

**Bridge the Gap Mentoring Program  
Ethical Violations, Reporting Misconduct and the Disciplinary Process  
Resource 19**

This resource will facilitate a discussion about a lawyer's obligation to report lawyer misconduct, including the appropriate way to handle situations where the new lawyer believes another lawyer has committed an ethical violation and where the new lawyer has been asked by a senior member of the firm to do something that is unethical or unprofessional. This resource explores ethical violations, the disciplinary process and a lawyer's duty to cooperate with a disciplinary investigation.

- Discuss a lawyer's obligation to report lawyer/judge misconduct, including the reasons why lawyers should report other lawyer's misconduct and to whom such misconduct should be reported. See Rule 16-803 NMRA. (find at <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0> or <http://www.law.cornell.edu/ethics/nm/code/> )
- Discuss the types of factors which should be considered in determining whether misconduct should be reported to a tribunal, disciplinary agency, prosecutor's office, or other authority.
- Discuss the following situations and suggest the most appropriate authority (if any) to whom the conduct should be reported and the reasons therefore:
  - Continuous discovery abuse by opposing counsel. See Rule 16-304D NMRA.
  - Opposing counsel filing frivolous lawsuits or lawsuits merely to harass your client. See Rule 16-301 NMRA and Rule 16-404 NMRA.
  - Egregiously unprofessional conduct during litigation. See Rule 16-304 NMRA.
  - Suspected theft by an attorney of a former client's funds. See Rule 16-115 NMRA and Rule 16-803 NMRA.
  - Suspected financial misconduct by a lawyer who is guardian for an incompetent person. See Rule 16-803 NMRA.
  - An attorney's failure to pay expert fees or others costs of litigation. See Rule 16-108 (E) NMRA.
  - Theft of IOLTA monies by a lawyer in your firm. See Rule 17-204B NMRA and Rule 16-115 NMRA.
  - Abusive and disrespectful behavior toward counsel and/or witnesses by a judge. See Rule 16-803B NMRA.
  - Client neglect because of suspected substance abuse or mental health issues by another attorney. See Rule 16-803E NMRA.

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- Erratic and unfair behavior by a judge because of suspected substance abuse or mental health issues. See Rule 16-803F NMRA.
- Opposing counsel representing a party with whom there is a conflict of interest. See Rule 16-107 NMRA through Rule 16-110 NMRA.
- Unauthorized practice of law by an attorney licensed in a jurisdiction other than New Mexico. See Rule 16-505 NMRA.
- Share with the new lawyer an overview of the disciplinary process, including how complaints are initiated, who may file a complaint against an attorney, with whom they are filed, what happens during an investigation, what to expect if a formal complaint is filed by the disciplinary agency, what types of discipline can be imposed in New Mexico, etc. See attached Disciplinary Process explanation and chart.
- Discuss a lawyer's obligation to assist in and provide information in a disciplinary investigation, in an inquiry by a tribunal or other authority investigating a lawyer or judge. See Rule 16-803 NMRA.
- Discuss whether you should, and the best time to, obtain an attorney as your counsel in a disciplinary investigation against you.
- Review the suggestions in the attached article and discuss their application in the New Mexico disciplinary process. Procter, Marcia L., *What to Do When Disciplinary Counsel Calls*. "The Compleat Lawyer." 1998.
- Discuss the effect a grievance filed against you by your client has on your attorney-client relationship, including the following:
  - Do you have a duty to withdraw as counsel? See Rule 16-116A NMRA.
  - If so, what steps should be taken to do so? See Rule 16-116D NMRA.
  - What obligation do you have to protect the client's interests if the client indicates in the grievance that s/he wishes to discharge you but there is a hearing or statute of limitations or other deadline approaching in the client's case?
  - Is it appropriate to communicate directly with your client to resolve the grievance, especially if it was the result of a simple miscommunication?
- Discuss then you have an obligation to report the misconduct of another attorney to a disciplinary authority. See Rule 16-803A NMRA.
- Discuss the firm's procedure (if in an Inside mentoring relationship) or the appropriate action for a new lawyer who suspects that a partner in the firm has committed misconduct. Discuss the procedure when an associate in the firm is suspected of misconduct.
- Discuss what the new lawyer should be if her or she does not know whether a partner or associate's conduct is inappropriate, but he or she suspects that it might be.

