Preventive ethics

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I. Introduction

During the past decade, a revolution has swept the medical profession and the ways in which doctors and other health professionals approach patients. Society has moved from a reactive model, where the primary role of the physician is to treat and attempt to cure a patient of a disease already contracted, to a model where the physician's role is to assist the patient in avoiding illness through education, counseling, regular checkups and lifestyle alterations.

■ First in a series.

Over the past several years, as we have found ourselves lecturing around Kansas on various ethics issues for continuing legal education programs and as we have taught classes at the University of Kansas on ethics and professionalism, we have found ourselves increasingly drawn to the notion that the ideas underlying the practice of preventive medicine could find an equally appropriate home in the field of legal ethics. If one analogizes ethical violations to the onset of an illness and accepts also the notion that few lawyers want to be charged with a disciplinary violation, then it is relatively easy to begin to think in terms of preventive ethics. In essence, all we are saying is that lawyers should adopt attitudes and practice management procedures that would minimize the potential for ethical violations.

II. Engagement agreements and fee disputes

One of the more common attorney-client disputes concerns attorney's fees and other charges.[3] While some such disputes arise from facts occurring in later phases of the representation, most can be traced directly back to the original understanding, or lack thereof, between the parties regarding this fundamental aspect of their relationship. That so, one might think the disciplinary rules would impose an obligation on the lawyer to initiate any representation with a written agreement with the client regarding fees and other charges. But such is not the case in Kansas and most other states. Fee arrangements are, consequently, the principal area of attorney-client relationships in which merely following the disciplinary rules of the jurisdiction can be an invitation to disharmony and, perhaps, disaster.

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In Kansas, written fee agreements are required only in contingent fee cases.[4] That requirement is in keeping with the American Bar Association Model Rules of Professional Conduct on which the Kansas Rules are based and is a typical, middle-of-the-road position among the 50 states.[5] Yet, Kansas lawyers who wish to avoid fee disputes in noncontingent matters would be well advised to practice preventive law and go well beyond the Kansas Supreme Court requirement. Specifically, Kansas lawyers should employ written engagement agreements that include a fee provision in all matters, or at least all matters involving new clients.

There are many reasons beyond fee-dispute avoidance for uniformly using written engagement agreements. Among the more obvious are:

1. To identify the client. While this aspect of a representation is less important in matters involving individuals or easily identifiable groups, it can become essential when the client is a business association or co-tenancy or when the matter concerns an intra-group dispute.[6]

2. To define the scope of representation. All counsel of experience know the discomfort and potential danger that arise when the client believes the lawyer has performed either less or more than the client's authorization.[7]

3. To clarify the client's obligations. At the very least, the agreement can set out specifically the requirements of cooperation in providing information and documents, the need for client availability for further consultation and the client's obligation to pay according to a written schedule.

4. To put into written form any consents or conflict waivers that are part of the undertaking. Many lawyers have learned, to their substantial discomfort, the difficulty of enforcing the oral versions of these basic arrangements.[8]

Including each of these four aspects of a well-crafted engagement agreement can prevent disputes between lawyer and client. Yet, while documenting these aspects of the representation in an engagement agreement may be necessary for many reasons, including avoiding fee dispute, the agreement must also include clear and explicit provisions regarding the parties' understandings of all aspects of potential billings.

If the lawyer's or firm's fee will be based on hourly rates, the responsible attorney's hourly rate is the most obvious inclusion in a comprehensive billing provision. But often that is not enough. The provision should additionally set forth the range of fees of other lawyers, or other professionals, whose work may be billed during the representation, as well as information regarding the increments of an hour that the

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FOOTNOTES:

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3. *See*, Hoeflich, "Ethical Concerns Regarding Fees and Billing," in Anderson, Badgerow, & Hay, KANSAS ETHICS HANDBOOK (1996), 7-1.

4. *See*, Model Rules of Professional Conduct 1.5(d).

5. Most states agree with Kansas. A few require no written agreements (Iowa, Nebraska, New York, North Carolina, Rhode Island, Tennessee, Vermont, Virginia). Fewer yet require all fee arrangements to be in writing (Connecticut, Michigan, New Jersey, Pennsylvania, Utah). California, not surprisingly, has its own hybrid.

6. This is particularly important to aid compliance with the conflict-of-interest rules of MRPC 1.7-1.10; *cf.* MRPC 1.13.

7. *See*, particularly, MRPC 1.2.

8. *See*, MRPC 1.7-1.10 cited above.

9. *See, In re Scimeca*, 265 Kan. 742, 962 P.2d 1080 (1998).

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responsible lawyer will use in the billing process.[9] The provision should also make explicit the nature and scope of any discounts the client will receive and any exceptions to those discounts. It should also deal with any special billing practices the lawyer or firm uses, including treatment of travel time.

