



# STATE BAR OF NEVADA

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## STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

### STATE BAR OF NEVADA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

#### Formal Opinion Number 1 April 23, 1986

**QUESTION** - May a private attorney who has formed a partnership for the practice of law with a part-time deputy district attorney for a rural Nevada county defend a person charged with a violation of any Nevada ordinance or law in any of the courts of the State of Nevada?

**ANSWER** - No.

#### **AUTHORITIES RELIED ON**

NRS 7.105 (1985)

NRS 252.120 (1985)

Nevada Rules of Professional Conduct

(Supreme Court Rules 157, 160 Op. Nev. Att'y Gen. No. 126 (Apr. 25, 1973))

#### **DISCUSSION**

This opinion discusses the ethical issues raised in Nevada when an attorney forms a partnership or association for the private practice of law with another attorney who serves as a part-time deputy district attorney for a rural Nevada county. Specifically, it discusses whether the partner or associate of the deputy district attorney may engage in criminal defense work in any court of the State of Nevada. For the reasons discussed below, it is the opinion of the Committee that the partner or associate may not.

NRS 7.105 states:

No city attorney, state district attorney or attorney general or their deputies and assistants

hired or elected to prosecute persons charged with the violation of any ordinance or any law of this state shall, during their terms of office or during the time they are so employed, in any court of this state, accept an appointment to defend, agree to defend or undertake the defense of any person charged with the violation of any ordinance or any law of this state.

(Emphasis added.)

Indisputably, a district attorney or deputy district attorney is disqualified by the terms of NRS 7.105 from defending any person charged with violating the criminal laws of the State of Nevada in any Nevada state court. The precise question presented, however, is whether the disqualification of a deputy district attorney applies to partners or associates of the deputy district attorney.

NRS 252.120 prohibits any partner of a district attorney from appearing in any criminal action, or from aiding, counseling, or assisting in the defense in any criminal action, within the county in which the district attorney serves. The same statute also prohibits the district attorney or his partner from appearing in any civil action begun or prosecuted during the district attorney's term, on behalf of any person suing or sued by the State of Nevada or any county of the State of Nevada. The Attorney General has interpreted NRS 252.120 as prohibiting a district attorney from representing a private client in any state or county civil action where the interests of the private client are adverse to those of the State of Nevada or any county thereof. Op. Nev. Att'y Gen. No. 126 (Apr. 25, 1973). Logically, then, the statute would also prohibit the district attorney's partner from making any such appearances in civil actions.

By its Order filed January 27, 1986 (effective March 28, 1986), the Nevada Supreme Court adopted, with certain amendments, the Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, as the rules of professional conduct for lawyers who practice in Nevada. These rules may be referred to as the Nevada Rules of Professional Conduct, and are comprised of Supreme Court Rules 150 through 203.5, inclusive.

Supreme Court Rule 157 (1) provides that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless . . . the lawyer reasonably believes the representation will not adversely affect the relationship with the client . . . and each client consents, preferably in writing, after consultation." Supreme Court Rule 160, entitled "Imputed Disqualification," provides in subsection 1 that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [Rule] 157, 158(3), 159 or 168."

A lawyer who represents criminal defendants and whose partner or associate represents the State, though in different cases and in different counties, has divided loyalties. The lawyer may be called upon at time to attack statutes the partner or associate must later

defend, or to cross-examine and impeach witnesses on whom the partner or associate must rely tomorrow. The effectiveness of a prosecutor may be diluted if the efforts of the partner or associate on behalf of defendants, even in other cases in other counties, are misconstrued by law enforcement officials.

A law firm is not permitted to represent adverse parties in contested proceedings, whether in the same or a different court; nor may it represent one party in one matter and, at the same time, represent an adverse party in a different matter. The State and those it prosecutes for crimes are adversaries.

The State of Nevada has expressly withheld its consent for a district attorney or a deputy district attorney to represent criminal defendants in any court of this State. NRS 7.105 (1985). Therefore, the partner of a deputy district attorney cannot rely upon the exception in Supreme Court Rule 157(1) (b), which permits the representation of conflicting interests if each party consents to the representation. Since a deputy district attorney is expressly disqualified from being of counsel adversely to the State, no partner or associate of the deputy or of the deputy's firm may accept employment adverse to the State in any case, in any court. To do so is prohibited by Supreme Court Rules 157 and 160 and the statutory sections cited. This appears to be the rule in most jurisdictions. See, e.g., Professional Ethics Comm., State Bar of Texas, Op. 419 (Dec. 1984), digested in ABA/BNA Lawyer's Manual of Professional Conduct 801.8305 (1986); Comm. On Professional Ethics, State Bar of Wisconsin, Mem. Op. 2-69 (Feb. 7, 1969), reprinted in Wis. B. Bull. 84 (Supp. June 1979), digested in O. Maru, 1980 Supplement to the Digest of Bar Association Ethics Opinions 13111, at 602 (1982); State Bar of Michigan, Informal Op. 49, reprinted in 57 Mich. St. B.J. 309 (Feb. 1978), digested in O. Maru, *supra*, 11496, at 286; Maryland State Bar, Informal Op. 77-57 (April. 28, 1977), digested in O. Maru, *supra*, 11321, at 246. See also *Thompson v. State*, 330 S.E.2d 348, 350-52 & 351 n.6 (Ga. 1985), and opinions cited therein. But see *id.* at 351-52 (because disqualification would limit the ability of criminal courts in rural areas to appoint competent counsel, the court declined to adopt a rule of automatic disqualification, and instead adopted a rule requiring disqualification only when an actual conflict of interest exists).

## CONCLUSION

A private attorney who has formed a partnership for the practice of law with a deputy district attorney for a rural Nevada county may not defend any person charged with a violation of any Nevada ordinance or law in any Nevada Court.

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# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 2 May 23, 1986

#### QUESTION

May an attorney write to a person who a client says owes the client money, demand payment, and threaten to sue if the person does not pay?

#### ANSWER

Yes, with some qualifications. The attorney must reasonably believe that the client's claim and the intention to sue are legitimate. Threats of criminal prosecution and predictions of the consequences of litigation amounting to legal advice are improper, as are communications with persons represented by counsel.

#### AUTHORITIES RELIED ON

Model Code of Professional Responsibility  
DR 7-105(a) (1980)  
Nevada Revised Statutes § 73.040 (1985)  
Nevada Rules of Professional Conduct  
(Supreme Court Rules) 150(1), 181(1), 182, 184, 202(2), 203 (1986)

#### DISCUSSION

This opinion responds to a request for a discussion of the ethical considerations applicable to collection letters, that is, letters sent by lawyers to third parties demanding payment of debts owed to the lawyers' clients. Although framed in general terms, the request raises a number of specific, subsidiary issues: whether a lawyer may demand payment from a third-party debtor on behalf of a client; whether the lawyer may threaten the debtor with litigation if payment is not made; whether the lawyer may warn the debtor of the potential costs of that litigation (e.g., costs of suit, attorneys' fees); and whether the attorney may advise the debtor of the possible consequences of a judgment (e.g., garnishment of the debtor's wages, sale of the debtor's property). In the opinion of the Committee, collection letters are proper as long as certain principles of honesty and fairness are observed.

Lawyers may demand that third parties pay debts owed to their clients. Collection letters may be sent to adverse parties before suit is filed and before adverse parties are represented by counsel. If the debtor is represented by counsel in connection with the debt, however, the lawyer may not communicate directly with the debtor unless the other attorney consents. Nevada Supreme Court Rule 182 [hereinafter cited as S.C.R.]. The lawyer should inquire of the client whether the debtor has responded to previous demands for payment or otherwise communicated with the client through counsel. If so, the lawyer should communicate only with that counsel.

