2019 Spring Conference - "Young Lawyers Leading the Way"

Program: What Would You Do? The Ethical Lawyer Dilemma
Date: May 3, 2019, 1:45 PM – 2:45 PM
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OVERVIEW

The field of law is often a minefield of ethical pitfalls. While it is nearly impossible to regulate every aspect of a lawyer’s conduct, each attorney is charged with practicing under a general set of rules for ethical behavior and professional conduct. However, as our society develops, new technology and evolving social customs expose ethical voids that were not previously a concern. Furthermore, even some of our hard and fast rules can be obscure and not necessarily address every situation. Here we take a look at a few specific situations where legal ethics come into play. Cognizant that legal ethical standards vary from state to state and jurisdiction to jurisdiction, here we analyze an attorney’s conduct under the ABA’s Model Rules of Professional Conduct.

SCENARIO 1: CROWDFUNDING

A young attorney has recently opened her own practice. She represents a client who is currently engaged in litigation against a government entity. The client is seeking equitable relief. This case involves an attorney fee shifting statute that would issue payment to the attorney if the client wins the case. The attorney feels very strongly that the client is morally and legally correct in this lawsuit and is confident that they will win this case. However, the client has no money and is not only unable to pay the attorney’s fee, but is also unable to provide the funds necessary to present a sufficient case to the court (secure an expert, conduct scientific testing of evidence, fly in key witnesses, etc.). The attorney is willing to use her own money to try this case; however, as a new solo practitioner, she does not have the funds to advance to the client.

The attorney’s young paralegal proposes crowdfunding as a means to secure the funds necessary to try the case. The paralegal advises the attorney that the issues involved in this lawsuit are of major concern to millennials, and the paralegal is certain they would receive the necessary donations to properly present a case. The paralegal subscribed to a popular crowdfunding website and created a page with a general overview of the case without using the names of any of the parties involved, and asking for donations to help the client win the case against this government entity. The paralegal asks the attorney for permission to launch the crowdfunding request.
**WHAT WOULD YOU DO?**

**Applicable ABA Model Rule(s):**

Rule 1.7(a)(1) – A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if the representation materially limited by lawyer’s responsibilities to a third party or the lawyer’s own.

Rule 1.8(e)(2) – A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Rule 1.8(f)(1, 2) – A lawyer shall not accept compensation for representing a client from other than the client unless the client gives informed consent and it will not interfere with independent professional judgment or with the attorney-client relationship.

Rule 1.8(i) – A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.

Rule 5.4(c) – A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

**Discussion:**

The rules of ethics are still developing in this fairly new area of legal funding. There are several implications at play in raising funds from an online pool of third-party donors, some of which may be anonymous. Generally, ABA rules and other legal guidance do not discourage this type of fundraising; however, the emphasis is placed on securing the informed consent of the client, retaining independent judgment, and relaying no promises or expectations to the donors.

**Additional Guidance:**

Formal Opinion 484, A Lawyer’s Obligations When Clients Use Companies or Brokers to Finance the Lawyer’s Fee, American Bar Association
(https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_484.pdf)

Informational Report to the House of Ethics, Commission on Ethics 20/20, American Bar Association
(https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf)

Ethics Opinion 375, Ethical Considerations of Crowdfunding, DC Bar
SCENARIO 2: SOCIAL MEDIA FRIENDSHIPS

A young family law attorney in her fifth year of practice has case pending before Judge Julie. Before being becoming a judge, Julie was an adjunct professor at the attorney’s law school while the attorney was still a law student. Though the attorney never took Professor Julie’s class, she heard that Julie was a well-respected lawyer and a good mentor, so she sent Professor Julie a Facebook “friends” invitation. Professor Julie accepted the invitation; however, they never exchanged any communication.

The night before the first day of trial, the young attorney was going through her Facebook friends list and, to her surprise, noticed that Professor Julie was now Judge Julie. The attorney wondered if this is the same judge which she would be appearing in front of the next day. The attorney sent Judge Julie a private message saying hello. Judge Julie responded in kind, and the two exchanged pleasantries in approximately 4 or 5 messages. After their interaction, the attorney realized that Judge Julie is in fact the judge she will be appearing in front of the next day, though this was never specifically discussed. The young attorney now contemplated whether she must disclose her interaction with Judge Julie to the opposing counsel.

WHAT WOULD YOU DO?

