

# Ethically Speaking



By Charles Slanina, Esquire

## Annual Compendium of Previous Columns

“**E**thically Speaking” begins the New Year by offering a seasonal gift of a free compendium of past ethics columns. As a reminder, the full text of each article from the last few years is available at the DSBA website.

2007

*“Ethically Speaking” Wish List for Christmas* (December 2007) The Christmas-Hanukkah-Kwanzaa-Eid column made five humble suggestions for changes to the disciplinary system for the New Year. They included suggestions for a statute of limitations for disciplinary matters; recognition of mental illness and addiction as mitigating factors; clarification of the Mid-Atlantic decision dealing with the required role of attorneys in Delaware real estate settlements without the discipline of another attorney to obtain it; greater weight to pre-certifications; an advisory opinion on the role of choice of laws; and an ombudsman for the state courts.

*Attorneys Left Holding the Bag (and Other Contraband): Balancing Duty to Client Against Duty to the Public and Profession* (November 2007) An attorney’s Rule 1.6 duty to maintain client confidences was balanced against the attorney’s Rule 3.4 prohibitions against obstructing another party’s access to evidence and altering, destroying, or concealing objects with evidentiary value.

*The Long, Long Arm of ODC* (October 2007) In the wake of the *Glover* decision, the absence of the statute of limitations and the extraterritorial reach of the Office of Disciplinary Counsel was discussed. In *Glover*, a non-Delaware attorney was disbarred in Delaware while another at-

torney (*Tennenbaum*) was disbarred for conduct that occurred twenty-three years after the disciplinary violations. After this column was published, I received a call from ODC advising that Respondent’s counsel in the *Tennenbaum* matter was informed of the identity of the victim of the sexual assault prior to the hearing despite the statement in the Board Report and Recommendation that this information was not provided.

*When Does Duty Trump Loyalty?* (September 2007) Classic examples of the conflicting duties to client and the profession, the courts and the public were explored. They included the duty to disclose the death of a client; the lawyer’s obligations where a client lies in discovery responses; the disclosure obligations of a lawyer who discovers that her client has violated a court order during litigation; mandatory and permissive withdrawal when a lawyer’s services will otherwise be used to perpetrate a fraud; disclosure to opposing party and court that the statute of limitations has run; and notice to opposing counsel of inadvertent omission of a contract provision.

*Inadvertent Assistance in the Unauthorized Practice of Law* (July/August 2007) The *Valerie Glover Tonwe* decision was explored. The case involved a Pennsylvania attorney who was deemed to have established a “systematic and continuous presence in Delaware for the practice of law” and was disbarred in Delaware without ever having been admitted here. The column cautioned Delaware practitioners who are aware of and assist in such practices lest they be deemed to have committed their own disciplinary violation by assisting in such unauthorized practice.

*Personal Injury Pitfalls* (June 2007) Ten pitfalls ranging from the common to the arcane were explored. They included the need for a proper fee agreement; screening for conflicts; careful client selection; preparation of the client; problems with consortium claims; loans and other business transactions to clients; duties to third party non-clients including Medicare liens; handling of settlement disbursements; competency; and the advisability of referring clients to specialists.

*Consortium Conundrum* (May 2007) The dangers and requirements of handling consortium claims was examined in the light of a recent disciplinary decision.

*The Dangers of Pay Day Advances: Rule 1.5 and the \$2,500 Earned When Paid Exception* (April 2007) In light of multiple prosecutions for violations of Rule 1.5(f) which requires that all unearned fees be retained in the lawyer’s trust account, “Ethically Speaking” cautioned its readers in detail on the requirements of this rule and the popular misconception of a \$2,500 exception to that rule.

*Updates* (March 2007) Previous columns dealing with topics such as attorney advertising were updated.

2006

*Medicare Liens On Personal Injury Settlements: Why You Should Care About Medicare* (November 2006) A cautionary tale was provided on how plaintiffs’ counsel can be caught between the duty to expedite the resolution of a client’s matter and the statutory obligation to honor the Medicare lien. It has been

subsequently pointed out to me that this may also be a dilemma for defense counsel since Medicare liens also extend to the settlements offered.

**Investigate Your Investigators** (October 2006) In the wake of the Hewlett-Packard scandal involving the use of pretexting by investigators hired by HP's general counsel, attorney duties and liabilities with regard to private investigators is discussed.

**You're the Best...Just Keep It to Yourself** (September 2006) The balance between protected commercial speech and the regulation of attorney advertising is explored in the context of "pay for play" publications rating subscribing attorneys.