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- Discuss what the new lawyer should do if a superior in the new lawyer's firm instructs the new lawyer to do something that the new lawyer believes to be unethical. See Rule 16-501 NMRA and Rule 16-502 NMRA.
- Discuss the new lawyer's ethical responsibility to properly oversee non-lawyer assistants' efforts to ensure that their conduct is compatible with the professional obligations of the lawyer. See Rule 16-503 NMRA.
- Read and discuss the attached excerpt regarding dealing with ethical issues in your law firm. See Walton, Kimm A. *What Law School Doesn't Teach You... But You Really Need to Know*. Orlando: Harcourt Legal & Professional Publications, Inc., 2000.
- Suggest resources that the new lawyer can consult for making important ethical decisions, including the following:
  - Identify the procedure for obtaining Inside ethics advice (if you are in an Inside mentoring relationship.)
  - Provide suggestions for finding outside ethics counsel and when such action is recommended. Identify for the new lawyer that the State Bar of New Mexico has an Ethics Hotline to answer ethics questions: 1-800-326-8115 or go to: <http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html> Discuss procedures for requesting or researching ethics advisory opinions of the New Mexico State Bar.
  - Identify other helpful ethics materials you are familiar with, where they can be found, and the importance of supplementing general ethics resources with independent research on New Mexico disciplinary case law when the ethics resources reviewed are not based on the New Mexico Rules of Professional Conduct.

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## What to Do When Disciplinary Counsel Calls

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An inquiry from the disciplinary agency is as welcome as a malpractice claim or a personal lawsuit. Like military draft notices and IRS letters, grievances are likely to cause discomfort and tension for even the most experienced and ethical lawyer.

Evidence suggests that lawyers do not understand their professional obligations and worsen their position before disciplinary agencies through ignorance of the procedures and applicable case law. A disturbingly high number of disciplinary matters result in defaults when the respondent lawyers fail to respond within the required period of time or at all. Many respondents attempt to represent themselves, even though they have no prior disciplinary experience and are not familiar with the rules or the proceedings.

It is also true that responding to a disciplinary inquiry, even at initial stages, can take a tremendous amount of time, preventing the lawyer from attending to client business. If the lawyer is a solo or small firm practitioner, this down time can strain already overextended resources. There is also a level of frustration in having to jump through the procedural hoops when the lawyer believes the grievance to be without foundation.

Although the disciplinary rules of each state differ, there are enforcement similarities that can guide the lawyer who has received a disciplinary inquiry.

### **Consult Counsel and Perform Research**

Even if you personally are an expert in disciplinary law, seek the input of counsel, or at least have a qualified lawyer colleague read your answer before it is submitted to the disciplinary agency. More and more, lawyers are engaging in "professional responsibility" practice, making themselves available to colleagues in malpractice, licensing, and risk management matters.

Those who concentrate in this legal field can be located by reviewing ads in lawyer publications, contacting authors of regulatory articles, or noting the counsel of record in published cases. Other sources are the Association of Professional Responsibility Lawyers, members of the state bar ethics committees (not the enforcement arm), professional liability carriers, and law school ethics professors.

Take the time to research the ethics issues and whether discipline has been imposed in similar matters before responding. In addition to ethics rules, some jurisdictions consider criminal offenses (including misdemeanors) and court rule violations as grounds for discipline. Become familiar with any ethics rule that might conceivably apply to the inquiry, and use terminology from those standards in the response. Most states have reference tools available such as ethics opinions, disciplinary case law, and court decisions. Westlaw, Lexis/Nexis, and the ABA/BNA Lawyers Manual on Professional Conduct provide national references on most ethics topics.

### **Tell Law Firm Colleagues**

Whether out of competitive concerns, embarrassment, or lack of understanding, many respondents keep a disciplinary inquiry secret. If the respondent is a member of a multi-lawyer firm, however, the respondent owes a fiduciary duty to other firm members to disclose information that may affect the firm's liability, reputation, or the way firm clients are served. If the respondent is a sole practitioner, arrangements may need to be made for handling client matters when the respondent cannot.

