

Quis Custodiet Ipsos Custodias?

By Nancy Byerly Jones

Doing the Right Thing. Sounds so simple, doesn't it? Its message reeks with common sense, morality, compassion and fairness. Heck, it's how we'd like and expect others to treat us, right?

Yet, when we find our professional selves in the dilemma of "doing the right thing" it can be far easier said than done. It can ignite an exhausting conflict among our inner voice, common sense, training, upbringing, morals, logic and emotions.

Such a dilemma is quite common when attorneys suspect or know of deceit, fraud, misrepresentation or the like that occurs all too frequently within our great profession -- in and out of the courtroom. The untruthful culprit may be one of many: clients; employees; partners; associates; witnesses; friends; opposing counsel; judges; professional colleagues; or others within the legal system.

Why is such a simple philosophy of doing the right thing such a difficult step to take for so many? The reasons are endless, but may include:

- "Who am I to judge another?"
- I'd look like a holier-than-thou do-gooder.
- It could cost me a friend.
- I'd tick off the judge AND hurt my client's case.
- What if I'm wrong!?
- Live & let live attitudes
- Winning at all costs personalities
- It's far easier to put my head in the sand and mind my own business.
- I don't have time to deal with it...let someone else deal with it...give the guy enough rope and he'll eventually hang himself.
- Etc., etc., etc! Few of us lack good excuses when we *really* need a good one!

So, just what is our obligation as lawyers, how to we prepare ourselves for doing the right thing and to protect ourselves from clients who lie?

The short (and simple) answers include:

- 1. Our obligation as lawyers is ongoing -- to do the right thing to ensure the integrity of our legal system and great profession.*
- 2. Don't be "too busy" to read and reread our NC State Bar Rules, pending and recently approved opinions, comments, attorney discipline*

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orders and other recent sanctions, the State Bar Journal, the ABA's annual compendium of Professional Responsibility Rules and Standards.

- 3. Read and reread Rules 1.6 (confidentiality) and 8.3(a) (Reporting Professional Misconduct) which requires a lawyer to inform the State Bar if the lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that **raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer.***
- 4. Ditch our traditional attitudes of dreading preparing engagement agreements and recognize the many benefits they offer in the short and long term. They are one of an attorney's **and** her/his clients' KEY protective "tools." And, it also helps to include a provision on the negative consequences including those to the attorney-client relationship should a client lie or otherwise misrepresent the truth.*

The long, official answers are clear too. A few of the relevant ethical rules are attached along with a few key opinions and comments. Also included are some thought-provoking articles by other authors. In addition, make it at least a monthly habit to visit the State Bar's website (ABA's too) to keep yourself and employees updated on our ethical rules, pending opinions, disciplinary orders and so much more. I've also attached the Council's July 2012 report on adopted and proposed formal ethics opinion....key issues are addressed regarding confidentiality, company email use by employees and critical other matters.

I've also created a partial list of things to consider in preparing for what to do when faced with ethical dilemmas (or other tough decisions as well). Hopefully, you will cut and paste from this list or create your own asap, ensure it is shared with all law firm employees, and *before* anyone is put in a position of having to report ethical misconduct.

Again, the list below is intended merely as a "starter" list. Like all checklists, they are invaluable tools and should be ever-evolving and frequently edited.

Preparing for the Reporting of Professional Misconduct

- 1. Keep an updated (written!) reminder list of why your law license is important to you** (e.g. helping the public; being a contributing and constructive member of your community and legal system; you enjoy work that is always challenging, changing and brings new experiences regularly; you appreciate and seek the continual learning of new "stuff;" it is an honor

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and you are passionate about being a strong voice for clients; your license and the *privilege* of practicing law helps you reach your personal, professional & financial goals; and so forth...)

Why do this when our plates are already beyond over-flowing? You may be thinking, I certainly know why I exposed myself to the challenges of law school. In our 90 mph worlds, however, there's no way to keep track of every single thing – our brains are continually having to hear, see, and try to absorb waaaay too much new information.

Bottom line is that it's easy for all of us to lose sight of the reasons why we became lawyers in the first place and, more importantly, why we want to continue serving in this capacity. Reading our written reminder lists help us to more *attentively* refocus for a few moments on our reasons. Likewise, this type of list can help keep us motivated in a world that seems to slap attorneys with de-motivators all too often. Finally, this and similar types of lists (see below) serve an important role in re-motivating us that it really does matter that *all* attorneys do her/his part in protecting the integrity of our great profession.

