

AVOIDING ETHICS PROBLEMS

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I. KEEPING YOUR CLIENT INFORMED

A. Competence and Diligence

1. Disciplinary Rule: DR 6–101

DR 6–101 Competence and Diligence

(A) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(B) A lawyer shall not neglect a legal matter entrusted to the lawyer.

2. Relevant Cases

a. *In re Thies*, 305 Or 104, 750 P2d 490 (1988). Attorney's failure to take action to modify the client's child support judgment, coupled with his failure to communicate with the client, constituted neglect of a legal matter.

b. *In re Bourcier*, 325 Or 429, 939 P2d 604 (1997). Attorney's failure to keep the client informed of his activities in prosecuting an appeal constituted a course of negligent conduct and, thus, neglect of a legal matter, even though the attorney actually performed all necessary services to prosecute the appeal.

c. *In re Meyer*, 328 Or 220, 970 P2d 647 (1999). Attorney's neglect in a domestic relations matter (including failure to keep his client informed regarding temporary support issues) over a two-month period constituted a course of negligent conduct and, thus, neglect of a legal matter.

d. *In re Cohen*, 330 Or 489, 8 P3d 953 (2000). Attorney's failure to take action to reinstate a dismissed dissolution of marriage for a period of seven months, coupled with a failure to communicate with a client, constituted neglect of a legal matter.

e. *In re Magar*, 335 Or 306, 66 P3d 1014 (2003). In a domestic relations matter, attorney viewed his client's marriage as short-term and conducted

informal discovery accordingly. Days before trial, the attorney concluded that his client was entitled to argue that the marriage was long-term and realized that he lacked the documentation to support this argument and the different property division that would result. The court found that neglect is a failure to act or a failure to act diligently, and the Bar must prove a course of *neglectful* conduct.

B. Misconduct; Responsibility for Acts of Others

1. Disciplinary Rule: DR 1-102(A)(3)

DR 1-102 Misconduct; Responsibility for Acts of Others

(A) It is professional misconduct for a lawyer to:

....

(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . .

2. Relevant Cases

a. *In re Fuller*, 284 Or 273, 586 P2d 1111 (1978). Attorney violated DR 1-102(A)(3) when he led his clients to believe he had obtained a default judgment on their behalf, falsely represented to opposing counsel that he had authority from the client to settle their case, and failed to inform his clients that he had settled their case.

b. *In re Thies*, 305 Or 104, 750 P2d 490 (1988). Attorney violated former DR 1-102(A)(4) (current DR 1-102(A)(3)) when he gave his client a series of excuses, some of them false, for his failure to communicate with the client and failure to proceed with the modification of the child support judgment.

c. *In re McKee*, 316 Or 114, 849 P2d 509 (1993). Attorney disciplined under DR 1-102(A)(3) for settling a case without his client's authority.

d. *In re Butler*, 324 Or 69, 921 P2d 401 (1996). Attorney violated DR 1-102(A)(3) by assuring clients on several occasions that he was working on their case when the case had been dismissed for lack of prosecution.

II. COMMUNICATING WITH REPRESENTED PARTIES

A. Disciplinary Rules: DR 7-104(A)(1) and (2)

DR 7-104 Communicating with a Person Represented by Counsel

(A) During the course of the lawyer's representation of a client, a lawyer shall not:

(1) communicate or cause another to communicate on the subject of the representation, or on directly related subjects with a person the lawyer knows to be represented by a lawyer on that subject, or on directly related subjects, unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

This prohibition includes a lawyer representing the lawyer's own interests.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

B. Relevant Cases

1. *In re Jeffery*, 321 Or 360, 898 P2d 752 (1995). Attorney found in violation of DR 7-104(A)(2) when he gave legal advice and negotiated a plea agreement on behalf of an unrepresented criminal defendant whose interests were adverse to those of the attorney's client.

