

A VIEW FROM BAR COUNSEL:

QUICK ANSWERS TO COMMON ETHICAL DILEMMAS

BY DENISE A. BRADSHAW,

As lawyers, no matter how hard we try to avoid ethical quandaries, we often find ourselves in them. We run the facts by our partners, associates and colleagues and receive different responses on how to handle a given situation. At that point, we can call the Office of Bar Counsel for guidance.

According to David Clark, State Bar of Nevada Bar Counsel, the five most popular areas of inquiry pertain to:

1. Client files;
2. Firm dissolutions;
3. Trust accounts;
4. Conflicts of interest; and
5. Substance abuse/mental health concerns.

The following are Clark's general responses to common questions:

Client Files:

My client requested his file. Who is responsible for copying and shipping costs?

This issue is best handled at the time of retention. Provided it is legal and reasonable, Bar Counsel will defer to the language of a fee/retention agreement that addresses file retention and copying charges. Notwithstanding such agreement, the *original* file belongs to the client.¹ Therefore, if the client wants the original, and the attorney desires to maintain a copy, the attorney bears the cost.

As for shipping, an attorney is simply required to make the file available to the client and is not required to incur costs for shipping.²

I have a new client and, despite repeated requests, former counsel will not release the file, what can I do?

Is the attorney asserting a retaining lien? A retaining lien allows an attorney to hold a client's papers, documents and property until all outstanding billings are paid.³ Retaining liens apply to fees and costs and are

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THE STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

BY BRETT KANDT, ESQ.

As Chief Justice Earl Warren suggested, our legal system is predicated on ethical conduct by those engaged in the practice of law. What are the sources of our ethical duties as Nevada lawyers? Certain ethical responsibilities originate from the U.S. Constitution itself, and are further delineated by case law. Perhaps the

most fundamental of these is the constitutional guarantee of due process. Other ethical obligations may be imposed upon us by statute or case law. Generally, however, our ethical duties are embodied in rules adopted by the Nevada Supreme Court that govern our practice of law in this state.

The Standing Committee on Ethics and Professional Responsibility, which includes 11 members plus one liaison from the Board of Governors, is governed by Nevada Supreme Court Rules 222 through 228. The purpose of the committee is to make available advisory opinions on the ethical considerations of the practice of law, which shall function to prevent harm to the public from the unethical practice of law and to provide a clear and timely understanding of the ethics of practicing law. SCR 224 specifies that the committee "shall respond to requests from all persons and entities seeking advisory opinions concerning the ethical and professional standards of practicing law" which shall include the issuance of advisory opinions "on the ethical propriety of hypothetical attorney conduct at

*"In civilized life,
law floats in a sea
of ethics."*

- Earl Warren,
U.S. Supreme Court
Chief Justice

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the request of members of the state bar or on its own initiative.”

Advisory opinions are issued in accordance with SCR 225. When the committee determines that a request warrants a formal opinion, the hypothetical facts and request are distributed to state bar officials and, if appropriate, other interested persons or entities, advising them that the hypothetical is under consideration by the committee for a formal opinion, and requesting comments thereon.

Opinions set forth:

- a. Hypothetical facts of the ethical question presented in a general manner without identification of the requesting attorney or any details of the request which would permit such identification;
- b. The rules of professional conduct or other authorities relied upon;
- c. A discussion; and
- d. A conclusion.

Committee members do not participate in any opinion in which they have either a material pecuniary interest or any other conflict of interest that would prevent them from participating. All opinions issued by the committee express only the judgment of the committee and are advisory only. The formal opinion is furnished to the person requesting the opinion and also filed with the clerk of the Nevada Supreme Court. The court has the authority to review the opinion and to consider any objections to it. The committee will not act on requests for opinions when:

- a. There is a pending state bar complaint, investigation, proceeding or litigation concerning the subject of the request;
- b. The request constitutes a complaint against a member of the state bar;
- c. The request involves procedures employed by the bar in processing complaints against members;

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broad in that they attach not only to the instant matter, but to any other file(s) the former attorney had for the same client.

If not, the client is entitled to his file and it must be released.

A former client wants his file, but I do not think it is safe for him to come to my office. What can I do?

