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What to Do if Your Client is Misbehaving - Part XIII

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WHAT TO DO IF YOUR CLIENT IS MISBEHAVING - PART XIII

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Introduction - What to Do if Your Client is Misbehaving

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.

The very best manner in which lawyers can deal with clients who misbehave is to be certain of their own ethical obligations in situations where the client misbehaves or threatens to do so. The second best manner in which lawyers can deal with misbehaving clients is to utilize a comprehensive, well-written, written and signed representation agreement.

This paper is an effort to help Texas attorneys stay current with new ethics information that has become available over the past months and years. 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 57 strategies that lawyers can use to avoid professional misconduct and sanctions.

1. Stay up-to-date with changes to applicable disciplinary rules.

The good news is that for the most part, ethical rules applicable to Texas attorneys do not change all that often. The less good news is that a set of rules amendments became effective during the summer of 2021. And another set of amendments went into effect in September of 2023. And yet another set of comprehensive substantive disciplinary amendments is due to be voted on by Texas attorneys just a few months from now in April of 2024.

The redline version of the 2021 rules amendments takes up 41 pages at this link: <https://www.txcourts.gov/media/1452266/219061.pdf>

The disciplinary rules amendments that went into effect in September of 2023 may be found here: <https://www.txcourts.gov/media/1457735/239100.pdf>

And the comprehensive revisions to the disciplinary rules that will be voted on by Texas attorneys in just a few months may be found here: <https://www.txcourts.gov/media/1457236/239080.pdf>

Everything a Texas attorney needs to understand the proposed rules amendments that are the subject of the April 2024 referendum – including explanations of each proposed rules amendment – may be found at the following website: <https://www.texasbar.com/AM/Template.cfm?Section=rulesvote&Template=/rulesvote/home-2024.cfm>

2. Do not give dispositive weight to an American Bar Association ethics opinion that is right on point, or a Texas formal ethics opinion that is right on point, but don't completely disregard them either.

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)).

At the same time, do not fail to consider the potential applicability of an ABA formal ethics opinion, a restatement of the law, or ethics opinion from another jurisdiction if it is directly applicable to your issue. *In re Thetford*, 574 S.W.3d 362, 377 (Tex. 2019) (“We have not addressed under what conditions a guardianship could be adverse to the ward, but the American Bar Association (ABA), the American Law Institute (ALI), and other jurisdictions have. We first consider these nonbinding but persuasive authorities and propose a general rule, which we then apply to the facts at hand.”).

Even Texas ethics opinions should not be considered as binding precedent. “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)).

Despite all of the foregoing, 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:

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