Collection letters must be accurate and truthful. "In the course of representing a client a lawyer shall not knowing . . . [m]ake a false statement of material fact or law to a third person . . . ." S.C.R. 181(1); see also S.C.R. 203 (It is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation"). Demand letters must be sent in good faith and for the purpose of reaching a settlement. A lawyer must not send a collection letter whose only purpose is to harass or burden the recipient. See S.C.R. 184. Accordingly, before sending a collection letter on behalf of a client, the lawyer should examine the pertinent documents and otherwise investigate sufficiently to satisfy him - or herself that the purported debt is in fact owed.

Generally, collection letters may threaten litigation if the debt is not paid. But this general statement must be tempered by the requirements of truth and accuracy. If litigation is not reasonably likely or the attorney knows suit will not be brought, either because the claim is so small as to make litigation economically unfeasible or for any other reason, it would be untruthful for the attorney to state that suit will be brought if payment is not made. Similarly, a lawyer should not state that a suit will include a claim for costs or attorneys' fees if such awards could not be made in the particular circumstances. See, e. g., Nev. Rev. State § 73.040 (1985) (awards of attorneys' fees barred in small claims actions).

Collection letters should be dignified; they should not threaten or intimate dire consequences. They may not state that nonpayment will injure the debtor's credit or reflect on his moral standing. General allusions to the well-known costs and inconveniences of litigation are permissible, but the lawyer must be careful not to appear to be harassing the debtor or offering unsolicited legal advice.

Similarly, a lawyer may not threaten the debtor with criminal prosecution if the debt is not paid. Indirect threats of criminal prosecution are equally impermissible; for example, an attorney should not state in a collection letter that certain conduct is a crime or violates a statute.<sup>1</sup>

There is less agreement about the propriety of other statements in collection letters. One state bar ethics committee has apparently held that collection letters may include legal theories, conclusions of law, citations to law, statutes, rules, and similar authorities, and copies of proposed complaints. See ABA/BNA Manual, supra note 1, at 801:8105 (1986) (digesting Ethics Comm., Board of Professional Responsibility of the Supreme Court of

Tennessee, Op. 81-F-22 (Nov. 20, 1981). Others apparently disagree. See, e.g., O. Maru, 1970 Supplement to the Digest of Bar Association Ethics Opinions 6844, at 238 (1972) (digesting New Jersey State Bar Association Op. 144) (demand letter threatening suit if payment is not made may not be accompanied by copy of proposed summons and complaint).

On this point, we believe lawyers should be guided by the general principle that collection letters may not contain legal advice, other than advice to seek counsel. Extensive explanations of the legal consequences that might follow nonpayment constitute legal advice for these purposes. Therefore, detailed explanations of the grounds for recovery and the consequences of nonpayment should be avoided; while they may be appropriate in a demand letter to another attorney, a nonlawyer is more likely to perceive them as harassing and unduly threatening. Speculation about the possibility and meaning of wage garnishment, execution

1. Threats of criminal prosecution to gain an advantage in a civil matter were specifically prohibited under the Model Code of Professional Responsibility, DR 7-105(A) (1980). This specific prohibition was not carried forward in the Model Rules of Professional Conduct, which were adopted, with amendments, by the Nevada Supreme Court as its Rules of Professional Conduct. S.C.R. 150(1). The reason for omitting the specific provision was "that the misconduct to which [the prohibition] is directed is proscribed more narrowly by specific Model Rules provisions." ABA/BNA Lawyers' Manual on Professional Conduct 101:1001 (1986) [hereinafter cited as ABA/BNA Manual]. For example, because repayment of a debt is not a direct, inevitable result of a criminal prosecution brought against a debtor, threatening the debtor with criminal prosecution amounts to extortion, which, of course, is itself a criminal act proscribed by the Nevada Rules of Professional Conduct. See S.C.R. 202(2): see generally ABA/BNA Manual, *supra*, at 101:1001 to 1002. Therefore, the Committee is of the opinion that it is improper for a lawyer to threaten a client's debtor with criminal prosecution if the debt is not paid, even though the Nevada Rules of Professional Conduct do not contain an express provision to that effect.

of judgment, and other specific post-judgment remedies are best left to the debtor and the debtor's own attorney.

## **CONCLUSION**

Lawyers with collections practices must strive on behalf of their clients to induce debtors to pay legitimate debts. At the same time, lawyers must remain sensitive to the dignity of debtors and to the principles of honesty, integrity, and fair dealing that govern our profession. These conflicting objectives make it difficult to formulate precise standards for collection letters. Lawyers must strike a balance to ensure that collection letters to debtors not represented by counsel encourage payment by adequately and accurately emphasizing the advantages of payment without overstating the disadvantages of nonpayment.

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# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 3 May 22, 1987

**QUESTION** - May a non-profit legal services corporation, as part of its retainer agreement, contract with its clients to receive all money in its clients' trust fund accounts not claimed by the clients within a three-year period following the corporation's attempt to locate the clients and return the funds?

**ANSWER** - No.

**QUESTION** - May a non-profit legal services corporation's retainer agreement provide that any amounts less than \$1 remaining in a trust fund account when a file is closed become the property of the corporation?

**ANSWER** - Yes.

### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct  
(Supreme Court Rules) 155, 158 (1986)

### **DISCUSSION**

As a preliminary matter, it has been widely held and is apparently generally accepted that "an indigent person seeking assistance from a legal services office forms the same lawyer-client relationship with its staff of lawyers as any other client who retains a firm to

represent him." Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U.L. Rev. 1115, 1122 (1982). Both ethics committees and courts have held that traditional conflicts doctrines apply to legal aid societies. *Id.* While a non-profit legal services corporation is not a law firm, for purposes of ethical analysis it should be treated as one, unless extraordinary circumstances require a different result. See, e.g., *Borden v Borden*, 277 A.2d 89 (D.C. 1971). Therefore, these questions will be analyzed in the context of a traditional client-firm relationship.

The first question--whether a law firm may contract for the forfeiture of money left in trust funds by clients who cannot be located--presents unique issues involving fees and conflicts of interest. It is the opinion of the Committee that the contemplated forfeiture could not be part of a reasonable fee arrangement, and that such an arrangement would cause unacceptable conflicts of interest between client and counsel.

"A lawyer's fee shall be reasonable." S.C.R. 155(1) (1986). A forfeiture of client funds held in trust accounts cannot be classified as a reasonable fee. The factors set out by the rule to be considered in determining the reasonableness of a lawyer's fee do not include the possibility that a client will be difficult or impossible to locate. *Id.* Only the anticipated cost of prosecuting a matter or a fee contingent on the outcome is permitted.

A forfeiture provision in a retainer agreement with an indigent client is particularly objectionable, since any non-trivial amount forfeited would be relatively substantial compared with the client's income. Consent to such a forfeiture provision would be highly suspect, considering that the indigent client would likely have nowhere else to go to seek legal representation and advice. See Breger, *supra* p.1, at 1136.

The forfeiture provision also poses a conflict of interest. "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client . . . ." S.C.R. 158(10) (1986). The Nevada Supreme Court interpreted a former, similar rule, S.C.R. 183 (1985), as prohibiting "a member of the state bar from purchasing or otherwise acquiring, directly or indirectly , any interest in the subject matter of the litigation which he is conducting." *Eikelberger v. Tolotti*, 96 Nev. 525, 530-31, 611 P.2d 1086, 1090 (1980). A potential for forfeiture of any amounts recovered for a client gives the attorney a clear interest in the cause of action. Such an interest is impermissible. In addition, the corporation's duty to locate the client and return trust funds is a direct conflict with the corporation's rights, pursuant to the retainer agreement, to retain the funds of clients it fails to locate.

However, in the opinion of the committee, a forfeiture of amounts less than \$1 in a client's trust account may constitute part of a reasonable fee arrangement, since the administrative cost of maintaining such an account could reasonably be charged to the client. Thus, an assignment of insignificant amounts to the corporation is permissible.

