

# The Rules of Professional Conduct: An Equal Opportunity for Ethical Pitfalls

by Ericka F. Houck Englert and Victoria E. Lovato

*This article discusses potential ethical pitfalls for attorneys in a hypothetical format.*

**T**he Rules of Professional Conduct (Rules) govern the ethical decisions made by attorneys. By their very nature, the Rules apply to attorneys of both sexes equally. Gender is no defense for unethical conduct, nor is it an indicator of how an attorney might act in a given ethical dilemma.<sup>1</sup>

In fact, the Colorado Office of Attorney Regulation Counsel (OARC) does not routinely keep statistics on ethical violations by sex. Creating the statistics that appear in the charts included as an appendix to this article required creativity by OARC's technology experts and a rare merging of databases.

Some general conclusions may be drawn from the charted statistics:

1. In 2011, no female attorneys were disbarred and the rate of discipline for male attorneys overall is greater than that for females.
2. In no category of discipline do female attorneys receive more complaints than men.
3. In most categories of discipline, the rate of complaints against male attorneys is greater than against female attorneys relative to the number of active attorneys by gender.

The authors conducted an informal poll of attorneys who specialize in attorney discipline, both from inside the OARC (current and former) and from the outside role of respondent's counsel. When asked whether and how gender plays into attorney discipline, the resounding answer by all interviewees was, "It doesn't."

Given that gender plays little objective role in attorney discipline, this article provides a brief overview of common, but perhaps lesser-known, ethical pitfalls for attorneys. Such pitfalls typically fall into five general categories: (1) fee agreements; (2) billing issues; (3) attorney-client boundary issues; (4) private conduct; and (5) client communication. This discussion is not simply a recitation of the Rules. Instead, the goal is to keep the reader from finding himself or herself in front of OARC with a complaint pending, thinking, "I should have known better."

## The Error

### ➤ Taking a flat fee without an agreement and without benchmarks for earning the fee

Joe Client asks Joanne Attorney to represent him in a driving under the influence (DUI) case in county court. The case sounds like an easy one, and Ms. Attorney agrees to handle the representation for a \$1,500 flat fee. Ms. Attorney takes the check and puts it in her operating account, because she feels she has earned the fee. She attends the arraignment and the disposition date, where she learns that Mr. Client does not want a plea bargain but wants to go to trial. Ms. Attorney and her client disagree on trial strategy and Mr. Client fires his counsel, demanding a return of the \$1,500. Ms. Attorney maintains she already earned the fee even though Mr. Client's DUI, for which he retained Ms. Attorney, is not resolved.

## The Remedy

With flat fees, the fee is not earned until the attorney completes the purpose of the retainer—here, until the DUI representation is finished.<sup>2</sup> Until the representation is completed, the funds remain those of the client and must be held in trust.<sup>3</sup> In this hypothetical, the representation in the DUI matter included a trial. Even if the client had taken a plea, the representation had not been completed when the lawyer accepted the fee and treated it as earned. Even though the attorney conferred some benefit on the client by attending hearings, the attorney had not yet earned the entire fee.

The attorney should have put the agreement in writing, including benchmarks for when the fee was earned. For example, the fee could have been earned in the following manner: \$250 after attending the arraignment, \$250 after a plea hearing, \$250 after reviewing discovery, \$250 after trial preparation, \$250 at motions, and \$250 at trial.<sup>4</sup> The attorney likewise should notify the client in writing when each benchmark is hit, so that the client knows the



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attorney has earned that portion of the fee and is justified in moving the funds from trust.

## The Error

### ➤ Accepting retainers but not sending bills

Lucy Lawyer is a busy employment attorney with many clients. Ms. Lawyer typically requires a \$5,000 retainer for a consultation. She is known for spending time with her clients and giving each of them the attention they require. She has a keen legal mind and is known for brilliant legal argument and winning briefs. However, Ms. Lawyer is a sole practitioner and just does not get around to the billing as often as she would like. When she needs money to pay the rent and electricity bill, she figures out which cases she has worked on, does some quick figures, and moves the clients' money from her trust account to her operating account to cover the bills. Once every few months, she sends the client a bill, showing how much she has earned. Unfortunately, Ms. Lawyer is converting client funds every time she treats money as her own without first advising her clients she earned their money.<sup>5</sup>

## The Remedy

Lawyers deserve to be paid, especially hard-working lawyers doing right by their clients. The remedy is simple: attorneys should do the billing on a monthly basis and never move money from their trust account until they advise the client, in writing, with an invoice that includes a detailed accounting of work performed on the client's behalf.<sup>6</sup> If necessary, attorneys should hire a bookkeeper.

