Ten Ways to Jeopardize Your License to Practice Law

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Attorneys, on occasion, may be the subject of allegations that they have violated their ethical duties and responsibilities as lawyers. The rules concerning such ethical obligations regarding attorneys in Kentucky are set forth in Supreme Court Rule 3.130 et seq., and are known as the Rules of Professional Conduct, ("RPC").

Attorneys get in trouble for a variety of reasons including, too much work, too little work, poor administrative skills, or undiagnosed, untreated or ignored health issues, such as alcohol abuse, substance abuse, depression, gambling addiction, etc.

The purpose of this article is to discuss a number of ethical infractions which, if unchecked, will create serious ethics problems for the attorney. In many instances, and probably in most instances, the particular personal or professional issues of a particular attorney may not be solved without some assistance from some other person, support group, healthcare professional, etc.

If you see yourself, or some attorney you know, in the following material, please take appropriate corrective steps to address the issues. Unfortunately, most ethics violations come from attorneys who are either solo practitioners or in small firm settings. Under such circumstances, with inadequate or non-existent oversight, the attorney will have practice problems and no real support structure to assist.

The following is a list followed by a brief discussion of some of the ways attorneys breach their ethics duties and eventually receive a certified mail envelope from the KBA. As we all know, rarely, if ever, does good news come by certified mail.

1. Assuming Representation in an Area of Law Outside Your Area of Competence.

Rule of Professional Conduct 1.1 concerns the core concept of competence. Competence is another way of saying that the right attorney needs to be selected for the right case and client. That selection is not a matter to be left to the client. It is not uncommon for a client to have great trust and respect for a particular attorney because that attorney has previously helped them in a particular area of law. If the client develops a legal need in another area of law, the client's first instinct may be to have "their" lawyer handle the new matter. The problem is that the attorney may not be competent in that area. No doubt, it is difficult for a lawyer to tell a prospective client that they do not practice in a particular area, especially when the client has great trust and faith in the lawyer and is willing to pay the appropriate fee. However, if, for example, the legal matter needs a tax attorney, and you are not a tax attorney, then you should not assume the representation without complying with RPC 1.1.

The issue of competence under RPC 1.1 has two elements, i.e., skill and care. Generally speaking, "care" is not related specifically to the practice of law, and concerns such matters as time management, diligence, submitting documents in a timely manner, etc. "Skill" on the other hand, refers to the knowledge level of the attorney in the procedural and substantive practice of law. A good attorney must have both characteristics. For example, if an attorney can always get to Court on time, and has everything properly set out on their calendar, but does not actually have a good legal background, the timely work product submitted by the attorney will sub-par. Similarly, an attorney may be a genius in an area of law, such as divorce law, but have poor time management and scheduling skills. Such attorneys are always getting in trouble with their clients and the Court because of missed deadlines, inadequate preparation, etc.

2. <u>Unrealistic Expectations of Client</u>.

Many clients, if not all clients, come to an attorney with certain expectations. The client has either heard from some aunt, uncle or cousin who had a similar injury and received a certain amount of money. Or, the client has seen a similar case in the media, and believes their case is just like the other case they saw as to the merits of the case and the damages which may be recovered. Many clients will come to an attorney expressing the belief that their case is very easy or very simple; and that as a result thereof, the case should be successfully resolved quickly with a small fee charged.

Your job is to give objective information to your client or prospective client. Unfortunately, some attorneys facilitate the creation of unrealistic expectations by the client. Such attorneys do so by a number of comments, statements, projections, etc. For example, some attorneys will tell the client that their particular case is one of the best cases of that type the attorney has ever seen, the client has no problems with establishing liability and has no problems in establishing significant damages. In some instances, the attorney will even give the client a specific dollar amount or a specific range of dollar amounts as a possible monetary recovery. All of these approaches create potential problems.

Firstly, a review of the client's case with only reference to positive elements of the case is not an objective case review and does the client a disservice. The client will go away thinking that there are no downsides to their case. Secondly, if you actually put a specific dollar amount in the client's head, and even tell the client that it is just a very loose, unscientific number, that number has nevertheless been chiseled into the client's brain, and there is nothing that you will ever be able to do to undo the problems you have created for yourself. Then, when you do not recover the amount

originally represented, the client will start looking for people to blame, and you will be at the top of that list.

Client expectations may also be based on a misunderstanding of the scope of your representation. The best way of minimizing the chance of being put in the position of the client saying that your representation was in broader areas than you originally anticipated is to use an engagement letter at the beginning of the representation. The engagement letter would address such matters as fee, circumstances surrounding termination of representation, and the scope and duration of your representation. For example, if you are doing a case for a fixed fee, there needs to be a clear understanding as to whether the fee includes any Appeal or any re-trial.

As we know, contingent fee contracts must be in writing. However, as a matter of good practice, all legal representation should be the subject of an engagement letter.

3. <u>Neglect of a Client Matter</u>.

