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A FORMER SENATOR'S GUIDE TO PROFESSIONAL RESPONSIBILITY: RPC 8.4 AND THE APPEARANCE OF IMPROPRIETY IN RETAINER FEES AND POLITICS

MICHAEL S. MORGAN*

Lawyers too frequently find themselves on the wrong end of a joke. In fact, if you Google “lawyer jokes,” you can spend the better part of an afternoon laughing, cringing, and wondering how a profession revered throughout history is so commonly cast in a negative light. Naturally, attorneys themselves have the hardest time reconciling this deleterious perception. They spend years studying the law, learning the rules of ethics, and cultivating a passion for justice, only to watch with disgust as their colleagues invent new ways to betray the public’s trust.

To address the public’s perception of lawyers, the American Bar Association (ABA) has worked to equip law students with the skills they need to make the right decision when ethical dilemmas inevitably arise. To that end, all ABA accredited law schools are required to offer “one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members.”¹ The ABA’s Center for Professional Responsibility continues this mandate well beyond law school.² It provides a forum for scholars, legal commentators, and practitioners to interpret the professional responsibility standards and address the grey areas in the conduct rules.³ But the ethical decision-making process rarely occurs in a vacuum. The most difficult decisions in an attorney’s professional career often present themselves when he or she is least suspecting. For all the ABA does to develop a thorough, well-rounded curriculum for the nation’s law schools, it does not prepare students for the invisible noose of client management.

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1. AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019–2020, at 16 (2020).

2. *See Center for Professional Responsibility: Resources*, AM. B. ASS’N, https://www.americanbar.org/groups/professional_responsibility/resources/ (last visited Apr. 18, 2020).

3. *See id.*

I have spent the better part of the last decade playing the same scene over and over again in my mind: The year is 2007. I am the President Pro Tempore of the Oklahoma State Senate.⁴ For the first time in the history of the state, the Senate is locked in a 24-24 tie between Republicans and Democrats.⁵ It is an interesting time to be in the legislative “corner office” practicing law and working to enact good public policy.⁶ Little do I know that my life is about to change forever.

My phone rings—the caller is a constituent from Perkins, Oklahoma, which is a community in my Senate District. This particular constituent was a significant supporter in my political endeavors, so of course, I answer. The conversation is rather typical. He wants to introduce me to a potential business associate of his: Sam Crosby, a gentleman who needed advice on how to deal with the Oklahoma State Department of Health regarding the development of an assisted living facility in Perkins. This seems reasonable

4. *Mike Morgan*, OKLA. SENATE, <https://oksenate.gov/education/senate-artwork/mike-morgan> (last visited Apr. 20, 2020). The President Pro Tempore of the Oklahoma State Senate (also called the “Pro Tem”) is elected by the members of the Senate. He or she serves as the Senate’s presiding officer and has the responsibility of appointing the chair, the vice-chair, the majority caucus members of all Senate committees, and the Senate members of all conference committees. The Pro Tem is the chief executive officer of the Senate and has responsibility for the Senate’s more than 125 full-time employees. By law, the Pro Tem is second in line of succession to the Governor, and often serves in that position when both the Governor and Lt. Governor are out of state. In addition, he or she heads the majority party of the Legislature’s upper house. As such, the Pro Tem is the leader of the majority party caucus and has many duties in the political arena, including fundraising, recruiting candidates, and campaigning.

5. “Democrats had controlled the Senate since statehood until the 2006 elections, when Republican gains created a 24-24 tie. As part of a power-sharing agreement adopted in January, Senator Mike Morgan (D-Stillwater) and [Senator Glenn] Coffee (R-Oklahoma City) were elected by senators to jointly run the Legislature’s upper chamber.” *Republican to Hold Senate President Pro Tem Office for First Time in History*, OKLA. SENATE (June 29, 2007, 1:33 AM), <https://oksenate.gov/press-releases/republican-hold-senate-president-pro-tem-office-first-time-history>. This period was marked by a historic power-sharing agreement between the parties that enabled the gridlocked Senate to enact positive legislation without undue political delay.

6. *See Full- and Part-Time Legislatures*, NAT’L CONF. ST. LEGISLATURES (June 14, 2017), <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> (“Although their income from legislative work is greater than that in the Gold states, it’s usually not enough to allow them to make a living without having other sources of income.”). In Oklahoma, members of the House of Representative and Senate work the equivalent of a part-time job. *Id.* Consequently, most have second jobs to supplement the relatively low income.

enough, so I agree to meet them for coffee on a Saturday morning in my constituent's office in Perkins. While the call was typical, the meeting certainly was not. For the first time, on that fateful Saturday morning, I met the man whose testimony would later condemn me to eighteen months confinement in federal prison on a bribery conviction.

