

A Critical Thinking Approach to Legal Ethics

Oklahoma State Bar Association, CLE
Course by Herb Rubenstein, Esquire
www.leadershipforattorneys.org

Introducing Herb Rubenstein

- Author, Leadership for Lawyers – 1st ed. NITA, 2005; 2nd ed. ABA, 2008
- Litigator DC, MD, VA
- Georgetown Law, JD 1982
- CLE and CPE (Accountants) Presenter – Leadership, Ethics, Professionalism, The Future of the Legal Profession
- Founding Board Member Association of Professional Futurists
- Class A, Member PGA, Golf Technology Investor
- Working on new book on the future of the legal profession and the courts
- Former Professor, Strategic Management, Graduate School of Business of the University of Colorado Denver and Adjunct Faculty Member George Washington University and George Mason Univ.

Topics

- Specific Provisions of Title 5 – Attorneys and the State Bar
- Specific Provisions of Appendix 3 – A. *Oklahoma Rules of Professional Conduct- Basically the ABA Model Rules*
<https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKST05&level=1>
- Specific Provisions of Appendix 4. *Code of Judicial Conduct*
- Definition of Ethics
- Definition of Corruption

Topics (Con't)

- Attorney-Client Relationship – Informed Consent
- Gender, Race Bias and Ethics
- Social Media, Advertising, Business Development
- Resigning/Firing Clients/Withdrawing from Matters
- Technological and Substantive Competence
- Settlement Agreements – Ethics in Drafting and Enforcement – Recent case – File for X problem, other side demanded waiver of all previous claims – Rejected.

Topics (Con't)

- Whistleblowers – Current Trends and Be Clear on Whom You Represent
- Ethics of Lawyer and Judicial Discipline Issues
- Ethics in Government and Administrative Agencies
- Covid's Impact on Legal and Accounting Ethics
- Helping Clients and Other Lawyers Be More Ethical
- How to Expand Your Practice and Get Better Clients Through Ethics
- Develop Your Own Law Firm Code of Ethics Even If You are a Solo Practitioner
- Duty to Report Unethical Conduct

Let's Begin With the Lawyer's Oath in Oklahoma – Title 5, Section 2

- Section 2: You do solemnly swear that you will support, protect and defend the Constitution of the United States, and the Constitution of the State of Oklahoma; that you will do no falsehood or consent that any be done **in court**, and if you know of any you will give knowledge thereof to the judges of the court, or some one of them, that it may be reformed; you will not wittingly, willingly or knowingly promote, sue, or procure to be sued, **any false or unlawful suit**, or give aid or consent to the same; you will delay no man for lucre or malice, but will act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client, so help you God.
- Excellent Oath – All oaths are general in language

Duties – Title 5, Section 3

- Second - To counsel and maintain no actions, proceedings or defenses, except those which appear to him legal and just. - SUBJECTIVE STANDARD, NOT A REASONABLE PERSON OR LAWYER STANDARD
- Fourth - To maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his client.
- Fourth conflicts with the Oath – Falsehood – “if you know of any you will give knowledge thereof to the judges of the court, or some one of them, that it may be reformed”

Rules Governing Disciplinary Proceedings

- §1.3. Discipline for Act Contrary to Prescribe Standards of Conduct.
- The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all.
- Rule 501 - The Acts Discreditable Rule – AICPA

Operational Definition of Ethics and Corruption

- **Ethics:** A system of moral principles turned into a code of conduct or behavioral norms which represent the minimum standard of acceptable behavior for the times. (*Equal Pay 1950's vs Equal Pay 2020's*) – *More than simply following written "obligations" and "prohibitions"*
- **Corruption:** "the exploitation of an official position [and all features, benefits, power, decision rights, deference afforded to in that position] for personal gain"

<https://www.theguardian.com/commentisfree/2021/aug/19/action-against-corruption-russian-sanctions-oligarchs-alexei-navalny>

Attorney-Client Relationship – Informed Consent

- Section Rule 1.0 – Terminology, Comment 7
- “Obtaining informed consent will usually require an affirmative response by the client or other person.”
- Duty of lawyer to document information given to and understood by client.
 - Meeting, call, agenda, meeting notes
 - Judge Garbis call – on Motion to Vacate Disqualification of Opposing Counsel/Firm
 - Question – If opposing counsel has a conflict or basis for disqualification, do you have an ethical duty to file a motion? I believe “YES”; Certainly, a duty to inform the client of the basis and implications of such disqualification.

