

## 10 Ways Not to Get Busted

BY ARTHUR D. BURGER

*The accounting firm is a PR model in many ways, but it was a mistake to deny responsibility.*

**Ethics**

**T**his may not be as much fun as 10 ways to shed those pounds or 10 ways to become rich and successful. But as someone who represents lawyers and law firms in ethics matters, I can report that there is an unfortunate pattern of typical scenarios that lead to ethics problems, or at least to narrow escapes. This suggests a checklist to avoid the most common sources of trouble. While plain bad luck can happen to anyone, here are some items over which you have control.

1. *Make sure you really want the case.* The most likely case to cause trouble is the one you shouldn't have taken in the first place. Perhaps you agreed to take it as a favor for a friend. Or it involves an area of law in which you are unfamiliar and have no interest in pursuing. Possibly, the amount of money at stake is out of proportion to the legal fees, or the facts as presented by the client are not borne out. Perhaps the client is unable or unwilling to pay a reasonable fee or has simply proved to be a jerk in the past. The likelihood of these scenarios can be reduced if you conduct a dispassionate analysis at the outset. This is immeasurably easier if more than one person is involved in the decision, particularly someone who does not have a stake in the origination credit. This is why most firms have a new case committee.

2. *Screen for conflicts.* When a big case appears, there is a natural tendency to want to reel it in quickly. If a conflict surfaces down the road, however, there can be very serious reper-

cussions. A conflict screen must be done at the outset and with diligence. This should include a database search as well as personal review by the attorneys. "Positional conflicts" or "issues conflicts" should be considered as well as traditional conflicts. If a potential problem surfaces, someone other than the originating attorney should make the decision as to how to address the conflict. Normally, screening will not cure a conflict. Knowing consent is normally required, and there should be a written document evidencing such consent.

3. *Have a good retainer agreement.* For one thing, under D.C. Rule 1.5(b), there must be a written document setting forth the basis of the fee. A good retainer agreement not only should fully and clearly set forth the understanding regarding fees, costs, and billing procedures, but also should define (as required under new ABA Rule 1.5(b)) the "scope" of the representation. Clarifying the scope can avoid what I call the perfect storm: The client thinks the lawyer is working on A, B, and C, and the lawyer is only working on A and B. Consider other special provisions, such as advance waivers. See D.C. Bar Ethics Opinion Nos. 309 and 310. The discussion regarding the retainer agreement should be frank and unhurried. Avoid any unrealistic predictions about fees and costs.

4. *Watch out for multiple client cases.* Special precautions should be considered when representing multiple clients in a matter. First, the lawyer must ensure that the clients do not have adverse positions that could trigger a nonwaivable conflict. Second, the lawyer should advise the clients that separate communications from each are not disclosable by the lawyer to

any of the others, without the consent of the communicating client. See D.C. Bar Opinion No. 296. The lawyer may wish to suggest that all parties waive any claim of confidentiality as to one another, in order to avoid awkward scenarios. If the clients are unwilling to agree to waive such confidentiality, then the lawyer should probe as to whether there are indeed adverse interests.

5. *Maintain client communication.* This is not only required by Rule 1.4; it is the first precaution against client resentment. A brief phone call or letter, even when very little is going on, helps client relations considerably. The absence of contact tends to breed suspicion and distrust. It only adds to the awkwardness when the client has to call and ask why she hasn't heard from you. Also, if there have been unfavorable developments, it's best to put the bad news out fast and discuss options, if any. Most clients can tolerate bad news, but it is tougher to take if it is delivered late. When someone asks me whether a client should be told about a particular type of development in a case, I sometimes respond that the answer should depend on whether they would want to be told if they were the client. The best answer is, if you have to ask, call the client.

6. *Don't work in isolation.* It is good risk management to have a colleague, who is aware of the facts and status of a matter, with whom you share thoughts and strategy. Sometimes, fairly obvious gaps or omissions can be pointed out by a colleague. The act of discussing the case helps bring out a plan.

7. *Be careful in handling the funds and property of clients and third parties.* The rules regarding handling funds and property of others are strict in every jurisdiction, and the penalties are extremely harsh, often involving disbarment. For example, when any check from a lawyer bank account bounces, the bank is obligated to notify bar counsel and there will be an investigation. If you are involved in handling such funds or property, you must be certain that you and the employees involved are fully aware of the requirements. The D.C. Bar offers a CLE course on these rules twice a year, and Reid Trautz, director of the bar's Lawyer Practice Assistance

Program, assists attorneys with setting up trust accounts.

8. *Get serious about staff education.* Under Rule 5.3, a lawyer in a firm is required to ensure that nonlawyer employees understand the ethical components of their work. For secretaries, this requires that you clearly explain the concept of confidentiality and ensure that they understand fully which parties are entitled to receive privileged material. It is not a complete defense to a bar counsel complaint to reply that the conduct was traceable to a non-lawyer employee. Lawyers have an obligation to educate non-lawyer employees in required practices.

9. *Be careful with problem clients.* Clients who fail to meet their obligations to pay their bills, or otherwise fail to cooperate in a constructive manner, can provoke legitimate feelings of exasperation in even the most patient lawyer. Keep several points in mind. First, the duty to zealously represent a client continues until the lawyer withdraws. You're either in or you're out. Don't be half-in with a resentful, half-hearted approach. Second, if you are going to withdraw, there must be an ethical basis to withdraw under Rule 1.16. Third, if the case is in litigation, a motion to withdraw is required. You remain in the case until the motion is granted. In making such a motion, a lawyer should be very careful not to disclose client confidences. The lawyer should also be diligent in withdrawing in a manner that does not prejudice the client, no matter how badly she may wish to disassociate herself from the client.

10. *Develop a clear policy on closed files.* The ethics requirements regarding closed files are complex and detailed. Every lawyer and firm should have a clear policy that complies with D.C. Bar Opinion No. 283.

Do these things, and bad luck will lose its fangs.

*Arthur D. Burger is a director with D.C.'s Jackson & Campbell. His practice includes representing lawyers and law firms in matters of professional responsibility. He is also a frequent instructor of the D.C. Bar's mandatory ethics course for new admittees. His e-mail address is aburger@jackscamp.com.*