If the representation is to be billed on a "flat" fee or "blended" fee basis, the provision must take care to address special, related issues. The exact scope of the arrangement, and any exceptions to it, must be laid out in detail. The precise nature and length of the representation must be set forth, along with any expectations of when billing will occur and payment will be required. If more than one lawyer might be involved in the representation, the agreement should clarify who will do the work on the matter, or at least who will decide that issue. Both "flat" and "blended" fee arrangements encourage "pushing down" work to lower-charging attorneys, an economically sound strategy to the firm that can sometimes prove a surprise and an annoyance to the client.

The final aspect of the billing process a written engagement letter must address is the basis for charging expenses. Every billing attorney has a story of a client who dutifully pays hourly fees without hesitation but goes wild over a 20-cents per page duplication charge or $1 per page fax expense. Nor is client unhappiness the only potential difficulty here. A recent ABA opinion has waded into the expenses area, opining that any charges above actual costs can be unethical.[10]

It is not possible to set out exactly what an expense provision in an engagement letter should cover because such advice is directly dependent on what charges the lawyer or firm decides to itemize on the bill rather than absorb as part of the overhead expenses reflected in the professional fees. At a minimum, though, an expense provision should identify any out-of-pocket charges the client will be expected to pay and set out specific rates on which those charges will be based when such rates are readily identifiable.

III. Hiring of new lawyers and other personnel

A second area in which preventive ethics should more frequently become standard operating procedure is in the hiring of new lawyers, especially "lateral," experienced lawyers. Here, engagement letters cannot help, for the potential problem concerns clients already being represented by the hiring firm.

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All lawyers know that an attorney cannot "switch sides" in the middle of a legal dispute, abandoning his client to take up the cause against that client. To do so would be an obvious violation of the lawyer's fundamental ethical duties of both loyalty and confidentiality.[11] Fewer lawyers understand, however, that hiring a lawyer, a summer associate or even nonlegal personnel from a firm against whom the hiring attorney or firm has a dispute can serve to disqualify the hiring entity from further representation in that matter. In an age of "free agency," where lawyers and other personnel move from firm to firm with seemingly ever-increasing frequency, such difficulties are far more likely to arise than in the bygone age of greater firm loyalty. The potential for ethical difficulties such situations can bring requires constant vigilance that only preventive ethics can offer.

The culprit here is the "imputed disqualification" provisions of Model Rule 1.10(a) and (b). In the common version of these rules, the adversary position of the migrating lawyer's first firm is "imputed" to the new firm if the lawyer has actual knowledge or information protected by rules 1.6, 1.8(b) and 1.9(b) regarding a matter being handled by her new firm, regardless of whether the migrating lawyer actually worked on the matter.[12] That imputed adversariness is then carried by the migrating lawyer to the new firm, tainting it with the former representation and rendering it vulnerable to a charge by the first firm's client that it has "switched sides" in the dispute.

The imputed representation can be avoided in a few states if the migrating lawyer's new firm builds a "wall" or "cone of silence" around its new arrival.[13] In Kansas, Missouri and most states, this alternative is not available in private firm situations, however, and nothing can save the hiring firm from the potential disqualification except a consent from the first firm's client that may well not be forthcoming.[14]

Disqualification is often the required outcome if either the first firm or its client brings an action challenging continued representation by the hiring firm.[15] The consequent required withdrawal is both embarrassing and costly to the hiring firm. An additional possible horror is a subsequent malpractice suit by the hiring firm's former client based on the apparently unnecessary sudden disqualification of its law firm in the midst of its representation.[16] A disciplinary complaint may also be filed by the first firm or either client.

The only way of preventing the problems imputed disqualification can bring in Kansas and other states that do not permit screening is preventive practice. Most hiring attorneys or firms review the migrating lawyer's clients and representations in search of potential conflicts. But that is obviously not enough. The screening net must be widened to include all of the first firm's client list as well. Obtaining and transmitting such a list can, of course, be a problem for the migrating lawyer. The fact that the first firm represents a certain client is not usually considered confidential information, and thus divulging that information to the hiring firm does not ordinarily subject the lawyer to disciplinary action.[17] If the migrating lawyer believes that she cannot reveal client identities, then the new law firm must decide whether it can safely hire the migrating lawyer.

IV. Seeking independent action on ethical issues

A third aspect of a preventive ethics

approach to practice management concerns how a lawyer or law firm should deal with a difficult ethical problem as it arises. With even the most prudent practice management policies in place, ethical dilemmas will inevitably arise and have to be dealt with. Conflicts, for instance, may occur in spite of the best efforts to avoid them. The question is, once such an ethical dilemma arises, how should a lawyer or law firm deal with it?