They say you can boil a frog just by slowly turning up the heat. It wasn't until I became the frog that I finally appreciated what that meant. Now, I am on a mission to educate members of our profession—especially new attorneys—in the area of client management and legal ethics. To that end, this Essay reviews the law governing lawyers' conduct and explains how a fast-paced work environment (whether legal or otherwise) exposes attorneys to potential allegations of misconduct should they fail to diligently manage their clients. Part I contains an overview of the relevant conduct rules and specifically highlights the development of the "appearance of impropriety" standard. Part II analyzes the operation of these rules in the context of the events leading to my federal bribery conviction. Part III concludes by providing examples of engagement letters and invoices that likely would have kept me out of prison had I displayed enough discipline to use them with consistency and focus fifteen years ago.

I. The Conduct Rules

A. Rule 8.4 and the Appearance of Impropriety

The Oklahoma Rules of Professional Conduct enumerate certain categories of behavior that constitute general misconduct. According to Rule 8.4, it is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.⁷

The comments to the rule state that “[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be *professionally* answerable only for offenses that indicate lack of those characteristics relevant to law practice.”⁸ As it turns out, most crimes are relevant to law practice—especially those involving breach of trust or dishonesty.⁹ For this reason, the Oklahoma Supreme Court routinely invokes Rule 8.4 as a catchall for attorney misconduct.¹⁰ The court has explained that its role is to “safeguard the interests of the public, the courts, and the legal profession,”¹¹ and Rule 8.4 gives it the flexibility to properly discipline attorneys for conduct that does not fit neatly within a particular rule.

Before the American Bar Association replaced the Model Code of Professional Responsibility with the Model Rules of Professional Conduct, courts frequently relied on the “appearance of impropriety” standard to label lawyer misconduct in discipline proceedings.¹² Today, the standard is

7. 5 OKLA. STAT. app. 3-A, r. 8.4 (2011), OK ST RPC Rule 8.4 (Westlaw).

8. *Id.* r. 8.4 cmt. 2 (emphasis added).

9. *Id.* (“Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.”).

10. *See, e.g., State ex rel. Okla. Bar Ass’n v. Withers*, 2019 OK 47, ¶ 25, 445 P.3d 229, 236; *State ex rel. Okla. Bar Ass’n v. Downes*, 2005 OK 33, ¶ 39, 121 P.3d 1058, 1067–68. In *Downes*, attorney Sean Downes was alleged to have violated ethics rules regarding fee retainers. *Id.* ¶ 20, 121 P.3d at 1064. In summarizing his misconduct, which ranged from inappropriate relationships with a client to commingling and converting retainer fees, the Oklahoma Supreme Court couched his misconduct in Rule 8.4’s sweeping terms. *Id.* ¶¶ 20, 39, 121 P.3d at 1064, 1067–68.

11. *Downes*, ¶ 47, 121 P.3d at 1069.

12. Kathleen Maher, *Keeping Up Appearances*, 16 PROF. LAW., no. 1, 2005, at 1, 12. In her article, Maher begins her analysis of the history of the “appearance of impropriety” standard by describing the West Virginia Supreme Court’s curious holding in *State ex rel. Cosenza v. Hill*, 607 S.E.2d 811 (W. Va. 2004). Maher, *supra*, at 1. In *Hill*, the court used the standard to disqualify the plaintiff’s law firm because it hired an attorney from the defendant’s firm shortly after the commencement of the case. *Hill*, 607 S.E.2d at 815. Although the new attorney allegedly acquired no knowledge about the defendant’s representation while employed at his former law firm, the court held that “[u]nder the Code

most often used in cases involving conflicts of interest, especially when an attorney moves to a new firm that subsequently opposes the attorney's former client in an adverse matter.¹³ Conceptually, it arose well over a century ago, when the ABA relied on the analogous but primitive "appearance of evil" doctrine in drafting its original ABA Canons of Professional Ethics.¹⁴ The "appearance of impropriety" standard was first incorporated expressly into the ethics rules in 1969, when the ABA adopted the Model Code of Professional Conduct.¹⁵ In Canon 9, the Model Code

of Professional Responsibility, a lawyer may be disqualified from participating in a pending case if his continued representation would give rise to an apparent conflict of interest or appearance of impropriety based upon that lawyer's confidential relationship with an opposing party." *Id.* at 817 (quoting *State ex rel. Taylor Assocs. v. Nuzum*, 330 S.E.2d 677, 679 (1985)). Ultimately, the court was convinced that the attorney's bare association with the defendant's firm was enough to disqualify him from representing the plaintiff. *Id.* This was an important holding. At the time of the *Hall* decision, West Virginia followed the Rules of Professional Conduct, which make no mention of the appearance of impropriety. Instead, the court borrowed the standard from the Code of Professional Responsibility in order to obtain the desired result. *See Maher, supra*, at 1. West Virginia is not the only state to adjudicate ethics issues while straddling the statutory fence. Many other states officially follow the rules of Professional Conduct while employing the Code of Professional Responsibility's appearance of impropriety standard. *Id.* at 13–14.

