

UNCOVERING PITFALLS

By

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1. Be Ye Honest, Law-Abiding, Loyal, and Diligent.
2. Keep Custody of the Lips.
3. Chase Not an Emergency Vehicle.
4. Do Not Confuse Zeal With Being Too Much of an S.O.B.

A respectable professional responsibility system could be run with only these Four Commandments. As it is, the Rules of Professional Conduct are a hybrid of hardcore ethics rules, prophylactic restrictions, trade association regulations, instructive rules and comments, and specifications of the basic commandments.

The current rules have reduced the emphasis on regulating the economic aspects of practice. "The 10 Most Asked Legal Ethics Questions" 14 years ago included two questions on letterhead matters, one on joint licensures, and the following query on advertising:

Q. May an attorney who is establishing a new office, hiring an associate, or taking in a new partner place a dignified, paid advertisement in local newspapers to announce that fact?

A. No. The present disciplinary rules prohibit all forms of paid advertisements in newspapers, whether dignified or not. [Note: The 1991 answer is "Yes."] As one commentator put it,

Not so long ago, a considerable area of the law of legal ethics was given over to the mysteries of the Macbethian witches of the common law who stirred the cauldron of disputed litigation — maintenance, champerty, and barratry While their origins are ancient, they exist today only vestigially.

Given this stew of different kinds of rules, what are the professional responsibility pitfalls for the average practitioner who wants to comply? Arguably, there are *no* disciplinary pitfalls for the lawyer who intends to do the right thing *and* takes the trouble to be informed. A pitfall is by definition "a hidden or not easily recognized danger or difficulty." In particular there are no pitfalls with a bottom line of public discipline. Violations of the Four Commandments comprise virtually the whole Supreme Court disciplinary law. There are challenging ethics questions, even conundrums, but attorneys are not disciplined for violating rules and opinions that are unknowable or excessively difficult to understand.

Nonetheless, the busy lawyer who has not taken the time to be well-informed on professional responsibility matters may encounter the discipline system unexpectedly. Here are some common, albeit unnecessary, discipline surprises.

Fee Agreements (Rule 1.5). Contingent fee agreements must be in writing. They must state specific factors for calculating the fee, for example the fee “in the event of settlement.” Interest on unpaid fees may not be charged in violation of the complicated laws on the subject. *See* “Interest on Attorneys Fees,” 46 *Bench & Bar* 9 (October 1989), p. 18.

Attorney Registration (Rule 5.5). Computer printouts of attorneys delinquent in payment of registration fees regularly include the names of many lawyers who would be considered ethical. Even the names of bar leaders appear occasionally. Such delinquency entails automatic suspension of the license, and continuing practice violates Rule 5.5, prohibiting the unauthorized practice of law.

Rule 1.8. There are several specifically “prohibited transactions” in Rule 1.8, including the vestiges of barratry and champerty. Also included are such prohibitions as agreements limiting malpractice exposure.

Expediting Litigation (Rule 3.2). A few of the rules do not so much recognize prevailing ethical norms as they attempt to actually reform the profession. Rule 3.2 requires lawyers to try to expedite litigation.

Required Ex Parte Disclosures (Rule 3.3(d)). “In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, *whether or not the facts are adverse.*” A lawyer in certain probate proceedings, or one seeking an *ex parte* temporary restraining order, should be mindful of this rule.

Correcting Discovery Replies (Rule 3.3(a)(4)). If a lawyer serves answers to discovery which she later learns are false, the lawyer must “take reasonable remedial measures,” which ordinarily involves disclosure.

Dealing With Unrepresented Persons (Rule 4.3). The Minnesota version of the Rules places special emphasis on a lawyer making clear to an unrepresented person whose side the lawyer is on. A lawyer suing a corporation might correctly conclude that he may talk with former employees of the corporation without informing corporate counsel, but forget to make his role clear to former employees.

Supervisory Liabilities (Rule 5.1). Those in charge of law firms must try to ensure appropriate firm procedures — *e.g.*, trust account books and records, file maintenance and return on request — or face violations for systemic failures.

Ads (Rules 7.2, 7.4). While the rules on lawyer advertising have been considerably relaxed, little-known remaining requirements include that every ad “include the name of at least one lawyer,” and that a copy of the ad be kept for two years. Rules restricting specialist advertising to those properly certified are apparently unknown to some Yellow Pages patrons.

Lawyers Board formal opinions, particularly those regarding attorney liens on homesteads, client files and copying costs, and trust account signatories should be known by the informed and ethical practitioner. *See Bench & Bar* November 1989, August 1990. The director’s office gives telephone advisory opinions to attorneys who are unsure of the propriety of their intended course of action: (612) 296-3952; (800) 657-3601. The ABA provides a similar service: (312) 988-5000. A good number of practicing attorneys and law school professors are expert in the law of professional responsibility.

Disciplinary consequences are often related to the type of rule violated. If the rule violated could be

called a “trade association” rule, which has little to do with protecting clients or the court; or is a little-known rule, which does not even indirectly embody such basic commandments as “Be ye honest,” then a determination will often be made that the violation is “isolated and nonserious,” so as to justify a private admonition.

Some supposed pitfalls are created by an attorney’s blindness, too often to the special responsibilities of representing or being a fiduciary. An attorney cannot help implement the fiduciary’s conflicts — for example, by drafting conveyances of estate property to a fiduciary without appropriate approvals and disclosures. The law of conflicts, loyalty, and Supreme Court discipline can come to bear on such fiduciary lapses.

Attorneys who observe the basic Four Commandments will probably avoid severe discipline. Attorneys who take the time to learn the rules will not just avoid pitfalls; they will eliminate pitfalls and avoid discipline altogether.