

TOP TEN MYTHS AND MISCONCEPTIONS ABOUT BAR DISCIPLINE AND NEVADA RULES OF PROFESSIONAL CONDUCT (RPCS)

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The following is based upon the experiences of the Office of Bar Counsel while handling calls to the Ethics Hotline, not the result of a scientific study.

An “earned on receipt” or “nonrefundable” fee agreement is enforceable.

“Not so fast!” Numerous states have expressly declared “earned on receipt” or “nonrefundable” fee agreements invalid. Non-refundable retainer agreements, while not specifically prohibited in Nevada, should be viewed with caution, as they don’t relieve an attorney of the burden of considering and utilizing all the factors listed in RPC 1.5(a) (fees) in initially setting a fee and justifying the reasonableness of the fee ultimately charged on those same factors. *See* Standing Committee on Ethics and Responsibility Formal Opinion No.15; *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P. 2d 31(1969), and RPC 1.16 (d).

If information is not learned in a privileged communication, lawyers are free to discuss with others.

“Not so fast!” Formal Opinion No. 41 from the Standing Committee on Ethics and Professional Responsibility directly addresses this issue:

Question: What types of information about a client does RPC 1.6 (confidentiality) restrict the lawyer from revealing?

Answer: ALL information relating to the representation of the client, except for a few exceptions dealing with possible criminal

conduct by the client or a dispute between the attorney and the client.

RPC 1.6(a) imposes a duty on all lawyers not to reveal information relating to the representation of their clients to anyone unless there is an applicable exception. *See Mckay v. Board of County Commissioners*, 103 Nev.490, 746 P. 2d 124 (1987); *Todd V. State*, 113 Nev. 18, 931 P.2d 721 (1977).

Only a client can file a discipline grievance with the state bar.

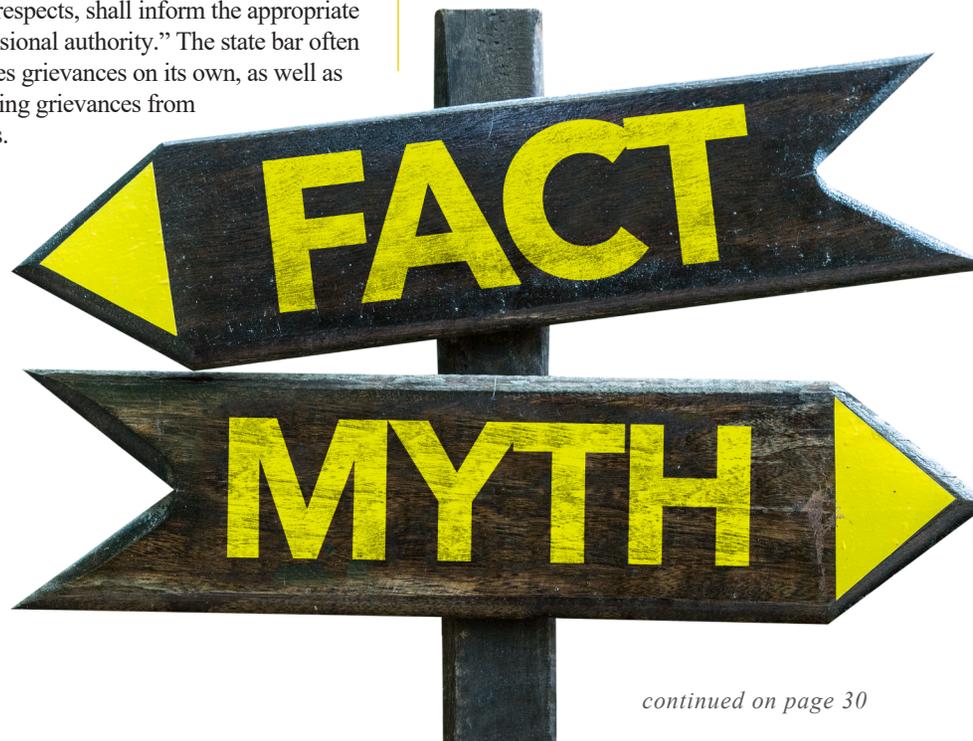
“Not so fast!” Anyone can file a grievance to begin investigation by the state bar, pursuant to Supreme Court Rule 104. RPC 8.3 (reporting professional misconduct) states:

“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” The state bar often initiates grievances on its own, as well as receiving grievances from judges.

A grievant can file a grievance against a lawyer at any time.