13. *See Maher, supra* note 12, at 12–13.

14. *Id.* at 1 (citing *Woods v. Covington Cty. Bank*, 537 F.2d 804, 813 (5th Cir. 1976); ABA Comm'n on Prof'l Ethics & Grievances, Formal Op. 103 (1933) ("If the profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but must likewise avoid the appearance of evil."); ABA Comm'n on Prof'l Ethics & Grievances, Formal Op. 49 (1931) ("[Lawyers] must avoid not only all evil but must likewise avoid the appearance of evil."); *cf.* ABA Comm'n on Prof'l Ethics & Grievances, Formal Op. 50 (1931) (stating that lawyers should avoid "all improper relationships" and "all relationships which may appear to be improper"))).

15. *See Peter W. Morgan, Essay, The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 602 (1992) ("When the ABA adopted the Model Code of Professional Responsibility in 1969, the ABA classified the 'appearance of impropriety' principle as simply one of the ethical considerations to which a lawyer should aspire."). In one noteworthy case involving the disciplinary proceedings of a divorce attorney, the court set forth the "appearance of impropriety" standard in clear terms:

[The legal profession] is a profession where one "seeks to avoid even the appearance of impropriety" and, thus, strives to live by a higher standard of conduct than a layperson. The duty to "avoid even the appearance of impropriety" is not one to be taken lightly because "[a]ttorneys 'constitute a profession essential to society. Their aid is required not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided to their management. The confidences which they receive and the responsibilities

admonished that “a lawyer should avoid even the appearance of professional impropriety.”¹⁶

The biggest problem with the standard is that no one really knows what “appearance of impropriety” means or how it should be applied.¹⁷ Many argue that it is too vague and difficult to define.¹⁸ Even the Restatement (Third) of the Law Governing Lawyers suggests that the provision’s lack of specificity may fail to “give fair warning of the nature of the charges to a lawyer respondent” and the provision’s phrasing may influence an adjudicator to validate charges based solely on “subjective and idiosyncratic considerations.”¹⁹ As with most other judgment calls that involve nebulous standards of conduct, judges likely channel their inner Justice Stewart and “know it when [they] see it.”²⁰

The appearance of impropriety standard has been used as a measuring stick in more than just attorney disqualification and discipline cases and has found itself the focus of numerous bribery charges as well.²¹ This makes sense. Bribery statutes contain nuanced intent requirements that make it difficult to clearly identify the offending conduct.²² For example, if a prosecutor cannot adequately diagram the quid-pro-quo or establish the corruptness requirement in connection with a bribery charge, the ephemeral and malleable appearance of impropriety standard becomes a useful tool. Courts are inclined to do the same thing and often make reference to the standard in order to close the gaps in their analysis.

The Fifth Circuit, for example, eagerly applied the gap-filling standard in *United States v. Brumley*, which discussed the application of a statute that criminalized defrauding citizens of honest services through interstate wire communications.²³ In *Brumley*, the court explained that the statute required the official to “act or fail to act contrary to the requirements of his job under state law,” and “if the official does all that is required under state law,

which they are obliged to assume demand not only ability of a high order, but the strictest integrity.”

In re Wehringer’s Case, 547 A.2d 252, 259 (N.H. 1988) (internal citations omitted).

16. MODEL CODE OF PROF’L RESPONSIBILITY Canon 9 (AM. BAR ASS’N 1969).

17. Maher, *supra* note 12, at 12.

18. *Id.*

19. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. c (AM. LAW INST. 2000) (internal citation removed).

20. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

21. *United States v. Jordan*, 364 F. Supp. 3d 670, 674 (E.D. Tex. 2019).

22. *See id.* at 673–75.

23. 116 F.3d 728, 734 (5th Cir. 1997).

alleging that the services were not otherwise done ‘honestly’ does not charge a violation of the mail fraud statute.”²⁴ Accordingly, the government could not prove a violation of the statute merely by showing that the official violated a state law prohibiting the appearances of corruption.²⁵ Quoting the Ninth Circuit’s reasoning in *Dowling*, the Fifth Circuit held the appearance of impropriety, on its own, could not support the conviction of a state official under the fraud statute because such a result “would have the potential of bringing almost any illegal act within the province of the mail fraud statute.”²⁶

The Fifth Circuit’s holding in *Brumley* cut to the heart of the issue. Although the appearance of impropriety standard is insufficient on its own to support a conviction for a specific intent crime, prosecutors (and some courts) nevertheless invoke the standard when the facts are unclear, unfavorable, or in some cases, nonexistent. The appeal of employing the standard this way is obvious. It enables attorneys and judges alike to fit square-peg legal theories through the round hole of justice. But such an approach may produce unfavorable outcomes. Taken to its logical extreme, the application of the standard could lead courts to supplant specific statutory requirements with only the vague appearance of corruptness, which, as the Ninth Circuit explained in *Dowling*, could bring almost any unlawful act within the province of a specific intent statute.