2. *In re Guthrie*, 13 DB Rptr 175 (1999). Attorney was found to have violated DR 7-104(A)(2) when she facilitated meetings between defendants in domestic violence cases and their victims and advised the victims, who were not represented, how to obtain waivers of court orders prohibiting contact between the defendants and the victims.

3. *In re Simcoe*, 14 DB Rptr 89 (2000). Attorney represented a client who had drafted a contract for signature by a minor. The minor's unrepresented father asked the attorney whether the contract was legal, and the attorney advised him that the contract was voidable, even though the interests of the attorney's client were adverse to those of the minor's father. The attorney violated DR 7-104(A)(2) in rendering this advice.

III. EX-PARTE COMMUNICATIONS

A. Disciplinary Rule: DR 7-110

DR 7-110 Contact with Officials

(A) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by Judicial Rule 3 of the Code of Judicial Conduct but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Judicial Rule 4 of the Code of Judicial Conduct.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) In the course of official proceedings in the cause.

(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(4) As otherwise authorized by law or by Judicial Rule 2 of the Code of Judicial Conduct.

B. Relevant Cases

1. *In re Bell*, 294 Or 202, 655 P2d 569 (1982). Attorney violated DR 7-110(B) when, in a chance encounter with the trial judge and without notice to opposing counsel, he presented a decree that effectively eliminated the adverse party's right to plead further.
2. *In re Smith*, 295 Or 755, 670 P2d 1018 (1983). Obtaining a post-decree ex-parte order allowing the attorney's client to temporarily remove the children out of the state was not a communication "on the merits" under DR 7-110(B) when the ex-parte order did not affect any legal right or duty of the parties and the client already had the right to temporarily remove the children from the state pursuant to the judgment of dissolution of marriage.
3. *In re Gillis*, 297 Or 493, 686 P2d 358 (1984). Attorney believed in good faith (and after research) that the law permitted an ex-parte application for a receiver in a dissolution of marriage proceeding. Because the law on the issue was unsettled, the court found that attorney's ex-parte contact with the court was "authorized by law" and he did not violate DR 7-110(B).
4. *In re Schenck*, 320 Or 94, 879 P2d 863 (1994). Attorney violated DR 7-110(B) by sending a letter to the trial judge criticizing the court's decision to delay the trial without sending a copy to the opposing counsel. A communication on a matter of procedure may still relate to the "merits" of the case.
5. *In re Dugger*, 334 Or 602, 54 P3d 595 (2002). An ex-parte application for an injunction and a temporary restraining order in a civil case violated DR 7-110(B). Attorney's mistaken belief that he was not required to give notice of such an application to opposing counsel was not a defense to the ethics charge. DR 7-110(B) does not require proof of a culpable mental state.
6. *In re Penz*, 16 DB Rptr 169 (2002). Attorney's obtaining an order for conducting a psychological home study in a domestic relations matter without notice to opposing counsel violated DR 7-110(B).

IV. EXCESSIVE AND ILLEGAL FEES

A. Disciplinary Rule: DR 2-106(A) and (C)(1)

DR 2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

....

(C) A lawyer shall not enter into an agreement for, charge or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement. . . .

B. Relevant Cases

1. *In re Anderson*, 12 DB Rptr 136 (1998). Attorney's fee was illegal under state law and bankruptcy law because his fee agreement included an irrevocable wage assignment and did not accurately reflect the annual percentage rate the attorney intended to charge on unpaid amounts.
2. *In re Bennett*, 331 Or 270, 14 P3d 66 (2000). Attorney violated DR 2-106(A) when he billed his client for time spent responding to his client's dispute of portions of his bill.
3. *In re Wyllie*, 331 Or 606, 19 P3d 338 (2001). Charging more than the attorney's hourly rate is an excessive fee in violation of DR 2-106(A).
4. *In re Gruber*, 15 DB Rptr 38 (2001). Collecting interest on unpaid fees contrary to the terms of attorney's fee agreement constituted an excessive fee.
5. *In re Eakin*, 334 Or 238, 48 P3d 147 (2002). Attorney had not charged an excessive fee in a domestic relations case where there was insufficient evidence to demonstrate that she had padded her billings or rendered services merely to increase her fee.