## **CONCLUSION**

A non-profit legal services corporation may not, as part of its retainer agreement,

contract with its clients to receive all money in its clients' trust fund accounts not claimed by the clients within a three-year period following the corporation's attempt to locate the clients and return the funds.

A non-profit legal services corporation's retainer agreement may provide that any amounts less than \$1 remaining in a trust fund account when a file is closed become the property of the corporation.

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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 4  
June 16, 1987**

**QUESTION** - 1. May a lawyer agree to the following fee arrangement, when it is one his client has proposed?

- (a) The lawyer will be paid monthly but at a rate equal to 80 percent of his usual hourly fee;
- (b) If the litigation succeeds and the client recovers the stock and other property that are the subject of the suit, the lawyer is to receive a \$150,000 bonus; and
- (c) As an additional bonus, the lawyer is to receive 50 percent of any punitive damage award the client might recover.

2. May a lawyer contract with his client's out-of-state counsel to share one-third of the bonus called for by his combined fixed/contingent fee contract with the client?

**ANSWERS** - 1. The proposed combination fixed/contingent fee contract does not violate the Nevada Rules of Professional Conduct so long as the fee does not appear at the conclusion of any representation to be unreasonably high. The agreement, like any fee agreement, must be explained to the client in sufficient detail to permit an intelligent evaluation of it. As a contract for a contingent fee, the agreement must also be in writing.

2. The division of fees with out-of-state counsel is permissible, provided the requirements of the Supreme Court Rule 155(5) (1986) [hereinafter SCR] are met, and provided SCR 189, addressing unauthorized practice by out-of-state lawyers, is not violated. SCR 155 (5) permits a lawyer to divide fees with another lawyer who is not a member of his firm so long as the client consents after full disclosure, the total fee is reasonable, and the division is either proportionate to the services rendered by each lawyer or, although disproportionate, the client's written consent to the division of fees is obtained and the lawyers agree to assume joint responsibility for the representation.

### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rules) 154, 155, 157, 158 and 189 (1986)

### **DISCUSSION**

The Model Rules of Professional Conduct, as adopted in Nevada, contain no prohibition against combination fixed/contingent fee contracts. Compare SCR 155(3) with SCR 155 (4) (contingent fees are generally permitted, except in criminal and certain domestic relations matters); see also South Carolina bar Ethics Advisory Comm., Op. 84-11 (July 23, 1984) (attorney is not prohibited from contracting with client to charge a contingent fee for representation in connection with the client's affirmative claims and an hourly fee for defending any potential counterclaim); cf. District of Columbia Bar Legal Ethics Comm., Op. 42 (Nov.23, 1977) (there is nothing intrinsically improper in an attorney contracting to try a case on a contingent fee basis but agreeing that, in the event of an appeal, additional compensation at the attorney's usual hourly rate would be paid).

The rules do require, however, that "[a] lawyer's fee shall be reasonable." SCR 155(1). This requirement applies alike to contingent and fixed fee contracts. G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook of the Model Rules of Professional Conduct* 79 (1985) [hereinafter Hazard & Hodes].

The determination of reasonableness is a factual one. *Thornton, Sperry & Jensen, Ltd. v. Anderson*, 352 N.W.2d 467, 468-69 Minn. Ct. App. 1984); Oregon State Bar Legal Ethics Comm., Op. 154 (June 30, 1967). SCR 155(1) sets out eight criteria by which reasonableness is to be judged:

- (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (c) The fee customarily charged in the locality for similar legal services;
- (d) The amount involved and the results obtained;
- (e) The time limitations imposed by the client or by the circumstances;

- (f) The nature and length of the professional relationship with the client;
- (g) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (h) Whether the fee is fixed or contingent.

Additional criteria, suggested by the inquiry in this case, are the sophistication of the client, Note, *Judicial Power over Contingent Fee Contracts: Reasonableness and Ethics*, 30 Case Western Reserve L. Rev. 523, 531 (1980); the fact that the arrangement was proposed or insisted on by the client, *Foshee v. Lloyds*, 643 F.2d 1162 (5th Cir. 1981); of New York City Bar Ass'n Comm. on Professional Ethics, (Op. 80-14); and the importance of the issues and the amount of money at stake, R. Aronson, *Attorney/Client Fee Arrangements: Regulation and Review* 40-43 (1980) [hereinafter Aronson]. Also bearing on the reasonableness of the proposed combination fixed/contingent fee contract is that here the lawyer risks loss of only 20 percent of his usual fee, which is much less than the all-or-nothing risks inherent in conventional contingent fee contracts. See ABA Comm. on Ethics and Professional Responsibility, *Informal Op. 1317* (May 17, 1975) (an attorney who purchases insurance against loss of prospective contingent fee income must disclose that fact to the client and, having reduced his risk of loss, may have to reduce the size of his fee accordingly). The reasonableness of the \$150,000 contingent "bonus" and the 50 percent share of any punitive damage award, which is in absolute terms a high percentage, would have to be measured against the total amount at stake and the degree of difficulty and risk involved in the case, generally, and on its punitive damages aspect, specifically, which are not stated in the inquiry. For a general discussion of "reasonableness" and the interpretation it has received, see Hazard & Hodes, *supra* p. 2, at 70-74; Aronson, *supra*; ABA/BNA Lawyers' Manual on Professional Conduct 41 (1987); S. Speiser, *Attorneys' Fees* ch. 8 (1973); Rhein, *Judicial Regulation of Contingent Fee Contracts*, 48 J. Air L. & Com. 151 J. Air L. & Com. 151 (1982); see also Hazard & Hodes, *supra* p.2, at 173 (Model Rule 1.8(j)), codified as SCR 158 (10), prohibits a lawyer from acquiring through a contingent fee arrangement such a substantial "investment" in the case that the lawyer loses his perspective).

This Committee is not constituted as a fact-finding body. See SCR 222-228. Absent facts sufficient to permit a *per se* finding of unreasonableness, the ultimate determination of reasonableness must be left to the courts and disciplinary authorities to decide on a fully contested, case-by-case basis. E.g., ABA Comm. on Ethics and Professional Responsibility,

*Informal Op. 1091* (Dec. 1, 1968) ("The Committee will not pass upon questions regarding the amount of an attorney's fee [because the] Committee cannot possibly undertake to pass

judgment on the reasonableness of [a] fee [without being fully] informed as to the extent of the services rendered and to be rendered"); see also Oregon State Bar Legal Ethics Comm., *Op. 154* (June 30, 1967); Arizona State Bar Comm. on Rules of Professional Conduct, *Op. 262* (Jan. 9, 1969); Virginia State Bar Standing Comm. on Legal Ethics, *Op. 526* (Sept. 13, 1983); Maine Bar Board of Overseers Professional Ethics Comm'n, *Op. 48*

(Feb. 2, 1977). This is mandated by the fact-specific nature of the inquiry and because reasonableness cannot be determined in advance but must abide the termination of the representation. ABA/BNA Lawyers' Manual on Professional Conduct 41.903 (1986) (the inquiry as to reasonableness extends "to considering the unfairness resulting from enforcement of an originally fair contingent fee contract"); Connecticut Bar Ass'n Comm. on Professional Ethics, Informal Op. 81-8 (Nov. 18, 1980).

In addition to being reasonable, the fee arrangement must be thoroughly understood by and explained to the client. This is required by SCR 155(2), as well as by SCR 154 and 157. Under these rules,

A client must be given sufficient information so that he is able to direct the lawyer's actions intelligently. An important consideration for many clients is whether the service received will be worth the price. Similarly, a client's decision to continue pressing a legal matter may be heavily influenced by the prospective costs involved.