B. Rule 1.5 and the Administration of Unconventional Attorney’s Fees

While Rule 8.4 and the appearance of impropriety standard establish the backdrop for attorney discipline, attorney conduct is governed by more specific rules, such as Rule 1.5. Most courts cite Rule 1.5 in cases involving claims for attorneys’ fees, as it provides an eight factor test for determining whether a fee is reasonable.²⁷ More than that—and in some cases, even more importantly—Rule 1.5 requires that “[t]he scope of the representation . . . be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.”²⁸ The commentary to the rule describes this as a rather straightforward requirement. Generally, the scope of the representation can be defined in the following format:

24. *Id.*

25. *Id.*

26. *Id.* (quoting *United States v. Dowling*, 739 F.2d 1445, 1450 (9th Cir. 1984)).

27. 5 OKLA. STAT. app. 3-A, r. 1.5(a) (2011), OK ST RPC Rule 1.5 (Westlaw).

28. *Id.* r. 1.5(b).

[A] simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of representation.²⁹

Like they do with most other documents relating to the attorney-client relationship, the Model Rules advise memorializing the foregoing information in a written statement.³⁰

Most attorney discipline cases that involve a violation of Rule 1.5 also include an allegation that the attorney failed to communicate with his or her clients and improperly retained fees.³¹ Fee cases can be complicated. There are many factors that inform a court whether the fee charged was reasonable, and certain extrinsic circumstances, including the diligence and competence of the representation, can affect whether the fee falls within an acceptable range.³² As a result, at least one state has adopted a statute that requires an attorney who engages a new client to enter into a written engagement letter prior to commencing the representation.³³ Oklahoma has not joined this approach; however, a written memorandum is “desirable.”³⁴

29. *Id.* r. 1.5 cmt. 2.

30. MODEL RULES OF PROF'L CONDUCT r. 1.5(b) (AM. BAR ASS'N 2018).

31. *See State ex rel. Okla. Bar Ass'n v. Reynolds*, 2012 OK 95, ¶¶ 1–4, 8, 289 P.3d 1283, 1284, 1285.

32. *Id.*

33. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1215.1 (2002). New York, for example, specifically prescribes a written engagement letter and the items it must contain:

- (a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:
 - (1) if otherwise impracticable; or
 - (2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term client shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

- (b) The letter of engagement shall address the following matters:
 - (1) explanation of the scope of the legal services to be provided;

The policy reasons for requiring a written engagement letter are clear. The attorney occupies a position of trust. As such, his or her superior bargaining power counsels in favor of providing as much information as possible regarding the nature of the representation and the fee to be charged. The case law, however, shows that this is for the protection of the attorney as much as it is for the client.³⁵ As shown in the many disciplinary actions focusing on fee disputes, the lack of a written agreement increases both the likelihood that a client will dispute the terms of an oral arrangement and the prospect of much more serious allegations. Without a clear writing evidencing the nature of the representation, the client could construe the relationship in a number of ways. So could the FBI.

II. How I Violated Rules 8.4 and 1.5

In the last decade, the American Bar Association has made a strong push to require experiential learning courses in ABA-accredited law school curriculum.³⁶ Any practicing attorney who remembers the growing pains of

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- (2) explanation of attorney's fees to be charged, expenses and billing practices; and
 - (3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.
- (c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

Id. This statute has become rather litigious. In one case, the District Court of Nassau County held that an attorney was precluded from recovering legal fees because he did not provide his client with a written letter of engagement. *Feder, Goldstein, Tanenbaum & D'Errico v. Ronan*, 761 N.Y.S.2d 463, 464–65 (Dist. Ct. 2007); *cf.* *Seth Rubenstein, P.C. v. Ganea*, 833 N.Y.S.2d 566, 572 (App. Div. 2007) (“We find that a strict rule prohibiting the recovery of counsel fees for an attorney’s noncompliance with 22 NYCRR 1215.1 is not appropriate and could create unfair windfalls for clients, particularly where clients know that the legal services they receive are not pro bono and where the failure to comply with the rule is not willful.”) (internal citation omitted).

34. 5 OKLA. STAT. app. 3-A, r. 1.5 cmt. 2.

35. See cases cited *supra* note 33.

36. Am. Bar Ass’n, Managing Director’s Guidance Memo: Standards 303(a)(3), 303(b), and 304, at 1 (Mar. 2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_.pdf.

their early years understands the value of these new requirements. Learning the practical side of the law carries an immense learning curve, as practice requires mastery of more than just the law. Tracking time, managing clients, and keeping up with paperwork all compound the complexity of an already dense field of knowledge. And those attorneys working in additional capacities must learn to balance additional responsibilities.

