PRESENTED AT

34th Annual School Law Conference

Feb. 28 to Mar. 1, 2019
Austin, TX

Everyday Strategies for Avoiding Professional Misconduct

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EVERYDAY STRATEGIES FOR AVOIDING PROFESSIONAL MISCONDUCT

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Introduction - Everyday Strategies for Avoiding Professional Misconduct

Lawyers are busier than ever. Courts issue opinions and orders multiple times per week. We are expected to keep up with procedural law, the substantive law that controls disposition of our clients' legal matters, and the law controlling our ethical duties to our clients. Those ethical duties are spelled out in numerous different ways. Court opinions construing attorney fiduciary duties, professional negligence, fraud and the like provide some of that guidance. The Texas Disciplinary Rules of Professional Conduct, the ethical opinions that construe them, and restatements, cases, statutes, and rules from other jurisdictions all form part of the kaleidoscope of information that we must process in order to assure that we meet the ethical obligations that we owe to our clients and to the legal system as a whole.

This paper is an effort to help Texas attorneys stay current with new ethics information that has become available over the past month or months, or year or years, as the case may be. It is a good start to assisting the average practitioner in meeting his or her ethical obligations to his or her clients, and to the legal system as a whole. With that, let's explore 50 everyday strategies that lawyers can use to avoid professional misconduct.

1. Do not give dispositive weight to an American Bar Association ethics opinion that is right on point.

Meador, In re:, 968 S.W.2d 346, 349, fn. 1 (Tex. 1998) (orig. proceeding):

> This ten-person standing committee of the American Bar Association is charged with "interpreting the professional standards of the Association and recommending appropriate amendments and clarifications...." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT viii (ABA Center for Professional Responsibility, 3d ed.1996). It issues advisory opinions on ethics questions of general interest submitted by attorneys. *See id.*; *see also* Klein, Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant, 61 TEMP. L. REV. 1171,

> 1179 n. 54 (1988). While the Committee's opinions are often cited as persuasive authority by state disciplinary bodies, the opinions do not bind those bodies. *See, e.g.*, ABA INFORMAL OP. 1420 (1978) ("Enforcement of legal ethics and disciplinary procedures are local matters securely within the jurisdictional prerogative of each state and the District of Columbia."); Hellman, When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions, 10 GEO. J. LEGAL ETHICS 317, 326 (1997) ("ABA opinions are binding upon no one. ABA opinions represent the views of a small committee of a private association, and they construe that private association's Model Rules and Model Code. The power to determine whether and to what extent either of these model documents will be put into force in any state is exercised by a state authority, most commonly the state's highest court." (notes omitted)).

2. Do not give dispositive weight to a Texas formal ethics opinion that is right on point.

"Such opinions are concerned with matters of attorney discipline and are advisory rather than binding." *Sidley Austin Brown & Wood, LLP, v. J.A. Green Devel. Corp.*, 327 S.W.3d 859, 866 (Tex. App.– Dallas 2010, no pet.) (*citing Labidi v. Sydow*, 287 S.W.3d 922, 929 (Tex.App.– Houston [14th Dist.] 2009, orig. proceeding)).

3. Do not completely disregard ABA or Texas formal ethics opinions.

Some Texas appellate courts have found that while these opinions are advisory, and not binding, they are persuasive enough to form the basis of appellate opinions:

> In 2001, the Texas Center for Legal Ethics and Professionalism was asked to address whether "a lawyer, who is the newly elected district attorney, [is] prohibited from prosecuting a former client in a new criminal proceeding." Tex. Comm. on Prof'l Ethics, Op. 538. While opinions of the Texas Ethics Commission are advisory, rather than binding, authority, Opinion 538 directly addresses the issues now before this Court and we find great logic in its reasoning.

In re Goodman, 210 S.W.3d 805, 812 (Tex. App.– Texarkana 2006) (orig. proceeding). *See also Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 503 (Tex. 2015) ("Opinions of the Professional Ethics Committee carry less weight than do the Disciplinary Rules as to legal obligations of attorneys, but they are nevertheless advisory as to those obligations.").

4. Do not contact a prospective expert solely for the purposes of disqualifying him or her. - EO 676 - 8/18

The Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from retaining an expert or disclosing confidential information to a prospective expert when the lawyer has no substantial purpose other than to attempt to disqualify or otherwise prevent the expert from being

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First appeared as part of the conference materials for the
34th Annual School Law Conference session
"Everyday Strategies for Avoiding Professional Misconduct"