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What to Do if Your Client is Misbehaving - Part XIII

**Bradley A. Jackson
Scott Rothenberg**

Bradley A. Jackson
Adjunct Professor
University of Texas School of Law

bajacksoncounsel4@gmail.com
832.506.6004

Scott Rothenberg
Law Offices of Scott Rothenberg
6565 West Loop South, Suite 560
Bellaire, TX 77401

scott@rothenberglaw.com
713.667.5300

Table of Contents

Introduction - Tips for What to Do if Your Client is Misbehaving	1
1. Stay up-to-date with changes to applicable disciplinary rules.	2
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.	2
3. In personal injury litigation, when representing a plaintiff, do not agree to personally indemnify the defendant. Defendant's counsel should not ask the plaintiff's attorney to do so either - EO 694 - 7/22.	3
4. Correction of a client's intentionally false statements depends on when and where those statements are made. EO 692 - 10/21	3
5. Do not contact a prospective expert solely for the purposes of disqualifying him or her. - EO 676 - 8/18	3
6. Do not renegotiate your fee in the middle of the representation unless you feel confident you can <u>prove</u> that the new agreement is fair to the client under all of the circumstances. EO 679 - 9/18	3
7. Be certain to understand the confidentiality risks in the technology that you use to maintain and store client communications. EO 680 - 9/18.	4
8. Make sure you know how to distribute client property when a third-party has a superseding interest in that property. EO 681 - 9/18	4
9. 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. A finding of bad faith is the key	4
10. Do not threaten to file a grievance or criminal charges. Period.	5
11. Do not disclose Confidential Client Information in Social Media without Client Consent.	5
12. Do not respond to Clients' Adverse Comments using Confidential Information. EO 662 - 8/16.	8
13. Scrub Electronic Documents to Prevent Transmission of Confidential Metadata. EO 665 - 12/16.	8
14. Do not conduct or direct someone else to conduct an anonymous investigation to determine jurisdictional information. EO 671 - 3/18	8
15. Do treat the information that is shared with you by a prospective client who does not hire you as confidential client information. EO 691 - 6/21	8
16. Turn over the original of a former clients' file upon request. EO 657 - 5/16.	8
17. Do not charge a client for copying a client's file. Do not provide only a copy. EO 657 - 5/16	8
18. Convert the file to a format reasonably accessible at the attorney's cost. EO 657 - 5/16.	9
19. Do not enter into an agreement restricting the lawyer's ability to represent clients upon separation. EO 656 - 5/16.	9
20. Do not provide free stuff in order to get prospective clients "in the door." EO 654 - 3/16.	9
21. Do not communicate with a represented party directly when the lawyer is a pro se litigant. EO 653 - 1/16	9

22.	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.	10
23.	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.	10
24.	Do not participate in the drafting of a sham affidavit.	10
25.	Do not charge a client for the time it takes to withdraw from representation of the client.	11
26.	Do not retain the general right to control the representation on behalf of the client.	12
27.	Do not retain the right to control whether or not a case will settle and upon what terms.	12
28.	Do not accept a contingent fee in a criminal representation.	12
29.	Do not enter into an oral contingent fee agreement.	12
30.	What if I do enter into an “oral contingent fee contract”?	12
31.	In most cases, do not attempt to recover attorney’s fees under quantum meruit for an “oral contingent fee contract.”	13
32.	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.	13
33.	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.	13
34.	Do not attempt to prospectively limit your liability for professional negligence, in writing or otherwise.	14
35.	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.	14
36.	Have a written representation agreement signed by the attorney and the client and initialed on all pages by both the attorney and the client.	14
37.	Do not accept an assignment of a portion of another attorney’s contingent fee agreement without independently determining that the other attorney complied with TDRPC 1.04 in all respects.	15
38.	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.	15
39.	Do not charge a non-refundable retainer without being CERTAIN you understand <i>Cluck v. Comm’n for Lawyer Discipline</i> , 214 S.W.3d 736, 739–40 (Tex. App.– Austin 2007, no pet.).	16
40.	Your representation agreement should contain 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.	17
41.	Include in your representation agreement a very detailed explanation of how the attorney’s fee will be calculated.	17
42.	Address frequency of billing in your written representation agreement, and comply with the frequency set forth in the written representation agreement.	17
43.	Address frequency of client communications in your written representation agreement and comply with the agreement as written.	17

44.	Address in the written representation agreement the specific expenses that will be charged by you or your firm, and the rates for each.	18
45.	Include the statute-mandated information that must be provided to each client with respect to the availability of the grievance process.	18
46.	Include in your written representation agreement the specific identity of the client.	18
47.	Include in your written representation agreement the identity of which persons are entitled to receive confidential communications, and in what manner.	18
48.	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.”	18
49.	Address in your written representation agreement the time and manner of disposition of the client’s file at the conclusion of the representation.	21
50.	Address in your written representation agreement the specific manner of dispute resolution to be utilized by the attorney and the client.	21
51.	Expressly state the manner of communications with client, and the ethical, security, and confidentiality issues surrounding them.	21
52.	Obtain the client’s permission to perform a background check of the client.	21
53.	Disclose in writing the risk of various rule, statute and common law bases of sanctions potentially applicable to your representation of the client.	21
54.	Include a merger clause and a no-reliance clause in your written representation agreement, if factually appropriate.	22
55.	Include “anti-contract of adhesion” language to your agreement, where factually appropriate.	23
56.	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.	23
57.	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.	23
	Bonus Material - Why you should have a comprehensive representation agreement.	23-25

WHAT TO DO IF YOUR CLIENT IS MISBEHAVING - PART XIII

Bradley A. Jackson
Adjunct Professor
University of Texas School of Law
(832) 506-6004
bajacksoncounsel4@gmail.com email

Scott Rothenberg
Law Offices of Scott Rothenberg
6565 West Loop South, Suite 560
Bellaire, Texas 77401
(713) 667-5300 telephone
(713) 667-0052 telecopier
scott@rothenberglaw.com email

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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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