

FAUGHNAN ON ETHICS

Thoughts on legal ethics, professional responsibility,
and other aspects of the law of lawyering.



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“13 Reasons Why Ethics Issues Are More Complicated Than Ever”

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Today's Agenda

- Something of a mixtape format



Today's Agenda

- And, if you happen to have a Spotify
- Have an actual playlist for your amusement:





Today's agenda

- 13 different topics
- With a focus on ways the rules have changed; possibly outdated rules that may need to change; and technology issues
- And, we'll close things out with one lawyer's thoughts on mental health & wellness of our profession



Side 1/Track 1: *When the Levee Breaks*

- The dam seems to have broken in the market for legal services
- Not just Avvo and a variety of other companies out there offering online platforms to consumers of legal services
- But other fronts like Atrium and PWC



Side 1/Track 1: *When the Levee Breaks*

- Throughout 2017, the unfavorable ethics opinions have continued to come out about Avvo Legal Services
- But lawyers haven't stopped participating
- Some states have moved toward changes to facilitate
- Antitrust challenges in play as well



Side 1/Track 1: *When the Levee Breaks*

- The rules that matter in TN?
 - RPC 7.2(c), RPC 5.4, RPC 1.8(f), and RPC 7.6
- They work together to prevent lawyers from partnering with nonlawyers, sharing fees with nonlawyers, or paying compensation for referrals



Side 1/Track 1: *When the Levee Breaks*

- But here's the thing... should they?
- Oregon Regulatory Committee's list of 9 findings
- First 8 sound pretty universal in application, so won't TN have to pursue the 9th one as well?



Side 1/Track 1: *When the Levee Breaks*

- RPC 1.8(f) and 5.4(c) require lawyers to protect their independent professional judgment
- Wouldn't that be enough alone?
- Or, what about that and having to disclose to clients any payments you made to someone referring work to you?



Side 1/Track 2: *Bait and Switch*

- 2017 has been a mixed bag of a year when it comes to issues of attorney advertising
- Utah radio personality case involving an ethics opinion bad on multiple levels
- NY offered another example of conflating seminars and solicitations



Side 1/Track 2: *Bait and Switch*

- Even the progress of APRL's proposal to streamline the rules has had mixed results
- Slow to gain traction with the ABA
- But Virginia essentially adopted much of it as its own rules



Side 1/Track 2: *Bait and Switch*

- A few maxims continue to be undeniably true
 - Lawyers are the only complainants
 - Bar regulators don't particularly enjoy ad cases
 - Consumers don't get worked up about it
 - There are people who still don't know they can be helped by a lawyer



Side 1/Track 2: *Bait and Switch*

- Advertising is how some learn
- Why does our profession need any rule beyond: advertising cannot be false or misleading?
- Redirect energies to encourage communication about what our profession does and how the work of a lawyer could help them



Side 1/Track 3: *A Cautionary Song*

- RPC 5.3 obligations and how they could be expanded by *Garland v. BPR* (Tenn. 2017)
- BPR went after the lawyer under other “direct” rules for what reads like an RPC 5.3 problem
- Public censure - drew a dissenting opinion on which rules charged



Side 1/Track 3: *A Cautionary Song*

- Garland was mainly a family law attorney. 1 full time and 1 part-time employee
- Facts were that he relied *heavily* on these employees for communications with clients; one client's case really went off the rails
- Disciplined for violations of RPC 1.3 (diligence) and RPC 1.4 (communication)



Side 1/Track 3: *A Cautionary Song*

- Also the typical add-on RPC 8.4(a) violation, but with a troubling twist – (“through the acts of another”)
- But not RPC 5.3; Kirby, J., dissenting
- “Rule 5.3 was tailor-made for situations such as the one presented in this case.”