Applicable ABA Model Rule(s):

Rule 3.5(b) - A lawyer shall not (b) communicate ex parte with [a judge] during the proceeding unless authorized to do so by law or court order.

Code of Judicial Conduct, Rule 1.2 – A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Code of Judicial Conduct, Rule 2.9 (a) - A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter …

Discussion:

In this modern age, we have come to depend on social media to be our lifeline to the world. This is also true in professional networking. Websites like LinkedIn are specifically designed for like-minded professionals to be linked together through a social media platform. The answer to the specific question of whether a judge can be “friends” with an attorney through social media is very jurisdiction-dependent. While some states place no prohibition on this conduct (such as New York or Ohio), some states strictly prohibit this type of conduct (such as Florida). The ABA model rules do not adopt a blanket rule that a judge and an attorney being connected as “friends” on a social media website creates a close enough relationship to run afoul of the Model Codes.
Additional Guidance:

ABA Formal Opinion 462 (February 21, 2013) states that when used with proper care, judge’s use of social media does not necessarily compromise their duties under the Model Code of Judicial Conduct any more than use of traditional social connection such as telephone and email.

Lessell, Melissa, “Is Being Friends with a Judge on Social Media an #Ethicsfail?” ABA YLD TYL Magazine, August 09, 2017
(https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/ethics/is_being_friends_a_judge_social_media_ethicsfail/)

SCENARIO 3: THE NONPROFIT BOARD LAWYER

A young Wills and Estates attorney has just been elected to the board of directors of a nonprofit organization. This nonprofit organization provides financial and labor assistance to elderly disabled people who need modifications to their home to make their home more accessible. In her work with the nonprofit, the attorney often obtains clients who seek estate planning assistance. Several of these clients lack the funds to pay the attorney’s fees, so the attorney often reduces her fees or takes cases pro bono.

Through her work in the nonprofit, the attorney meets a new client who has significant assets in real property, but does not have access to any cash-on-hand funds. The client wishes to retain the attorney but cannot afford her legal fees. The attorney offered the client a reduced fee, but the client stated that she could not accept the reduction “in good conscience.” Instead, the client proposed that in exchange for the attorney’s services, the client will bequeath a significant portion of her property to the nonprofit organization. The attorney knows that the value of the property would significantly help the nonprofit in its mission, which is a part of her responsibilities as a board member. The lawyer contemplates the client’s offer.

WHAT WOULD YOU DO?

Applicable ABA Model Rule(s):

Rule 1.8(c) – A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Discussion:

In this scenario, the dueling role of the attorney is the crux of the issue. On one hand, as a member of the board of directors, the attorney has a fiduciary duty to the nonprofit organization. On the other hand, as the beholder of an attorney-client relationship, the attorney has a legal duty
to serve and protect the interests of the client. Here, the needs of the client are not adverse to that of the organization, which makes things less muddy. The attorney would be under a legal duty to disclose her role within the nonprofit organization and, as in almost all scenarios, the informed consent of the client is required.

Additional Guidance:


SCENARIO 4: CAMPAIGN LOANS

Two young attorneys are roommates in a small town. One attorney works for a large private criminal defense law firm and the other works for a local government agency. The government attorney tells his roommate that he has decided to run for a newly vacant judicial seat on a local circuit court. Knowing that his roommate makes a sizable salary as a “big law” associate, the government attorney asked his roommate for a $10,000 loan to launch his judicial campaign. The roommates are great friends and the big law attorney has the means to help her friend. However, the big law attorney believes there is a significant chance that, if elected, she will try cases in front of her roommate given the small size of the town. The criminal defense attorney contemplates whether or not she should loan her roommate the funds.

WHAT WOULD YOU DO?

Applicable ABA Model Rule(s):

Code of Judicial Conduct, Rule 4.1(a)(4) – Except as permitted by law, a judge or a judicial candidate shall not solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office.

Code of Judicial Conduct, Rule 2.4(c) – A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

Rule 7.6 – A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

The scenarios provided are fictitious and for educational purposes only. Any resemblance to actual persons, living or dead, or actual events is purely coincidental.
Discussion:

Though there can be some ethical considerations down the road, the attorney’s decision whether to loan the money to her roommate is a personal one. If elected and the attorney has a case before her roommate, the attorney will be required to disclose the extent of her relationship with the judge to opposing counsel, which will surely present a conflict of interest. The more overarching rule here is that the roommate running for the judiciary should not have solicited funds from his roommate.

Additional Guidance:
