BECOMING A MORE EFFECTIVE LAWYER BY BECOMING A MORE ETHICAL LAWYER:

AN APPELLATE LAWYER'S PERSPECTIVE

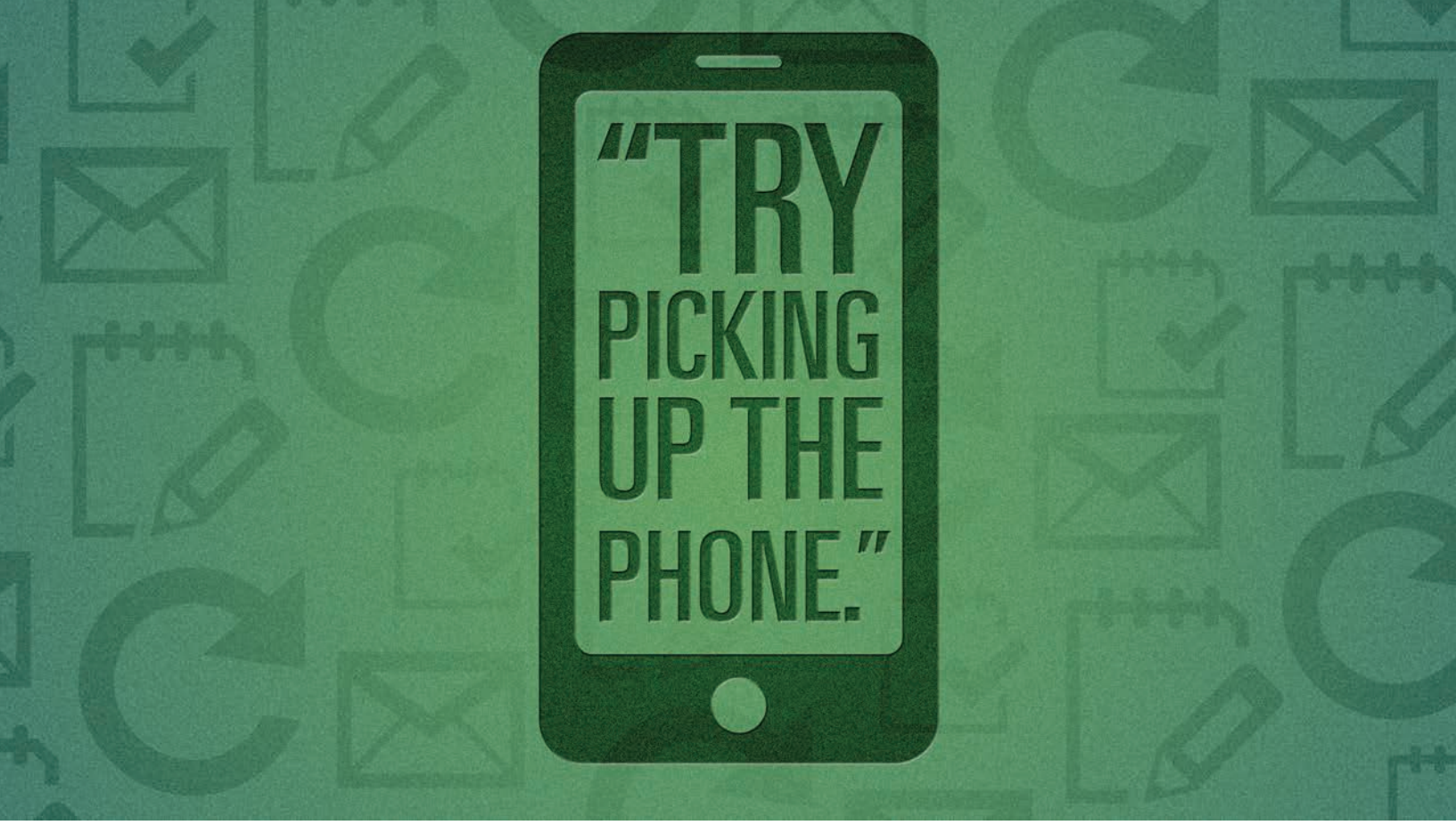
By Joshu L. Harris

In law practice, productivity is at a premium. Private-sector clients have become increasingly cost-conscious, while public-sector lawyers have faced rising caseloads and dwindling resources, particularly after the Great Recession. In that context, careful cultivation of a highly ethical practice may seem at best a costly luxury and at worst an impediment to client interests. Yet, close attention to ethics can make your law practice not only more virtuous but more effective. As an attorney concentrating in appellate and collateral matters, I routinely bear witness to the damage lawyers do to their cases by inattention to ethics. This piece examines the space where "[p]rudence and ethics merge." Some of the following pointers may seem basic. But, in my practice I have found them all too often overlooked, to the detriment of fledgling lawyers and veterans alike.

Codified legal ethics have existed in some form for a full century. But modern legal ethics emerged out of the ethical mushroom cloud of the Watergate scandal. The American Bar Association made ethics instruction an accreditation requirement for law schools and promulgated its Model Rules of Professional Conduct. States almost universally adopted the Model Rules, made passage of the Multistate Professional Responsibility Examination a bar-admission requirement, and eventually began to require ethics instruction among continuing legal education requirements.