Side 1/Track 3: *A Cautionary Song*

- Kirby - “We have no findings on what measures Mr. Garland *should have* had in place to supervise his staff.”
- Kirby - “We have no findings on what efforts ... *should have* made to reasonably ensure that his staff’s conduct was appropriate.”
- Me – if the BPR is allowed to do this, then RPC 5.3 is nigh meaningless



Side 1/Track 4: *Boys Better*

- So many ethics lessons can be learned from the recent David Boies/Harvey Weinstein saga
- One lesson about advanced conflict waivers will be discussed later today
- Other lessons about not speaking publicly about clients you fired won't be discussed today at all...



Side 1/Track 4: *Boys Better*

- One lesson – somewhat relevant to our prior topic – is the role of lawyers when dealing with agents using deceitful practices
- www.BlackCube.com
- The explicit aim of the investigations work – according to contract – was to stop publication in *The NYT* and elsewhere of the abuse allegations



Side 1/Track 4: *Boys Better*

- Black Cube created fictional companies and fictional websites for them
- “Avatar Operators” – hired to create fake identities on social media
- Pretended to be freelance journalists
- Black Cube PIs under false identities met with and secretly-recorded Rose McGowan



Side 1/Track 4: *Boys Better*

- Boies signed the contract for Black Cube's work for Weinstein
- The payments to Black Cube went through Boies' law firm
- Boies received progress reports and passed them along to Weinstein
- RPC 8.4(c), RPC 4.1, & RPC 4.4(a) are the rules most readily applicable



Side 1/Track 5: *Changes*

- March 7, 2017 - TN became the 27th state to adopt this “duty of technological competence”
- RPC 1.1 cmt. [8]: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...”
- If you use something, you need to know how it works.



Side 1/Track 5: *Changes*

- Additional Ethics 20/20 changes of note
 - Update to RPC 1.4 cmt. [4]
 - ~~Client communications, including telephone calls,~~ A lawyer or member of the lawyer's staff should be promptly respond to returned or acknowledged client communications.



Side 1/Track 5: *Changes*

- Definition change in RPC 1.0 as to “writing”
- RPC 1.18 clarity on what kinds of communications trigger
- RPC 1.1 - Client consent before bringing on lawyers outside of firm
- RPC 5.3 cmt. [4] focuses on when client directs the selection of a particular service provider outside the firm



Side 1/Track 5: *Changes*

- Tension between RPC 1.6 and 1.7 now addressed for lateral moves and mergers
- RPC 1.6(b)(6) – “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in composition or ownership of a firm”
- RPC 7.2 working with “lead generators”



Side 1/Track 5: *Changes*

- Jan. 25, 2017 Rule 19 (Pro hac vice) revision
 - Those who reside in state but permitted to practice by Rule 7, §5.01(g)
- May 31, 2017 – Rule 7 revision
 - Brief further extension of “transition” provisions for comity and in-house registration
- Aug. 30, 2017 - Rule 9 revision (Section 32)



Side 1/Track 6: *Tenuousness*

- Another specific Ethics 20/20 revision
- Updates to RPC 1.6 - new (d) and a new, expanded accompanying comment
- “(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to representation of a client.”



Side 1/Track 6 – *Tenuousness*

- “The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made *reasonable efforts* to prevent the access or disclosure.”
- What constitutes a “reasonable effort?”



Side 1/Track 6 - *Tenuousness*

- Factors (i.b.a.n.l.t)
 - The sensitivity of the information
 - The likelihood of disclosure if additional safeguards are not employed
 - The cost of employing additional safeguards

Side 1/Track 6 - *Tenuousness*

- The difficulty of implementing safeguards
- The extent to which safeguards adversely affect the lawyer's ability to represent clients
 - E.g. – making a device or important piece of software excessively difficult to use



Side 1/Track 6 - *Tenuousness*

- ABA Formal Op. 477R further elaborates on the interplay of these factors
- Some lawyer pundits have (mis)read to require encryption of email exchanges
- But, no question that this pushes the needle further and requires lawyers to be deliberate about decision-making w/r/t encryption



Side 1/Track 6 - *Tenuousness*

- When transmitting 1.6 info:
 - [19] Must take reasonable precautions to prevent the info coming into hands of unintended recipients
 - No special security measures if method affords reasonable expectation of privacy



Side 1/Track 6 - *Tenuousness*

- Client is still the boss
- “A client may require the lawyer to implement special security measures not required by this Rule”
- “Or may give informed consent to forgo security measures that would otherwise be required”



Side 1/Track 6 - *Tenuousness*

- What happens if TSA or Customs officials demand access to your phone when going through security?
- NYC Bar Formal. Op. 2017-5
- I know a practical solution for protecting email ... but protecting texts or other digital data?