Hazard & Hodes, *supra* p. 2, at 71. The lawyer should make clear to the client how costs will be billed and collected; the parties should also be made aware that certain activities of the lawyer may relate both to the assertion of the claims for which the client has agreed to pay him hourly and to others, such as the punitive damages claim, which are contingent, and that this may result in the inability of the lawyer to distinguish billable from non-billable hours. South Carolina Bar Ethics Advisory Comm., Op. 84-11 (July 23, 1984). And, finally, the contingent fee agreement must be in writing. SCR 155(3).

1. Under the Model Code of Professional Responsibility, only "clearly excessive" fees were prohibited. DR 2-106. The somewhat awkward language of DR 2-106, equating fees that were "clearly excessive" with those that were "in excess of a reasonable fee," led some authorities to conclude that only grossly unreasonable fees were a basis for discipline under the Code. Hazard & Hodes, *supra* p. 2, at 73. Model Rule 1.5(a), adopted in Nevada as SCR 155(1), adopts the better Code review that unreasonable fees are per se prohibited. *Id.*

The division of fees with out-of-state counsel is controlled by SCR 155(5), which provides: A division of fee between lawyers who are not in the same firm may be made only if:

- (a) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (b) The client is advised in writing of and does not object to the participation of all the lawyers involved; and
- (c) The total fee is reasonable.

The inquiry does not state whether the proposed one-third/-two-thirds division of fees is proportionate to the contemplated division of the services to be rendered. SCR 155(5) represents a departure from prior law in that it permits fee divisions that are disproportionate to the services to be rendered provided the lawyers assume joint responsibility for the representation. Again, the agreement must be preceded by full

disclosure to the client and the client must agree to it in writing.

The facts posed to the Committee do not describe in detail the responsibilities out-of-state counsel will assume or discharge. SCR 189 provides:

A lawyer shall not:

1. Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
2. Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

"The law in most jurisdictions treats lawyers who are licensed elsewhere almost as if they were lay persons for purposes of the 'unauthorized practice' rules." Hazard & Hodes, *supra* p.2, at 481. Depending on the particular facts involved here, *pro hac vice* admission may be required. *Id.* Care should be taken that the out-of-state lawyer does not step over the line marking what Nevada considers to be the unauthorized practice of law.

## **CONCLUSION**

The combined fixed/contingent fee arrangement is not unreasonable *per se*. The final determination of reasonableness must abide the termination of the litigation and is, in any event, for the courts and the disciplinary authorities to decide on a fully developed record, not for this Committee to decide on the basis of incomplete, hypothetical facts. It is not improper to divide the contingent portion of the fee with out-of-state counsel, provided the requirements of SCR 155(5) are met and SCR 189 is not violated. Both the fee arrangement with the client and the arrangement must be preceded by full disclosure to the client and embodied in a writing signed by the client, expressing his understanding and assent to the terms of the fee arrangement.

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 5 June 16, 1987

**QUESTION** - May an attorney, in conjunction with fund-raising efforts of a church of which the attorney is a member, mail a letter to all church members and sponsors informing them that he will waive one-half of his normal fee for preparation of wills and trusts, if the client will agree to donate the one-half saved to the church?

**ANSWER** - No.

#### **AUTHORITIES RELIED ON**

Nev. Rev. Stat. § 7.045 (1985)

Nevada Rules of Professional Conduct (Supreme Court Rules) 167, 188, 195, 196, 197 (1986)

#### **DISCUSSION**

The question posed raises a number of ethical considerations. The proposed action would clearly violate certain of the Nevada Rules of Professional Conduct, and its implementation would create the clear and present danger of the violation of others. For reasons hereinafter discussed, it is the opinion of the Committee that the question must be answered in the negative.

With certain exceptions not here relevant, Nevada Supreme Court Rule 188 provides that "[a] lawyer or law firm shall not share legal fees with a nonlawyer." Supreme Court Rule 188(1) (1986) [hereinafter SCR].

The proposed action would be directly contrary to this rule. Similar plans have been considered in other jurisdictions and found to constitute an impermissible division of fees with a nonlawyer, notwithstanding the fact that the contribution to the church or charity is made by the client directly and not by the attorney. Arizona State Bar Comm. on Rules of Professional Conduct, Op. 79-15 (June 6, 1979); Iowa State Bar Ass'n Comm. on Professional Ethics and Conduct, Op. 84-7 (Jan. 18, 1985).

It is, therefore, the opinion of the Committee that any arrangement whereby an attorney agrees to perform specified legal services for the members of an organization upon the express understanding that all or any specified portion of the fee so earned will be contributed to the organization, directly by the client or by the attorney after receipt from the client, constitutes fee splitting in violation of SCR 188.

SCR 188 dispositively answers the inquiry presented to the Committee. Three additional problems are noted in passing, however. First, while SCR 196 and 197 permit advertising and certain limited types of solicitation, both rules are subject to the strictures of SCR 195, which provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

1. Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading . . .

Although the Committee has not found any opinions from other jurisdictions considering a proposal identical to the one here involved, the problem presented is the same as in the case of discounted fees. That problem has been stated as follows:

The principal concern with offering a discount from customary fees is the potential that the offer may be misleading in violation of [the Rule]. If the lawyer has customary fees for various services that are readily ascertainable, then it is permissible to offer to discount them. The difficulty is in determining what is a "customary fee."

New York State Bar Ass'n Comm. on Professional Ethics, Op 563 (Oct. 1, 1984) (emphasis added).

The question posed to the Committee here involves the "normal fee for preparation of wills and trusts." The range of fees for such services can be enormous - from less than \$100 for a simple will to thousands of dollars for a complex trust. Absent a standard by which objectively to ascertain the "normal" or "customary" fee for such services, problems could arise under SCR 195. See Nassau County (New York) Bar Ass'n Comm. on Professional Ethics Comm., 83-2 (Feb 23, 1983) Oregon State Bar Legal Ethics Comm., Op. 448 (July 1980.)

The second problem is that in the event any client participating in the program described in the inquiry desires to name the church as devisee or legatee under his will or as beneficiary under any trust, potential violations of SCR 157 (conflict of interest) and SCR 67 (duty to exercise independent professional judgment) immediately arise. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1288 (June 17, 1974); Montana State Bar Ethics Comm., Op. 26 (March. 1982); New York County Lawyers' Ass'n Comm. on Professional Ethics, Op. 656 (Sept. 23, 1980).

Finally, if the church, directly or indirectly, becomes involved in soliciting its members to

participate in the program, it would appear that such activity by the church would be unlawful. Nev. Rev. Stat. § 7.045 (1985) (unlawful or nonlawyers to solicit legal fees on behalf of lawyers).

## **CONCLUSION**

An attorney may not, in conjunction with fund-raising efforts of a church of which the attorney is a member, mail a letter to all church members and sponsors informing them that the attorney will waive one-half of his normal fee for preparation of wills and trusts, if the client will agree to donate the one-half saved to the church.

*This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.*



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## **STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 6  
September 24, 1987**

**QUESTION** - May a practicing lawyer operate a collateral business through which he places temporary secretarial and clerical help in other law offices?

**ANSWER** - A lawyer should not operate such a collateral business unless he devises and adopts measures to ensure that:

1. The lawyer does not place temporary help in offices with which he has matters pending;
2. The employees clearly understand they must preserve client confidences and avoid

working on matters they have worked on for the lawyer or in other law offices; and  
3. The lawyers who use the temporary secretarial service are told that the owner/operator of the service is himself an active lawyer.

## **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rules) 156, 187, 203(1) (1987)

## **DISCUSSION**

Lay employees who move from office to office, whether permanent, part-time, or temporary, present a threat to client confidences. Nevada Supreme Court Rule 156(1) (1987) [hereinafter "SCR", entitled "Confidentiality of Information," states the general rule:

A lawyer shall not reveal information relating to the representation of a client....