2. **Know your values** (write them down too and look at your personal values/ethics list often). Think ahead about how you'd handle any and all such situations (including the scenarios where the person attempting to deceive the tribunal is also your friend).
3. **Train yourself and your employees** (re-training and redundancy are invaluable and mandatory if we want to do it right!) Have we discussed with them how to handle suspected or known lying? Are they reminded often to never keep such information from you? Do they feel comfortable when needing to grab your absolute attention or are you constantly sending out "don't bother me now" signals at the workplace?

And while you're at it, ensure they know our Rules of Professional Conduct too via workshops, Q&A sessions focused on one rule at a time, etc. Yes, this is an ongoing obligation of all of us serving in supervisory roles.

Ask yourself, "When was the last time I took the time to talk to my staff about the Rules of Professional Conduct?" "To give them the time (and my *undivided attention*) to ask questions about the Rules?" "Do they *really* understand what a conflict of interest is, how to spot them, what confidentiality means and their responsibility to help guard clients' "

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confidences?” “Do they know they should *always* refuse to lie for an attorney – no matter how trivial or small the lie may seem?”

4. In your **initial discussions with prospective clients**, talk about your responsibility to them as their attorney AND their responsibilities as a client including the importance of their being brutally honest with you at all times. Let them know the downsides of NOT being honest with you and the potential consequences to their case not to mention the attorney-client relationship.
5. Include sections on trust, confidentiality and truthfulness in your **Engagement Agreement**. Explain your professional and ethical duties as an officer of the court and your commitment to helping maintain the integrity of our legal system.
6. If you request and receive an **ethics advisory from our State Bar (or any regulatory agency for that matter)**, confirm in writing with the appropriate Bar personnel what you understand to be their and the Bar’s directives and opinions on the subject at hand. Include a request that if you have misunderstood their advice on the subject matter that they will send you a written reply to correct any misunderstandings or confusion.
7. Have a **predetermined plan for how you’ll handle** suspected and confirmed fraud, deceit, lying (e.g. brainstorm the options with trusted advisors and colleagues (include this critical topic in firm training sessions and meetings); plan how to talk to and to approach others about your concerns; know the steps you must and WILL take before you find yourself in the midst of such a situation. And, if you are in a partnership or group of shareholders, by all means, please include these types of clearly detailed provisions in your partnership agreement.
8. Once you suspect lying, **don’t put your head in the sand**. Carry out the steps you know you must take conscientiously, of course, but also sooner than later.
9. If you really want to put your head in the sand (human nature can some times lean us in that direction!) or you are very stressed over “doing the right thing” as an officer of the court, then **weigh the pros and cons** of going forward vs. not going forward.

Ask yourself, “If I do this or don’t do it, will anyone be helped or hurt by my decision? What if I were the one who would be harmed by this deception or

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misrepresentation? How would I want the situation handled? Will I be able to look in the mirror and know I did the right thing? What decision would I hope a colleague or a family member to make in this situation?"

And, if you choose to ignore an obvious deception – one that will cause unfair and adverse effects on unsuspecting others and our legal system, ask yourself "Aren't I now a part of the deceit, the fraud, the misrepresentation -- an enabler at the least and, therefore, one of the wrong-doers?" We all know the answer to that question.

10. **Doing the right thing** doesn't usually win us rounds of applause or "Thank You's." In fact, it can often generate multiple "costs" financial and otherwise. Those costs seem unfair just because we stepped up to the plate and did the right thing.

So perhaps the final questions to ask then before going forward may be, "Would I want me or my loved ones to bear the consequences of such deceitful actions? Or, would I hope that an attorney made aware of fraud or misrepresentations would have the courage to ensure it was exposed and stopped – in other words, that they did the right thing?"

Engagement Agreement Suggestions

Now for some pointers as promised regarding how agreements for legal services can incorporate protections in this area.

In addition to the suggestions already discussed above regarding including provisions that cover confidentiality, the consequences if clients lie to you (e.g. your withdrawal from their case), etc., here are a few other recommendations for engagement agreements. And, again, please remember this list is not intended to be all-inclusive, but rather a starter list to help you customize the one(s) that work best within your areas of practice.

- 1) Remind clients at the onset of the agreement that you have discussed all of these matters previously and specify the date of that conference. An example of such language follows: "This letter agreement will confirm our discussions of [add day and date] when we met at [location of initial meeting]. Should you, however, need further clarification, or have any questions whatsoever, please let me know. If you agree this agreement accurately confirms our discussions, then please sign where indicated acknowledging your receipt, agreement and understanding of our

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attorney-client agreement.”

2) Thank clients in the first paragraph for their confidence in you and the opportunity to be of service. If we ever start taking our clients for granted, it's definitely time to rethink why we are practicing law (as discussed above) and if we'd want someone with our poor attitude serving as *our* attorney.