“Not so fast!” Supreme Court Rule 106 (privilege and limitation) establishes the time limitation for disciplinary proceedings. SCR 106 (2) states:

“Disciplinary proceedings shall not be commenced against an attorney for alleged misconduct occurring more than 4 years prior to the receipt of the grievance or filing of the complaint by bar counsel. In the event of fraud or concealment, the 4-year period begins on the date the fraud or concealment was discovered by the grievant, or on the date facts were known to bar counsel, which should have lead [led] bar counsel to discover the alleged misconduct.”



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RPC 1.4(a) (communication) applies only to communication between lawyer and client.

“Not so fast!” RPC 1.4(a) states:

“A lawyer shall: ... (4) Promptly comply with reasonable requests for information...”

RPC 1.4(a)(4) specifically does not limit its application to client information alone. Therefore, a lawyer should promptly reply to any reasonable request by a third party for information that is not privileged, such as a doctor regarding his bill, a lienholder’s request, third-party assigned rights from client, opposing counsel and courts.

See Standing Committee on Ethics and Responsibility Formal Opinion No. 31.

A lawyer is ethically obligated to follow a client’s instructions “to ignore a third party claim and disburse all settlement funds to the client.”

“Not so fast!” Under RPC 1.15 (safekeeping), if the person has an “interest” in the funds, the lawyer has three ethical obligations with respect to those funds: To promptly notify the client and third person on receipt of the funds; To promptly deliver, to the client or third person, any funds the client or third person are entitled to receive, and upon request by the client or third person, to promptly render a full accounting regarding the funds. This is a result under which the lawyer has ethical duties to someone other than the lawyer’s client. See *Achrem v. Expressway Plaza Limited*, 112 Nev. 737, 917 P. 2d 447 (1996).

The disciplinary hearing process is similar to the summary proceeding of a driver’s license hearing under a DUI implied consent suspension.

Not so fast and, literally, “not so fast!” A bar grievance normally goes through extensive steps before a law license is suspended pursuant to SCR 105. Upon the submission of a grievance, an investigation, including the responding attorney’s input, is assessed by an intake

attorney. If it is determined at intake that the grievance should proceed, the case is submitted to a screening panel, consisting of two licensed attorneys and one lay member, that will determine what, if any, discipline should be pursued. A formal hearing is always set for any case involving a license suspension or public reprimand. At the formal hearing, bar counsel must prove its case—demonstrating by “clear and convincing” evidence that the attorney violated the alleged rules of professional conduct—to a panel consisting of two licensed attorneys and one lay member, different from those on the screening panel. If a license suspension is recommended by the formal hearing panel, the case is submitted to the Nevada Supreme Court for a de novo review of the record. Only upon the finding by the Nevada Supreme Court is an attorney’s license to practice law suspended.

According to RPC 1.15, attorneys must preserve their files on paper for seven years after termination of the representation.

“Not so fast!” RPC 1.15 states, “Complete records of such account funds or other property shall be kept by the lawyer for a period of seven years after termination of the representation.” As far back as February 9, 2006, the Standing Committee on Ethics and Responsibility Formal Opinion No. 31 addressed the issue that lawyers may store files electronically. There are a few exceptions, such as the need to keep originals required for evidence or original documents that may have legal significance as originals (such as, wills or trusts).

When storing files in electronic format, take steps to ensure that client confidences are protected and that safeguards are in effect to prevent file degradation. Also, bear in mind that the originals that have legal significance should be kept in a safe place and that

the software necessary to open the files needs to be maintained, should the client request copies in the future.

If someone other than the client is paying the lawyer’s fee, the third-party payer has a say in how the representation proceeds.

“Not so fast!” This is a classic case involving parents paying for their kid’s legal representation. RPC 1.8 (f) “A lawyer should not accept compensation for representing a client from one other than the client unless

1. The client gives informed consent;
2. There is no interference with the lawyer’s independence of professional judgement or with the client-lawyer relationship; and
3. Information relating to the representation of the client is protected as required by Rule 1.6.”

Before accepting this arrangement, all parties should have a clear understanding of RCP 1.8(f).

Attorney must get the client’s permission to grant a continuance.

“Not so fast!” RPC 1.2 requires a lawyer in a civil matter to abide by a client’s decision whether to settle a matter. RPC 1.2 requires a lawyer in a criminal case to abide by the client’s decision, after consultation, as to the plea to be entered, whether to waive jury trial and whether the client will testify. RPC 1.2 specifically states, “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”

Camels have always been welcome in the Nevada desert.

“Not so fast!” It is fact that wild camels became such a nuisance in Nevada that the State Legislature passed an act in February 1875 prohibiting “camels and dromedaries from running at large on or about the public highways of the State of Nevada.” The law was not repealed until 1899. (Just checking if you’re still reading!) **NL**