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In the Spirit of the Season: Free Advice

LEGAL ETHICS: The Rules that trip us up are simple and few. We are expected to know them. We often don't.

By **Marc Garfinkle** | December 30, 2019

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Expertise and specialization have become essential to modern professional success, and most attorneys today have a specialty. Even lawyers who are generalists are usually experts in some field of law. On top of that, however, the Supreme Court expects that all attorneys have expertise in yet another field—legal ethics.

Their reasoning is hard to challenge: First, legal ethics is central to our existence. We need rules which govern our conduct. Next, the entire body of required ethics information is finite and manageable. Almost everything we need to know is codified in the Rules of Professional Conduct and the Rules of Court. Moreover, we have studied it all before. We all took at least one law school course in professional responsibility, we passed a professional responsibility exam, and we take mandatory CLE. Nevertheless, we lawyers often violate rules we have forgotten or never even knew.

But fear not, dear reader. In the spirit of the season, I am pleased to offer you free advice. I have analyzed the most common ethics violations or misconceptions by *honest* attorneys and laid them out for you, below. They fall into two main categories: Trust Accounts, and Fees and Fee Agreements. Some of you know all of this; I would appreciate your finishing this column, anyway. However, if any of this comes as a surprise, then take note and take remedial measures.

So now, finally, in the spirit of the season, please accept these tips and pointers from a concerned colleague.

Attorney Trust Account

The ATA is a sacred account. The Rules provide details for its creation and use. Any attorney with ATA authority should know those rules. The ATA is by far the richest source of unintentional ethics violations. As the Random Audit Program has just been expanded from 500 audits to 700 audits per year, we are placing special emphasis on some of the most common violations that concern the auditors. Here they are:

a. *Three-way reconciliation.* The heart of the Random Ethics Audit, three-way reconciliation is simpler than it sounds. It is merely a snapshot of three aspects of your ATA as of the date of your monthly bank statement. It should show that the balance in your statement is identical to the actual balance in your account (adjusted for uncleared checks), and that these are identical to the total of funds you are holding for others, including your "$250 or less account," discussed below. Trust accounts are supposed to be reconciled

monthly because the problems and mistakes that put lawyers afoul of the OAE can all be prevented, avoided or managed when detected early. It is a simple function. In contrast, reconciling an account that has had an undetected issue will be a problem and an expense and a source of great anxiety. It often makes sense to hire an experienced bookkeeper.

b. *Unidentified and non-returnable funds.* If you are holding money in your trust account and you don't know whose it is, or you *do* know whose it is, but you can't locate the owner, you have a problem. Failure to return the funds shows lack of diligence and violates RPC 1.15's mandate to promptly return property to its owner. The procedure for doing so is relatively quick and user-friendly. Read the Rules.
c. *Commingling*. If some of that money in your ATA is yours, get it out of there. Yesterday! The only money you may keep in that account is *no more than $250*, kept as a separate "client" in your trust ledgers. That money may only be used to pay bank charges. Additional money of yours, or any other use of the funds would cause commingling.
d. *Retainers*. Many firms do deposit retainer checks into the ATA and bill against it. The OAE says, "Don't." You should deposit the check into your operating account, provided you are willing to return any portion later deemed to be unearned. On the other hand, trust money you have earned must be withdrawn as it is earned, or you risk commingling your funds. To avoid this result, some attorneys set up separate "retainer trust accounts" unrelated to their IOLTA account. That works.
e. *Electronic transfers and payments to cash.* You may not make an electronic transfer of funds from your ATA. All withdrawals must be done by check. You may not make an ATA check payable to cash.

Fees and Fee Agreements

Nothing is more fundamental to a practice than the fees. The overarching principle is that fees must be reasonable. That doesn't sound too difficult, but we still have problems with it. Assuming your fee is reasonable, the following pertains:

a. *Written agreement.* Unless you have previously done similar work for the same client on the same basis, every engagement should be memorialized in writing which must state the work to be done and the basis for the fee. Fleshing it out a bit may help. Failure to have a written agreement will ordinarily result in discipline.
b. *Scope of representation.* Take time to clearly define the scope of your representation. This will make it easier for you to get paid and, if necessary, to get out.
c. *Referral fees.* Avoid paying or receiving improper referral fees. For proper fee-sharing arrangements between attorneys, the client must be made aware of the nature and extent of each attorney's participation. It's in the Rule.
d. *Costs and expenses.* In a contingency fee case, you must, of course deduct the expenses before calculating a contingent fee, but you may not seek reimbursement for ordinary photocopying, long-distance phone, postage, and other normal office overhead, nor may you average or round up your expenses. It's all about fairness to the client.

The Rules that trip us up are simple and few. We are expected to know them. We often don't. Even good, honest lawyers receive discipline because they don't know the rules. Sometimes they don't even know there *is* a rule. Perhaps these words, offered in the spirit of the season, will save someone some pain. Happy New Year.

Marc Garfinkle *practices in Morristown, focusing exclusively on legal ethics, attorney discipline, bar admission and judicial misconduct. He is also an adjunct professor at Seton Hall University School of Law in Newark.*