3) Specify on what basis your fee is figured (i.e. hourly basis, flat fee, value billing, contingent fee, other) and clearly distinguish and explain the difference between fees and out-of-pocket expenditures/costs.

4) Include explanatory language if any part of your retainer/fee is nonrefundable (make sure you are in compliance with all applicable ethical rules and other regulations and remember...in the NC State Bar's eyes, **no** fee is *really* nonrefundable!). Know too how our Rules *define* retainer!

5) Explain what happens when payments are delinquent (e.g. late charges, withdrawal from the case, etc.) and what additional monies are owed (if any) when appointments are not cancelled within a specified time (e.g. 24 hours prior to appointments, etc.).

6) If you require all fees in advance, make it clear what is the minimal amount that must be kept in the client's trust account at all times (and always enforce this provision with each and every client in a timely manner – always!). Explain also that trust account activity reports will be sent along with their statements and that should a balance remain in trust after their case closes, it will be reimbursed to them. Remember...if you want your client contracts to be upheld if ever challenged then you must fulfill your obligations under the agreement (e.g. if you promise monthly billings, do them faithfully).

7) Include a detailed itemization of the scope of services agreed upon.

8) With certain clients, remember it may be wise to include a description of services that are **not** being provided (e.g. the attorney is retained to handle the custody issues, but not alimony, etc.).

9) Clearly identify and itemize the responsibilities of the law firm and those of the client. This may include statements such as: “I am not a tax expert, accountant or financial advisor. It is the client's responsibility to seek such guidance independently and in a timely basis in regard to all legal matters requiring such advice (e.g. wills, separation agreements,

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alimony, etc.)

10) In addition to the responsible attorney, identify who will be working on the case their title and their rate per hour, if applicable, (i.e. associates, legal assistants, investigators, other support staff, etc.).

11) Remind your clients that **only** attorneys can give legal advice.

12) Include a reminder that *no* promises or guarantees have been or will be made regarding the outcome of the case.

13) Educate clients regarding the confidentiality privilege between attorney and client and how to ensure it is protected at all times. Include reminders that cell phones and emails are not to be considered confidential and, therefore, extreme caution should be taken when using these forums for communications. Note: *This is a good place to also clarify the client's approval on how you communicate (e.g. via telephone and fax and at what numbers, email, etc.).*

14) Explain what situations may trigger your withdrawal policy (e.g. when clients fail to pay fees and costs due or otherwise fail to cooperate).

15) Explain your procedures for returning and receiving telephone calls or attach a copy and refer to your office's "Telephone Policy." Need a sample telephone policy to get you started? Let me know and I'll share one with you.

16) Explain to whom they can voice any suggestions, concerns or dissatisfaction with the handling of their case if for any reason they do not feel comfortable discussing those issues with the responsible attorney. Without such a plan, clients may feel like their *only* option is to go straight to the State Bar with their concerns. *Never* be scared of legitimate client feedback...the good, bad or ugly....they are indeed are best resources for learning what we're doing right, not so good, etc.

17) Do *not* rely on cookie cutter engagement agreements. Read each and every one to see how it may need to be tweaked or changed for each and every client. Include any provisions required that may be unique to the particular case or client.

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18) Ask clients to sign the agreement, make a copy for their files and return the original to you.

19) Express your appreciation *again* in the closing paragraph for their having given you this opportunity to be of service!

20) #17 is worth repeating – Never ever let an engagement agreement be sent to a client without the appropriate attorney having personally reviewed it and revised it according to each client's specific issues.

Remember, engagement agreements are one of a practicing lawyer's most protective and helpful "tools" of the trade....and, talking about ethics, I have always considered it our ethical DUTY to provide our clients with timely, comprehensive and understandable engagement agreements. Not all State Bars require written agreements, but I wish they would.

And, finally, once we have a primary model for our agreements, it's just a matter of tweaking and customizing each one a bit further for each client's specific needs and goals. Many lawyers put their heads in the sand here in spite of the fact that they would never advise their clients to do the same. Go figure.

IN CLOSING (*Always deserving a big Yahoo!*)

So, my closing thoughts begin with a repeat of this paper's title (in English not Latin this time, however) "Who **WILL** Guard the Guards?"

Hopefully each and every one of us will make a daily commitment to be attentive and loyal **guards** -- to help ensure that we and every lawyer whose paths we cross are indeed **honest, trustworthy and fit to practice law**.

If we want our profession to remain self-regulated, to win back respect lost in recent times and to continue to serve the public's best interests....then we all know what our answer to "Who will guard the guards?" must always be. Actually, the hard part is not answering the question for most of us...it's applying --the **living**-- of our answer and values when we are faced with our profession's uncomfortable decisions to make – in other words, "Doing the right thing."