Gender, Race and Other Forms of Bias and Ethics

- Now, many forms of bias are against the law and this is an ethical issue
- Not well “codified” in the ethical code
- Here, you must create your own code of ethics – your own standards
- How do you deal with a client that exhibits gender and/or racial or other bias?
- Notify client in writing of the issue and ask them to correct the situation in a timely manner and if they do not, resign (fire the client)
- Example: Worker bias 1992 – treating employees as “independent contractors” - illegal – notified client, gave them 30 days to correct, they did not, resigned – my biggest client
- Old adage – You are not a lawyer until you have fired a client, you are just a hired gun. And, you are not a great lawyer until you have fired a very good (well paying) client

Social Media, Advertising, Business Development

- Rule 7.1 – 7.5 Oklahoma Rules of Professional Conduct
- Here ethics rules and excellent business sense go hand in hand
- Bad review, let it go, never disclose client potentially confidential information
- Positive side: Show the world you have some expertise or insight into legal ethics with your own videos, your own articles, your own blog entries, your own speeches to Rotary, Kiwanis, Optimist, Lions Clubs, Chambers of Commerce, etc.
- Never do any selling, just educate at these speeches or with these articles or videos you post on social media
- Guest lecture on ethics, practice management at a Law School
- Manage the conversation about you, build social capital (used to be called “reputation” or “brand”), and you will get more and better clients because of how you “show up” in the world

Resigning/Firing Clients/Withdrawing from Matters

- All beginnings (retention agreements) and all “terminations” should be in writing, and where necessary approved by the court
- Can be done in court based on an emergency motion, notice to other counsel, notice to client
- Be supportive of substituted counsel, be supportive of former client by giving up all files immediately (and retaining copies), be prepared to resign, withdraw
- 100% retainer refund often appropriate early in a representation
- Story of \$2,500 retainer, not in litigation, spent \$5,000 worth of time, client within first 30 days told me “I hired you to lie for me.” Upon hearing that...I buzzed office administrator, said write me a check made out to the client for \$2,500 and standard termination letter, copy of entire file and I was no longer the lawyer twenty minutes later
- My mistake to have taken on the client. I pay for that mistake, but only once and not over and over and over during prolonged representation

Technological and Substantive Competence

- You need to know something about:
 - Artificial intelligence which will be used to help deciding cases in the future and is currently used to help decipher and learn from e-discovery
 - Cryptocurrency – what will be the future rules on law firms accepting this currency and whether your clients should accept this currency
 - Blockchain technology – will use of this be required of your client – already is by Walmart of its entire supply chain
 - Cybersecurity – Every law firm must have a cybersecurity consulting expert today. Data stolen from your law firm, not just a bad business situation, also an ethics situation, especially if law firm was negligent, failed to meet the standard of care of protecting client confidences.
 - Also, Ransomware, Privacy and Cybersecurity Insurance – Does your law firm need it and is it malpractice for you not to recommend it to your clients?
 - Electronic courtrooms – here to stay; become a master at video presentations, video communications with clients and beware of cybersecurity issues here

Settlement Agreements

- Certain non-disclosure agreements are now viewed as unenforceable and demanding them in settlement agreements would be unethical or even allowing your client to sign them if the other side put them in and demanded your client sign it
- Great future question – Is it unethical to draft settlement agreement for which there is no practical or legal means to enforce? (Clearly malpractice)
- When it comes time to do the first draft the settlement agreement, you do it yourself or have someone in your firm do it, if at all possible
- The case is not settled until the settlement agreement is signed must be your stance in negotiation, but agree to one element, do not go back
- Waivers of rights - beware of the blanket “release” and sign only when appropriate as to “all claims known and unknown prior to the date of this agreement” – Just refused to sign with such a clause and prevailed