By its terms, SCR 156(1) does not apply to nonlawyer assistants. It is made applicable to their conduct, however, by SCR 187 and 203(1).

SCR 187 establishes a duty of supervision in the lawyer who employs nonlawyer assistants. It provides:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

1. A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
2. A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
3. A lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
  - (a) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (b) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.

Under SCR 187, "partners and those who supervise nonlegal assistants, such as secretaries and paraprofessionals, must take steps to see that breaches of confidentiality 'incompatible with [SCR 156(1)] do not occur through the actions of such personnel." G. Hazard & W. Hodes, *The Law of Lawyering* 464 (1986) [hereinafter "Hazard & Hodes"].

SCR 187 addresses the duty of the lawyer who first hires or exposes a lay employee to client confidences. SCR 203(1) complements SCR 187 by imposing a duty on the lawyer who hires another lawyer's employee to prevent the employee from betraying the first lawyer's client confidences. Thus, SCR 203(1) establishes it as "professional misconduct" for a lawyer to "[v]iolate or attempt to violate the rules of professional misconduct,

knowingly assist or induce another to do so, or do so through the acts of another." Under this rule, a lawyer may not hire another lawyer's lay employee unless he takes reasonable steps to ensure that the employee honors the other lawyer's duty of confidentiality to his clients. See Florida

Bar Professional Ethics Comm., Op. 86-5 (Aug. 1, 1986); Virginia State Bar Comm. on Legal Ethics, Op. 745 (Dec. 4, 1985); cf. Hazard & Hodes, *supra* p. 2, at 570 [illustrative case (a)].

There is nothing per se improper, under the principles just stated, in a lawyer operating a collateral business through which he places temporary secretarial and clerical help in other law offices so long as the lawyer does not place temporary help in offices against which the lawyer has adversary matters pending and adequately instructs the employees in their duty of confidentiality to the clients on whose files they work. See Oregon State Bar Legal Ethics Comm., Op. 226 (June 2, 1972) (lawyer may permit employees to work part-time for other firms so long as they do not work in offices against which the lawyer has cases pending); New York State Bar Ass'n Comm. on Professional Ethics, Op. 386 (Apr. 24, 1975) (to like effect). The lawyer conducting the business must carefully instruct each employee the rules of professional conduct, including the duty of confidentiality. SCR 187; see Florida Bar Professional Ethics Comm., Op. 86-4 (Aug. 1, 1986) (lawyer whose lay employee leaves to go to work for firm against whom lawyer occasionally litigates must instruct the departing employee in the duty of confidentiality); Wisconsin State Bar Comm. on Professional Ethics, Op. E-86-15 (Dec. 12, 1986) (to like effect). The lawyer who hires the temporary help must also take care to prevent "leaking" of confidences by such employees. SCR 203(1); see Tennessee Supreme Court Board of Professional Responsibility Ethics Comm., Op. 85-F-99 (Sept. 12, 1985) (a lawyer who leases employees from an employment agency must exercise "reasonable care" to prevent disclosure by them of confidential information and instruct the leased employees in their duty of confidentiality).

The real problem with the hypothetical before the Committee is the possibility that the lawyer will place temporary clerical or secretarial help in offices against which he has adversary matters pending. Other state ethics committees have addressed the related question of whether a firm may hire a departing nonlawyer employee of another firm when the firms have adversary matters pending and given varying responses, depending on whether client consent has been sought and obtained and on such additional factors as the access the employee had to confidential information, the relationship between the information and the issues in the case, the nature of the employee's duties, the risk of inadvertent disclosure, and the feasibility of instituting a "Chinese Wall" or other method of separating the employee from the matter. For a general discussion see Philadelphia Bar Ass'n Professional Guidance Comm., Op. 80-77 (1980); see also Florida Bar Professional Ethics Comm., Op. No. 86-5 (Aug. 1, 1986) (it is not improper to hire a secretary from a firm against which the hiring firm has pending matters, so long as the first firm's clients are advised and consent); Michigan Bar Association Op. C10-798 (July 9, 1982, (to like effect provided client consent is obtained and a "Chinese Wall" established); New York State Bar Ass'n Comm. on Professional Ethics, Op. 422

(Nov. 6, 1975) (a lawyer may hire a secretary who worked at another firm against which the hiring lawyer has adversary matters pending provided he prohibits the secretary from divulging confidential information). But see Oregon State Bar Legal Ethics Comm., Op. 435 (Jan. 1980) (lawyer who hires secretary of firm against whom he has matter pending must withdraw where secretary worked on the matter previously and had access to confidential information); Vermont Bar Ass'n Com. On Professional Responsibility, Op. 79-28 (Feb. 1980) (a paralegal employee who has worked extensively on a case and is privy to confidential information concerning it cannot be hired by opposing counsel without creating an intolerable appearance of impropriety which will require the law firm to withdraw unless another solution is reached).

This case does not involve employees leaving one firm to work for another but employees working simultaneously for more than one lawyer and moving from office to office on a short-term, temporary basis. Addressing part-time employees who work for more than one firm, both the New York and Oregon State Bar Associations have concluded that it "is improper for a lawyer to employ a part-time secretary if he knows she will continue her employment at another law firm with which he has periodic adversarial matters." New York State Bar Ass'n Comm. on Professional Ethics, Op. 386 (Apr. 24, 1975; Oregon State Bar Legal Ethics Comm., Op. 226 (June 2, 1972); see also ABA Comm. on Professional Ethics, Op. 692 (Feb. 25, 1964) (a law firm engaged in criminal practice may not employ as a secretary in a confidential capacity the wife of a police detective, when the possible result is that the police would thereby gain access to confidential information otherwise not available to them). The duty of confidentiality is too important to be subjected to the risk that a lay employee's divided loyalties to simultaneous employers will lead to its breach, whether intentional or inadvertent. In the case of temporary or short term employees, moreover, the time does not permit consultation with clients, erection of Chinese Walls, or implementation of the other screening measures that can make tolerable the employment by one firm of another firm's former confidential employee. See also Tennessee Supreme Court Board of Professional Responsibility Ethics Comm., Op. 85-F-99 (Sept. 12, 1985) (in approving a "leased" employee arrangement, the Committee emphasized that the employees were to be leased on a long-term basis, which would permit the leasing lawyer time to counsel the employees as to their duty of confidentiality).

The temporary employees involved in the inquiry to this Committee present the same, even more acute problem of divided or confused loyalties as the part-time employees addressed in the New York and Oregon Bar Association Opinions. The lawyer who employs them is not a mere passive investor in an independently managed temporary secretarial agency; he owns and operates the business, side-by-side with his law practice. The inquiry to this Committee does not state whether the temporary employees also work for the lawyer in connection with his law practice, but even if they do not, the risk of inadvertent or intentional disclosure of confidential information is too great on the facts before the Committee to permit the lawyer to place temporary personnel in offices against which he has adversary matters pending.

To comply with his ethical obligations, the lawyer in question should maintain careful

records of those lawyers against whom he has cases pending and decline to place temporary help in their offices. He should also inform lawyers who use his temporary help service that he is a lawyer, so they may exercise their own independent judgment regarding the propriety of using his employees.

Temporary employees frequently move from office to office. In view of this fact, both the lawyer operating the employment agency and the lawyers who use his services have a heightened duty to admonish the temporary employees not to disclose any confidential information, and to avoid exposing them to files regarding which they have pre-existing confidential knowledge.