Firm members and office sharers might be contacted about the grievance during the investigation, or may be able to serve as mitigation or character witnesses. If they do not know about the inquiry, they cannot be prepared to render the best assistance. Firm procedures may need to be adjusted or audited in order to determine the extent of any problem or to corroborate that no problem exists. Firm members may need to assist in gathering records, attending meetings, and responding to the disciplinary inquiry.

The firm's professional liability policy might cover disciplinary defense costs. If the inquiry is never reported, the respondent loses that source of expertise and financial assistance should the process become lengthy and complex.

Some disciplinary systems offer probation, counseling, mentoring, and other diversionary dispositions in lieu of formal discipline. If the law firm or office sharers know of the disciplinary situation and are willing to participate in such programs, it may be easier to negotiate a diversionary resolution.

The firm is responsible for handling client matters when the respondent is unable to do so. If disciplinary rules require the respondent to attend a hearing, the law firm may have to stand in for a client matter in another forum. Also, if the respondent's license is suspended or revoked, the law firm must manage the transition of the workload.

If the respondent is a sole practitioner, having other lawyers ready to cover client matters is an even greater necessity. If the sole practitioner does not ensure that clients continue to be served promptly and competently, there may be no practice to preserve once the grievance is resolved. Office sharers, other lawyers in the respondent's field of practice, or other lawyers whose offices are located proximately to the respondent's are candidates for the respondent's confidences.

The respondent may become less productive in the firm because of the stress of the grievance and insecurity about a position in the firm, to the point that counselling or leave time will be appropriate. If the firm knows the reasons for the respondent's distraction, the firm is more likely to be understanding and accommodating.

Most grievances are filed by members of the public, both clients and nonclients. A much smaller number are initiated by lawyers and judges. If other members of the firm have unrelated cases before the complaining judge or with the same opposing party, the lawyers may wish to adjust strategies of the case. If the firm represents the complaining client on other matters, conflict rules may require withdrawal. (According to ABA Model Rule 1.7(b), the lawyer's interest in defending the grievance may materially limit representation of the complainant in other matters.)

### **Answer the Inquiry**

Neglect of legal matters is one of the most frequently raised complaints, and one of the areas of conduct most frequently sanctioned. It is not surprising, therefore, that respondents as a group neglect disciplinary inquiries. They fail to answer, fail to answer on time, and fail to appear in proceedings.

Although every communication from the disciplinary agency should be taken seriously, the initial inquiry should receive immediate and professional attention. The initial inquiry is an opportunity for the respondent lawyer to resolve the matter without further proceedings. By sending the notification, the agency is affording the respondent due process rights of learning of the complaint and providing

an explanation. The vast majority of complaints are closed at early stages, either because the facts are different from those alleged in the complaint, or because the complaint alleges problems that are not violations of the ethics code.

There is a set time frame for response to a disciplinary inquiry. Doing nothing, i.e., failing to provide any response, is not just a default but may also be separate grounds for misconduct. If a respondent believes there is a constitutional right to refrain from answering all or part of the inquiry, that claim must be made within the prescribed time frame. Failing to respond may be deemed lack of cooperation with the disciplinary process, and may result in the imposition of discipline even when you are acquitted of the underlying misconduct.

All jurisdictions have a version of ABA Model Rule of Professional Conduct 1.6(b)(2), which allows a lawyer to candidly respond to grievances without fear of improperly revealing client confidences and secrets. Many jurisdictions also provide that a client who files a grievance waives any attorney-client privilege.

The answer to an initial disciplinary inquiry may be of sufficient quality to dispose of the disciplinary matter without further proceedings. Although you should not volunteer information beyond the scope of the inquiry, your response should be completely candid. A false or untruthful answer to a grievance is a separate ground for discipline. Your response should be professional and unemotional, and avoid derogatory references to the complainant, the court, or the discipline system. The response might be shared with the complainant, or might eventually become part of a public record if formal proceedings are initiated.

### **Duties to Clients**

You are not prohibited from having contact with the complainant. If a current client was the complainant and you could not communicate, the underlying representation could not proceed and withdrawal could not be accomplished, since it requires notice to the client and proper counseling of the client's options.