When an ethics allegation is raised against an attorney, an alleged lack of diligence is frequently part of the allegations. Rule of Professional Conduct 1.3 simply states that a lawyer "shall act with reasonable diligence and promptness in representing a client."

Matters regarding lack of diligence are frequently symptoms of a larger problem. For example, an attorney who has taken a case outside his or her area of competence, in violation of RPC 1.1, may also have a diligence problem under RPC 1.3. Since the matter is not one which the attorney feels comfortable in handling, the attorney may simply do nothing.

Typically, a neglect allegation under RPC 1.3 and a lack of communication allegation under RPC 1.4 are matters which go "hand in hand." Even worse, such allegations may be viewed as the "smoke" in the phrase "Where there is smoke, there is fire." For those who are cynical when

looking at attorney conduct, a lack of diligence and a lack of communication may be considered evidence that there are more serious allegations which have not yet been unearthed.

4. <u>Failure to Maintain Reasonable Communication with the Client</u>.

The communication obligations of a lawyer to his or her clients are set out in RPC 1.4. That Rule provides that an attorney should:

> 1. Keep a client reasonably informed about the status of a matter.
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> 2. Promptly comply with reasonable requests for information.
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> 3. Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The communication obligation of you to your client and the communication obligation of your client to you are significantly different. A client certainly has an obligation to keep you updated as to their contact information, such as address and phone number. Additionally, a client has an obligation to respond to your requests for information and documentation. However, the obligation of the lawyer exists even if the client has not contacted the attorney. An unpersuasive defense to a lack of communication allegation is the lawyer saying that the "client never called me." As a lawyer, you have an affirmative obligation to keep the client informed as to what is happening in the case.

This communication obligation does not mean that you have to tell the client all steps you are taking at all times. Actually, this type of ongoing communication as to what is happening in the case is a matter easily addressed by merely sending copies of correspondence and other

documents to the client, even if the client was not the intended recipient. I have always been amazed to see attorneys send out letters reflecting what they are doing in the case but not send the client a copy of the letter.

A lack of communication is also more of that "smoke" in the "Where there is smoke, there is fire" saying. If an attorney has a problem in a case, such as a missed statute of limitations, non-compliance with a particular Order, or some other problem in the case, one of the first things that happens is that the lawyer stops communicating with the client. In some instances, when the client and the attorney eventually connect up, the lawyer may misrepresent the status of the case. Now, the attorney has converted an RPC 1.4 lack of communication issue into an RPC 8.3 allegation of dishonesty and misrepresentation. For this reason, a review of reported decisions from the Supreme Court establishes that lack of communication allegations under RPC 1.4 are usually part of a bigger picture of more serious allegations.

5. <u>Improper Business Relationships with Client</u>.

The Rules of Professional Conduct expressly permit an attorney to engage in a business transaction with a client. In particular, RPC 1.8(a) set up the specific procedure which the attorney must follow before entering into a business transaction with a client. However, in practice, the process is fraught with danger.

Let us say, for example, that an attorney is representing a client in a particular commercial transaction. During the period of that representation, the client expresses an interest in buying a piece of real estate which the lawyer owns. The steps which an attorney must follow in order to sell that piece of property to the client are set out in RPC 1.8. In particular, the following elements of the transaction must occur:

1. The transaction and the terms of the transaction must be fair and reasonable to the client.

2. The transaction and the terms of the transaction must be fully disclosed in writing to the client in a manner which can be reasonably understood by the client.

3. The client must be given a reasonable opportunity to seek the advice of independent counsel; and

4. The client consents to the transaction and the terms of the transaction in writing.

Having said that, and even though ethically permitted, such business dealings are high-risk ventures. If problems develop, you can be sure that you will be blamed. Also, keep in mind that the term "business transaction" is a very broad term. For this reason, if an attorney enters into legal representation at an hourly rate, and, while the representation is pending, asks the client to convert the fee arrangements to a contingent fee, the prudent course of conduct would be to view that change in the contract to be a "business transaction" with an existing client and therefore subject to the terms of RPC 1.8.

6. <u>Paying Personal Expenses of Clients</u>.

An attorney may legitimately advance litigation costs, such as filing fees, deposition costs, expert witness fees, etc., during the representation. Moreover, the lawyer is not required to recover those advanced expenses from the client. As a result, an attorney may ethically advance litigation costs and, if the case is unsuccessful, not require the client to repay the attorney for the expenses advanced.

Although an attorney may advance tens of thousands of dollars, if not more, in litigation expenses, the attorney may not pay a $200.00 food bill for the client, help the client in paying rent, utilities, etc. This Rule, set out in RPC 1.8(e), is counter-intuitive to what we would generally would consider to be the proper and moral thing to do. Only three States permit, in some form, an attorney to advance personal expenses for a client. Kentucky is not one of those States.