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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 7  
October 15, 1987**

- QUESTION** - May a lawyer mail solicitation letters regarding the following:
- (1) To inform persons whose homes are about to be foreclosed of the option of curing arrearages over five years under a Chapter 13 bankruptcy plan;
  - (2) To inform persons against whom Internal Revenue Service tax liens have been filed of the option of avoiding garnishment or foreclosure or both, and paying the debt owed to the Internal Revenue Service over a period of five years under a Chapter 13 bankruptcy plan;
  - (3) To inform persons similarly situated to litigants in pending litigation of their potential

rights regarding the legality of Internal Revenue Service assessment made in the aftermath of certain tax court decision?

**ANSWER** - Nevada Supreme Court Rule 197 (1987) prohibits a lawyer from mailing solicitation letters to specific persons known to require legal services because of pending foreclosure, existing liens or involvement in previous litigation in which a judgment was entered against the person is presently the subject of post-judgment proceedings where no family or previous professional relationship exists between the lawyer and the person.

Absent a supervening determination from either the Supreme Court of the United States or the Nevada Supreme Court, the prohibition of certain types of solicitation contained in SCR 197 may constitutionally apply in circumstances like those described above.

### **AUTHORITIES RELIED ON**

Nevada Rule of Professional Conduct (Supreme Court Rule) 197 (1987).

### **DISCUSSION**

The committee was asked to consider this question in light of Nevada Supreme Court Rule 198 (1987) ("SCR"), entitled "Communication of Fields of Practice." However, it is the committee's opinion that this question is more properly evaluated in light of SCR 197, entitled "Direct Contact with Prospective Clients."

The Committee reaches this conclusion based on the method to be used to select persons who are to receive one or more of the solicitation letters. The attorney requesting this opinion has provided the committee with blank forms of the three letters that he proposes to send to each of the three categories of persons specified in the question stated above. Persons in the first category would receive a letter based on the fact that a notice of foreclosure sale affecting their property was published in a legal newspaper. Persons in the second category would receive a different letter based on the fact that the Internal Revenue Service published a notice of the filing of a tax lien affecting that person's property in the same legal newspaper. Persons in the third category would be selected to receive another letter based on information developed from the review of tax court records regarding cases recently disposed of. Based on the method to be used to select persons who are to receive the solicitation letters, it is the committee's opinion that this question properly involves direct contact with prospective clients rather than communication of a lawyer's fields of practice.

SCR 197 addresses the solicitation of professional employment from a prospective client. The rule reads:

A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not

include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

The attorney requesting this opinion has asked the committee to consider this question in light of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Leoni v. State Bar of California*, 704 P.2d 183 (Cal. Sup. Ct. 1985) appeal dismissed, U.S. , 106 S.Ct. 1170 (1986); *In Re Von Wiegen*, 470 N.E.2d 838 (N.Y. App. Ct. 1984) cert. Denied, 472 U.S. 1007 (1985) and *Grievance Committee v. Trantolo*, 470 A.2d 235 (Conn. Sup. Ct. 1984).

Implicit in the requested consideration of case authorities cited in the previous paragraph is the suggestion that the solicitation standards in SCR 197 are constitutionally infirm. The committee does not accept the suggested conclusion. *Zauderer* is an advertising case which does not reach the direct mail solicitation issue involved in this opinion. *Leoni* deals with a targeted direct mail program using letters and pamphlets which the court treats like misleading advertising. *Von Wiegen* involves, in part, the direct mail solicitation of certain accident victims and their families under a professional responsibility rule that that court characterizes as a complete ban on this type of solicitation. *Trantolo* involves, in part, the direct mail solicitation of realtors under a professional responsibility rule that the court concludes is a blanket prohibition of mailed solicitations to third parties. As stated earlier, this opinion does not involve public advertising nor does it arise under a rule of professional responsibility that can be characterized as a blanket prohibition of mailed solicitations to third parties.

The committee recognizes that the cases discussed in the two preceding paragraphs are not the only authorities that appear to question the constitutionality of a rule like SCR 197. *Adams v Attorney Registration & Disciplinary Com'n.*, 617 F. Supp. 449 (D.C. Ill. 1985) aff'd, 801 F.2d 968 (7th Cir. 1986) involves, in part a bankruptcy lawyer who wants to send direct mail materials offering his professional bankruptcy services to people whose names appear on state court lists of debtors against whom a judgment has been entered. The applicable Rule of Professional Responsibility reads in relevant part:

(b) A lawyer may initiate contact with a prospective client in the following circumstances:

.....

(2) By written communication distributed generally to persons not known in a specific matter to require such legal services as the lawyer offers to provide but who in general might find such services to be useful and providing that such letters and circulars and the envelopes containing them are plainly labeled advertising material;

Illinois Supreme Court Disciplinary Rule 2-103.

The district court enjoined the enforcement of the disciplinary rule in the circumstance of

this type of targeted direct mail solicitation.

The district court contrasted *Zauderer v. Office of Disciplinary Counsel*, supra, with *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) and *In Re R.M.J.*, 455 U.S. 191 (1982) and concluded that the protection afforded lawyer "print" advertising precludes the disciplinary rule's overly broad prohibition against these targeted mailings. The court pointed out that targeted mail solicitation is properly subject to regulation to prevent misleading communication. However, the court could not see a justification for the conclusion that targeted mail solicitation should be completely banned because it may promote invasions of privacy, overreaching and undue influence which justifies the total prohibition of in-person solicitation. *Adams v. Attorney Registration & Disciplinary Com'n.*, supra, 617 F. Supp. At 451-455. The court of appeals in affirming this reasoning points out that targeted mailings subject an individual to less harassment, overreaching and duress than personal contact does stating: "It is easier to throw out unwanted mail than an uninvited guest." *Adams v. Attorney Registration & Disciplinary Com'n.*, 801 F.2d 968, 973 (7th Cir. 1986).

In *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Pa. 1984 ) aff'd, 760 F.2d 261 (3rd Cir. 1985), the district court addresses another concern raised as a justification against direct mail solicitation. In that case the Rules of Professional Responsibility provide:

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer.

Pennsylvania Disciplinary Rule 2-103(A). The Rules also provide:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice....

Pennsylvania Disciplinary Rule 2-104(A). The attorney in this case wanted to claim that he was an experienced pilot and computer programmer in direct mail solicitation letters individually addressed to aircraft owners, aircraft pilots, computer users, computer operators, and others.

The district court agreed with the state that the claims the attorney wanted to make were inherently misleading but disagreed with the state that an absolute prohibition of direct mail solicitation was justified or permissible. In support of its position, the state argued that the prohibition of direct mail solicitation prevented undue influence, intimidation and overreaching where the lawyer's letter reached a vulnerable recipient. The court rejected this contention stating:

Even if the state could identify specific situations in which mail recipients were particularly susceptible or vulnerable to the persuasive influence contained in a lawyer's letter, an absolute prohibition of direct mails would not be justified. Rather, direct mails

could be banned only in those identified circumstances.

*Spencer v. Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. At 890. Similar considerations concerning direct mail solicitation as those analyzed in *Adams and Spencer* are noted and approved of in the circumstances where a bankruptcy law clinic mailed its pamphlet to persons facing foreclosure on their homes. In *Re Damon*, 40 B.R. 367 (Bkr. S.D.N.Y. 1984). However other courts have reached a different conclusion regarding the propriety of targeted direct mail solicitation.

SCR 197 is taken from Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct (Adopted August 2, 1983). The comment accompanying Rule 7.3 discusses the dangers of false and misleading representations and the possibility of undue influence, intimidation and over-reaching that may be present in direct solicitation whether the solicitation is in-person or by mail and goes on to state:

These dangers attend direct solicitation whether in-person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition. One proposed safeguard is to require that the designation 'Advertising' be stamped on any envelop containing a solicitation letter. This would do nothing to assure the accuracy and reliability of the contents. Another suggestion is that solicitation letters be filed with a state regulatory agency. This would be ineffective as a practical matter. State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading. In any event, such review would be after the fact, potentially too late to avert the undesirable consequences of disseminating false and misleading material.