6. *In re Paulson*, 335 Or 436, 71 P3d 60 (2003). Attorney violated DR 2-106(A) by billing a client for time spent responding to the client's complaint to the Bar. A fee charged for time spent exclusively in pursuit of a lawyer's own interests violates DR 2-106(A).

C. Formal Ethics Opinions

1. Formal Ethics Opinion No. 1991-69. If the court awards an amount of attorney fees greater than the amount of compensation agreed upon with the client, the attorney may not receive more than the previously agreed-upon fee, even though the larger fee might also be reasonable under the circumstances.
2. Formal Ethics Opinion No. 1991-97. In the absence of an enforceable agreement for higher interest, attorneys are limited to interest on the past-due amounts of 9 percent pursuant to ORS 82.010(1)(a).
3. Formal Ethics Opinion No. 1991-13. An attorney may charge a contingent fee for enforcing an existing support order but not for obtaining one in the first instance. An attorney's fee may not be contingent on the size of a property distribution in a divorce *or a domestic partnership dissolution*.

V. FEE COLLECTION ISSUES

A. *In re Huffman*, 289 Or 515, 614 P2d 586 (1980)

Attorney took a security interest in marital property to secure his fee in a dissolution of marriage. The property was awarded to the opposing party, free and clear of any interest of attorney's client. Later, the attorney refused to release his security interest. The court found that the refusal to release the security interest amounted to the knowing advancement of an unwarranted claim (DR 7-102(A)(2)) and the assertion of a position when it was obvious that such action would serve merely to harass another. DR 7-102(A)(1)).

B. *In re Carstens*, 17 DB Rptr 46 (2003)

Attorney violated DR 5-101(A), DR 5-103(B) and DR 5-105(C) when, to assure payment of his fees from the sale of the family home and to help his client avoid foreclosure, he entered into a contract with the client whereby he would make the mortgage payments until the property sold.

VI. SEX WITH CLIENTS

A. Disciplinary Rules

DR 5-110 Sexual Relations with Clients

(A) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer/client relationship commenced.

(B) A lawyer shall not have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(C) For purposes of DR 5-110 "sexual relations" means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(D) For purposes of DR 5-110 "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

DR 5-101 Conflict of Interest: Lawyer's Self Interest

(A) Except with the consent of the lawyer's client after full disclosure,

(1) a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial business, property, or personal interests. As used in this rule, "a lawyer's own

financial, business, property, or personal interests” does not include serving in a pro tem capacity on any court, board or other administrative body where such service is occasional or for a limited period of time and compensation therefor is incidental to the lawyer’s other sources of income;

(2) a lawyer related to another lawyer as parent, child, sibling, spouse or domestic partner shall not represent a client in a matter adverse to a person who the lawyer knows is represented by the other lawyer in the same matter.

(B) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

B. Relevant Cases

1. *In re Wolf*, 312 Or 655, 826 P2d 628 (1992). Attorney’s sexual relations with a 14-year-old client were deemed to have affected his professional judgment, even though the legal services for the client were substantially completed at the time.
2. *In re Hubbard*, 12 DB Rptr 53 (1998). Attorney began a sexual relationship with a client during the time she represented him and continued to represent him after she became pregnant with the client’s child. The subject of the representation was child support. Later, attorney sought child support from the client and used information from the prior representation in doing so. The attorney violated DR 5-101(A) and DR 5-110(A).
3. *In re McHugh*, 14 DB Rptr 23 (2000). Attorney violated DR 5-110 when he engaged in sexual relations with a current client.

C. Formal Ethics Opinion No. 1995-140

Attorney violates DR 5-110 by beginning a sexual relationship with a client during the representation of the client. A preexisting consensual sexual relationship does not violate this rule but may violate DR 5-101(A) or DR 7-101(A)(3).