If contacting the complainant about the grievance, take care to follow ethics rules governing contacts with represented and unrepresented persons under ABA Model Rules 4.2 and 4.3. Do not negotiate with the complainant to withdraw the grievance, do not use threats, and, if the complainant is a current client, do not cease performing legal work. Do not ask potential witnesses not to cooperate with the disciplinary investigation. Some states have opined that a lawyer may not offer or make an agreement restricting a party or counsel for a party from bringing information concerning a lawyer's ethical misconduct to the attention of the disciplinary agency.

Further, since disciplinary authorities may act sua sponte and need not await a "complainant," an agreement to withdraw a grievance would have no practical benefit. In virtually every state, complainants and complaints are immune from suit for communications made to the disciplinary agencies.

Even if the complainant is a current client, you may not be able to withdraw from the representation. Every grievance does not create grounds for withdrawal. If a matter is before a tribunal, withdrawal is not effective until the adjudicator rules on the motion to withdraw, even if the client is in favor of discharge.

It is improper to charge a complaining client for the time you take to prepare your response to the grievance. Fulfilling professional responsibilities to the disciplinary system is a personal obligation of the lawyer, and not something chargeable to a client. The contract between you and the client is for services you are to perform in the client's legal matter. The client has not agreed to be charged for your grievance defense.

### **Private Dispositions**

The disciplinary rules of most states provide a range of disciplinary sanction options, both public and

private. Private dispositions are available at the initial inquiry stages before formal charges have been filed and before the matter becomes public. If the inquiry is not dismissed as meritless after you respond, you may wish to consider private disposition.

Private dispositions may be a reprimand or admonition to which the respondent consents, or diversionary options such as alcohol counseling, mentoring, or supervised practice. Diversionary options are tailored to the needs of the particular respondent and negotiated with the disciplinary agency. If the terms of the diversion are not fulfilled, the underlying conduct may be reopened for formal proceedings.

Private dispositions become part of the respondent's discipline record, but are not generally released or published. Admonitions are admissible in subsequent grievance matters usually only in determining the degree of sanctions that may be imposed. Since admonitions arise without formal hearing records and perhaps with incomplete investigative files, the respondent should create and permanently maintain a detailed record of any mitigating facts and circumstances, exculpatory information, and any defenses to the grievance giving rise to the private disposition. It might be appropriate, after consultation with counsel, to file a qualified objection indicating that although the admonition is accepted, there are perceived weaknesses in the conclusions set forth in the admonition or in the grievance.

### **Public Proceedings**

If formal proceedings are initiated, a complaint is filed before the disciplinary agency and served on the respondent. The procedural rules applicable are found in the disciplinary enforcement rules of the jurisdiction. The applicability of the rules of civil procedure in disciplinary proceedings vary greatly from state to state. In some states, the civil rules apply unless a discipline rule is on point; in other states, the civil rules do not apply unless specifically referenced in the discipline rules.

Pleadings must be served on the disciplinary counsel, and service must be made by personal service or registered or certified mail. A respondent must file an answer within a specific time, or in most states will be subject to a default with the same effect as a default in a civil action. Extensions of time to respond may be granted upon motion and a showing of good cause. If a respondent is represented by counsel in the formal proceedings, counsel should file an appearance. Affirmative defenses, including a defense of disability or substance abuse, must be raised in a timely manner. Any refusal to answer based upon a claim of constitutional rights must be affirmatively raised within the prescribed time frame.

The rules for disqualification of judges in the jurisdiction generally apply to disciplinary adjudicators. (See the ABA Model Rules for Lawyer Disciplinary Enforcement, Rules 2F and 3F; ABA Model Code of Judicial Conduct, Rule 3E.)

A respondent is required to personally appear at the formal hearing and to submit to cross-examination. If you fail to appear at the disciplinary hearing and fail to file an answer, the charges may be deemed admitted and a default entered. Failure to answer and failure to appear make it impossible for the adjudicating body to determine what is happening with the respondent and is deemed to be a lack of respect for the professional regulatory system. Although you may invoke the Fifth Amendment protection against self-incrimination in a proper case, you may not refuse to testify or to respond to subpoenas for required records.

