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Line of Fire

More than just rules, ethics are the guiding principles attorneys follow from the moment potential clients inquire about their services.

By Lee Kanon Alpert

Ethics are something taught in law school and included in the State Bar's Rules of Professional Conduct. Ethics, however, are more than words in a textbook or lines in a set of rules. They are the guiding principles attorneys follow from the moment potential clients inquire about their services.

Lawyers face subtle ethical issues daily. For example, before a potential client's initial interview, attorneys should always run a check to ensure a conflict won't arise with an existing client. Yet, how many attorneys wait until the potential client is in the initial interview to suddenly find that a client conflict exists?

Attorneys put themselves and others in an awkward ethical position by not conducting early due diligence. While not required by State Bar rules, law firms should implement systems that automatically check and cross-check current and previous clients for possible conflicts before the initial meeting.

In some instances, a check uncovers a conflict between an existing client and the potential client. State Bar rules allow attorneys to represent the two clients as long as both sign a conflict of interest waiver. But is it ethically the right thing to do?

Even if both parties agree to a waiver, attorneys generally should not accept the second client. No matter what an attorney includes in the waiver, odds are something will come up to place the attorney in a precarious position.

And if one client is unhappy with the outcome of the legal matter, the client may point to the conflict as the reason for the disappointing results. If there is a conflict of interest, attorneys should refer the potential client to another attorney. By rolling the ethical dice and accepting the second client, attorneys run the risk of possibly finding themselves in the midst of a breach-of-confidentiality lawsuit.

When a potential client first contacts an attorney about a legal matter, the attorney is not required to provide a written agreement outlining the attorney's obligations and fees for the initial meeting. It is only after the attorney is officially retained and agrees to undertake work on behalf of the new client

that the Rules of Professional Conduct require a written agreement between the parties when the fees are expected to exceed a certain amount.

What about the initial meeting? Here, ethics and good business sense go hand in hand. The attorney should draft, for the potential client's signature, a document containing pertinent information about the client and verbiage outlining the scope and fees for the initial meeting.

The document should state that the potential client understands that the initial meeting is for consultation purposes only and does not guarantee that the attorney will accept the matter. Also included should be wording that says the fee for the consultation is based on a stated hourly rate and is payable whether the client decides to retain the attorney's services. This avoids two problems: 1) disputes about consultation costs and 2) misunderstandings about whether the attorney accepted the case and whether further action on the part of the attorney was expected.

The potential client must sign off on this wording before the consultation takes place. The attorney has clearly defined the attorney's role. If the client later refuses to pay for the consultation services, the signed document shows the client understood the arrangement. The document also should state that it supercedes any oral agreement. While these agreements are not legally required or mandated by the bar, ethically they should be part of every lawyer's standard business practice.

Attorneys find themselves walking the ethical line when representing clients in court. The Code of Professional Conduct makes it clear that attorneys cannot improperly coach witnesses, permit witnesses and clients to sign declarations that they know are not true or misrepresent facts before the court.

However, decisions to undertake other legal maneuvers have much to do with an attorney's ethical make-up. For example, filing a complaint when there is no legal basis may be repugnant to some attorneys, but for others it is sound strategy that will force the other side to be more inclined to settle to avoid trial.

Papering the other side with irrelevant interrogatories and requests for admissions will be professionally distasteful to most attorneys, but some see it as an opportunity to financially break the opposition. The Code of Professional Conduct requires that attorneys give their clients the best legal representation possible. How far should attorneys go? Actions may not be illegal, but are they ethical?

Lawyers often try to distance themselves from ethical questions by saying the decision to proceed in a certain manner is the decision of the client. Yet, if a client asks the lawyer to proceed in a way that is ethically inappropriate, the attorney is under no obligation to do so.

As advocates for clients, some attorneys cross the ethical line when they believe the method used to win for their clients becomes irrelevant. If attorneys are successful, they know they generally get paid for their services, their clients are happy, they receive referrals and are viewed as the "better" lawyer.

For amoral types, the only ethics rules to be concerned with are those, which, if broken, can lead to disciplinary action. Everything else is open to interpretation.

But that's not what ethics is all about. Other attorneys see the Rules of Professional Conduct as minimum requirements. In the end, attorneys must make professional decisions based on their moral beliefs and what will allow them to sleep well at night.

It is an individual decision that attorneys must address each day.

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