Side 1/Track 7: *Why Can't We Be Friends?*

- Somehow whether judges can be Facebook friends with lawyers is still an open question
- The Florida Supreme Court has that question before it in an appeal of a disqualification ruling
- California and Massachusetts have issued very restrictive ethics opinions



Side 1/Track 7: *Why Can't We Be Friends?*

- To me, this topic should be easy
 - Judges (and lawyers) are human beings
 - Human beings have friends
 - The judicial ethics rules don't say judges can't be friends with lawyers
 - If can have friends in real life, can have friends on FB



Side 1/Track 7: *Why Can't We Be Friends?*

- Status as a Facebook friend should just be one factor in evaluating whether there is a close relationship sufficient to require recusal.
- Real-world interactions likely more important.
- And, FB presence tends to benefit the public because “Friends” list is *usually* publicly accessible



Side 2/Track 8 – *Infinite Content*

- Made something of a habit over the last couple of years of writing about “bad” ethics opinions
- Two really noteworthy opinions this past year worth highlighting
- One from Nebraska and one from Rhode Island



Side 2/Track 8 – *Infinite Content*

- Rhode Island 2017-2
 - Whether the law firm may represent the buyer and the seller, two current clients of the firm, in the sale of a division of seller's business to the buyer.
 - Rhode Island does not have some unique version of RPC 1.7(b)

Side 2/Track 8 – *Infinite Content*

- Yet, the opinion advises that the conflict is not consentable because the same lawyer could not “reasonably believe” they could provide competent and diligent representation to each of buyer and seller
- Also provides a discussion of screening that fails to draw a distinction between consensual & non-consensual screens



Side 2/Track 8 – *Infinite Content*

- Nebraska 17-03
 - Can a lawyer accept Bitcoin as payment from a client?
 - Provides a “yes, but” sort of answer
 - Is a helpful opinion in quite a few ways
 - But ... in the end still bad

Side 2/Track 8 – *Infinite Content*

- Nebraska 17-03
 - Treats Bitcoin as property much differently than any other property used to pay a fee
 - Misses the important confidentiality concern
 - Manages to say “yes” in a way that no one who would accept Bitcoin would find helpful



Side 2/Track 9: *Do I Have to Talk You Into It?*

- The problems of relying on advanced waivers of conflicts is another rich vein we can mine from Boies/Weinstein
- Reminder – Boies’s firm was representing *The New York Times* in defending a libel case at same time he took on assisting Weinstein with trying to spike *The New York Times* story
- Boies’s justification was an advanced waiver



Side 2/Track 9: *Do I Have to Talk You Into It?*

- In TN, guidance is in Cmt. [22] to RPC 1.7
- Effectiveness guided by extent to which client “reasonably understands the material risks that the waiver entails”
- More comprehensive the explanation, the greater the likelihood of necessary understanding
- General and open-ended usually not effective



Side 2/Track 9: *Do I Have to Talk You Into It?*

- But what the Boies/*NYT* situation really shows is that ethical enforceability is only half the dynamic
- *NYT* fired Boies and (because they buy ink by the barrel) ripped him publicly
 - “We consider this intolerable conduct, a grave betrayal of trust, and a breach the basic professional standards that all lawyers are required to observe.”