There are two purposes of the formal hearing: (1) to determine whether the charged misconduct has been established, and (2) to determine the appropriate sanction, if any, to be imposed. The two questions might be addressed in hearings held on separate dates or one immediately following the other. If you are not sufficiently prepared to present mitigating evidence immediately after the misconduct hearing, you should request a continuance. You should be prepared to move forward on the question of appropriate sanction, however, and should not assume continuances will be routinely granted.

### **Constitutional Challenges**

Historically, the disciplinary system has been slow to respond to constitutional law developments. It takes a while for constitutional decision making to percolate through rulemaking bureaucracies anyway, and lawyers are more likely to tend to their clients' needs than to the lawyers' own regulatory rulemaking.

Valid constitutional challenges should be raised in the context of the primary disciplinary proceedings. Too many respondents wait until all disciplinary proceedings have been exhausted and disciplinary sanctions have been imposed before articulating the constitutional arguments that might be applicable. Ancillary attacks in state or federal courts have uniformly been dismissed for lack of jurisdiction. The appellate path of all disciplinary actions will end at the highest court of the state. Appeals from the state supreme courts must be taken to the U.S. Supreme Court.

### **Stipulated Discipline**

A respondent may offer a plea of nolo contendere, admitting all essential facts in the formal complaint or any of the allegations in exchange for a stated form of discipline and on condition that the plea, admission, and discipline is accepted by the adjudicating agency. If the stipulation is not accepted by the hearing panel, the offer is deemed withdrawn and statements made in connection with it are not binding on the respondent or the disciplinary counsel and are not admissible in discipline proceedings. A large number of disciplinary dispositions each year are stipulated matters.

### **Prepare for the Consequences**

While you should not attempt to resign, since in most jurisdictions, a resignation from the bar will not be accepted while a grievance is pending, you should prepare for the possibility of suspension or disbarment. If a respondent is suspended or disbarred, disciplinary rules require notifications to be made to clients, opposing counsel, and tribunals before which any matters are pending, and that the respondent file proof that the notifications were made. A respondent may not engage in the practice of law after the effective date of a suspension or revocation.

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or a lack of initiative. Drum up the work yourself. If there is someone in charge of your assignments, go to them and volunteer your time. If nobody is in charge of the work you get, go around and ask other lawyers if there's something you can work on for them. If there's a particular practice area that interests you, be sure to get to know the attorneys who work in that area and ask if you can help them. You may shake loose not just a memo or two but some work that really excites you! If you aren't able at first to find any more work, hide that as best you can by boning up on your legal reading. Don't let yourself be seen twiddling your thumbs!"

#### D. ETHICAL ISSUES: HOW TO AVOID BEING LED AWAY IN HANDCUFFS AND AT THE SAME TIME AVOID TORQUING OFF YOUR BOSS

I don't have to tell you that if you do something unethical, you risk losing your license to practice law. But in practical terms, things are often not quite so cut and dried. If they **were**, nobody would ever do anything unethical. You can be under **lots** of pressure as a lawyer, and that's what causes ethical problems. Your boss may press you to do something that makes you uncomfortable, and you worry that if you speak up you may lose your job. A major client wants you to bend the rules a little, implying that if you don't, you'll lose their business. You're at a prosecutor's office, and your boss pressures you to "get a conviction," and you interpret that to mean, "Do **whatever** it takes, ethical or not." You're still in school, and the employer you'll be working for when you graduate asks you to use your Lexis or Westlaw student ID to do research for them. You worry that if you don't, you'll jeopardize your job before you even **start**.

In this section, we'll talk about how to handle ethical dilemmas, and how to resolve ethical issues without destroying yourself politically at the office. We'll also discuss what to do if you determine that the behavior being pressed on you is truly unethical. (As we'll see, it's pretty straightforward. Refuse to do it. If they insist—leave.)