Whistleblowers

- Who do you represent? Who do you not represent? See Section 1.13 of Appendix 3-A, Oklahoma Rules
- What ethical duties do you have toward the client and the person you do not represent? Notify not representing potentially adverse party and suggest they get own counsel
- If you represent the entity or any officer who is not the whistleblower, you do not represent the whistleblower and you must make that clear in writing, but you may owe that whistleblower a duty of confidentiality if at any point the whistleblower sought legal advice from you or your firm and then you have a conflict of interest.
- Big minefield here and it is growing every day

Whistleblowers (Con't)

- Recent developments regarding whistleblowers
- SEC pays \$114,000,000 in October, 2020 to one whistleblower and over \$200,000,000 total in year
- Unlimited budget (5-30%) of amount collected
- Attorneys' fees are starting to be awarded to whistleblowers
- Here comes tons of work for lawyers on both sides
- Whistleblowers are starting to get the "home field advantage" – can get their message out faster, are viewed as being more honest than defending organization, and getting better press coverage as part of the "*speaking up culture*" which is getting more and more traction and sponsors as part of the *transparency* fight against *secrecy*

Ethics of Lawyer and Judicial Discipline Issues

- Lawyers devoting millions of *pro bono* hours
- Court supervised in all states
- Discipline is too slow in most states and in DC the average case takes 8 years before final decision/implementation of sanctions so the public is not protected for many years due to delay in sanctions
- Too few lawyers report disciplinary matters regarding other lawyers or judges and a system is only as good as its reporting/intake function

Ethics of Lawyer and Judicial Discipline Issues(Con't)

- No easy solutions here, but demand quick and appropriate discipline in your state in dealing with ethics related complaints against lawyers and judges, maybe call for an increased budget for more paid investigators
- There can be technology innovations that can begin to help address some discipline areas – like putting security cameras in Judge's Chambers, analogous to requirement of BodyCams police use or cameras in the classroom of schools to deal with unethical behavior that is place specific
- Complaints against police used to be private, now public (New York) but in most cases strict nondisclosure rules apply while ethics complaint is being investigated in legal profession

Ethics in Government and Administrative Agencies

- Accounting concept of “duty to the report audience”
- Typical lawyer in private practice duty to client, tribunal, and to adversary
- Accountant - ethical duty to all investors, potential investors, those who read and are informed by reports where accountants had a role in preparation or dissemination
- Ethics in government – Military - responsible for ethical violations six levels below you in your chain of command

Ethics in Government and Administrative Agencies

(Con't)

- **Duty** to all taxpayers, all voters, all citizens, all residents, all businesses, nonprofits, educational institutions, other government agencies, the duty is broad and deep
- **Fair application** of government regulations - implementation or impact ethics also called “performance” where malfeasance is considered an ethical violation, *per se*, like years’ waits for administrative hearings
- **Accuracy** – Reporting ethics – telling the truth and providing factually supported analysis of data
- **Be heard** – government employee or lawyer is no longer willing to sit in silence in a government agency when it commits ethics violations – this is an important trend in many government agencies, but not all, of course, and is not spreading evenly across the regions of the United States

Covid's Impact on Legal and Accounting Ethics

- Devastating in the financial work and hard on the accounting profession – financial, insurance, government benefits, commercial fraud all increased dramatically in 2020 and predicted to increase again in 2021
- No clear data on impact in legal profession, but clear societal trend towards more fraud suggests more fraud and unethical behavior in the legal profession
- <https://www.natlawreview.com/article/health-care-enforcement-update-covid-19-fraud-cases-brought-doj-and-private>
- Sexual related assaults, improper relationships violating ethical rules of many professions and increasing prosecutions/complaints related to sex were predicted to increase due to Covid and this appears to be the case

