

Finding The Answers To Ethical Problems

BY PHIL SCHATZ

The nightmare can take many forms, some worse than others, but all bad. You receive a letter from the Departmental Disciplinary Committee enclosing a copy of a complaint that a former client has filed against you, demanding your prompt reply. Or you are served with an order to show cause to disqualify you and your firm from further representation — a disqualification that will necessarily cause you to forfeit future fees from this potentially lucrative representation and, worse, may even force you to refund all fees paid to date. Or you are publicly admonished by a judge who tells you she finds your conduct objectionable and will be referring the matter, with a recommendation for disciplinary action, to the Departmental Disciplinary Committee.

All of these problems, and more, can happen to even the best of lawyers if they don't take prompt action to identify and deal with ethical issues as they arise. Fortunately, there is reason for hope, because a wide variety of sources can help lawyers steer clear of ethical shoals.

Many Hotlines Available

This article will describe some of the methodology and sources that the author has used to answer questions for callers to the "Ethics Hotline" sponsored by the New York County Lawyer's Association-- just one of many such hotlines that are available, at no cost, to help any interested lawyer identify and solve ethics issues as they arise. I will refer to treatises and links that can help the practitioner stay current with ethical developments and avoid disciplinary problems.

My basic methodology for solving ethics issues, which is neither complicated nor original, can be broken down into four steps: (1) identify the Disciplinary Rules involved and become familiar with the concepts and reason for the Rules; (2) analyze your question against the Rules and the reason behind the rules; (3) look for interpretive cases and ethics opinions; (4) call an ethics hotline or discuss your analysis with another lawyer to obtain an objective third party opinion, free from bias and financial interest.

Identifying The Applicable Rules

In my opinion, every attorney in New York should have a desk-side copy of the current New York State Code of Professional Responsibility, and should scan the table of contents periodically to be familiar with the general outline of the Code and the subject matter of the nine Canons. The entire Code is available online, in downloadable and searchable form, at the Legal Information Institute of Cornell Law School website, www2.law.cornell.edu/cgi-bin/fofiocgi.exe/NY-code?, or at www.nysba.org (click on "Ethics," then on "Code of Professional Responsibility"). The full text of the Code may also be found in Simon's New York Code of Professional Responsibility Annotated, 2001 Edition. It may also be ordered from the New York State Bar, One Elk Street, Albany, N.Y., 12207.

Keep A Copy of the Model Rules Handy

It's a good idea, also, to keep a copy of the ABA's Model Rules handy. The ABA's Annotated Model Rules of Professional Conduct can be ordered directly from the Association, and they are now available on line at www.abanet.org/cpr .

Although individual issues can be difficult, the New York Code itself is not very complicated, and a general familiarity with the structure and feel of the various Canons and accompanying Ethical Considerations goes a long way to assisting an attorney to identify and solve ethical issues as they arise.

Thus, for example, Canon 2 covers most advertising and fee issues; Canon 5 covers questions dealing with conflicts of interest; Canon 7 covers witness-contact issues; and Canon 9 deals with issues of accounting and record keeping. Of course, all of these issues can and do bleed over into other Rules and Canons. Only after you have identified the Rules, concepts and issues involved can you begin to develop a reasoned answer to your question.

I believe that a sound interpretation of any Rule requires study both of the letter and the spirit of the Rule, so I usually take some time to familiarize myself with the reasons for the Rule by skimming the Ethical Considerations. Ethical Considerations, unlike the Rules, are aspirational only and not mandatory, but they "represent the objectives toward which every member of the profession should strive." I also pay particular attention to the choice and use of such words as 'may', 'must', 'shall', 'should', and of concepts such as 'believe', 'know', 'reasonable', and 'substantial'. These are so important to rule interpretation, and they often indicate that more careful analysis is necessary.

Researching An Ethics Issue

Often, the plain language of the Disciplinary Rule or Rules will answer the ethical question without more. For my own first-level review, I have downloaded the current version of the Code from the web, and placed it in a binder that I keep by my phone. If additional guidance is necessary, a good annotation of the entire Code, such as Professor Simon's *New York Code of Professional Responsibility Annotated*, is the easiest way to locate cases and ethics opinions, as well as related Rules that may affect the issue. For follow-up, and to crosscheck my initial answer from the Rules against the relevant cases and ethics opinions, Professor Simon's book is aces.

The full text of the cases and ethics opinions that are digested in Simon's and other annotated copies of the Code can be found in most good law libraries in a set published by Oceana. In addition, there are several ethics-related databases on Westlaw: ABA-BNA (the ABA/BNA Lawyer's Manual on Professional Conduct); METH-EO (the full text of ethics opinions from approximately 20 states); METHCS (state case law focusing on ethics and discipline); ETH-TP (a collection of law review articles and publications that focus on legal ethics); ABA-MRPC (the ABA Model Rules of Professional Conduct); and ABA-ETHOP (ABA ethics opinions). Of course, Westlaw is fee-for-service, but many ethics opinions from many states are also available free on Bar Association websites. Most of these websites can be accessed at www.law.cornell.edu/ethics/listing/htm .

