

ETHICS 101

FUN WITH ETHICS

BY

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PRACTICE TIPS ON HOW TO ETHICALLY PRACTICE LAW

WEBSTERS DICTIONARY defines Ethics as the system or code of morals of a particular philosopher, religion, group, or profession. The State Bar of Texas provides Ethical Rules for lawyers to follow. Every lawyer has an obligation to be familiar with the Texas Disciplinary Rules of Professional Conduct and to follow them.

I was asked to speak on ethics. Historically speeches on ethics have been about as interesting as a discussion on life insurance policies. The hardest part of ethics speeches is to not sleep through them or while delivering them. One might ask, “Can one claim one hour of CLE for ethics if one attends the ethics speech but sleeps through it?” I will leave this question to greater minds than mine. Parenthetically that would mean almost any mind.

To put it bluntly, I am no expert on ethics. I was told that an expert is someone who is from out of town. I suppose under that limited definition, as long as I am not making this speech in Houston, I am an expert.

I was raised in Midland, Texas with simple values. Unlike “W”, my family was not rich. My father was a geologist and a good man. In fact, to date he was the best man I ever met. I am lucky to be able to say that. My father, Phillip Fickman, passed away 25 years ago and I remain certain I will never again meet a man as good as him.

Why is this relevant? Because I learned ethics or morals like most of you from my parents. This paper is no expert treatise on ethics. It’s just a fellow lawyer’s thoughts on the subject. Whatever ethics I have I attribute to my parents.

Ethically,

What is most important?

Honesty and integrity! Perhaps they are the same thing. I was raised to be honest. If a man is not honest he is not much of a man. This basic rule applies to all of us and it has been restated many times. Jerry Jeff Walker sings a song that I often quote to my son’s, Sam and Daniel. In the song he sings, “The price for living honestly comes hard-earned everyday.” Nothing could be truer for a criminal defense lawyer.

Everyday our honesty is put to the test. We have opportunities to do the right thing or the wrong thing. Everyday we have numerous opportunities to lie or tell the truth. Lying is some people’s way. To be ethical, means to fight hard every day to be honest and good.

Now I do not mean to sound preachy. There are gray areas. However, most times what someone says is either the truth or not. As it has been said, a man is only as good as his word. If you want to be ethical, keep your word.

A lawyer perhaps has a higher ethical obligation than some. Some unethical lawyers have given the rest of us a bad name. They should be banished from our midst. To be a lawyer by definition one should be ethical. Those who are not ethical should not be lawyers. They should just run for political office and save us all the trouble.

A lawyer's ethical duty calls on him to zealously represent his client. He has to be willing to go to the MAT for his client. Consider Atticus Finch and his willingness to go against society to do what he believed was right. Our cause need not be popular. Let others worry about popularity, let us take care of our character and our deeds and the rest will fall in place.

As criminal defense lawyers, we more than most other lawyers, have a special bond with the poor and underprivileged. We have an ethical duty to speak out publicly, pointing out the daily injustices that grind the little man down. We are ethically bound to raise our voices over police and government abuse. We have a duty to speak out even when what we say may be unpopular, even - among our peers. We should never fear repercussions; rather we should expect them.

An ethical man will not please everyone. In the end, he will know what he did was right and that alone will be enough.

Rule 1.01 Competent and Diligent Representation

Practice Tip

Stick to what you know. Even if you're broke, don't take a case beyond your ability. It's ok to get another lawyer to help who is competent to handle the case. The client has to agree to the other lawyers association on the case. Try not to get someone who is dumber than you.

If you're lost on a desert island you can open up a general practice.

Don't neglect clients! If you gave a guy \$10,000, wouldn't you expect him to take your call? Take client's calls don't be a Shmuck! Don't neglect client's cases. If you read the bar journal you know civil lawyers get in trouble all the time for neglecting cases.

Rule 1.02 Scope and Objectives of Representation

Practice Tip:

In a criminal case the client gets to decide what plea to enter and whether to testify. You can limit the scope of your employment by using a written contract. Remember, just because your client may be a stupid crook does not mean you have to follow suit. You're the boss. Follow the Rules, (also known as the law). Make your client agree to follow the law. Tell him you'll fire him if he doesn't.

