

Ethics in IP Practice

David Hricik

Professor of Law

Associate Dean for Faculty Research & Development

Mercer Law School

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The Role of Ethics Rules

- Do the ethics rules control, have weight, or even matter?
 - Discipline: controlling.
 - Malpractice: varying effect.
 - Disqualification: Varying effect.
 - Contract enforcement (engagement/fee splitting agreements): varying effect.
 - Outcome determinative example: \$MM Fee splitting agreement between MA, SC, and MS lawyers, which was in part negotiated at O'Hare.
 - Outcome determinative example: *Shepard Mullin* case (below).

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Choice of Law

- Choice of ethics rules:
 - Generally, if a suit is pending before a tribunal, its rules will control.
 - Many federal courts adopt state ethics rules – be sure to check because ethics rules still vary among each other and from the Model Rules.
 - However...

Federal Courts: Varying Weight to State Rules

- In Fifth, Tenth Circuits, and some other courts:
 - Forum state's rules do not control even if district court has adopted them in its local rules;
 - Model Rules do not control; and instead
 - “National standards” determined by “federal law” controls.
 - *In re Dresser* (conduct allowed by Texas rules unethical under federal law).

What to do

- Reduce uncertainty: specify which state's law applies.
- For federal litigation, best to follow the most stringent rule, but:
 - Easy if one set of rules requires something be in writing (consent from a client), then get it in writing;
 - Hard if there is no conflict between clients under one set of rules, but there is a conflict under another, which is more “stringent?”

Basic Principles: Current Clients

Under Model Rule 1.7 and PTO Rule 11.107, a conflict of interest exists if and requires informed consent:

(1) a representation of a firm's client will be directly adverse to another firm's client; or

-- “adversity”

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

-- “pulling punches”

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