Many lawyers and law firms have no established procedure or even any set idea about how to deal with ethical problems as they arise. Instead, one sees a vast array of responses from denial to frantic attempts to do research in the hope of finding a solution. Of course the difficulty with such responses is that they are rarely optimal. Denial only makes matters worse. Attempts to discover a solution in the cases or in the literature to a particular ethical problem are often unsuccessful. Many issues are never litigated or the subject of published opinion and others, even if there is some discussion, may not be exactly on point. The complexities of the ethical rules under which we live and the fact specific nature of most problems that arise in practice make the hope of finding any easy answer chimerical.

Here again, the rules themselves offer little advice. Both the MRPC and the version thereof adopted in Kansas are focussed primarily on substantive issues rather than process or prevention. The rules may tell a lawyer that there is a problem, but they rarely tell a lawyer how to resolve that problem. From the perspective of preventive ethics, several procedural steps become crucial. First, of course, is the realization by the lawyer or law firm that there is an ethical problem at all. The two examples given above show how a lawyer or law firm can put procedures in place that will avoid or, at least, identify ethical problems. The second step, once it is realized that a problem under the rules exists, is to decide how to deal with it. As we have already noted, the optimal manner of dealing with ethical problems is to seek assistance. This may take several forms.

First, a law firm should have one or more members of the firm, acting either alone or in concert, who can advise lawyers in the firm on how to deal with ethical problems.[18] For instance, many firms have conflicts committees charged with the identification and resolution of conflicts. Often, a firm will also have a senior member, sometimes a former judge, who serves as the firm's resident "ethicist." Such a lawyer will have professional responsibilities as a practice "specialty" and, presumably, will have more learning and more experience in dealing with ethical problems than the average attorney in the firm. By consulting with such an individual or committee, the lawyer with the ethical problem achieves several goals. First, other lawyers in the firm, who may share in potential liability over a matter, are alerted to the potential problem. Second, as the old saying goes "two heads are better than one," particularly if others in the firm have expertise in this area.

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A second means of dealing with such a problem as it arises is to ask for an advisory opinion from the Kansas Bar Association Professional Ethics Advisory Committee. Here, again, one is going to "experts" for assistance with the matter. Such advice is provided without charge to lawyers in Kansas. Of course, in many cases it may be impractical to go to such a committee, because it takes more time to research, discuss and issue an opinion than a lawyer has for resolution.

A third option is to seek an independent opinion from another member of the bar. Of course, there is little point to seeking informal advice or even a written opinion from another lawyer if that lawyer is not experienced and does not have sufficient standing at the bar to justify reliance on her opinion. But if a lawyer can find such an independent lawyer to give such advice or a written opinion, then there are, again, significant benefits. As in seeking help from an internal "ethicist" one has the advantage of a second — and, presumably, more experienced and learned — mind. Secondly, although such advice may not have quite the prestige and weight of an Ethics Advisory Committee opinion, it still shows that the lawyer with the ethical problem has taken it seriously and attempted to address the problem in an appropriate manner. Seeking third-party advice or an informal advisory opinion and following it, therefore, may be a relatively easy way of mitigating one's risk of facing disciplinary or other claims involving professional misconduct. Of course, the independent advice or opinion cannot be obviously wrong.

A fourth option is to contact the Kansas Disciplinary Administrator's Office for an informal discussion of the potential problem with one of the four attorneys on staff.

To a large extent, the adoption of a preventive management attitude requires nothing more than learning the rules, using common sense in developing procedures by which potential violations can be recognized and avoided and seeking to resolve problems as they arise in a rational manner. Alas, many lawyers have yet to adopt such an attitude. If more lawyers begin to practice preventive ethics, fewer will face disciplinary complaints and the level of professionalism at the Kansas bar will rise.

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10. ABA Formal Ethics Opinion 93-379.

11. *See*, especially, MRPC 1.6.

12. The rule reaches any lawyer, regardless of station within the first firm, and can even reach former summer associates. *See, Actel v. Quicklogic*, 1996 U.S. Dist. LEXIS 11816, WL 297045 (N.D. Cal. 1996).

13. Illinois, Michigan, Oregon, Pennsylvania and Washington seem to permit such devices.

14. There seems little reason to believe a client would give his consent, as that would, generally, be against his interest.

15. *See, e.g., Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *Nelson v. Green Builders Inc.*, 823 F.Supp. 1439 (E.D. Wis. 1993).

16. *Padco Inc. v. Kinney & Lange*, 444 N.W.2d 889 (Minn. App. 1989).

17. *See*, MRPC 1.6. There are infrequent situations where the fact that a particular firm or attorney represents a particular client is highly confidential.

18. *See*, MRPC 5.1(a).