Oklahoma state legislators are generally part-time employees with second jobs.³⁷ Some of them are farmers, lawyers, bankers, and teachers. To supplement their freshman orientation, newly elected legislators receive a copy of the Legislative Manual, which is a document that provides “basic information about the . . . policymaking process that will enable them to do the job that the citizens in their districts elected them to perform.”³⁸ Unsurprisingly, the manual contains a section entitled “legislative ethics,” which uses the notorious appearance of impropriety standard to admonish members from “do[ing] anything that they would not like to read about on the front page of the newspaper.”³⁹ My failure to heed this admonition turned my life upside down.

A. Appearance of Impropriety

Many years ago, when I was a law student, the standards I learned and later used to guide me in my law practice came from the Code of Professional Responsibility. As a young practitioner, I was proud to be a lawyer, and the provisions relevant to the appearance of impropriety made sense to me. As I evolved into an experienced private practice attorney, my attitude about the conduct rules did not change. In later years, when I became the part-time municipal judge for my hometown, appearances of impropriety were even more important. I managed to steer clear of controversies and disciplinary issues throughout a significant period of my life and career. But when I made the fateful decision to be a candidate for

37. *Full- and Part-Time Legislatures*, *supra* note 6.

38. OKLA. HOUSE OF REPRESENTATIVES, LEGISLATIVE MANUAL 9 (Marcia L. Goff ed., 17th rev. ed. 2017), <https://www.okhouse.gov/Documents/Legislative%20Manual%2056th%20Legislature.pdf>.

39. *Id.* at 90. The Manual states that “the appearance of impropriety standard is frequently debated.” *Id.* This is because legislators serve “in a fish bowl environment” where everyone can scrutinize their every move. *Id.* However, the Manual suggests that legislators should not “concede to the media that they are the proper arbitrators of legislative ethics,” especially because many of the actions criticized by the media are in fact proper. *Id.*

public office, the level of public interest in my conduct elevated beyond anything I could have appreciated at the time.

I never used to think of myself as naïve, but in hindsight I realize I was. Like many others, I believed that following the law and trusting my instincts would be enough. This mindset continued after I was elected as a State Senator, but over time, I allowed my good instincts to be obscured. Being a State Senator was good for me. It required me to develop my skills and learn a great deal along the way. Because of my success in furthering good public policy, I earned a reputation as a rising star. My dedication and hard work eventually led to my election as the head of the Senate and caused many political observers to speculate that I might be destined for higher office.

In the political world, many people praise one in a position of power and influence. Although I received more than my share of complimentary platitudes, I tried not to let the bravado affect me. I succeeded for the most part but fell short in a very significant way: I allowed my clients and others closely aligned with me to use the prominence of my position to their advantage. I failed to correct the improper inferences and conclusions people drew. Instinctively, I knew (or should have known) this was happening. I failed myself and others. The lesson for lawyers is to be vigilant and attuned to the emergence of improper appearances created by their conduct or the conduct of others associated with them. Notwithstanding the awkwardness or inconvenience such diligence may present in the moment, taking steps to clarify others' expectations will serve each party well. Anything less might result in prison.

B. Inadequate Documentation

Because Oklahoma legislators generally keep their day jobs, my private law practice remained my livelihood. Although my practice took a secondary role as I focused more time on my political career, I knew politics was temporary. Constitutionally imposed term limits guaranteed I would not serve for more than twelve years,⁴⁰ and the allure of higher office did not draw me in. Accordingly, it was important that I keep my law practice afloat. I was keen to attract new (and better) clients, and intuitively, I knew being a prominent State Senator would help.

Serving as a Senator, especially at my level, was demanding work that limited my time in the law office at my desk. In order to accommodate my

40. OKLA. CONST. art. V, § 17A.

political career and my legal practice, the traditional ways I had worked for and billed my clients had to evolve. Instead of billing on an hourly basis, I endeavored to move much of my clientele to retainer billing. This freed me from the demands of timekeeping and detailed billing and allowed me to do my work without a great deal of administrative support.

I sought the advice of more senior lawyers who held legislative office and further obtained specific legal advice on the applicable law and ethics as I moved forward. I was fully aware of the relevant legal requirements, but as I became busier, I paid less attention to the details of my practice. I focused on the obvious issues—statutes of limitation, filing deadlines, court appearance dates, and paying my taxes—but other areas of my practice suffered. I failed to consistently create file notes and memoranda documenting my research, reading, analysis, meetings, and conversations.

Attorneys do more work for their clients than their clients realize. Although it is easy to fall into the trap of thinking the client understands everything that an attorney does for them, one must make sure his or her files adequately reflect the time expended and the work completed. I learned this the hard way. The FBI agents who raided my home and office discovered my lack of documentation, and the federal prosecutor used it to secure a conviction against me.

