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CRIMINAL TRIAL TECHNIQUES & OVI DEFENSE

Ethics in 2017: What Do We Do Now?

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Ethics in 2017 - What Do We Do
Now

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NEW ISSUES - NEW PROBLEMS - CAUTIONS

FaceBook

- ABA Caution - 2013 - Judges should be cautious in "friending"
 - Florida Case - 8/2017 - attempt to recuse judge who had "friended" lawyer for opponent
 - One Florida Circuit - said "problematic"; another said "friending" of little significance - not show any "closeness"

Blogging

- How much can you blog to secure clients
- California new rule - informational and educational - political speech - and state is lawyer - but if add "availability" for specific legal services - directly or indirectly - then is advertisement
 - Link to professional page and contact information - not make it advertising
 - Listing of cases ok - but not "bragging" about victories
- Crossing the line - not mean can't do - just means - must follow rules as to advertising and solicitation

Search Engines

Lawyers in Florida Buying Competitors Names as Key Words

- Directs searchers to other law firm
- Challenge that is false and misleading
- Defenders - like McDonalds putting up Billboard across street from Burger King
- Ethics Complaint by law firm of Morgan and Morgan against PPC Marketing Services

Negative On-Line Reviews

- You Google Yourself and find ---- - What can you do

Cant's

- Not reveal confidential information about reviewer - is not a waiver

Can

- Sue for Defamation [good luck!]
 - Not work for anonymous criticisms
- Respond with character and record - General -
 - Use as marketing opportunity - ask happy clients to post; indicate availability to talk to any client past or future about work
 - Pennsylvania approved language -
Because of ethical obligations, I can not respond point for point to these allegations. Suffice it to say that the post does not present a fair and accurate picture of events or my abilities. Fell free to check my record.

Paraprofessionals

- 2017 - Oregon State Task Force Recommend Following Washington State - licensing of “paraprofessionals”
 - Different from Legal Assistants or Paralegals - can do almost everything but litigant - and can be “partners” with lawyers

NEW RULES - NEW PROPOSALS BY ABA

Withdrawal

ABA - Formal Opinion 476 - Request to Withdraw from Case

- MR 1.6 - must keep confidential everything “related to the representation” and obey tribunals rules as to withdrawal
- Can say “professional considerations” force me to withdraw” - but does that include failure to pay fee?
 - May if there is a written fee agreement and this is explained to court - not a breach of confidentiality - if “limited to the extent reasonably necessary to respond to court’s need for information

Unauthorized Practice

New Proposed Changes to Rule 5.5 - allow registration of in-house counsel who is admitted in another state or country but not admitted in a jurisdiction - and then allowed to “provide legal services” in that jurisdiction to employer organization or affiliates

- But not litigation - unless associated with duly admitted attorney
- But can perform pro bono services through recognized entity
- State Supreme Court may also admit foreign lawyers who do not meet all qualifications of home country for admission`
- Is subject to ethical and legal rules concerning discipline and enforcement of discipline

CLE - Proposed ABA Ethics Rule

- Must have specific credits for “ethics” [old rule]; and now Diversity and inclusion [conquer “implicit bias”] and mental health and substance abuse disorders [how can affect lawyer’s competence]

SOLICITATION

- Association of Professional Responsibility Lawyers - Propose Rule to Allow [for potential “Sophisticated Clients”] In-person solicitation and Third Party [non-lawyer] solicitation for lawyers; and [for all potential clients] Real-time Electronic Contact [open issue is Skype and Facebook - Face to Face]
 - Argument - “Must Keep up with Technology and Social Media”
 - Only bar false and misleading and coercion

Discrimination

ABA Model Rules Proposal - Rule 8.4 (g) to provide that Professional Misconduct includes “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, national origin, ethnicity, disability, sexual orientation, gender identity, marital status or socioeconomic status”

- Would add to Ohio’s 8.4 (g) - to include “harassment” as compared to just “engaging in conduct” and also add “disability; socioeconomic status; gender identity”

Other Jurisdictions

- Federal Court in Puerto Rico - law firm that represented a municipality for many years can't represent former employees suing city - "playbook information" means conflict
 - Potential for having and applying knowledge of settlement policies; resources for investigation; "traits" of other counsel
 - Unclear how long bar is for - burden on firm to show sufficient change in municipality administration and policy

Vidt - Pa. Federal District Court - Public Defender sent a memo to higher ups on ethical issues related to increasing workloads - was fired - claimed retaliation

- Speech was as a public employee - and though virtuous - was not political speech and not entitled to 1st Amendment protection

Pennsylvania - client can not be asked to waive claim of ineffective assistance of counsel as part of plea bargain - violation of ethical duties by both counsel and prosecutor

Illinois - referring lawyer loses fee - as not secure client's consent in writing

New York - Ethics complaint against former counsel; ask for file to respond; new counsel not give file unless client consents [could have retained file but didn't]

