

Dealing With an Ethical Dilemma

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In today's legal world every practitioner encounters ethical issues ranging from obligations to be fulfilled in the practice of law, (such as Continuing Legal Education and biannual registration), to issues arising from client representation, (such as conflicts and client fraud). Somehow a lawyer must find a way to deal with such issues and to do so in compliance with the New York Code of Professional Responsibility, as well as a multitude of other rules in the Judiciary Law; and the Rules of Court. In addition, where the rules are not specific, lawyers may look to bar association advisory opinions or case law for guidance. As a result, it can be difficult to deal with issues on behalf of a client, while maintaining and protecting our licenses to earn a living. This article will give a brief practical overview as to what to do if an ethics and professional responsibility issue arises and what to do when facing disciplinary authorities conducting a grievance investigation.

1. *What can a lawyer do when faced with an ethical dilemma?*

If taking an action on behalf of a client feels wrong but you are unable to pinpoint the problem - follow your instinct; don't do it, or ask for time to research the issue (see Resources Outline). If you are pressed for time due to a trial or court appearance, a brief discussion with the judge or law secretary as to a pending "ethics issue" (without disclosing harmful facts) will usually result in a short adjournment to allow you to make a telephone call to consult with a colleague or a supervisory attorney. If you are unable to reach someone, contact one of the bar association ethics hotlines. You will find that most issues have arisen before and someone will either have an answer or give you guidance as to a rule, case or advisory opinion.

2. *What can a lawyer do when faced with an allegation of ethical misconduct?*

DR 1-103 provides that a lawyer may report another lawyer's misconduct to either "a tribunal or other authority empowered to investigate or act upon such violation." Notwithstanding the rule, even if the allegations are only made to the court in which you are appearing, the grievance committee can still initiate an

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investigation! Thus, you may be subject to financial sanctions by the court, as well as disciplinary sanctions by disciplinary authorities. As a result, once there is any allegation of ethical misconduct a lawyer should act carefully and try to resolve the issues so as not to risk a negative Opinion by a Court. .

- *Consider obtaining counsel.*

Representing yourself is not a good idea because you are too close to the issues. In addition, practitioners in the field know the grievance procedures, rules and staff and will be able to shepherd you through the system. If you cannot afford to hire someone, at the very least have a respected colleague look over your documents before you submit them to the court or the grievance authorities to give your answer a dispassionate review.

- *Cooperate with the court's or grievance committee's requests.*

Any delay in the submission of your response may negatively impact on the investigation. Moreover, a failure to respond may result in an interim suspension pending a final hearing. See 22 N.Y.C.R.R. § 603.4(e)(1)(1st Dept.); § 691.4(1)(1) (2d Dept.); §806.4(f)(1)(3rd Dept.) and § 1022.19(f)(1)(4th Dept.).

- *All statements can and will be used against you.*

Do not make any “off the cuff” statements about your conduct to the court, clients, colleagues and opposing counsel. Moreover, if you contact staff for the grievance committee, keep the conversation to a minimum. Most important, do not misrepresent the facts because the grievance authorities will find out if you do. As a result, you could be subject to additional charges for lying to the committee during the investigation.

- *Written responses.*

When providing a written response to a grievance, consult the client's files and your records before responding. Focus on an explanation of your conduct. Do not blame the client, the court or your supervisors unless you can back-up your claims. Note: DR 4-101(c) (4) permits a lawyer to reveal client confidences or secrets in order to defend the lawyer or the lawyer's employees against an accusation of wrongful conduct.

- *Aggravating and mitigating circumstances.*

If you find yourself the target of a disciplinary investigation there are

certain factors, which may be presented as aggravating or mitigating circumstances which can affect the sanction imposed upon a finding of misconduct. Aggravating circumstances which considered by the grievance committees when sanctioning a lawyer include, *inter alia*, failure to cooperate with the committee, lying to the committee, lack of remorse, prior disciplinary history and untreated substance abuse. Mitigating circumstances include, *inter alia*, character references, pro bono activities, community service and treatment for substance abuse.

■ *Substance Abuse.*

Lawyers Assistance Programs (“LAP”) are available to members of the legal community with alcohol or substance problems. The New York State Lawyers Assistance Trust (NYLAT) has a website which provides invaluable information about resources to deal with these issues at www.nylat.org. NYLAT works hand in hand with local LAPs including those established by the New York State Bar Association and the Association of the Bar of the City of New York.

Each LAP offers free, confidential assistance to lawyers, judges, law students and their families in addressing their problem, identifying appropriate resources and beginning the recovery process. The New York State Bar Association Lawyer Assistance Program has been in existence since 1990 and its director is Pat Spataro. She can be reached at (800)255-0569. The Director of the New York City Program is Eileen Travis and she can be reached at (212) 302-5787. Both programs work together to assist lawyers in need and their services are confidential pursuant to §499 of the Judiciary Law as amended by Chapter 327 of the Laws of 1993 and Federal Regulation 42 CFR Part 2. If you, or any lawyer you know, is experiencing a problem, don’t wait until a grievance is filed, call LAP, they can help!