III. The Desk Practice That May Have Saved Me

A. Engagement Letter

After a sixty-three count indictment and a five week trial, I was only convicted of one count of federal bribery.⁴¹ Counts one through twenty-nine related to fees I received from [Company A].⁴² Counts thirty through sixty-two arose from fees collected from [Company B].⁴³ Count sixty-three concerned \$12,000 in fees I collected from Silver Oak Senior Living, which was partly owned by Sam Crosby.⁴⁴

The jury was unable to reach a verdict on counts two thorough twenty-nine relating to Company A, and it acquitted on all others except count sixty-three.⁴⁵ On appeal, the Tenth Circuit explained that the jury could

41. See *United States v. Morgan*, No. CR-11-108-C, 2012 WL 3929842, at *1 (W.D. Okla. Sept. 7, 2012).

42. *United States v. Morgan*, 635 F. App'x 423, 427 (10th Cir. 2015).

43. *Id.*

44. *Id.* at 425, 428.

45. *Id.* at 428.

consider as a substantial factor my failure to execute an engagement letter with Silver Oak—I had executed an engagement letter with both Company A and Company B—even though such letter is not required by the Oklahoma Rules of Professional Conduct.⁴⁶ In hindsight, my engagement letter with Silver Oak should have looked like Company A's (Figure 1).

In Figure 1 below is a copy of the simple engagement letter I used most often to set forth the terms of my engagement and advise the client that my efforts as a lawyer and my duties as a State Senator were separate. Unfortunately, I did not execute such a letter with Mr. Crosby. At the time he hired me I was busier than at any other point in my life. Because I never got Crosby to sign one of these letters, I was not able to rely on it to refute allegations that I disguised a bribe as attorney's fees.

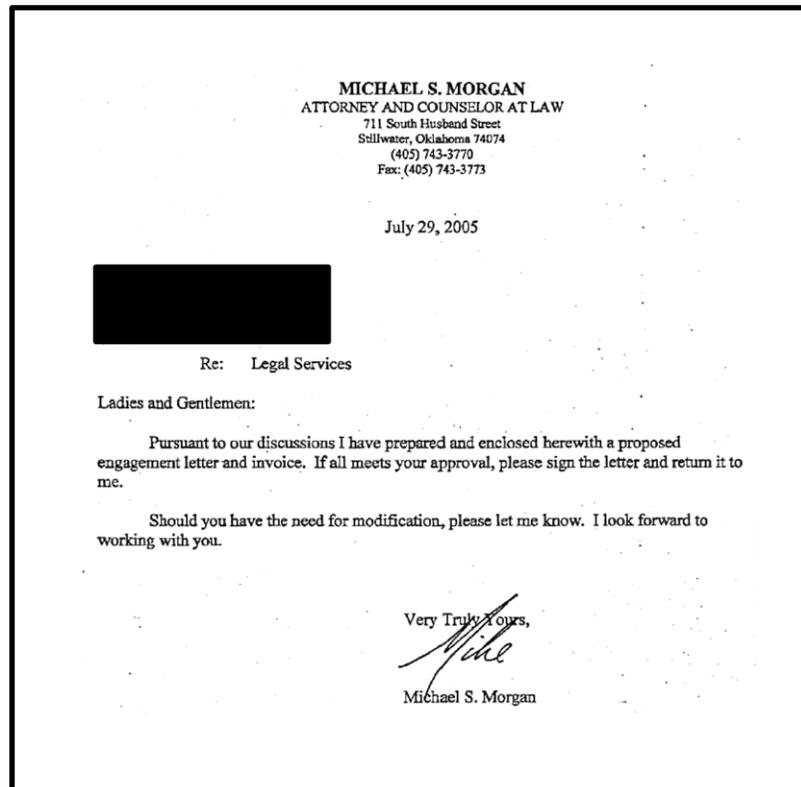


Figure 1

46. *Id.* at 432 n.15.

July 29, 2005

Michael S. Morgan
711 S. Husband St.
Stillwater, OK 74074

Dear Mr. Morgan,

We are pleased that Michael S. Morgan (the "Firm") has agreed to represent and provide legal advice to Dilworth Development, Inc. ("Company") in connection with the development of a proposed landfill facility in the State of Oklahoma (the "Matter"). The legal services to be provided may include, without limitation, advice as to Oklahoma state and local laws, advice as to site selection and real estate matters such as zoning, tax abatement, contracts and easements, and representation before administrative agencies. The specific legal services to be provided by the Firm for this Matter will be as requested and identified by representatives of the Company from time to time.

The effective date of the engagement is July 1, 2005 and will continue for one (1) year.

As consideration for the services to be provided by the Firm, including disbursements made by the Firm in providing services, the Company agrees to pay the Firm a retainer fee of \$4,166.66 per month during the term of the engagement.

