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Attorneys in the Hot Seat: Problems and Solutions

Nicole T. LeBoeuf

Kevin Love

ATTORNEYS IN THE HOT SEAT: PROBLEMS AND SOLUTIONS

I. Introduction

We take courses on ethics as law students. We take the Multistate Professional Responsibility Examination, in order to obtain a license. We turn to the back of the Texas Bar Journal on a monthly basis and wince at the section on Disciplinary Actions. We faithfully record at least 3.0 hours of ethics training each year, in order to maintain our licenses.

But what do we really understand about the ethical practice of law? "Be honest." "Do the right thing." "Don't mingle client funds with your own." "Return phone calls." "Meet deadlines." Are these things enough?

Many lawyers rarely look at the Texas Disciplinary Rules of Professional Conduct (the "Disciplinary Rules" herein), unless they are puzzling through a potential conflict of interest, or are charged by their firm with making sure a website or magazine ad comports with the advertising rules of the State Bar. So what do the Disciplinary Rules require, and how relevant are they?

We know that a violation of the Disciplinary Rules can lead to a grievance, and a grievance can lead to a reprimand, a fine, a suspension or even loss of a law license. A look at statistics compiled by the State Bar of Texas reveals a 20% decline in lawyer disciplinary actions between 2011-12 and 2013-14.[1] However, in 2013-14 alone, 21 Texas lawyers were disbarred, 17 resigned, 131 were suspended, 96 were publicly or privately reprimanded, and 57 were sent for GRP.[2] One must assume that the State Bar's ability to self-regulate its members – accomplished primarily through the Disciplinary Rules and the grievance system – will be favorably regarded by the Sunset Review Commission as the State Bar proceeds through the Sunset Review process, scheduled for 2016-17, during the 85th Legislative Session. There is no reason to believe that the self-regulatory function of the State Bar will either continue to decline or be abolished.

In addition to forming the basis for State Bar discipline the Disciplinary Rules are often a focal point in legal malpractice cases. The rules themselves do not give rise to a private cause of action, and are not to be used as the standard of care in a malpractice case. *See* TEX. DISC. R. PROF'L COND., Preamble: Scope, par. 15; *Blankinship v. Brown*, 399 S.W.3d 303, 311 (Tex. App. – Dallas 2013, pet. denied); *George Fleming & Assocs., LLP v. Kinney*, 395 S.W.3d 917, 931 (Tex. App. – Houston [14th Dist.] 2013, pet. denied) (citing *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 158 n.2 (Tex. 2004) ("[W]e note that the Rules do not define standards of civil liability of lawyers for professional conduct."); *Greenberg Traurig of N.Y. v. Moody*, 161 S.W.3d 56, 96-97 (Tex. App. – Houston [14th Dist.] 2004, no pet.) (trial court erred in allowing expert witness to testify that "the standard of care for attorneys is based on the Texas disciplinary rules when no such liability can be based on any violations of those rules")). However, trial and appellate courts frequently look to the rules for *assistance* in defining the standard of care applicable to lawyers.

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[1] Texas State Bar statistics regarding the disciplinary process can be found in the annual report of the Texas Commission on Lawyer Discipline and at https://www.texasbar.com/Content/NavigationMenu/AboutUs/FortheMedia/Grievance_and_Ethics_Information2/5-YearGrievanceChart.pdf.

[2] GRP stands for Grievance Referral Program, represents an alternative to discipline available to lawyers meeting certain criteria, and offers education on law practice management and self-care.

See, *e.g.*, *In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998) (the Disciplinary Rules are not binding as to substantive law regarding attorneys, although they inform the law); *Franks v. Roades*, 310 S.W.3d 615, 629-30 (Tex. App. – Corpus Christi 2010, no pet.). The distinction can appear meaningless to the attorney Defendant, when the Disciplinary Rules are referenced in a malpractice case.

Courts have also looked to the Disciplinary Rules in determining such matters as what and when a lawyer gets paid. *See*, *e.g.*, *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 205 (Tex. 2002) ("A fee sharing agreement between lawyers who are not in the same firm violates public policy and is unenforceable unless the client is advised of and consents to the sharing arrangement."); *Lemond v. Jamail*, 763 S.W.2d 910, 914 (Tex. App.--Houston [1st Dist.] 1988, writ denied) ("In substance, the trial judge . . . found . . . that the referral agreement is void and unenforceable as being against public policy because . . . the client . . . was never informed of the fee-splitting agreement . . . ."); *Fleming v. Campbell*, 537 S.W.2d 118, 119 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ ref'd n.r.e.) (holding an attorney's referral fee contract was void because it was against the public policy expressed in the disciplinary rules).

Thus, in considering aspects of real estate law, as it is commonly practiced, which may trigger either State Bar grievances or malpractice claims, we look to both the Disciplinary Rules and applicable case law. This paper addresses several aspects of the practice of law that invite a deeper look at their treatment by the courts and in the Disciplinary Rules.

II. Negotiating Title Exceptions – Is this the Unauthorized Practice of Law?

An increasingly common practice, it would seem, is the negotiation of title exceptions by non-lawyers, often paralegals at real estate firms and non-lawyer staff at title companies. That is, it is not uncommon for non-attorney staff to negotiate the reduction or elimination of exceptions to a title commitment or title policy, by the preparation of, or by sending a response to, a title commitment comments and objections letter. Doing so typically involves the review and citation of various legal title and transfer documents, and often necessarily involves discussions of the nature and effect of such documents. Does the negotiation an review of title exceptions constitute the practice of law? While there do not appear to be any reported cases or advisory ethics opinions directly on point in Texas, the practice may well constitute the unauthorized practice of law when performed by non-attorneys. If it is, then the lawyers who participate in promoting or aiding the practice may also be subject to discipline. *See* TEX. DISC. R. PROF'L COND. 5.05 (b).

A. What is the practice of law?

We start by considering what constitutes the practice of law. The practice of law in Texas is defined by statute and by case law. Section 81.101 of the Texas Government Code states:

> (a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or

Title search: Attorneys in the Hot Seat: Problems and Solutions

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