### 1. Protect yourself up front from ethical problems.

Ideally you never want to be in the situation where your boss comes to you and says "Hey—bury this gun for me, will you?" There are a couple of prophylactic measures you can take to protect yourself from ever having that happen. One is to "establish yourself from the start as a rule-following, I-dotting, T-crossing person," says DePanfilis & Vallerie's Carrie Colangelo. Don't brag about how you've gotten away with things in the past, and don't make approving noises when other people tell you about what **they've** done. "The kid at the checkout missed the case of soda under my cart," "I wrote off more miles on my car than I **drove** last year"—don't respond, "Wow!" When you turn in your time sheets, make them precise, and let your supervisors **know** that. Don't pad expense reports. Don't suggest in any way that you've got lax standards. That may well encourage an unscrupulous supervisor to ask you to do something unethical at work.

Secondly, make sure that you keep accurate records. I talk all about that in the "Getting Off On the Right Foot" Chapter in the section called "Getting Organized." If you keep accurate records of what you do, communications with clients, and you have memos to file and backup e-mails, you'll help protect yourself if you're ever charged with an ethical breach.

### 2. When you're faced with an ethical issue, don't jump to the conclusion that what you're being asked to do is unethical. There are a **lot** more 'gray areas' than you think.

Some things are obvious. Destroying evidence. Paying bar dues out of trust accounts. Padding bills. But many lawyers told me that new lawyers tend to think that a lot of behavior is unethical when it really isn't. It's important to figure out if something is really an ethics problem—or you've got something on your mind making you **think** it is. It could be that you don't approve of the client or what they want to do. Perhaps you're **sure** that the client is lying but you have nothing to prove it. Or maybe you think you heard someone say that something's unethical, but when you look it up you find that the rule you thought you heard wasn't accurate.

Incidentally, "If you turn in your billables and your supervisor cuts your hours, it's not an ethical issue," says Nova Southeastern's Pat Jason. "That's looking out for the client. It's perfectly ethical."

So—how do you figure out if something is ethical or not? That's what we'll tackle next.

### 3. Finding out whether something is truly unethical *without* upsetting the apple cart.

It depends on the source of the questionable behavior and the nature of your employer. If it's the client, buy time so that you can find out whether the behavior is ethical or not. If you're a junior person, say, "I hear what you want, let me talk to X [your superior] about it and get back to you." If it's your client, say, "I hear what you're saying. Let me think about this strategy. I'll call you back at X time."

The situation is different if it's your superior who's requesting what you believe might be unethical behavior. The problem is this: *especially* if you're new, you don't know how your boss will react to having his/her ethics questioned. Some lawyers will take it in stride. Some won't, and they'll be hacked that you'd even question their ethics. You're better off *not* asking them directly unless you're *sure* of how they'll react. If you're *not* sure, what you should do depends on the nature of your employer. If the person who's asking you to do something unethical is not at the most senior level in the office—for instance, it's a senior associate—go to someone *more* senior to ask for advice. If you're at a large firm or in a large office of any kind, go to someone else you trust—be it a mentor, a risk management partner, or anyone else at work whom you trust—and say, "I'm not really sure about this one—what do you think?" and lay out the problem. Or you could say, "I'm new, but last semester in school we studied this, and it seems to me it's against the code of professional ethics." Pitch the question as though you want to be educated, not as though you're pointing an accusatory finger. They'll do one of two things: They'll assure you that what you've been asked to do is ethical (and that's what'll happen the vast majority of the time). Or they'll tell you that it's *not* ethical, and if that's the case, you need to ask them how best to handle it. Maybe they'll talk to your supervisor directly. Or they'll

brainstorm with you about alternative strategies. Either way, you've taken a great burden from your shoulders by going to someone who knows your supervisor better than *you* do.