The Firm's invoices should be rendered monthly, with the understanding that payment will be paid within 30 days. All invoices should be sent to [REDACTED]

The Firm has agreed that neither it nor any of its affiliates or associates will undertake the representation of any party or act on its own behalf in connection with any matter which is adverse to the interests of the Company or which could impair or delay the successful completion of the Matter. The Firm and its members have also agreed to not disclose to any party other than the persons designated by the Company from time to time any information ("Confidential Information") provided to the Firm or any member thereof by the Company relating to the Matter which is not generally available to the public. Finally, the Firm has agreed that it will promptly return to the Company all copies of any Confidential Information provided to the Firm or any of its members by the Company, upon request. The provisions of this paragraph shall continue beyond the term of the engagement. This paragraph does not limit the scope of the Firm's professional duties arising pursuant to applicable law.

Figure 1 (continued)

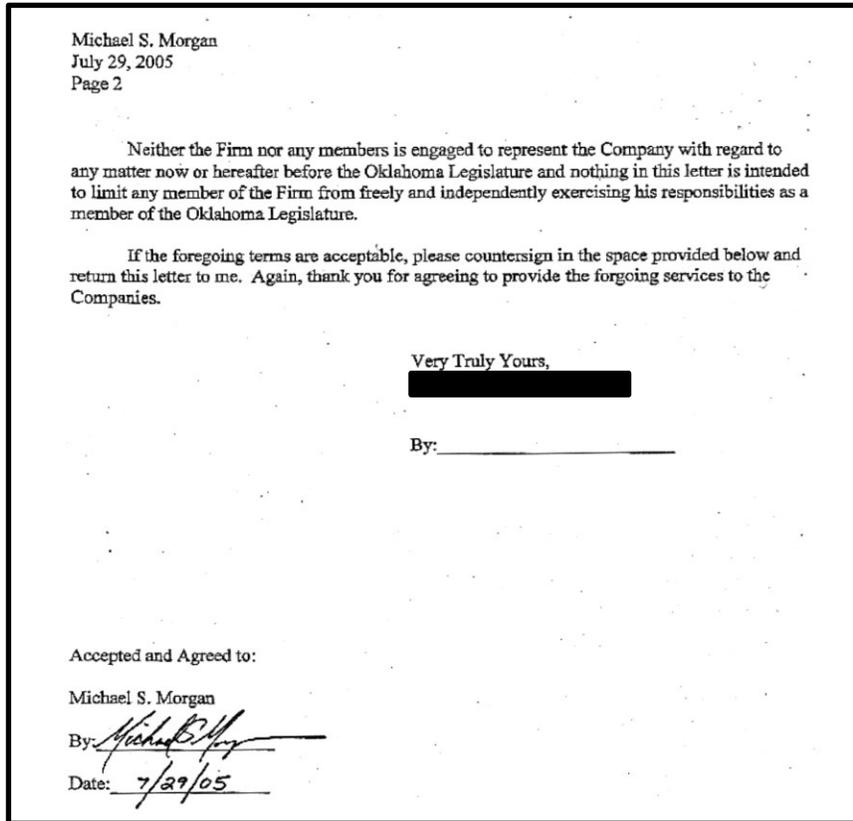


Figure 1 (continued)

If I had used this letter in connection with Silver Oak, I may have been acquitted on count sixty-three. The Company A engagement letter and its express limitations on the scope of my representation added a layer of protection that was notably lacking from my representation of the assisted living center. As the Tenth Circuit stated in my case:

Although such letter is not required by the Oklahoma Rules of Professional Conduct, it is common when retaining the legal services of an attorney and was also common in Morgan's practice with other clients. While not determinative, the absence

of an engagement letter may, in context, be part of the totality of the circumstances a jury may consider.⁴⁷

In my case, the absence of an engagement letter seemed to be the *sum total* of the circumstances and a leading cause of my conviction. But for my failure to send this one letter, I may have saved myself eighteen agonizing months in federal prison.

B. Detailed Invoices

Naturally, the story does not end there. Convictions are the product of a multitude of factors—one can rarely point to a single piece of evidence as the sole cause of a jury’s decision. If my failure to execute an engagement letter with Silver Oak was the first misstep, then my monthly invoices were undoubtedly the second.

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|---|-------------------------|
| February 25, 2007 | |
| Silver Oak Senior Living 3720 E. 2 nd Street Edmond, OK 73034 | |
| Professional Services Rendered for February: | |
| <u>Date</u> | <u>Monthly Retainer</u> |
| 2/25/07 | \$1,000.00 |
| TOTAL AMOUNT DUE | \$1,000.00 |

Figure 2

Authoring this Essay has caused me to reflect—in embarrassment—on the quality of the invoices I produced and sent to clients during this period

47. *Id.*

of my career. Like the Silver Oak invoice displayed above in Figure 2, I routinely mailed invoices that did not adequately reflect the types and quantities of services I provided. As the document clearly shows, I was not paying attention to what I was doing. I was a busy lawyer-legislator who did the bare minimum necessary to issue statements and move on to the next task. This is an easy trap to fall into.

If I had taken the time to ensure my invoices reflected the services I performed, even for non-itemized monthly retainers, I may have been able to convince the jury that I had received fees in exchange for valid legal services. I did not live up to the standards required by my profession and I most certainly did not live up to my own. The jurors in my federal criminal trial saw every lackluster invoice I produced—it is clear they held it against me.