That regime guarantees ethics instruction for law students and practicing lawyers alike, and laudably so, but it has its limitations. And many ethics rules are either non-binding – using precatory, aspirational language – or not absolute, leaving some portion of the rule to lawyerly discretion. Moreover, there are differences in ethics rules and their interpretations across jurisdictions, a hazard in an era of increasingly interjurisdictional and even international law practice. Public disciplinary action is reserved for egregious or repeated violations. Advisory ethics opinions can be requested, but take time to issue when accepted and are not absolutely authoritative. And law firms generally do not take affirmative action to address these challenges. As such, attorneys often lack sufficient guidance as to "everyday ethical questions." Under these circumstances, attorneys must take personal responsibility for developing a robust ethical practice along with all the other challenges of career development. The good news is that careful attention to development of a highly ethical practice will support other career goals, from client satisfaction, to substantive success, to building a legal brand.

The best way to avoid ethical problems is to develop work habits that minimize them. As Benjamin Franklin famously observed, an ounce of prevention is worth a pound of cure. In



all areas of law practice, development of good habits will make your practice more ethical and more effective at the same time.

COMMUNICATION AND DOCUMENTATION

One underappreciated rudiment of good lawyering is consistent communication and documentation. Regular communication with clients is a bedrock ethical duty, but a regular bugaboo for lawyers: poor communication is a leading cause of disciplinary complaints from clients. But there is even better reason to go beyond the ethical bare minimum – effective communication is crucial to ascertaining relevant facts and achieving a high level of client satisfaction. Indeed, a Missouri Bar study found that clients who feel their lawyers are attentive tend to rehire them without regard to fees or case outcome.

Meanwhile, the rules are much less demanding when it comes to communication with opposing counsel and others, requiring only "fairness" and "truthfulness." In litigation, too often lawyers communicate with opposing counsel solely through court filings. Even in transactional settings, communication can be terse and mechanical, a function of Blackberry-era email volume. Try picking up the phone. Personal experience has taught me a phone conversation with opposing counsel can pay dividends. It can save time, yield useful information, build good will and otherwise make your job easier and more pleasant. And the goal of building mutual respect and good will with opposing counsel is consistent with the general ethical ideal of abiding by the values of the legal community. Building rapport with support staff, court personnel, and other non-lawyer legal professionals – not to mention jurors – is also critically important.

Keeping records of any written and oral communications is also essential. Most obviously, it helps to minimize the headaches associated with forgetting or misremembering. But it also can minimize misunderstandings. Simple steps like sending a letter memorializing a conversation with a client or opposing counsel or a status conference with a judge helps to ensure that everyone understood each other completely. It can be slightly tedious, but it is well worth the time investment. Tech tools, such as Google Voice, that save voicemail and convert it to text, can make the task even quicker and easier.

Along the same lines, attorneys often find themselves hitting ethical tripwires, despite the best intentions, simply because they struggle to juggle their commitments. Too many attorneys risk running afoul of their duties of competence, diligence and communication by letting work become a string of frenzied dashes to the next deadline. While the realities of law practice sometimes make a deadline crunch inevitable, a well-managed calendar can help tremendously. Do a preliminary assessment of each case, breaking up projects into smaller intermediate deadlines on your calendar, and then set calendar alerts enough in advance that you can put anything non-urgent aside and ramp up. This is especially easy now that it is easy to sync between computers and smartphones, or just keep everything in the computing "cloud."

MINDING THE BOUNDARIES OF SCOPE OF REPRESENTATION

Another common pitfall is careful management of the scope of representation. Over the last few years, unbundled legal services have

been newly recognized as ethically permissible, and the Great Recession may well have hastened their adoption. But, although useful, they heighten the necessity of good client communication – from initial consultation and explanation of the fee agreement, to timely discussion of whether the client may need additional services as the case unfolds. For example, some attorneys assume that once they have fulfilled the terms of their fee agreement, they are absolved of any active responsibility for the client's interests. But, counsel must seek leave from the court to withdraw. And the timing and other circumstances of the withdrawal must not prejudice the client; for example, by causing the client to miss a filing deadline or waive a claim. Even in the case of broader fee agreements, such as those that cover all proceedings up through trial or through post-verdict motions, attorneys must take care how and when they withdraw. Filing deadlines for post-verdict motions or direct appeal are short enough that the best practice is to make arrangements well in advance to protect a client's interests, in case the client wishes to challenge any jury verdict or judicial order. Then withdrawal can be sought and granted without the ticking time bomb of a deadline threatening to explode on the unwitting client.

SCRUPULOUS USE OF AUTHORITY

Identification and citation of legal authority is another frequent, but easily avoidable, problem area. Ethics rules set forth twin duties, requiring that a lawyer not only refrain from making any knowingly false statements of law but also any disclose adverse controlling authority if not cited by opposing counsel. The former is more challenging than it first appears at first blush because a misleading statement of law or fact qualifies as a false statement. So, lawyers must exercise in citing and characterizing legal authority.

