual perjured statement is offered; or

(2) When the client has already made the perjurious statement, and you, as the attorney, had no knowledge that the perjured statement was going to be made until after the statement is made.

In those instances where the client expresses his or her intent to commit perjury, the lawyer must go through a number of steps. The steps are different if the case is a criminal matter as opposed to a civil case. Under Model Rule 1.2 and constitutional principles, a client's decision to testify in a criminal case against the lawyer's advice must be accepted by the attorney and is not grounds for the attorney withdrawing. If an attorney does not do certain intermediate steps, but merely seeks to withdraw from the case and fully advises the Court of what has occurred, the attorney has not acted appropriately.

In essence, the client must be persuaded, through a number of means, to "do the right thing" and not commit perjury. Only after the client refuses to take your advice, should you, or may you, take the ultimate step of withdrawing.

The steps which an attorney should take when defending a person in a criminal case generally fall into the following areas:

(1) The lawyer must try to persuade the client to testify truthfully.

(2) The lawyer should advise the Court of a disagreement between the lawyer and the client as to the testimony to be offered, and advise the Court that the client will testify in a narrative form.

(3) The lawyer should create a private record of the action taken by the attorney, why the action was taken, and the particular advice which was given the client. The private memorandum should be counter-signed by the client to acknowledge the advice given, and the client's election to disregard that advice.

The attorney, in taking remedial action, should make every effort to not "poison the mind" of the trier of fact. In the case of a jury trial, the Court is not sitting as a finder of fact . As a result, an exchange between the lawyer and the Court on the perjury issue may be a bit more

forthcoming. Such discussions should be in-camera without participation of the prosecutor, with the consent of the prosecutor. As a practical matter, if your client testifies on the stand through a narrative form, the prosecutor, as will every other attorney in the Courtroom, will know that the testimony of the client is perjured testimony.

If the client in a criminal case insists on taking that stand and is advised that the method of examination is simply going to be the attorney asking the client one open-ended question, the client should also be advised of the other significant limitations which will be imposed on the attorney for the rest of the trial. For example, the client needs to be advised as follows:

> (1) You will not be able to engage in any re-direct examination of the client in order to rehabilitate or clarify any statements made by the Defendant during cross-examination which may be in conflict with the earlier narrative testimony.
>
> (2) You will not be able to question any witnesses by making use of any of the narrative testimony provided by the client.
>
> (3) You will not be able to base any Motion, procedural or substantive, on the narrative testimony.
>
> (4) You will not be able to refer to the client's narrative testimony in closing argument.

In a civil case, the client may make a false statement during a deposition or at some hearing and you later find out that the client committed perjury. For example, in the recent Michael Jackson criminal case, the attorney who represented the family of the accuser in a personal injury case testified about what had occurred during the deposition of the accused's mother. Although the attorney had two dozen conversations with the mother about her personal injury case against J. C. Penney's, she never told her attorney that she had been fondled by the security guard. However, during her deposition in the personal injury case, the mother alleged that she had been fondled

twenty-five times by the security guards. The chances of that mother's deposition testimony being truthful is, to be kind, somewhat suspect.

When an attorney is faced with such a situation, the lawyer should request that the client take appropriate remedial action. In the event the client refuses to take any remedial action, the lawyer should withdraw. Since Model Rule 3.3 requires the attorney to take "reasonable remedial measures" after client perjury has occurred, the lawyer has additional obligations beyond merely withdrawing from the case.

If the attorney is able to supplement previous discovery responses in such a way that the previous inaccurate statement is corrected without directly disclosing the client perjury, such remedial action should be taken.

If the client insists that no remedial action should be taken, the attorney will have no choice but to withdraw from the representation. In that case, the attorney's obligation to take remedial action under Model Rule 3.3 and the attorney's duty of candor to the Court will trump any confidentiality obligation under Model Rule 1.6. Therefore, the attorney may be required to engage in what is referred to as a "noisy withdrawal." In such a "noisy withdrawal," the lawyer would affirmatively state that certain information previously provided to the Court or to opposing counsel was not accurate.

V. Escrow Accounts: Handling Client Funds.

Handling client money and handling money in which third parties have a claim are perhaps the most dangerous areas of practice for an attorney. Any ethics allegations which involve a dollar sign are inherently dangerous. Improper handling of an escrow account, negligently or

intentionally, through your own mishandling or through the mishandling, negligent or otherwise, of support staff, will still get you in trouble.

Funds which go into your escrow account may fall into several categories, the primary ones of which are as follows:

(1) Money which your client gives you as an advancement towards expenses and/or attorney's fees.

(2) Money you collect or recover on behalf of your client.

(3) Money which you are holding for later distribution pursuant to an agreement of the parties, further Order of Court, etc.

At the time you are initially retained, an engagement letter from you to your prospective client is an excellent idea. That engagement letter lets you address a number of issues, including your request and subsequent receipt of a retainer from the client.

Some jurisdictions permit non-refundable retainers. In those jurisdictions which do not permit such a non-refundable retainer, attorneys may frequently seek to categorize the retainer in such a way as to avoid being put in the position of having to give back any of the money to the client at the end of the representation, whenever that end may occur. Sometimes the lawyer will refer to such retainers as advanced fees, flat fees, minimum fees, prepaid fees, etc. Ultimately, the question is whether the money which you receive from the client, at the time you receive it, is your money, the client's money, or the funds of a third party.

Upon the termination of representation, you have an obligation under Model Rule 1.16(d) to refund to the client any "advance payment of fee that has not been earned." Failure to promptly refund any client funds which were not earned would subject you to disciplinary sanction under that Rule.

Sometimes, the term "co-mingling" is used as an euphemism for "theft." Actually, the terms have different meanings, although each may constitute an ethics violation, with only the seriousness of the offense at issue.

"Co-mingling"is the mixing of escrow funds and non-escrow funds in a single bank account. "Co-mingling" of funds may be the result of bad bookkeeping, sloppy banking habits, not sending out timely bills, and a number of other reasons which do not necessarily reflect any evil motive on the part of the lawyer. However, not making personal use of the escrowed funds, (i.e., stealing the money), is not controlling as to whether there is an ethics violation.

You should view the handling of escrow funds as a "strict liability" matter. If the funds are "co-mingled" and you did not mean any real harm, the response from your State's Bar Counsel may very well be "so what." The absence or presence of client prejudice is either a mitigating or aggravating circumstance, and does not necessarily go to whether an ethics violation has occurred.

Many attorneys delegate the handling of the law office checkbooks, <u>including</u> the escrow account checkbook, to a secretary, paralegal, office manager, etc. This is a very risky practice and should not even be considered unless you have adequate safeguards in place, including, your monthly review of the bank records, and intensive training of the support staff as to the distinct differences between an escrow account and an operating account.

Lastly, if you have been paid funds to be placed in escrow to be used for the payment of your attorney's fee, and the fee has been earned, to continue to have those funds sitting in your escrow account for anything more than a reasonable period of time, could satisfy the "co-mingling" ethics violation.