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Everyday Strategies for Avoiding Professional Misconduct

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Table of Contents

Introduction - Everyday Strategies for Avoiding Professional Misconduct 1

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

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

3. Do not completely disregard ABA or Texas formal ethics opinions. 2

4. Do not contact a prospective expert solely for the purposes of disqualifying him or her. - EO 676 - 8/18 2

5. Do not renegotiate your fee in the middle of the representation unless you feel confident you can prove that the new agreement is fair to the client under all of the circumstances. EO 679 - 9/18 3

6. Be certain to understand the confidentiality risks in the technology that you use to maintain and store client communications. EO 680 - 9/18. 3

7. Make sure you know how to distribute client property when a third-party has a superseding interest in that property. EO 681 - 9/18. 3

8. Just because no rule, ethics opinion, case, disciplinary rule or other authority prohibits it doesn't mean you can't be sanctioned for doing it. 4

9. Do not disclose Confidential Client Information in Social Media without Client Consent. 4

10. Do not respond to Clients' Adverse Comments on the Internet using Confidential Information. EO 662 - 8/16. 8

11. Scrub Electronic Documents to Prevent Transmission of Confidential Metadata. EO 665 - 12/16. 8

12. Do not conduct or direct someone else to conduct an anonymous investigation to determine jurisdictional information. EO 671 - 3/18. 9

13. Do not communicate with potential witnesses who could turn into clients without complying with rules regarding lawyer advertising. EO 672 - 3/18. 9

14. Turn over the original of a former clients' file upon request. EO 657 - 5/16. 9

15. Do not charge a former client for copying of the former client's file. Do not provide only a copy. EO 657 - 5/16. 9

16. Convert the file to a format reasonably accessible to the ordinary client at the attorney's cost. EO 657 - 5/16. 9

17. Do not enter into an agreement restricting the lawyer's ability to represent clients upon separation. EO 656 - 5/16. 10

18. Do not provide free stuff in order to get prospective clients "in the door." EO 654 - 3/16. 10

19. Do not communicate with a represented party directly when the lawyer is a pro se litigant. EO 653 - 1/16.. 11

20. Do not use a collection agency to collect past due attorney's fees without dotting the I's and crossing the T's or report a nonpaying or slow paying client to a credit bureau. EO 652 - 1/16. 11

21. Treat prospective client information confidentially if your web site does not warn that the info provided will not be treated confidentially. EO 651 - 11/15. 12

22. Do not participate in the drafting of a sham affidavit. 12

23. Do not charge a client for the time it takes to withdraw from representation of the client. 13

24. Do not retain the general right to control the representation on behalf of the client. 14

25. Do not retain the right to control whether or not a case will settle and upon what terms. 15

26. Do not accept a contingent fee in a criminal representation. 15

27. Do not enter into an oral contingent fee agreement. 15

28. What if I do enter into an "oral contingent fee contract"? 15

29. In most cases, do not attempt to recover attorney's fees under quantum meruit for an "oral contingent fee contract." 15

30. Do not attempt to recover attorney's fees as a "piece of the client's action" without dotting the I's and crossing the T's. 16

31. Do not accept compensation from a third-party other than a client, for representation of the client, without dotting the I's and crossing the T's. 17

32. Do not attempt to prospectively limit your liability for professional negligence, in writing or otherwise. 17

33. Do not exercise a unilateral right to convert a fixed-fee or hourly fee agreement to a contingent fee agreement after the commencement of the representation.. 17

34. Have a written representation agreement signed by the attorney and the client and initialed on all pages by both the attorney and the client.. 18

35. Do not accept an assignment of a portion of another attorney's contingent fee agreement with a client without independently determining that the other attorney complied with TDRPC 1.04 in all respects. 18

36. Obtain a guardian ad litem to protect the client's interests if you have reason to believe that a potential new client lacks legal competence to enter into the representation agreement.. 19

37. Do not charge a non-refundable retainer without being CERTAIN you understand *Cluck v. Comm'n for Lawyer Discipline*, 214 S.W.3d 736, 739–40 (Tex. App.– Austin 2007, no pet.). 20

38. Make certain your representation agreement contains a specific description of the professional legal services that you and/or your firm will provide, and those that you and/or your law firm will not provide. 21

40. Address frequency of billing in your written representation agreement, and comply with the frequency set forth in the written representation agreement. 22

41. Address frequency of client communications in your written representation agreement and comply with the agreement as written.. 22

42. Address in the written representation agreement the specific expenses that will be charged by you or your firm, and the rates for each. 23

43. Include the statute-mandated information that must be provided to each client with respect to the availability of the grievance process. 23

44. Include in your written representation agreement the specific identity of the client. 23

45. Include in your written representation agreement the identity of which persons are entitled to receive confidential communications, and in what manner.. 23

46. Include in your written representation agreement the manner in which it can be terminated by the attorney and by the client "for good cause," the manner of calculating the attorney's fee if the agreement is terminated "for good cause," and if it is not terminated "for good cause.". 23

47. Address in your written representation agreement the time and manner of disposition of the client's file at the conclusion of the representation. 28

48. Address in your written representation agreement the specific manner of dispute resolution to be utilized by the attorney and the client. 28

49. Expressly state the manner of communications with client, and the ethical, security, and confidentiality issues surrounding them. 28

50. Obtain the client's permission to perform a background check of the client. 28

51. Disclose in writing the risk of various rule, statute and common law bases of sanctions potentially applicable to your representation of the client.. 29

52. Include a merger clause and a no-reliance clause in your written representation agreement, if factually appropriate.. 29

53. Include "anti-contract of adhesion" language to your agreement, where factually appropriate. 29

54. Attach a copy of or a link to the applicable disciplinary standards to your written representation agreement and expressly incorporate its terms into your representation of the client.. 29

55. Encourage your new client to have your proposed form of representation agreement reviewed by counsel of the client's own choosing, at the client's own cost, to ensure that you are both satisfied that the individual terms of the agreement, and the agreement as a whole, are fair to both the attorney and the client. 30

Bonus Material - Why you should have a comprehensive representation agreement. 30

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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