Some attorneys attempt to be overly-technical in trying to avoid the RPC 1.8(e) prohibition. For example, if a case is resolved at mediation for a specific dollar amount and a mediation agreement is signed, there may be several weeks, if not longer, before the settlement proceeds are distributed. Some attorneys who represent claimants in such cases believe that between the time of the mediation when the settlement was reached and the time the actual money is disbursed from their escrow account, the attorney may nevertheless make an advancement to the client before the actual distribution is made from the escrow account. Although arguments may be made, and particular facts of a particular case may yield a different result, the better course of conduct is to never make an advancement to the client from a settlement which has not yet been received.

7. <u>Mixing Escrow Funds and Non-Escrow Funds in the Same Account</u>.

In years past, the term "co-mingling" was 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.

When I use the term "co-mingling," I am referring to a mixture of escrow funds and non-escrow funds into 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 was an ethics violation.

You should view the handling of escrowed funds as a "strict liability" matter. If the funds are "co-mingled" and you did not mean any real harm, the KBA's response 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.

Another way this problem occurs is for reasons discussed in more detail later in this article. Many attorneys delegate the handling of the law office checkbooks, <u>including</u> the escrow account, 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.

8. <u>Failing to Return the Client's File Following Termination of Representation</u>.

The applicable Rule, RPC 1.16(d), refers to the obligation of the lawyer, upon termination of representation, to surrender "papers and property to which the client is entitled." Of course, this is a question-begging phrase. The real question is what constitutes the "papers and property" subject to the duty. Ethics Opinion KBA E-395 lists the categories of material which the

lawyer should return to the client. However, that Opinion also notes that the attorney's "work product" is not part of the file to be returned to the client. You may certainly request that the client reimburse you for copying the file, if you wish to keep a copy of the file. However, the client's unwillingness to pay for that copy would not be grounds for keeping the file.

If you retain the file following the termination of the representation, with the client's consent, your obligation to keep that file is not for an indefinite period of time. Ethics Opinion KBA E-300 provides some general guidelines as to what a lawyer should do with closed files.

Sometimes an attorney will refuse to turn over a file because the client still owes them a fee. The problem with that position, as pointed out in Ethics Opinion KBA E-395, is that Kentucky does not recognize a retaining lien. Kentucky does recognize a charging lien on any funds or property recovered. However, the file itself is not subject to the assertion of a security interest.

9. <u>Failure to Return any Unearned Fee to the Client</u>.

If the client has paid a retainer to be used for the payment of any attorney's fees and expenses, and the representation terminates before the retainer is consumed, the lawyer must refund any advanced, but unearned fee, to the client. Failure to return the unearned retainer could be a violation of RPC 1.16.

Of course, one way of addressing this potential problem is to designate the retainer as "non-refundable." In order to do so, the attorney must comply with the guidelines set out in Ethics Opinion KBA E-380. That Ethics Opinion states that for a retainer to be non-refundable, the attorney must do the following:

1. Arrangement must be fully explained to the client orally and in a written fee agreement signed by the client.

2. Arrangement must specify the dollar amount of the retainer, the scope of representation and/or the time frame in which the agreement will exist.

3. The total fee to be charged must be reasonable.

Therefore, if the retainer is going to be non-refundable, you will need to do an engagement letter which will need to be counter-signed by the client to comply with KBA E-380. If the retainer is not non-refundable and has not been consumed by the termination of the representation, then the balance of the unused retainer must be sent back to the client.

Some attorneys may feel compelled to fabricate time at the end of the representation to consume an otherwise unused retainer. To engage in such conduct converts a relatively minor violation of not timely forwarding an unused retainer back to the client under RPC 1.16 into a very serious allegation of deceit and misrepresentation under RPC 8.3. Unfortunately, some attorneys, in an attempt to avoid a small problem, create a much bigger problem for themselves.

10. <u>Delegating Too Much to Non-Lawyer Support Staff or Delegating Without Supervision</u>.

The Rules of Professional Conduct expressly recognize that lawyers employ non-lawyer support staff in their law practice. The use of legal assistants, paralegals, in addition to more traditional support staff of secretary and office managers, is becoming more and more prevalent as time passes.

The problems associated with delegating too much responsibility and too much authority to a paralegal or similar support staff are almost too numerous to count. If the legal assistant does not appreciate the significant distinction between an escrow account and an operating

account, there is going to be "co-mingling," or worse, between those accounts. If the attorney is not maintaining proper oversight, there may be problems of which the attorney has no knowledge until it is too late.

Always remember that in the equation of the lawyer and the non-lawyer assistant, only one of those persons has a law license. It is unfair and inappropriate for the lawyer to expect the non-licensed legal assistant to care more about the law license than the attorney actually holding the license.

CONCLUSION

There are many ways in which a lawyer may get in trouble with the KBA. Many of these ways are avoidable. The purpose of this article has been to touch on some of the areas of concern. It would nice to think that all of these areas of probable concern are hypothetical issues only. Unfortunately, such is not the case.