Helping Clients and Other Lawyers Be More Ethical

- Duty To Report Ethical Infractions By Other Lawyers and Judges
- *Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers.* #12 Preamble to the Rules of Professional Conduct– Lawyers’ Responsibilities
- Rule 8.3 – Oklahoma Rules of Professional Conduct
- (a) A lawyer who **knows** that another lawyer has committed a violation of the Rules of Professional Conduct that raises a **substantial question** as to that lawyer's **honesty, trustworthiness or fitness as a lawyer** in other respects, shall inform the appropriate professional authority.
- (b) A lawyer **having knowledge** that a judge has committed a violation of applicable rules of judicial conduct that raises a **substantial question** as to the **judge's fitness for office** shall inform the appropriate authority.

Helping Clients and Other Lawyers Be More Ethical (Con't)

- When a lawyer “knows”... another lawyer has committed a violation of the Rules of Professional Conduct that...
- Raises a substantial question as to honesty, trustworthiness or fitness as a lawyer in other respects? Critical thinking approach – what kind of standard is this?
- Is this an evidentiary standard? What if you have “evidence,” “substantial evidence,” “beyond a reasonable doubt” or even a “preponderance of evidence” can you, should you “inform the appropriate professional authority?”
- Clearly other professions like accounting are requiring greater reporting

Helping Clients and Other Lawyers Be More Ethical (Con't)

- The Accounts' Ethics Code, through NOCLAR provisions by, the International Ethics Standards Board for Accountants and possibly soon to be adopted by the AICPA - allows [mandates] **accountants to disclose a suspected illegality to an appropriate authority without being in breach of confidentiality...** [when]they suspect illegal activity under new NOCLAR ethical guidelines.
- <https://www.iaasb.org/projects/noclar>

Helping Clients and Other Lawyers Be More Ethical (Con't)

- Help create office of Chief Ethics Officer or VP for Ethics or Corporate Director for Ethics
- Help create Ethics as a specific duty of a committee of a board of directors
- Help create and write contracts for clients for *Ethics Hotlines run by independent third parties* including reporting, analysis, and action requirements when data reveal problem (Could also include sexual harassment hotlines, workplace safety violation hotlines, racial or gender bias hotlines, regulatory noncompliance hotlines by phone, email, text, and protecting, where appropriate, the anonymity of information provider
- Do a conflicts of interest check of board members

Helping Clients and Other Lawyers Be More Ethical (Con't)

- Conduct regulatory, ethics *compliance legal audits*
- Help client write a code of conduct (so you better have one for your own firm before you try to do this)
- Help client create “an adjudicatory system” for when a person associated with client is alleged to have committed an ethics violation
- Help conduct an ethics related risk assessment via surveys, interviews, etc.
- Help develop regulatory risk profile in terms of potential future liabilities, social media response, negative potential outcomes to the client

Helping Clients and Other Lawyers Be More Ethical (Con't)

- Help your clients have good internal controls to assure the accuracy of their Environment, Social and Governance reporting
- Conduct a human capital and workplace compliance legal audit to assure equal pay across genders, no systematic racial bias in pay, promotion or workplace treatment
- Conduct a study of the future regulatory changes and future social changes in terms of ethics that will impact your client - Burberry story: *burning clothing*

Trends in Ethics

- More judges sanctioning lawyers for filing lawsuits that are not supported by law or fact
- Judges need to be even better at being the gatekeepers to the courts and lawyers must use self-discipline not to file lawsuits that are not supported by law or fact in violation of Rule 3.1 which states: *A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.*
- More whistleblowers and accusers having “courage to come forward”

Trends in Ethics (Con't)

- Whistleblowers and accusers/complainants are getting “lawyered up”
- New non-hourly charges and fees and innovations in billing for all types of legal clients especially complainants with stories that will be compelling in social and traditional media
- “Nonlawyers” being allowed to invest in law firms, provide legal services