This is a common scenario. You can send the file to Bar Counsel and we will contact the client to arrange a documented delivery.

My client contacted the state bar directly about getting his file – will a disciplinary file be opened?

In this situation, we will call or send a letter to the lawyer and determine if there is a reason the file has not been released, (e.g. retaining lien). Otherwise, the file needs to be turned over to the client. We are here to help and, generally, this scenario does not constitute a disciplinary event.



Are clients entitled to our electronic work product?

More and more clients are demanding electronic work product, e.g. word processor documents, as part of their file. This issue has not yet been litigated in Nevada. Our current position is that the client’s “file” is limited to the paper version, except for those parts that are stored only in electronic format. This is another issue that could be addressed in your retainer agreement.

Can I provide the client a copy of their file on a CD?

Again, the client is entitled to the original file. However, assuming that is not an issue or the situation was addressed in the retainer agreement, yes.

Do I really have to retain client files for seven years?

Yes.⁴ This includes clients’ financial records and ledgers.

Can I store files electronically?

Yes, provided they are in a legible format that can be accessed by others.⁵

Firm Dissolutions:

I am planning on leaving my firm, what do I do?

An amicable dissolution with all terms in writing is the best way to protect everyone, including clients. However, that is not always possible. In these situations, ABA Ethics Opinion 99-414 is an excellent place to start to ensure ethical compliance. It provides, among other things, suggested

content for the formal notice an attorney must provide to clients of the impending departure, which clients of the firm an attorney may provide with notice, along with the proper timing and manner of the notice.

My former firm is advising clients that they do not know my new contact information. Is that ethical?

While there is not an ethical rule on point, it is imperative we act like professionals. The client may return to the former firm for representation in the future. Therefore, it is important to simply provide the departed attorney's new contact information and not let hard feelings affect the clients.

Can I contact Bar Counsel about the dissolution?

We are more than happy to talk with you and offer ethical guidance. However, we prefer to talk with both sides at the same time.

Trust Accounts:

This is, by far, the largest area of disciplinary action. Any notification or complaint of a trust account violation will result in an automatic open disciplinary file and screening panel review.

My client has instructed me not to pay a doctor's lien so he can negotiate the bill on his own, can I do that?

No. Once a case is settled, your duty to lienholders is the same as to your client.⁶ You must honor all liens. If a lienholder reports nonpayment to the state bar, it will be considered a trust account violation and result in an open file and investigation.

Can I leave my earned fees in the client trust account?

No. This constitutes commingling and is an ethical violation.⁷ Further, it puts your clients' funds at risk as, if there is commingling and you end up in financial straits, your trust account can be garnished to satisfy your debts. Once your fee is earned, immediately transfer it out of the trust account.

If I cannot commingle funds, how do I pay the bank's service fee?

You may deposit your own funds into the trust account to cover service fees.⁸ If you fail to do so and the service fees cause the account to overdraw, the bank will automatically report to the state bar, resulting in an open file and investigation.

I settled a large case and the funds need to be held for an extended period of time. May I put the funds in a separate interest-bearing account for the client's benefit?

Yes. Client trust accounts are for holding clients' funds for a short period of time.⁹ An attorney, at his/her discretion, can open a separate account for a client and that decision is not reviewable by Bar Counsel.¹⁰

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- d. The propriety of activities in the request turns on a question of law unrelated to legal ethics;
- e. The request involves pending or threatened litigation or involves the propriety of sanctions within the purview of the courts; or
- f. The committee determines that it would be inadvisable to respond to the request.

Advisory opinions are available at

www.nvbar.org

under

"Member Services" >

"Ethics &

Discipline" > "Ethics Opinions." Please note

that the Nevada Supreme Court repealed Rules 150 through 203.5 of the Supreme Court Rules and adopted the Nevada Rules of Professional Conduct effective May 1, 2006.

Consequently, advisory opinions issued prior to the comprehensive revision of the former Supreme Court Rules governing professional conduct into the new Nevada Rules of Professional Conduct may make reference to the repealed Supreme Court Rules. However, the analysis and conclusions in these opinions is still sound, and when consulting those opinions attorneys should cross-reference the citation of any repealed Supreme Court Rule to the appropriate Nevada Rule of Professional Conduct.



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