Connecticut - Lawyer's failure to convey favorable plea for two days [until after trial had started]- per se ineffective assistance- "promptly" means as soon as practicable - and failure to convey is not effected by prosecutor's agreement to keep deal open

Minnesota - Colorado attorney sent emails to Minnesota attorney to help in-laws negotiate a dispute - Minnesota Supreme Court said was Unauthorized Practice

New York - Attorney may ordinarily not use client's name in advertising without permission unless information is "publicly known" and not embarrass client

Florida - Actor - Even if Identified as an Actor- May not Read Client Testimonials in Lawyer Ad - As Misleading that Actor Has Ability to Evaluate Firm

OK - WHAT ABOUT OHIO

**Rule 1 - Admissions to the Practice of
Law - Section 16**

Person not admitted to practice of law in Ohio
can become certified to practice law in Ohio

- Admitted elsewhere; with law degree from
accredited law school; agree to discipline
jurisdiction
- Has not failed the Ohio Bar; is of good
character
- ***Is in this jurisdiction as a spouse of a member
of the United States Uniformed Services***

Rule XIV - Certification of Specialists

Amended Rule - effective April, 2017

- Supreme Court Commission on Certification of attorneys as Specialists
- Commission approve and regulate organizations that certify attorneys as specialists
 - Recommend to Supreme Court - subject areas; need and value; degree of proficiency; program of CLE; standards for organizations

OHIO BOARD OF PROFESSIONAL CONDUCT

Advisory Opinion 2017-1 - Contingent Fee

Lawyer may not advertise litigation services on contingent fee basis and use phrases like "There is no charge unless we win" or "No Fee without Recovery" unless lawyer agrees in advance to pay litigation expenses regardless of the outcome

Advisory Opinion 2017-2 - Reporting Misconduct

A judge who has knowledge [or receives information that indicates a substantial likelihood] that another judge has violated the Code of Judicial Conduct or ethical rules or that an attorney has violated ethical rules "has an ethical duty to report this violation within a reasonable time

Advisory Opinion 2016-4 - certified student intern [for non-profits or government] who also is working as a law clerk for law firm - is now bound by confidentiality and conflict rules - but can be screened in law firm or act with client waiver; and no imputation if screened

Advisory Opinion 2016-7 - once a third party check is received - lawyer must promptly deliver funds from trust account - week to ten days is presumptive period for promptness

Advisory Opinion 2016-8 - client testimonials on line websites; legal directories and social media - not be prepared by client; must be truthful and be general statements about lawyer or client's experience [but not include settlement or verdict amounts]

- However - statements of lawyer's skills, reputation, or record are unverifiable and not permitted
- Lawyer must monitor and make reasonable efforts to assure that statement are not in violation of rules

Advisory Opinion 2016-9 - out of state lawyer can have office in Ohio if exclusively practices in federal courts and federal administrative agencies

- Letterhead can say "Attorney at Law" but must indicate limits on practice

Advisory Opinion 2016-10 - Information from Prospective Client is to be confidential even if not become client

- Only waiver by individual or voluntary statements made by individual in proceeding can waive

Advisory Opinion 2016-11 - reaffirm if not in same firm - even if share space - not share fees unless agreement by client in writing and either proportional to work or responsibility

- If one of lawyers not have liability insurance must get written waiver from client

Advisory Opinion 2016-12 - defense counsel married to police officer in jurisdiction of crime - needs explicit written consent and demonstrate that can be competent and independent and that not reveal confidences

- Bar of lawyer not bar others in firm if screening

Medical Marijuana

Pennsylvania - Rule 1.2

A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsel counsels the client about the legal consequences, under the applicable law [in Pennsylvania or in places other than Pennsylvania or under Federal Law] of the client's proposed course of conduct

- Passed in response to passing of legal medical marijuana law in Pennsylvania

Compare Ohio Board of Professional Conduct - Can not so advise - as even medical marijuana still a violation of federal criminal statutes

Supreme Court has set up task force to review the issue and recommend changes in Rule

OSBA Futures Commission

- Assistance to Law schools for reducing costs; reduce loan indebtedness; revamp admissions testing for practice readiness [offer bar exam earlier in law school career]
 - Student licenses for 2nd year students; practice management courses
- Modernize CLE - fewer live; allow shorter segment credit [15 minutes]; “Train the Trainer” programs for those teaching CLE

- New Service Delivery options - explore multi-disciplinary practice and alternative business structures for lawyers; study and regulation of internet legal service providers; increased help for pro se litigants; look at alternative billing structures and innovative law firm models
- Increased visibility and public relations on importance of contacting attorneys and availability of and need for attorneys
- On-Line Legal Portal Development and Enhancement - library; live chat; YouTube; links; [lain English; self-help toolkits; multiple languages; staffing and updates; long-term funding stream-

Express Lien v. Cleveland Bar (2016)