When a client suggests something improper or illegal, stomp on his foot and say "No." There is no gray area. After you stomp on his foot and say "No", if he suggests something improper or illegal again look for the wire and fire him.

Rule 1.03 Communication

Practice Tip:

Clients give lawyer's money and then leave. They don't know what the lawyer is doing. They assume after taking their money we just go to the topless bar or the tracks or both.

Keep the client informed as to what you're doing. Call him up, send him letters, have appointments, have phone appointments. If you don't tell him what you're doing, he won't know.

Don't assume your client knows anything. Whatever he knows he learned on "Law & Order", so it is wrong. When a client tells you, "They didn't read me my rights" and if it's not relevant explain that is "Kojack".

Rule 1.04 Fees

Practice Tip:

I don't know how lawyers set fees over the phone. I don't.

Fees need to be fair to both sides. Don't undersell your services and don't rip the client off. The perfect fee is probably one that is less than you are worth and more than the client wants to pay.

Put your fee agreement in writing and keep it simple. Review the fee agreement with the client. Make sure he understands it. After he signs it, give him a copy.

If you give the client a payment plan send him fee statements. Like you, he is not going to pay a bill unless he gets it.

Keep track of your time, even if you're not billing hourly, in case you need to justify your fee later. If in good faith you have not earned the fee its ok to return part of the fee.

Check the most current rules on dividing fees.

Rule 1.05 Confidentiality of Information.

Practice Tip:

Next time you are drunk in a bar trying to impress a woman/man or beast half your age, don't say "Guess what my client Jimmy told me today." While this may make for more interesting bar talk it will probably not advance your barroom agenda and it most assuredly will be unethical.

This is all pretty simple. Don't tell other people what your client tells you unless they are also working on the defense. Don't reveal what you learn during the course of your representation to others as well. There is a reason this stuff is called "confidential". Don't reveal confidential information to the District Attorney without your client's prior consent.

Lawyers who rat out clients, lawyers who put clients on the stand to cover their own backside should find another way to make a living. All this conduct is unethical.

Rule 1.06 Conflict of Interest: General Rule

Practice Tip:

When I was a baby lawyer I represented three sisters involved in a brawl with a store employee. I tried all three cases together. They had little or no money. Two of the sisters were acquitted, one was convicted and got probation. On the way out I reminded them to thank me, since they never bothered to pay the fee. Why do I tell this story? Is there a lesson here? No! I just thought I would tell the story so you would know I once won a case.

Representing multiple parties is dangerous business. It's easy for a conflict to develop. In most cases its best to only represent one person and to refer the co-defendant to your friend, who won't run down and flip on your client five minutes after he gets the case.

If you're representing the principal in a company and all the employees get grand jury subpoenas, refer them to other counsel. If you give them advice you may be conflicting yourself right out of representing Mr. Big.

Rule 1.14 Safekeeping Property

Practice Tip:

If you read the Bar Journal then you know civil lawyers are all the time getting disbarred and sent to Devils Island for stealing from clients. They steal clients, trust funds, clients property, even client's first born.

Don't lie, cheat, or steal. If you don't know that already, I cannot help you.

Seriously, make sure you have a trust account. Put all clients' funds for expenses in the trust account. Keep a separate ledge for each client, so you know how much money each client has in the trust account. When the case is over, refund any unspent trust money to the client. Of course, we all know never to commingle funds.

On a side note its best not to "hold" property for a client. I don't see any reason to hold anything for anyone.

Rule 1.15 Declining or Terminating Representation

Practice Tip:

The two best days on any case are the days you get hired and the day you get off.

You cannot refuse a case just because the client is a jerk or doesn't bathe. However, you are allowed to set your fees at any reasonable rate and if the client cannot afford your fee, he cannot afford your fee.

If your client and you are at such odds you cannot continue to represent him or if he has sufficiently violated the fee agreement you may attempt to get off the case. The sooner you try to get off the better. Don't wait till the day of trial to file your motion to withdraw. Also remembering the rules of confidentiality, do not "Bad Mouth" your client while trying to get off.

Rule 2.01 Advisor

Practice Tip:

Don't lie to your client. If the news is bad, don't sugar coat it. Give it to him straight. Be candid.