## The Error

### ➤ Failing to report criminal conduct that occurs in an attorney's private life

Linda Lawyer is enjoying her weekend, and goes out to dinner with friends. During dinner, Ms. Lawyer drinks wine. On her way home, Ms. Lawyer is pulled over by the police because her headlight is out. While speaking with Ms. Lawyer, the police officer observes that her eyes are slightly red and that there is a faint smell

of alcohol on her breath. Based on the breathalyzer results, Ms. Lawyer was over the legal limit. Ms. Lawyer is arrested for DUI, but later pleads guilty to driving while ability impaired (DWAI). Ms. Lawyer fails to report this conduct to the OARC.

Albert Attorney is enjoying a lovely spring day watching the Rockies play with his friends. During the game, Mr. Attorney has several beers. While driving his friend home, he runs a yellow light. A police officer pulls him over, and suspects he has been drinking. When asked for his driver's license, Mr. Attorney opens up his center console for his wallet. As he does this, the police officer observes a small package of white powder; a packet of cocaine was in the center console. Mr. Attorney agrees to a blood test, and his blood alcohol content is over the legal limit. Mr. Attorney pleads guilty to a class 6 felony, possession of a controlled substance, and DWAI. Mr. Attorney received a deferred judgment and sentence, but fails to report this to OARC.

## The Remedy

Attorneys have a duty to report convictions. Every licensed attorney:

upon being convicted of a crime, except those misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs, shall notify the Regulation Counsel in writing of such conviction within 14 days after the date of the conviction.<sup>7</sup>

A conviction includes any ultimate finding of guilt, including a guilty verdict, "a plea of guilty, or a plea of *nolo contendere*, and irrespective of whether entry of judgment or imposition of sentence is suspended or deferred by the court."<sup>8</sup> In both of these scenarios, even though the criminal conviction occurred in the attorneys' private lives, the convictions should have been reported to the OARC within the requisite timeframe. In each case, the OARC will commence an investigation.<sup>9</sup> In the second scenario, because the conduct involved a serious crime (felony drug possession), the attorney would be issued a citation to show cause why he should not be immediately suspended.<sup>10</sup> In sum, the failure to report a conviction is a violation of the Colorado Rules of Professional Conduct.

## The Error

### ➤ Ignoring a difficult client

Linda Lawyer has a very busy employment law practice. She represents many of the major companies in town, as well as some

smaller companies. One small company she represents is Ma & Pa's Bakery. The bakery has three stores in town, and they have forty-five employees. Ms. Lawyer provides general employment advice as issues arise with the bakery. Ma and Pa tend to call Ms. Lawyer frequently with simple questions. They send Ms. Lawyer multiple e-mails over the weekend, and often call her cell phone with questions regarding their employees. Although the phone calls should last no more than five to ten minutes, the clients often keep her on the phone for thirty minutes or longer. Moreover, Ma and Pa generally complain about the amount of their bill. Ma & Pa Bakery is one of Ms. Lawyer's most difficult and least profitable clients. Ms. Lawyer is very busy with her corporate clients, so she begins having her assistant either take a message from Ma and Pa, or else she has their calls sent to voicemail. One such message says that they are having "an issue" with one of their employees. Because of her history with this client, Ms. Lawyer assumes that this is nothing serious and ignores the message.

### The Remedy

Lawyers need to pay attention to all of their clients, regardless of whether they are difficult. Lawyers have a duty to "act with reasonable diligence and promptness in representing a client."<sup>11</sup> In the above scenario, there is no evidence that Ms. Lawyer's neglect of Ma & Pa's Bakery resulted in the client's interests being adversely affected—for example, by overlooking a statute of limitations. Nevertheless, the client may suffer needless anxiety or lose confidence in Ms. Lawyer's trustworthiness.<sup>12</sup> Even though Ms. Lawyer has more sophisticated clients, who may be easier to deal with, she must competently and promptly handle matters for all of her clients.

Moreover, Ms. Lawyer cannot ignore communications from her clients. When a client requests information, lawyers are required to promptly reply to reasonable requests.<sup>13</sup> Ms. Lawyer should have promptly returned Ma & Pa Bakery's telephone call or, at a minimum, she should have had her assistant acknowledge receipt of the call and provide the client a reasonable estimate of when a response could be expected. Ms. Lawyer also may want to consider terminating the attorney-client relationship.