Side 2/Track 10 – *I Didn't See It Coming*

- A few words about things that can still trip up even excellent lawyers
- The risk to privilege and confidentiality presented by client's use of employer-owned email systems
 - Weird wrinkle arose in case involving emails sent by the CEO of Marvel to his personal attorney



Side 2/Track 10 – *I Didn't See It Coming*

- Conflicts involving subpoenas to current or former clients
- Some lawyers want to push back on the idea that this presents an issue
 - NYC Bar Op. 2017-6 provides very good explanation of the problems
- At least running the conflicts to know what you may be getting into is a must



Side 2/Track 11 – *Art of Almost*

- Only 2 TN Ethics Opinions issued in 2017
- Unfortunately, both opinions leave much to be desired in terms of cogent analysis
- There is a number missing between the two opinions, so there also must be one in the works but that has gotten into a limbo status.



Side 2/Track 11 – *Art of Almost*

- 2017-F-162: niche opinion about what an “ombudsman attorney” under the new workers’ compensation framework can do in providing “limited legal advice” to a pro se litigant
- Opinion explains how such limited legal advice does not create a/c relationship
- Unfortunately, offers an interpretation of RPC 1.2(c) that is problematic on principal



Side 2/Track 11 – *Art of Almost*

- RPC 1.2 – Scope of the Representation and the Allocation of Authority between the Lawyer and Client
- “(c) A lawyer may limit the scope of a client’s representation if the limitation is reasonable under the circumstances and the client gives consent, preferably in writing, after consultation.”
- BPR uses this to say ombudsman attorney can avoid attorney-client relationship being formed



Side 2/Track 11 – *Art of Almost*

- 2017-F-164: addresses whether a proposed interstate law firm (TN/Fla) can operate with a trade name and lease space from a title company
- Gets base-level questions right but, unfortunately, again offers a less-than-ideal analysis.
- Also rolled out in a weird way with an unsigned, undated copy.



Side 2/Track 11 – *Art of Almost*

- Ignores the impact of RPC 8.5 and that you can't really answer the questions without talking about Florida's version of the same relevant rules
- Mischaracterizes how RPC 5.7 actually works in Tennessee.
 - Makes it sound like certain things have to be done merely to be able to lease the space as opposed to mattering for whether services provided by the title company would be treated as separate/distinct from law firm



Side 2/Track 12 – *Don't Do Me Like That*

- Last year, I made mention of ABA Model Rule 8.4(g)
- Nov. 15, 2017 – TBA & BPR filed a joint petition to ask TN Supreme Court to adopt a version of RPC 8.4(g)
- Now out for public comment – March 21, 2018 comment deadline



Side 2/Track 12 – *Don't Do Me Like That*

- “It is professional misconduct for a lawyer to... (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law.”



Side 2/Track 12 – *Don't Do Me Like That*

- “This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16.”
- “This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”
- Also highlights additional First Amendment protections not in ABA Comments.



Side 2/Track 12 – *Don't Do Me Like That*

- “Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.”
- “. . . does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment.”



Side 2/Track 13 – *Anxiety*

- Significant media attention and developments in 2017 involving lawyer wellness issues
- July 15, 2017 *New York Times* article about high-profile Silicon Valley lawyer who died of a drug overdose managing a conference call before dying
- Very recent story of a high-profile Texas trial lawyer committing suicide



Side 2/Track 13 – *Anxiety*

- The 2016 ABA and Betty Ford Foundation study
 - 21% of lawyers are “problem drinkers”
 - 28% struggle with depression
 - 19% struggle with anxiety
 - Only 25% of those polled even responded to the section on drugs



Side 2/Track 13 – *Anxiety*

- Aug. 2017 – Report of the National Task Force on Lawyer Well-Being released
- There is, of course, an ethics component to well-being (RPC 1.1, 1.3, 1.4)
- But also, a very human component
- “All stakeholders must take steps to minimize the stigma of mental health and substance use disorders because the stigma prevents lawyers from seeking help.”



Thank you

- Be kind to each other.
- Reminder, you can sample that playlist at my blog
- If you'd like these slides, just drop me an email at bfaughnan@lewisthomason.com