Rule 3.01 Meritorious Claims and Contentions

Practice Tip:

As defense lawyers 90% of what we do is probably considered frivolous by some. Our job requires that we take unique positions and that we are creative in our approach to defending clients. If there is a good faith basis for your claim, assert it. Gideon's claim was probably considered frivolous when he first made it.

Rule 3.02 Minimizing the Burdens and Delays of Litigation

Practice Tip:

As defense attorneys we need all the time in the world to get ready. Don't let anyone rush you or push you to trial before you are ready. Delay is often to the client's advantage. As was once said, "A continuance is as good as an acquittal for as long as it lasts."

That said, when you file a sworn Motion for Continuance, it better be true.

Rule 3.03 Candor Toward the Tribunal

Practice Tip:

This goes back to the basic rule of being honest. Be honest with the Judge. That does not mean you should or can breach confidentiality. In most cases you cannot. Sometimes you just have to tell a Judge that you cannot answer his question.

If you find out you have offered evidence that is false then you should take appropriate steps to correct that situation.

If a Judge is acting like a jackass than cite this rule and tell him you are ethically required to respectfully advise him that his behavior is out of wack.

Rule 3.04 Fairness in Adjudicatory Proceedings

Practice Tip:

When is the last time a prosecutor told his witnesses they didn't have to talk to you. While that doesn't violate the rule, if they unlawfully obstruct your access to evidence they have violated this rule.

Obviously we all know we cannot suborn perjury. We cannot encourage it or turn a blind eye to it. We have to set the rules at the beginning with our clients. Let them know we are ethical and we play by the rules. If a client knows this up front he will be less likely to suggest something stupid.

Rule 3.05 Maintaining Integrity of Jury System

Practice Tip:

Prosecutors violate this rule with Judges all the time. How many times a day do prosecutors discuss cases with Judges when defense counsel is not around. This is unethical conduct. Even you are not involved in the case you should speak up when you see such conduct. Shine light on it.

I was once in a courtroom and overheard a prosecutor discussing the next day's trial with the Judge. They were talking about the facts. In my usual delicate manner I announced tongue in cheek, "sounds kinda Ex Parte to me."

The Judge caught himself and told the district attorney they should wait until defense counsel was present. The judge never took it out on me. He wanted to do right, he just needed to be reminded what right was. We all need to be reminded what right is from time to time.

Rule 3.06 Maintaining Integrity of Jury System

Practice Tip:

These rules are simple enough. Don't talk to Jurors and don't let anyone else do it. This is not Gene Hackman in "Runaway Jury."

Sometimes it's hard to show respect for a jury. Sometimes they get pompous and even assume a swagger. It's understandable. After a jury reads a verdict if you are invited to talk to them you can, but you don't have to. If you are particularly mad at a jury for lying and not following the oath it may be best not to talk to them and not to bad mouth them to the press.

Rule 3.07 Trial Publicity

Practice Tip:

The press picks which cases they are going to get involved in. You will know you are on a “press case” when you are suddenly surrounded by cameras and a client who is scared out of his wits.

The prosecutor has limitations on what he can say to the press. So to get around these limitations the prosecutor will have his non-lawyer friend, known as the cop, violate all the ethical rules. The cop will tell the press all about how guilty your client is and how he confessed and all the rest, while the prosecutor stands off to the side.

To zealously represent your client, you have to deal with the press. Treat the press with courtesy, but remember at all times who you are talking to. Nothing is off the record. Let them take your clients picture but don't let him talk. As they are going to run the story, declare his innocence and let them know the matter is under full investigation. Keep your cards close to your chest and tell them the case will be tried in the court, not on the street.

Rule 5.08 Prohibited Discriminatory Activities

Practice Tip:

In my house the “N” word was never spoken. My three brothers and I were raised in west Texas and we did use words like “fag” and “homo” when teasing one another. Still, we were raised not to Judge a person by sexual orientation.

I am always surprised when I hear members of the defense bar us the “N” word. I expect this disgusting behavior out of racist cops, not out of enlightened defenders of the Constitution. So, if by chance the “N” word comes out of your mouth, think about that. Think about all the damage, hatred and racism has caused.

It’s inconsistent for a defense attorney to be a bigot. By definition, to be an ethical defense lawyer we must recognize our own prejudices and rise above them.