If you work in a smaller office—or you work in a large organization and don't feel comfortable going to someone in-house—there's a whole raft of possibilities for you in determining whether or not something is unethical. If you have other close friends in the legal community, you can bounce the situation—in very general terms—off them. You can say, "Am I nuts, or is this a problem?" You can call your ethics professor from law school and use them as a sounding board. Or you can call your state bar association's hotline. Florida, for instance has an ethics hotline that gets 20,000 calls a year and they give opinions over the phone. You could also contact the ABA's ethics hotline. It's called ETHICSearch, and you can reach them by phone at 312-988-5323, or fax at 312-988-5491, or e-mail at [ethicsearch@staff.abanet.org](mailto:ethicsearch@staff.abanet.org) (needless to say, if you call, from your cell phone or a public phone; if you e-mail, e-mail from home; and if you fax, fax from Kinko's. You don't need to have your employer see a record of your contact on the phone bill!!) ETHICSearch lawyers can often give you an authority on point immediately and/or e-mail or fax you the authorities you need to understand the issue and resolve the problem (like relevant ethics opinions and rules). The initial consultation is free, and if you want additional research, it costs \$45/hour for ABA members and \$60/hour for non-members. You could even contact a legal ethics lawyer—there are lawyers who devote some or all of their practice to handling ethical questions for other lawyers—and ask *them*. If you're sufficiently concerned or flummoxed, that's a possibility. And that has the benefit of proving, should the issue ever arise, that you took steps to ensure that you were doing the right thing. The bottom line is, there are a bunch of resources available to you for resolving ethical issues. Take advantage of them!

Now, it *may* be that after asking around a bit, you don't have a definitive answer on whether or not the behavior is unethical. There's a *lot* of gray area in ethics! In that case, the rule is that if you're acting under the direction of another lawyer, you can rely on their interpretation of an ethics rule as long as it's *reasonable*. There's a bit of judgment there—

you couldn't, for instance, follow the advice of a superior saying, "Oh, go ahead and hide the body. It's ethical. Trust me." But for an issue that is truly questionable, the rules suggest that you're protected.

#### 4. Handling the situation once you know something is unethical.

Again, it depends on the source: whether it's a client or a superior who requested the unethical behavior.

If it's a client, it depends whether you're their attorney or if it's your supervisor who's the point person. If your boss is the one with the principal responsibility for the client, then your boss will handle the matter. If instead you are the front person with the client, you can always point out other alternatives that **are** ethical. "Why don't we think of other alternatives . . ." You can also point out that what they're trying to do ultimately won't work. Pass the ball! For instance, you can say, "A jury will not believe this."

If they back you into a corner, you've basically got to say, "What you're asking me to do will put my license to practice at risk. I wouldn't do it for anybody **against** you, and I can't do it **for** you. And neither can any other lawyer." I know that's easy to say when I'm sitting here writing a book instead of staring down a big client. But apart from any other ramification of unethical behavior, think about this: Once a client convinces you to do something unethical, they've got you by the short hairs. They can blackmail you professionally. You can't ever again say "I won't do that" because they know you already **did** something unethical. It's just not worth it!



### SMART HUMAN TRICK . . .

Mid-level associate, New England firm: "We represented a chain of stores who leased space from larger stores. The deal was that they were supposed to pay rent based on how much they sold, and it was pretty clear that they were hiding some of their sales. In order to get out of paying the larger stores, they were contemplating filing bankruptcy. Finally one day the CEO asked me to do something that was

clearly outside the scope of my duties as a lawyer. He wanted me to use a document where he had whited out some of the words; I'd seen it before, so I knew something was different. I told my supervisor, and the supervisor immediately responded, 'Get rid of the client. It takes years to develop a professional reputation. You can lose it in an instant. Don't let a client put you in that position.'

If it's your boss, again, break it gently. Look past their specific request to the goal they are trying to reach, and see if there isn't an ethical way to accomplish that goal. Perhaps there's a client who's insisting on a particular answer, and your supervisor is feeling that pressure. Instead of saying, "This is wrong!" or "This is unethical!" say, "Can we take a look from this perspective?" or "This troubles me. I hear what you're asking me. But can we talk about other strategies?" Maybe they interpret the rules differently than you did, and if they can support their argument, as I mentioned just a minute ago, the ethics rules say you're covered (mind you that's only true for areas that are **truly** gray, **not** for things that are more straightforward). As Dickinson's Elaine Bourne suggests, "Do a memo to file, cc: somebody else if that's feasible"—cover yourself!