### The Error

#### ➤ Having a sexual relationship with a client

Lynette Lawyer has known Charlie Client and his family for years, and they have socialized on many occasions. Charlie Client is involved in a serious car accident. He has suffered multiple injuries and his car was totaled. Client comes to his family friend, Ms. Lawyer, for assistance. She agrees to represent him on a contingent fee basis, and the terms of the representation are clearly outlined in the engagement letter. Over the next several months, Ms. Lawyer and Client become very close. Ms. Lawyer never asks Client out for a date because she is aware of the Rules as they relate to attorney-client relationships. Following a hard-fought trial, the jury finds in favor of Client and awards him \$500,000. Ms. Lawyer and Client go out together to celebrate. Over the next couple of

weeks, Ms. Lawyer and Client continue dating, and eventually begin a sexual relationship. Soon thereafter, Ms. Lawyer receives notice that the defendant in the case is appealing the verdict.

### The Remedy

The Rules are very clear that "[a] lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."<sup>14</sup> It does not matter whether the relationship is consensual, nor does it matter whether there is an absence of prejudice to the client.<sup>15</sup> Lawyers have a fiduciary relationship to their clients. If the relationship becomes sexual in nature, this can "involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage."<sup>16</sup> In the above scenario, Ms. Lawyer never terminated the attorney-client relationship. It was not sufficient that she waited until the trial was over. Moreover, Client had a reasonable expectation that Ms. Lawyer would handle all post-trial matters, including collections and possible appeals. Ms. Lawyer should not have engaged in a sexual relationship with Client.

### Conclusion

All attorneys are subject to the Rules of Professional Conduct and have an obligation to know the Rules and to follow them. We need to be conscientious and not allow ourselves to become lax with respect to our duties as lawyers, our duties to our clients, and our duties to our profession.

### Notes

1. There appears to be little to no research in the area of gender differences relative to ethical conduct in the legal profession. However, one article concluded:

Some studies in gender ethics have found that women are more ethical than men, while other studies found that there is no statistical difference between men and women when it comes to ethics. A few studies have found that men are more ethical than women.

Gupta and McGee, "A Comparative Study of New Zealanders' Opinion on the Ethics of Tax Evasion: Students v. Accountants," 16 *New Zealand J. Taxation Law and Policy* 47 (2010).

2. Colo. RPC 1.5, cmts. 12 to 15.

3. Colo. RPC 1.15.

4. Colo. RPC 1.5, cmt. 14. Note that the fee need not be earned in equal installments.

5. Colo. RPC 1.15(a) and (c).

6. *Id.*

7. CRCP 251.20(b).

8. CRCP 251.20 (h).

9. CRCP 251.20(c).

10. CRCP 251.20(d) and (e).

11. Colo. RPC 1.3.

12. Colo. RPC 1.3, cmt. 3.

13. Colo. RPC 1.4(a)(4).

14. Colo. RPC 1.8(j).

15. Colo. RPC 1.8(j), cmt. 17.

16. *Id.* ■



## Appendix

### 2011 Statistics

	Total	Active	Disbarments	Suspensions (disciplinary)	Diversions (by Attorney Regulation Committee)
Men	23,313	15,852	16	52	31
Women	12,644	8,398	0	8	5

### 2011 General Categories of Complaint by Gender of Attorney Respondent

Complaint	Gender	Number	Percentage of Total Active
Action on Case	F	358	2.83%
	M	899	3.86%
Communication	F	84	0.66%
	M	229	0.98%
Competence	F	47	0.37%
	M	73	0.31%
Conflict	F	16	0.13%
	M	82	0.35%
Fee Issue	F	82	0.65%
	M	294	1.26%
Improper Funds Handling	F	71	0.56%
	M	281	1.21%
Misrepresentation	F	62	0.49%
	M	144	0.62%
Neglect	F	46	0.37%
	M	230	0.99%
Other	F	73	0.58%
	M	167	0.72%
Possible Serious Misconduct	F	17	0.13%
	M	110	0.47%
Return of File	F	10	0.08%
	M	39	0.17%
Threatening Prosecution	F	3	0.02%
	M	22	0.09%
Unprofessional Conduct	F	68	0.54%
	M	182	0.78%