**Permissible Puffery: The Ethics of Negotiation** (July/August 2006) A dividing line between playing the game and committing a personal foul was explored in light of ABA Formal Opinion 06-439 (4/12/06) which distinguishes between "puffing" and "false" statements.

**Summer Reading List** (June 2006) An unabashed plug for *The Lincoln Lawyer* by Michael Connolly which explores the ethics (and sometimes lack of ethics) of a fictional L.A. criminal lawyer.

**Lawyers Gone Wild!** (May 2006) Another potpourri of attorney misconduct cases from around the country.

**I'm Not a Client, But I Play One on TV** (April 2006) Guest columnist David L. Finger returns to his First Amendment forte in this article on celebrity endorsements and client testimonials in attorney advertising.

**Pro Hac Vice Admissions: Local Counsel on the Hook** (March 2006) The duties and liabilities of moving local counsel for the conduct of *pro hac vice* admitted attorneys is explored.

**The Ethics of Mining for Metadata** (February 2006) Computer generated documents may contain more information than the printed word. The ethics of uncovering changes to documents is explored. As an update, the ethics of such "mining" remains an open question.

**Oops Opinion: Revisions to the Law**

**of Inadvertent Disclosure of Confidential Materials** (January 2006) Once again, "Ethically Speaking" returns to the issue of the receiving attorney's duty (and the sending attorney's liability) upon receipt of misdirected communications in light of ABA's Formal Opinion 05-437 (10/1/05).

## 2005

**Ethics on the Ether – Update** (November 2005) An updated review of disciplinary resources available on the internet.

**Update of "Lawyer vs. Banker: What are the Permissible Limits of Non-Attorneys' Role in Financing Litigation?"** (October 2005) "Ethically Speaking" revisits the issues arising from financial assistance to personal injury litigants.

**Discipline By Numbers** (September 2005) An examination of who gets disciplined for what and how often. "Ethically Speaking" looks at the numbers to address the age old question "Does ODC really target solos?"

**Crouching Metadata, Hidden Disclosure** (July 2005) Guest columnist David Finger discusses disciplinary liability for inadvertent disclosure of client confidences through electronic communication.

**Disciplinary Liability for Attorney Conduct During Depositions: Sanctions for Deposition Despots** (May 2005) More examples of disciplinary liability for out-of-the-courtroom antics.

**Bankrupting Attorneys?: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and the Liability of Debtors' Attorneys for the Accuracy of Debtor's Bankruptcy Schedules** (April 2005) Disciplinary liabilities of bankruptcy practitioners for the content of bankruptcy petitions.

**Kill Bills** (March 2005) An update on recent disciplinary decisions involving for billing and billing practices including the liability of partners and supervising attorneys.

**Public vs. Publicized? The Disciplinary Case Digest Goes Online** (February 2005) Announcing the launch and a description of the ODC online service providing access to disciplinary cases and advisory opinions.

## 2004

**Making a List? Checking It Twice?** (December 2004) Preparing for the Delaware Supreme Court Annual Registration Statement and Certificate of Compliance.

**Lawyer v. Banker: What Are the Permissible Limits of an Attorney's Role in Financing Litigation?** (November 2004) Lawyer loans and gifts to clients as well as third party financial support are discussed.

**Lawyers' Rights and Wrongs** (October 2004) Guest columnist David L. Finger thoughtfully explores the delicate balance between an attorney's private free speech rights and the professional responsibilities of an attorney.

**From Here to Indemnity: Will Delaware Adopt Mandatory Malpractice Insurance for Lawyers?** (September 2004) As of January 2005, the answer was still "not yet."

**Who Can You Rely On?: Good Faith Reliance on Someone Else's Lawyer** (June 2004) May advice of counsel be used by a non-client? Does the attorney have liability to a non-client relying on that advice?

**A Lawyer By Any Other Name (or Esq-y Business)** (May 2004) Guest columnist David L. Finger explores the ethical issues in titling oneself as a "lawyer."

**A Fresh Look at Stale Checks** (April 2004) Your obligations per Professional Conduct Rule 1.15 and the leading cause of attorney discipline in 2004.

**Ghostbusters: Attorney Obligations and Liabilities for Assisting "Pro Se" Clients** (March 2004) The permissible and the prohibited when providing "behind the scenes" help to "clients" without an entry of appearance.

**Career Interruptus: What Attorneys May and May Not Do During Suspension** (February 2004) Read it. Learn it. Don't live it.

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*\*\*"Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association. ☐*