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mails not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

American Bar Association's Model Rules of Professional Conduct (1983), p. 30.

These concerns were considered and approved of very recently by the Supreme Court of Kentucky when it endorsed Model Rule 7.3 as the appropriate rule concerning solicitation by lawyers in that state. The court stated:

This Court is not unmindful of the serious potential for abuse inherent in direct Solicitation by lawyers of potential clients known to need specific legal services. Such

solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of possibility of undue influence, overreaching and intimidation.

As provided in the Model Rules which are now under consideration by this Court and members of the Kentucky Bar Association, as well as current rules, advertising makes it possible for a potential client to be informed about the need for legal services and about the qualifications of available lawyers without subjecting them to direct personal pressure. The use of general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation.

We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation.

Such dangers result from direct solicitation whether in person or by mail. General mailings not addressed to a specific situation do not have the same danger for abuse as direct target mailing.

*Shapero v. Kentucky Bar Ass'n.*, 726 S.W. 2d 299, 301 (Ky. 1987). Absent, a supervening decision by the Supreme Court of the United States or the Supreme Court of the State of Nevada, the committee adopts the rationale of the Supreme Court of Kentucky and determines that SCR 197 may be applied to the issue addressed in this opinion.

The first concern in applying SCR 197 to the proposed solicitation letters is whether the letters and method for selecting their recipients are solicitation within the meaning of SCR 197. Based on the text of the sample letters received by the committee, it is apparent that they

are written communication from the lawyer that would be directed to a specific recipient. We must assume for purposes of this opinion that the specific recipient of the letter enjoys no family or prior professional relationship with the lawyer. The content of the sample letters makes it apparent that a significant motive for transmitting the letter is the lawyer's pecuniary gain because the letter outlines the recipient's legal situation in very general terms, discusses possible legal avenues that may be pursued (i.e., filing a Chapter 13 petition in the United States Bankruptcy Court), states the lawyer's fee for filing the petition and closes with an offer of the lawyer's professional services. The only other concern is whether the letter is excluded from SCR 197 because of the last sentence contained in that rule.

The last sentence of SCR 197 reads in part:

The term 'solicit'... does not include letters addressed...to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Contrasting this language with the text of the sample letters, it is apparent that the lawyer knows that the recipient is in need of legal services. It is entirely possible that the potential client receiving one of these letters may feel overwhelmed by the situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment and a natural protective self-interest. *Shapero v. Kentucky Bar Ass'n.*, supra, 726 S.W.2d at 301. See also *State v. Moses*, 642 P.2d 1004, 1007 (Kan. 1982) (lawyer's direct mail solicitation for real estate listings grounds for discipline) and *In Re Frank*, 440 N.E.2d 676, 677 (Ind. 1982) (lawyer's direct mail solicitation of persons charged with crime grounds for discipline). Consequently, the proposed direct mail solicitation of specific persons known to presently require legal services because of pending foreclosure, existing liens or involvement in previous litigation would be improper under SCR 197 absent the lawyer having a family or prior professional relationship with the person

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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 8  
February 18, 1987**

**QUESTION** - May a lawyer who is personally involved in a dispute with nonlawyers communicate directly with the nonlawyers about the dispute after having been asked to communicate only through counsel?

**ANSWER** - No. Having been asked to do so, the lawyer-party should refrain from contacting the adversaries directly. Even if there is no express request, the lawyer should refrain from contacting personal adversaries known to be represented in the specific matter by another lawyer, without the other lawyer's consent. The adversaries' lawyer should not withhold consent unreasonably.

### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct  
(Supreme Court Rules) 171(1), 182, 184, 203(1) (1968)

### **DISCUSSION**

Communications with adverse parties are governed by Nevada Supreme Court Rule 182 (1986) [hereinafter SCR]: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Cf. Model Rules of Professional Conduct Rule 4.1 (1983) (identical to SCR 182). The rule against direct communication applies whether or not the parties are in litigation. Model Rules of Professional Conduct Rule 4.2 comment (1983).

The purpose of the Rule is "to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer." ABA/BNA Lawyers' Manual on Professional Conduct 71:303 (1984); see also *United States v. Jamil*, 546 F. Supp. 646, 652, 654 (E.D.N.Y. 1982) (the rule "protects an adverse party from the imbalance of skill and knowledge between laymen and lawyers," and "from squandering a possible claim or defense"; it also ([e]nsure[s] against disclosure of privileged information").

The rule's applicability is clear where a lawyer representing a party communicates with the party's adversary, bypassing the adversary's lawyer. It is not so clear where the communications are between two parties, one of whom just happens to be a lawyer. The rule allows "parties to a matter [to] communicate directly with each other." Model Rules of Professional Conduct Rule 4.2 comment (1983); see also *Kleiner v. First National Bank of Atlanta*, 102 F.R.D. 754, 769 (N.D. Ga. 1983). Thus, it could be argued that lawyers acting in their capacities as parties may communicate directly with other parties. Cf. *United States v. Dennis*, 645 F.2d 517, 523 (5th Cir. 1981) (it is not an ethics violation for an FBI agent who is a law school graduate but not a member of any bar to interview a criminal defendant who is represented by counsel, because "the agent is not acting as an attorney"). It could be further argued that otherwise laudable efforts to resolve personal disputes privately should not be prevented simply because one of the disputants happens to be a lawyer. The generalization that a lawyer always has the advantage over lay adversaries could be dismissed as conceit.

Nevertheless, in the only opinion we have found directly addressing this question, a state bar ethics committee held that a lawyer must not communicate with represented parties even though the lawyer is acting as a party to the matter. South Carolina Bar Ethics Advisory Comm., Op. 86-10 (June 16, 1986) (decided under comparable provision - DR 7-104(A) (1) -of the Model Code of Professional Responsibility). The South Carolina Bar committee stated that "a lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity." Id. (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 336 (June 3, 1974)).

The inquiry before the Committee does not require such a sweeping interpretation of SCR 182. The crucial point here is the hypothesis that the lawyer has been asked to communicate with the adversaries only through their counsel, which suggests that direct communications are a burden to them. The lawyer has an obligation not to burden others through conduct serving no other substantial purpose. SCR 184. We cannot see how dealing through counsel would prejudice the lawyer. Therefore, the lawyer should honor the request and refrain from dealing with his adversaries except through their counsel.

The Committee also believes that under SCR 182 a lawyer-party should not communicate directly with represented adversaries even where no express request has been made. In this context, the meaning of "represented" is restricted. SCR 182 prohibits communications with persons a lawyer knows to be represented "in the matter" by another lawyer. We interpret "in the matter" as limiting the prohibition against direct communication to situations where a lawyer learns during the course of a specific controversy that his or his clients' adversaries are represented by another lawyer with respect to the subject matter under discussion or at issue. Thus, if a lawyer or the lawyer's client has a dispute with (for example) a landlord or a creditor or a neighbor, the lawyer can talk to the landlord, creditor, or neighbor about the dispute, even though the lawyer knows that the person is or has been represented by counsel on other matters. But if the lawyer learns that the adversary has referred the matter in question to counsel, the lawyer's communications with the adversary should cease. By referring the dispute, the adversary signals his decision to have it handled by counsel. The lawyer should respect that decision, even if he is personally a party to the dispute, by obtaining the other lawyer's consent before communicating directly with the adversary. When considering requests for consent, the other lawyer should keep in mind the duty to "make reasonable efforts to expedite litigation consistent with the interests of the client." SCR 171(1). Accordingly, the other lawyer should freely consent to direct communications where they will facilitate a resolution without jeopardizing the client's interests.

## **CONCLUSION**

A lawyer personally involved in a dispute should not communicate directly with adversaries who are represented by another lawyer in connection with the specific dispute, unless the other lawyer consents. The other lawyer should not withhold consent unreasonably.