Unfortunately, misleading citations are common. The majority of my casework consists of legal research, writing and argument, affording me ample exposure to the constellation of ways legal authority ends up misleadingly cited. A major culprit is ill-advised shortcutting in legal research, usually for the sake of time-saving or convenience.

A highly dangerous, but all-too-prevalent, form of shortcutting is to take a citation from another brief or judicial opinion without reading it. No matter how erudite and diligent the author, you cannot rely on their work. There is no way to know without reading a case how well it fits your case and its strengths and weaknesses in general. Even if it is your own past work, be careful. When you read the case while writing your old brief, you were not reading it through the lens of your current case. Differences in the cases' facts, standard and scope of review, governing statutes and rules, and other aspects can have far-reaching implications not apparent from a quick or partial reading.

A related form of reckless shortcutting in legal research is superficial or incomplete reading of a case. This mistake is enabled by

the terrific convenience of searchable databases like Westlaw and Lexis. They make it tempting, particularly under heavy time pressures, to read only an opinion's headnote or the portion of the opinion containing the search terms in question. But context is crucial. Failing to read an appellate court's recitation of the facts, or a related section of the opinion's legal analysis, recklessly risks misunderstanding the court's decision and reasoning. A significant pitfall of such incautiousness is mistaken citation of dicta as if it were binding law.

To avoid these pitfalls requires diligent reading of every case cited in support of an argument, whether the argument is made orally or in writing. Doing so will minimize the risk of violating the ethical prohibition against even inadvertently misrepresenting legal authority to the court. It will also, unsurprisingly, make your legal arguments better. Indeed, Judge Pierre Leval of the Second Circuit Court of Appeals has warned against the danger, even for judges themselves, of taking statements from judicial opinions "out of context, without a careful reading to ascertain what role they played in the opinion." Notably, in discussing this trend, Judge Leval cites not only time pressures and the tunnel vision of electronic legal research tools but also the increasing length of judicial opinions as a factor. Of course, judgment still has a role to play – sometimes skimming is appropriate, particularly in a sprawling opinion addressing several obviously unrelated claims. But blithely skipping over entire portions of an opinion altogether courts disaster.

A third popular shortcut is the use of a citation relevant only for a general statement of law in support of a more specific proposition of law, without even parenthetical explanation. Whether offered with a pin cite or not, it misleadingly suggests that the citation is directly on point when, in fact, it only offers a starting point for arguing from a general legal proposition to a more specific one. Such reasoning should be explicit. There are myriad reasons why lawyers fail to build a bridge of reasoning from general authority a specific legal position, from carelessness or laziness to purposeful vagueness or wishful thinking. But doing so has much greater downside than upside. Although it may give your brief the superficial impression of a firm foundation in legal authority, the inevitable closer inspection by opposing counsel and the court will reveal that foundation's poor fit to the specific contours of your argument, without the structural support of carefully articulated reasoning. If your reasoning is left unarticulated, it is open to attack by opposing parties and invites the conclusion that your characterization of cited authority is tortured, even if proper explanation would show it to be eminently reasonable. For similar reasons, the Bluebook prescribes at least a parenthetical citation when the proposition of law for which a citation is offered is not obvious.

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DO NOT HESITATE TO SEEK GUIDANCE

Of course, no amount of diligence can prevent an occasional ethical quandary. Whether you identify the issue in advance or only after making a mistake, call upon the guidance of lawyers whose judgment and experience you trust. In bigger law offices, it is now common for there to be an ethics guru, either formally or informally anointed. Otherwise, speak to a trusted superior, colleague or peer. If you are not sure whom to consult, contact your state or local bar association, which should be able to provide or refer you to ethics resources. Some law periodicals have ethics columns that can be a useful resource if the issue is not urgent. In all cases, be sure to first do your homework before seeking input so that you speak with command of the facts and full consideration of the issues involved. Discussing tough issues in your cases with lawyers you respect will help you to sharpen your legal acumen while demonstrating to them your thoughtfulness and diligence, another way your attention to ethics will make you a better lawyer.

No matter what, do not sweep dilemmas (or mistakes) under the rug. Trying to avoid dealing with them only postpones the unpleasantness, and usually makes them worse. But swift and decisive action to address an ethical issue or a mistake can not only minimize any ethical and reputational damage, it can often improve your image in the eyes of your clients, superiors and colleagues. To err is human, but prompt redress is the gold standard of ethics and professionalism.

As these everyday ethical considerations demonstrate, a highly ethical practice should not be a disadvantage to a lawyer and, indeed, often imparts a substantial advantage. Accordingly, diligent cultivation of a highly ethical practice is an essential component of a lawyer's professional development. By extension, a lawyer has much to gain by exceeding minimum ethical obligations, including professional success and the esteem of the legal community. Some ethicists have framed "the fundamental question of ethics" as "not 'What should I do?" but 'What kind of person should I be?'" One answer for all lawyers is, a more ethical, and thus more effective, lawyer. ■

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