C. Prompt Email Replies

Keeping track of client communications is paramount. Not only is it important from a client management perspective, but it is also expressly mandated by the Rules of Professional Conduct.⁴⁸ Like my engagement letter (or the lack thereof) and invoices to Silver Oak, my overall client communication was sub-standard. The Tenth Circuit noted (with obvious disfavor) that I “had no written record of [my] communications with Crosby,” and that without any evidence showing that I had not sold my Senate seat, a jury could reasonably conclude that I had.⁴⁹

For most of my legal career, I primarily communicated with clients by telephone. In those days, it was common to return from a hearing or other excursion to a mound of message slips at the office indicating a client had called and requested a reply. Those return calls consumed a great deal of time and required significant effort. The coming of the digital age may have relieved some of the necessity of making telephone calls but it has not lessened the importance of maintaining good client communications. During the period when I represented Mr. Crosby, email was (at least for

48. In Oklahoma, client communication is not recommended—it is mandatory. 5 OKLA. STAT. app. 3-A, r. 1.4(a)(1)–(5) (2011), OK ST RPC Rule 1.4 (Westlaw) (noting a lawyer shall promptly communicate with clients). Rule 1.4 states that a lawyer shall “reasonably consult with the client about the means by which the client’s objectives are to be accomplished” and “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional conduct or other law.” *Id.* r. 1.4(a)(1), (5).

49. *Morgan*, 635 F. App’x at 432–33.

me) a relatively new phenomenon. I had an email address, but I rarely used it. Over time, my failure to adjust my practice habits and methods proved to be detrimental.

In my prosecution, the United States Attorney argued that my failure to respond to incoming emails could be interpreted as criminal intent.⁵⁰ He was wrong. I was admittedly bad at email and overwhelmed with Senate work, but my failure to timely respond to Mr. Crosby's staff clearly indicated my lack of diligence in tending to the attorney-client relationship. To this day, I maintain that I committed no crime, but the appearance of impropriety was too great to overcome. My level of client mismanagement was criminal, and I served eighteen months for it.

IV. Conclusion

Experience is something you do not gain until after you need it. For me, and many other attorneys who have been subject to disciplinary proceedings (or worse), the reality of that statement is haunting. Most new attorneys think they know the importance of good client management. They probably intend to maintain a strict twenty-four-hour response rule, file emails, and always execute detailed engagement letters before performing legal services. But prison is full of convicted felons who swear by their good intentions.

50. *See id.* at 426. In setting out the facts of my conviction, the Tenth Circuit described my failure to respond to client emails with clear disdain:

[A]t Crosby's direction, Belinda Arguello, Silver Oak's director of compliance, began sending e-mails to Morgan reporting Silver Oak's ongoing difficulties with the ODH. She attached communications between Silver Oak and the ODH. When Morgan had not substantively responded by August, Crosby suggested an e-mail be sent from his e-mail address to ensure Morgan had received the information. There still was no response. The only communication between Crosby and Morgan after the meeting in May 2006 was a visit from Morgan to Crosby's office seeking a campaign contribution for another candidate. Crosby also said he attempted to contact Morgan's law office several times concerning traffic tickets. His testimony was clear enough: Morgan never assisted Silver Oak as a lawyer in dealing with the ODH or any other matter, but he found another way to be helpful.

Id. (footnote omitted). Of course, the court was referring to my introduction of a shell bill many months later that addressed certain assisting living issues in a manner favorable to Silver Oak and Mr. Crosby. This was allegedly the quid-pro-quo that could support a jury conviction on bribery.

Law schools can only go so far in educating the next generation of lawyers. Professional Responsibility professors can recite the rules, review the comments, and highlight extraordinary cases. Students can even commit every single rule to memory and receive a perfect score on the MPRE.⁵¹ But the measure of a good lawyer is not whether he or she mastered ethics from a book. It is whether that lawyer is committed to juggling a multitude of clients on a broad range of issues while learning and studying new areas of the law, meeting quick deadlines, and on top of it all, keeping clear and accurate records.

The good news is that complying with the rules and being a good lawyer is far from impossible; most attorneys do it every single day. The bad news is that one bad day can obliterate a perfect track record. All it takes is one occasion where busyness leads an attorney to believe that a two-sentence engagement letter or a one-line invoice is “good enough.”

Take my advice. Execute an engagement letter for every single client. Provide detailed narratives in each monthly invoice. Talk to your client regularly. It may just save your career.

51. The Multistate Professional Responsibility Examination (the MPRE) is a two-hour multiple-choice exam that “measure[s] candidates’ knowledge and understanding of established standards related to the professional conduct of lawyers[.]” and is required for admission to most state bars. *Jurisdictions Requiring the MPRE*, NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mpre/> (last visited Apr. 19, 2020).