If your boss doesn't take the bait and insists that you do something that you're fairly sure is unethical, you just can't do it. As Venable, Baetjer's Stefan Tucker advises, "Once you ascertain for sure that it's unethical, say to them, 'I'm sorry. I can't do it.'" If it costs you your job, you're well rid of it. As Loyola's Pam Occhipinti says, "My father always told me, 'You can always make all the money in the world, but you can't make your name back.' Don't compromise your reputation!" Flaherty, Sensabaugh's Scott Kaminski agrees: "In the practice of law, your reputation is everything. Never do anything that would compromise your reputation, no matter the reason." **No** job is worth committing an ethical breach, no matter how it looks when you're sitting in the hot seat. If your boss is a sleazeball, other lawyers know it, and you don't want to be tarred with that same brush. As Pam Occhipinti says, "One associate I know worked for three partners in a plaintiff's personal injury firm. One day all three partners were arrested for stealing from clients. Realize that



if your boss is disbarred, you'll be investigated, too." As soon as you know the real story—get out.



## S M A R T H U M A N T R I C K . . .

Junior associate, Midwestern firm: "Our firm had a 'partner from hell,' who always waited until the last minute to do tremendously important work. Then he'd make a frantic pass through the hallways, grabbing whatever hapless associate(s) he could find. When the last minute work was done, he'd inevitably blame the associate for whatever went wrong, missed issues, bad cites. Fortunately, nobody at the office was ever fooled."

Once he strode into my office at 4:30 in the afternoon, half an hour before the courthouse closed, and plopped a one-inch thick complaint on my desk. He told me to sign it and get it filed. A firm in another state had sent it over by federal express and he had promised them he'd have it filed that day. The partner left my office and I sat there staring at this behemoth of a complaint, just stunned. After about five minutes, I collected my wits. I knew that under FRCP Rule 11, there was no way I could sign and file the complaint by five o'clock, and comply with the rule. There was no way I could verify the items in the complaint in any way, shape or form in less than half an hour!

I walked to the partner's office, looked him in the eye, and said, "Under Rule 11, I cannot, and will not, sign this complaint today." He looked at me, absolutely flabbergasted that I had the nerve to stand up to him. Then he said in distress, "But I can't do it, either!" essentially admitting that he tried to bamboozle me into doing something he knew was unethical!

Fortunately for him, the Statute of Limitations was not an issue, so he called the out-of-state firm and asked if they minded whether he took another day to review the complaint and comply with Rule 11. No problem. I read and checked out the complaint and the next day had it filed.

After that incident, that partner never asked me to do his dirty work for him again."

Incidentally, if it comes to that—and you have to look for another job—be careful how you bring up the topic with future employers. If there are other reasons you wanted to leave the employer—like you wanted to change practice areas or settings or move to another city—focus on those. When it comes to the ethics problems, as Hofstra's Caroline Levy says, "Couch it in diplomatic terms, like 'I had some reservations about the practice' or 'I was uncomfortable' or 'Our styles weren't compatible.' The fact is, if somebody is sleazy, everybody in the legal community already knows it!" If you're pressed on the issue, Elaine Bourne says, "Then tell them. Dance around it until you're cornered, and then say, 'They asked me to do some things that I researched and found to be outside the rules of ethics. Frankly, if you asked me to do those things for you, I wouldn't do them for you, either.'" Face it. If a prospective employer wanted you to do something unethical for them, you don't want *that* job, either!

### 5. What to do if you find out that the behavior is ethical—but you're still not happy with it

If you ascertain that what you're being asked to do is ethical, and you're disappointed with that—there's something else going on. It's entirely possible that something could be ethical but still make your hair stand on end. Maybe you just can't bring yourself to represent people you consider sleazoids. Or maybe you've got moral problems with the kinds of businesses your firm represents. Or maybe you think your bosses are sleazy, even though what they're doing is technically on the right side of the ethics code. You know what? It's not the right job for you. As Nova Southeastern's Pat Jason says, "If you're uncomfortable, it's not a good fit for you. It's a sign." John Marshall's Bill Chamberlain adds, "They may be paying your salary, but it's still *your* life." To figure out what to do, look at the chapter called "Being Your Own Career Coach," where we talk all about those kinds of issues. That's not an ethical problem—that's a career issue!

# An Overview of the Disciplinary Process

