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Perils of Crossing State Lines

Complexity abounds when ethical duties vary, sometimes greatly, by jurisdiction.

Ernst & Young is currently running an advertising poster that features an alternating black and white background and alternating black and white letters. The entire written content of the ad is: "This is the only way we see our ethics." The point is that they view ethics as black and white. Given the public impression that accounting firms have a cavalier attitude toward ethics, it's probably an effective ad.

It is laudable to have an uncompromising attitude toward ethics, and I don't mean to be cynical. Rather, I mention the ad to contrast the notion that legal ethics is black and white—a view shared by many lawyers and nonlawyers—with the reality that jurisdictions sometimes provide lawyers with inconsistent, often-changing, and ambiguous ethical obligations.

BY ARTHUR D. BURGER

Ethics

Simply put, a lawyer's proper ethical response, beyond the basic obligations of fair dealing and diligence, often varies depending on the state he or she is in. I have been struck by this diversity of approaches ever since I became involved with the more intricate aspects of professional ethics, beginning with my service on my firm's ethics committee many years ago.

Why is this so? It's simply because so many issues require that difficult policy choices be made regarding the conduct of lawyers—and reasonable people, including state courts in various jurisdictions that oversee such choices, can come to different conclusions. While these disparities are thus understandable, they can still create confusion for lawyers who seek to comply with the rules.

Some states, for example, give primacy to the goal of preserving dignified and restrained marketing behavior by lawyers, ahead of the interests of the public and potential clients in unrestricted access to information about lawyers' services. In jurisdictions that have adopted the approach of the American Bar Association Model Rules regarding solicitation, lawyers are prohibited from engaging in one-on-one marketing of prospective clients. The D.C. rules, on the other hand, bar such contact only when it is misleading, when undue influence is used, or when it is made in or near the courthouse.

Moreover, the D.C. rules are unique in the nation in permitting lawyers to use nonlawyer intermediaries to solicit potential clients, including the often maligned and controversial use of "runners" who contact victims of accidents. (See D.C. Ethics Opinion 286.) In Maryland, on the other hand, such conduct can constitute a criminal misdemeanor.

The largest current ethics controversy surrounds the scope of the obligation to maintain client confidences and the exceptions that should be recognized. The vast majority of jurisdictions provide an exception to confidentiality for financial fraud that is likely to harm third parties, yet the D.C. rules recognize no such exception, and the ABA rejected it in adopting its Model Rules. So the rules regarding confidentiality and financial fraud among the various jurisdictions now range from prohibiting such disclosures to requiring them. Most jurisdictions take the middle course of simply permitting them.

The handling of issues of financial fraud in the context of the Securities and Exchange Commission is addressed separately in the new Rules of Professional Conduct promulgated by the SEC under the Sarbanes-Oxley Act. The rules, which become effective 180 days after their publication in the *Federal Register,* were expressly designed to address perceived deficiencies in various state rules. But the jurisdictions, including the District, that take a different approach were motivated by well-considered concerns regarding the degree of trust that lawyers could expect from clients if the expectations of confidentiality were weakened.

Another area in which jurisdictions differ is the conflict between principles of confidentiality and the obligation of candor to the court. Some jurisdictions have adopted the ABA Model Rule on this issue. Accordingly, in some instances they would require a lawyer, after trying but failing to induce a client to recant false testimony, to disclose the client's fraud to the tribunal if withdrawal from the case is not an option. In the District, however, such disclosures are prohibited.

So ethical dilemmas can have more than one "right" answer, despite the widespread impression to the contrary. What can a conscientious lawyer do to negotiate the shoals of differing rules? He or she needs to look at the choice-of-law rules in the affected jurisdictions. For jurisdictions that have adopted the

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format of the ABA Model Rules, this is Rule 8.5. Rule 8.5 has been modified twice in recent years—first in 1996, and again in 2002 as part of the ABA Ethics 2000 Commission.

The basic purpose of the changes to Rule 8.5 has been to create a simple and straightforward test of which rules apply, although in the process of repeatedly amending the rule, some confusion was created rather than lessened. For example, under the most recent version of ABA Rule 8.5 (not yet adopted in the District), matters in litigation before a "tribunal" are governed by the ethics rules of the jurisdiction of the tribunal. (The word *tribunal* was substituted for the word *court* in the earlier version of the rule, because *court* did not encompass administrative hearings or arbitrations.)

For conduct other than litigation, the new ABA rule changes the test from the place of the lawyer's principal office to the place where the conduct occurred, unless the predominant impact is in another jurisdiction.

It can be seen that the rules regarding choice of law are also in flux—and lawyers need to be aware of the changes to those rules as well.

So the conscientious lawyer is not left without means to determine the rules with which to comply. It's neither simple nor hopeless. Just complicated.

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