- Anti-trust suit vs Cleveland Bar and members of UPL Committee - Company sold cloud based mechanics lien software in Ohio - UPL filed claims against Company
- Company claim that not practice law - just text based technology powered scrivener
- Settlement by Ohio Board on Unauthorized Practice - allows sales of forms so long as forms comply with Ohio law and no specific property included in form prior to being filled out by customer

Concern - with UPL - Supreme Court case [N.C. State Bd of Dental Examiners v FTC (2015)] as to Dentists- that allowed anti-trust - self-regulatory professions at risk if FTC or states decide limiting fair competition

HOW COULD THEY

RECENT OHIO DISCIPLINARY CASES

Frenden - disbarment

- Medicaid Case - Not Act Competently - Lack of Understanding of Process
- Personal Injury - Not Obtain consent of Client for Settlement; Not Obtain Release of Client; Deposited Check without Release; Give Accounting to Client of Settlement
- Domestic Relations -No Written fee Agreement; Not Obtain Discovery; Settlement Coerced on Client
- Domestic Relations - Threaten Client send Children to Child and Family Services Unless Pay More Fee Money - Had Secretary Take Children for their "safekeeping;" Sex with Client [Client felt would get discount]
- No Malpractice Insurance - Not Inform Clients

Smith - Public Reprimand

- Represent defendant in criminal matter - \$25,000 fee
- Review cases - asked for \$50,000 more [received \$45,000]
- No Written Fee Agreement
 - Never deposited in Clients Trust Account
 - No records of time or effort
- Plea of Guilty - released after 3 and ½ years
- Agreed - that attorney provided “very effective assistance”
- Finding - not tell client might be entitled to refund; no trust account; excessive fee
- No prior ethical violations over 50 year career

Ashtabula - law firm used name of sitting Supreme Court Justice in firm name - Justice not know this violated Ethics Rule - and gave permission - ethics action vs “partner” - violation of Rule 7.1 [false advertising] and 7.5 (c) [using name of lawyer who in public office]- Two year suspension - stayed- dissent wanted indefinite suspension

MHB - Note - now improper for retired judge to use title or to be addressed publicly as judge

Coll - denied admission - can reapply in two years - in application did not detail facts of numerous moving violations and when asked - gave his name; social security number; driver's license number - the second request gave info as to some but not all - and then not tell of charges since first application - including short jail term [10 days for underage fishing

- Answer was that he fully informed Board and they not entitled to more - and driving record no consequence on character and fitness
- Dissent - should permanently bar

Catalfina - complaint by UPL Board vs Florida lawyer - held self out as Ohio lawyer - civil penalty

- Agreed to represent elderly couple seeking social security disability benefits - and waive fee if get five more clients
 - Never file or seek benefits and then found out not a lawyer in Ohio
- Agreed to handle divorce matter - told hearing scheduled - client called no hearing and Catalfina not Ohio lawyer

Clifton - Reprimand

- Altered will after executed and before probated
 - Claimed not a violation of ethical rules - merely changed inadvertent omission - but never disclosed - had no impact on distribution
 - Caught by counsel for one of children - not included in original or altered will
 - No prior discipline - good faith effort to correct omission

Azman - Suspension with conditions

- Fired from law firm and then accessed email accounts of former employer to view emails of fellow employees and clients and then lied about conduct under oath
- Asked managing partner for letter of recommendation and would in return do a “non-compete” and not “bad mouth” firm and not steal clients though were “his clients”
- Then entered emails again and deleted all his emails to anyone in firm
- Firm withdrew criminal complaint and reported to ethics committee - Azman again denied

***Boland* - Disbarment**

- Divorce Case - scheme to hide \$850,000 in marital assets [put into a Swiss Bank and then Caleos Islands] - paid to him by client in amounts under \$10,000 - to avoid detection under banking laws
 - Also another case - no liability insurance and no notification to client
 - Also - two other cases - not put retainer in trust account
 - Not cooperate with investigators
- No prior disciplinary actions - Been a lawyer for 20 years

***Tamburrino* - One Year Suspension [6 months stayed]**

- Judicial campaign - two TV Commercials against opponent - false and impugned integrity of judge
- dissent - protected as political speech
- Claimed judge not disclose travel expenses
 - Were public documents and no one asked to disclose
 - criticized concurring opinion - that suggested that judge approved of teenage drinking - when issue was needing a warrant to enter a private home

Jacob - Two year suspension - second year stayed

- Municipal Court Judge - found guilty of soliciting prostitution and falsifying court record
- Started with 21 counts of evidence tampering; solicitation; falsification of documents - bench trial conviction of only five misdemeanors - three counts of solicitation and one count of falsification - resigned from bench; 60 days in jail and fine
- Facts - series of sexual acts with several prostitutes; also in DV case reduced on own to disorderly conduct so defendant not lose right to own gun - signed document that said - falsely - that prosecutor was present and authorized reduction
- No prior discipline