Website Databases

In New York, the following websites have searchable ethics databases: The New York State Bar Association, www.nysba.org/opinions/opinions.html ; The Association of the Bar of the City New York,

www.abcny.org (click lawyer services/ethics opinions); the New York County Lawyer's Association, www.nycla.org (click publications/ethics opinions); and the Bar Association of Nassau County, www.nassaubar.org/ethic_opinions.cfm. I suspect that other county bar associations may also have good free links to New York ethics opinions. [Note: the ABCNY website also includes FAQs ("frequently asked questions") for several universal issues: e.g., simultaneous representation of multiple clients, successive adverse representation; withdrawal and retention of client files when the client fails to pay; and of counsel relationships.]

The website www.legalethics.com posts current developments in legal ethics and has links to state bar association home pages and state rules of professional conduct. A terrific set of links is available on the ABA website at www.abanet.org/cpr/ethics.html. This site also carries valuable information from the ABA's Ethics 2000 Commission and the ABA's Commission on Multijurisdictional Practice.

After I have located and reviewed the ethics opinions and cases interpreting the Rule at issue, I am usually fairly confident that I have the right answer to the ethics question I'm confronted with. (If I am not certain, or if the question is especially murky or jurisdiction-specific — some off-the-cuff examples include interviewing witnesses employed by a represented party, and the responsibilities of a lawyer who learns that his client has manufactured testimony or evidence — I go even farther afield, to treatises, the new Restatement of the Law Governing Lawyers, and any other authority I can identify.

But my analysis is not done, because I have yet to perform the most important step of all.

Calling An Ethics Hotline To Get Another Lawyer's Opinion

This is a crucial step. While taking care to maintain client confidentiality, of course, no lawyer should ever take action on an arguably disputable interpretation of an ethics issue without first checking his analysis with an objective, uninvolved lawyer. The lawyer at the other end of an ethics hotline is such a lawyer. The best use of ethics hotlines, in my opinion, is not to find the answer to your ethics dilemma most hotlines won't give definitive answers, anyway — but rather to cross-check your analysis with a neutral third party who approaches the problem without emotional bias. Ethics hotlines generally have access to a great range of no-cost research materials, and may be able to help you get access more quickly to the relevant ethics opinions and cases. Also the hotline attorney may perceive issues and Rules relating to your question that you have not focused on. This may help you to redirect and expand your research to include these additional issues.

The phone number of the Ethics Hotline of the Association of the Bar of the City of New York is 212-382 6624. The New York County Lawyer Association Ethics Hotline phone number is 212-267-6646.

In addition, the ABA has a service called ETHICSearch, which provides a free initial consultation on any situation that seems to pose an ethics issue. You can call, write, fax or email ETHICSearch: phone (312) 988-5323; fax (312) 988-5491; e-mail: ethicsearch@staff.abanet.org. Most inquiries are handled on a same day basis. If your question warrants additional research, the fee is \$45/hour for ABA members and \$60/hour for non-members (\$15 minimum).

That is my method for analyzing, researching and acting upon an ethics problem. I believe that this method permits me to find reliable answers quickly and efficiently, with a minimum of time and expense.

It is not rocket science, and other lawyers have no doubt developed different and equally valid methods.

A word about problem prevention through regular preparation. In my opinion, the easiest and most painless way to avoid ethical problems is to add ethics-related reading into your regular routine. This is preaching to the choir, of course; you would not be reading this publication and taking its monthly ethics test if you did not already recognize the value of continuing education on ethical issues.

Other Good Sources

In addition to NYPRR, other good sources for keeping up-to-date on ethics issues (albeit without the added benefit of CLE credit) are: the disciplinary proceedings reported in the New York Law Journal; the Legal Ethics List Service maintained by Washburn Law School (for subscription information, send an e-mail to server@lawlib.wuacc.edu); and the ABA/BNA Lawyer's Manual on Professional Conduct (www.bna.com/products/lit/mopc.htm), which consists of (a) a bi-weekly loose-leaf newsletter or searchable online database containing a nationwide summary of cases and developments, (b) extensive research links, and (c) the Manual itself. The Manual contains indispensable, heavily-referenced summaries of ethical rules, opinions and cases organized by subject matter (e.g., qualifications, the lawyer-client relationship, fees, client funds, etc.). Joining a bar association committee relating to professional responsibility or ethics is also a terrific way to learn to identify and solve ethical issues. In the final analysis, there is no better way to learn to solve ethics problems than to ask for help from, or give help to, another lawyer.

The ethical rules governing our profession are not traps for the unwary, but awareness of the Disciplinary Rules is the key to avoiding ethical problems. The prime directive for resolving an ethics issue is to address it immediately. The very minute you have any inkling there is a potential issue, check it out at once. Some ethical issues involve painful choices, but the earlier the problem is identified, analyzed and resolved, the less painful the choice will be. The one sure recipe for disaster is to ignore an ethics issue in the hope that it will resolve itself. The bad news is: it won't. The good news — there are plenty of tools to help you resolve it yourself.

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