Trends in Ethics (Con't)

- More remote legal advice and adaptations to rules about practicing in one state while “residing” in another
- Greater use in disciplinary proceedings of immediate suspension “from the practice of law ... pending final disposition of this proceeding” for lawyers and judges...
- More clarity regarding ethics violations for unduly expansive e-discovery
- More people willing and able to speak up against ethics violations

Trends in Ethics (Con't)

- More motions and successful disqualifications of law firms in litigation
- More privacy rights, workers' rights, gender rights, religious rights, litigation
- More litigation where not a lot of money is at stake...“When there is not a lot of money at stake, there is often a lot to fight about...” Jake Stein, former President of the District of Columbia Bar and Supreme Court ruling: *Held*: A request for nominal damages satisfies the redressability element necessary for Article III standing where a plaintiff's claim is based on a completed violation of a legal right. Pp. 3–12. *Uzuegbunam v. Preczewski*, 392 U.S. ____ (2021)
- More litigation between cities, counties, towns, school districts, local governments and state governments over who has the right to decide and govern on certain issues (big in Colorado in the energy sector in the early 2000's and now in Texas and Florida over mask mandate rights)

How To Expand Your Legal Business Through Ethics Related Services

- These are many good business ideas for lawyers if you know trends and increasing focus on ethics is an important trend that will give many lawyers excellent business development opportunities
- Some new business development opportunities can be done in concert with work done by the accounting firm for current or future clients
- Some can even be done for your smaller clients on a per project cost rather than hourly basis and these projects will become more efficient and pay dividends when done for many clients

How To Expand Your Legal Business Through Ethics Related Services (Con't)

- Excellent business strategy to use “ethics” as an intentional springboard to new business
- If “advertised” or “shared” via websites, social media, speeches, etc. this increased “social presence” should promote getting more and better clients
- Don’t take a case unless you want three like it because when you do a brilliant job for Client A, others will hear about it and you will get more work in this area

How To Expand Your Legal Business Through Ethics Related Services (Con't)

- Join nonprofit boards or do *pro bono* work for a nonprofit – beware of politically divisive work and how your *pro bono* work can cause conflicts of interest
- Hire a social media or website expert to help you present your “ethics brand” and expertise as clearly as possible

Conclusion

- Lots of time for questions via the chat box
- Oklahoma follows model rules with some modifications allowing for such things as “reciprocal referral arrangements”
- Use the rules to help promote your business
- Create your own set of rules which incorporate the Oklahoma Rules of Professional Conduct, but go beyond them when your ethics rule would be beneficial to the profession, to your reputation and that of your firm, your clients, and society writ large

Conclusion (Con't)

- Provide ethics training in-house at your law firm
- Give a guest lecture on ethics at a law school
- Put “ethics” on the agenda in writing in meetings
- Speak and write about ethics
- Recommend new ethics rules
- Expand your reputation (social capital) in the ethics arena
- Enforce ethics rules in your own firm and practice
- Raise in a private manner with another lawyer if you think that they might commit an ethics violation – fair warning doctrine, but never threaten to file a disciplinary action – either do it or don't do it

Conclusion (Con't)

- Ethics takes time and an investment (a cost of doing business as a lawyer)
- Report lawyers and judges when they commit ethical violations
- Push hard for quicker, better disciplinary enforcement in your State
- Be an “ethics leader” and apply your critical thinking skills to ethics situations and opportunities to expand the ethics related work that you and your law firm do

Thank you and Contact Information

- Feel free to share these slides with anyone
- Keep me posted on any questions you might have and your efforts in the area of ethics by reaching out to me at:
- Herb Rubenstein
- 303.910.7961
- herb@sbizgroup.com
- www.herbrubenstein.com (under construction)
- Thanks to the Oklahoma State Bar Association for sponsoring this CLE course. I hope you have found it useful today and for a long time in the future.