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What on Earth Were You Thinking? Getting Caught Breaking the Rules

Many lawyers believe that receiving an Ethics Complaint is a worst-case scenario. Not so. Things can still get worse.

By **Marc Garfinkle** | March 21, 2019

Attorneys break rules all the time. It can't be a serious problem, one might suppose, since it happens so often. Maybe we didn't come to a complete stop before making a right on red, or we used the salad fork for the main course at lunch. Maybe we laughed too loudly in the library quiet room, or we forgot to wipe down the equipment at the gym when we were done.

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Sometimes lawyers even break rules at work. Perhaps we didn't put the milk back in the break-room fridge, or we didn't count the cover sheet when we sent the fax. Rules, it appears, are meant to be broken—even by attorneys—judging from the evidence. However, when a lawyer breaks rules of the profession, there may be serious consequences. In view of some of the consequences, it's surprising that lawyers break the rules at all.

Lawyers who break rules don't get caught very often. Perhaps it's because they stay under the radar—classifying the rules that govern us as being either minor or major, and breaking the minor ones only. They think, perhaps correctly, that these are less rigorously enforced than the major rules. *Honest* lawyers typically limit their transgressions to the minor ones. This is somewhat like committing only minor sins. "Minor" is a dangerously deceptive term. To some, a "minor" rule might be the one that forbids notarizing the someone's signature without confirming her identity, paying a referral fee to a referring attorney without being a certified specialist, or simply neglecting to sign a retainer agreement with each new client. Of course, to the OAE, no rules are minor.

Sad to say, lawyers will break major rules, too, if they figure they won't get caught. The late Essex County attorney Mark S. Tepper, whose ethicality was never questioned, called that kind of ethics "middle-class morality," which he described simply as "the fear of getting caught." To Tepper, morality was a function of self-preservation. Whether we are cheating on our spouses or on our taxes, packing a hotel towel along with the toiletries, or pocketing the over-change from the cashier, we are not thinking about the propriety of our actions. Instead, we are calculating the odds of getting caught, quickly improvising some algorithm of risk factors, and acting accordingly.

Unfortunately (from this writer's self-interested perspective), relatively few rule-violators get caught. In fact, most go undetected. For a host of reasons, attorneys are often able dodge potential bullets. Perhaps the adversary or the judge declined to report the violation, or gave the attorney the benefit of a doubt. Maybe the client didn't know that any rules were broken or that there is a procedure for inquiry and grievance. Perhaps the grievant became incarcerated, incapacitated or deported, or was illiterate or relocated to a distant place. Maybe the offended party thought, "No big deal," "No harm, no foul," or "Nothing in it for me." Perhaps—as with so many trust account violations—a calculating lawyer thought, "Nobody will find out"; and no one did. It probably happens every day, somewhere.

On the other hand, many lawyers *do* get caught, and many violations *are* pursued. These come to the attention of the Office of Attorney Ethics (OAE) as grievances, inquiries, audit reports, advisories from foreign jurisdictions, advertising complaints, notices of criminal charges, RPC 8.3 notifications, self-reporting and criminal convictions. Many of these matters go to Complaint.

Many lawyers believe that receiving an Ethics Complaint is a worst-case scenario. Not so. Things can still get worse. For one thing, many ethical violations might also be a crime (all crimes are ethical violations). But even where criminal prosecution is unlikely, the process of attorney discipline gives abundant opportunity for the Respondent (as our risk-taker is now identified) to compound his problem. Untimeliness, incompleteness, lack of candor, lack of rehabilitation, wrongful contact with a witness, fudging or forging evidence, and a host of other inappropriate acts or responses can complicate a Respondent's plight. The disciplinary process will often give us the opportunity to make things better; it will *always* give us the opportunity to make things worse.

Case in point. During my stint as District Ethics Committee Chair, I sometimes reviewed statistics relevant to the disciplinary process. One statistic shocked me. It concerned the response rate of attorneys served with the "In re: Gavel letter" or the "10-day letter"—the notification from the OAE that the Office has received a grievance. The letter typically states that a copy of the grievance is enclosed (although often one is not) and advises the Respondent that s/he has 10 days in which to respond. The notice usually includes a warning that failure to timely respond might result in enhanced discipline; some letters specifically mention suspension or disbarment. Still, having received the notice, *20 percent* of these lawyers did nothing! Such a failure is invariably an aggravating factor in discipline, while cooperation with the investigation is always a mitigating factor. Looking at my list of delinquent lawyers, I thought: What on earth are they thinking? Why risk so much for so little?

Today I understand it a little better. Most of them were thinking they would not get caught; the rest weren't thinking at all. Because you, dear reader, have stayed with me thus far, the reward for your patience shall be a whirlwind tour of cases from an ethics practice—cases in which, upon learning what the Respondent did, I failed to suppress an astonished, "What on earth were you thinking?" (or more colorful words to the same effect).

Some of the best, and perhaps the most numerous, examples of poor attorney risk-taking derive from the Random Ethics Audit. Five-hundred of these laser-guided missiles are launched every year, targeting that many law firms, randomly chosen. The struggling solo and the huge multinational firm have identical odds of getting hit. The purpose of the audit is to determine whether the firm is correctly maintaining the

proper accounts according to the rules. The auditors check all account activity in all attorney accounts for (usually) a two-year period. No deviation from the rules is considered minor. The audits usually result in a list of deficiencies which the attorney is required to remedy. Sometimes, the auditors don't circle back around to verify compliance for several years. Passage of time is not a reason to think the audit is over or that you won't get caught.

One attorney had been taking her fees (from P.I. cases) from trust and depositing them directly into her personal account, entirely bypassing her attorney business account (and presumably her Schedule C). She showed me a letter from the Random Audit program advising that they were referring her audit to the Ethics Committee because she "continued to deposit fees into your personal account after we specifically directed you not to." When I blurted out the question that lent its name to today's column, she replied: "I thought the audit was over and they wouldn't follow up."

Another attorney (now, former attorney) was told by auditors to pay over to his client a small amount he'd been holding for years in trust, or to do what was necessary to pay it into court. He'd lost track of the client, so he began the due diligence required for the process. About this time, he opened a new trust account, to start afresh. He wanted to exclude that troublesome sum, so rather than isolating it until he could dispose of it properly, he put it into his personal account. It took the auditors about a minute to figure it out. What on earth was he thinking? Just that he wouldn't get caught.

Still another attorney occasionally took his fee from a closing out of the purchase-money check before the matter closed. He figured, correctly, that if deal fell through, he would be able to replace the pilfered sum and return the full amount to the bank. All deals went through. There was never a problem … until the Random Audit. Or how about the P.I. lawyer who, at distribution time, was keeping the money she had set aside to pay doctors' liens? They never heard of the audit? What on earth were they thinking?

Mark Tepper would have known: They were thinking they wouldn't get caught.

And so, dear colleagues, even though the lawyers who read ethics columns to the end rarely have ethics problems of their own, remember this: If you are ever tempted to break some rule—major or minor—whose breach could put your license in danger,

there is no such thing as “good odds.” Not only might you get caught, but some rules may have a “one strike, you’re out” component, and there are no “do-overs” for ethics violations. Better you should have a healthy fear of getting caught.

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