*This opinion is issued by the Standing Committee on Ethics and Professional*

*Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with the regulatory responsibilities, or any member of the State Bar.*



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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 9  
April 21, 1988**

- QUESTIONS** - 1. Is an attorney required to disclose to the insurance company which hires him to defend a personal injury lawsuit arising from a vehicle accident information communicated by the insured client as to potential fraud of the client in obtaining vehicle liability insurance?
2. Does the client's communication of information as to potential fraud in obtaining vehicle liability insurance create a conflict of interest which requires or suggests a) the attorney withdraw his representation from client or b) terminate his employment by the insurance company?
3. Does the client's disclosure create a conflict of interest which precludes the attorney from accepting compensation from the insurance company for representing the client?

**ANSWERS**

1. Information communicated by an insured client to his attorney as to potential fraud in obtaining vehicle liability insurance is confidential. Unless the client consents to disclosure, it would be a violation of Nevada Supreme Court Rule 156 (hereinafter SCR) for attorney to reveal such information to the insurance company which hired him because a) disclosure is not impliedly authorized to carry out attorney's representation, b) there is no threatened criminal act likely to result in death or bodily harm, c) the

attorney's services have not been used in the commission of the fraud, and d) disclosure is not necessary for the attorney's self-defense.

2. Information of the potential fraud communicated by client to the attorney does not create a conflict of interest within the meaning of SCR 157 to require that attorney withdraw his representation from the client or terminate his employment by the insurance company provided that a) the attorney believes his representation of client will not be adversely affected and b) the client consents to continuing representation. Nor does the communication suggest the attorney should consider withdrawal under SCR 166 because a) continuing representation does not violate the Nevada Rules of Professional Conduct or other law, b) the client has not used the attorney's services to perpetrate the fraud and c) the fraud does not involve continuing use of the attorney's services.

3. Client's communication of potential fraud in obtaining vehicle insurance does not create a conflict of interest under SCR 158 to require the attorney decline compensation from the insurance company provided a) the client consents after consultation, b) there is no interference with the attorney's independence of professional judgment or the client-lawyer relationship and c) information relating to representation of the client is protected as required by SCR 156.

### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rules) 152, 154, 156, 157, 158, 166, 167, 172 and 181.

Nevada Revised Statutes, Sections 49.035 through 49.115 (1971).

### **DISCUSSION**

The questions presented arise from a hypothetical fact situation submitted to the Ethics Committee wherein attorney is hired by client's insurance company to defend client regarding a complaint filed against client alleging client, as owner of a vehicle, negligently entrusted the vehicle to client's brother's friend. Client's brother's friend then became involved in an accident injuring plaintiff. Client is, in fact, the title owner and registered owner of the vehicle involved in the accident. Prior to the accident, client's brother had been cited on numerous occasions for driving while under the influence and was unable to obtain automobile insurance because of his poor driving record.

Significant discovery has taken place in litigation over the accident, although no trial has been set. Recently, client advised attorney that the vehicle involved in the accident was for client's brother to use and that the only reason client was the title owner and registered owner was so that he could obtain insurance for the vehicle. It is likely that if such information had been known to client's insurance company, the policy would have been written so as to exclude client's brother from coverage or not written at all. It is further likely that such information could provide client's insurance company with ground to deny coverage.

The attorney submitting the hypothetical fact situation requests the Committee advise the best method for the attorney involved to handle the situation and the reasons for the Committee's opinion.

It is assumed by the Committee that the attorney has been hired solely to represent the client in defense of the vehicle accident and not for the purpose of advising the insurance company on questions of coverage. It is further assumed, without deciding, and for purpose of this opinion only, that client's conduct in obtaining insurance constituted a "fraudulent act" within the meaning of SCR 156. Whether the client actually committed fraud is a question of law beyond the scope or jurisdiction of this Committee. It is suggested the attorney advise client that fraud may have been committed, and if discovered independently by the insurance company, this may be grounds for denial of coverage and possible criminal prosecution. Accordingly, client should be advised of his right to consult with other counsel as to these matters.

An attorney hired by an insurance company to represent an insured owes that person the same unswerving allegiance and fidelity that would be owed if the attorney were retained and paid personally by the insured. *Glacier Gen. Assurance Co. v. Superior Court*, 95 Cal. App. 3d 836, 157 Cal. Rptr. 435, 436 (1979) ("overall", . . . the attorney's primary duty is to the insured"), *Mead Corp. v. Liberty Mut. Ins. Co.*, 107 Ga. App. 167, 129 S.E. 2d 162, 165 (1962) (Attorneys, whether or not paid by insurance companies, owe their primary obligation to the insured they are employed to defend"); *Apex Mut. Ins. Co. v. Christner*, 99 Ill. App. 2d 153, 240 N.E. 2d 742, 753 (1968) (counsel provided by insurer represents only the insured); *Jackson v. Trapier*, 42 Misc. 2d 139, 247 N.Y.S. 2d 315, 316 (Sup. Ct. 1964) (counsel provided by insurer represents solely interest of the insured); *American Employers Ins. Co. v. Goble Aircraft Specialities, Inc.*, 205 Misc. 1066, 131 N.Y.S. 2d 393, 401 (Sup. Ct. 1954) (counsel provided by insurer has "paramount" duty to insured).

The attorney should consult with client to confirm the confidential nature of the information and the attorney's duty to maintain the confidence unless the client otherwise consents to disclosure. This is in conformity with the general rule of attorney-client privilege (Nev. Rev. Stat. Sec. 49.095) pertaining to confidential communications. Such information is not to be released unless authorized by the client.

"A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Nev. Rev. Stat. Sec. 49.055.

The general rule of confidentiality under the Nevada Rules of Professional Conduct, SCR 156, is that all information conveyed by the client, unless subject to stated exceptions, is confidential. The exceptions include disclosures that are "impliedly authorized" to carry out representation and disclosures required or permitted under subsections 2 and 3 of the rule

SCR 156(2) mandates disclosure where the attorney "reasonably believes" disclosure is necessary to prevent the client from committing a criminal act that the attorney believes is likely to result in "imminent death or substantial bodily harm." This exception is not

applicable under the facts submitted.

SCR 156 (3) (a) allows discretionary disclosure to the extent the attorney "reasonably believes" necessary:

"(a) To prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action. . . ."

Disclosure is further allowed under SCR 156(3) (b) to establish a claim or defense in behalf of the attorney in a controversy between the attorney and client, to establish defense to a criminal charge or civil claim against the attorney based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the attorney's representation of the client. This is commonly known as the "self-defense" exception.

Neither of the exceptions to discretionary disclosure applies in this case to overcome the general rule of confidentiality. First, the client's fraudulent conduct in obtaining vehicle insurance for his brother occurred before attorney's representation and not in the course of representation. Discovery of the fraudulent conduct was "incidental" to the attorney's representation. The attorney's conduct was not "instrumental" in the commission of the fraud. Secondly, the fraud has already occurred and cannot be prevented by the attorney's disclosure. In accord, see *Sloan v. State Bar*, 102 Nev. Adv. Opn. 97, 726 P.2d 330 (1986).

SCR 156 (formerly SCR 179), is derived from the Model Rules of Professional Conduct adopted by the American Bar Association with amendments approved by the Nevada Supreme Court based upon analysis of the confidentiality problem and proposal for solution by Professor Geoffrey C. Hazard, Jr., reporter for the Model Rules, in his article entitled "Rectification of Client Fraud: Death and Revival of Professional Norm", 33 EMORY LAW JOURNAL 271 (1985). SCR 156(3) (a) embodies the language suggested by Professor Hazard. *Id.*, 308. As noted by Professor Hazard, the rule requires a connection between attorney services and the fraud before the attorney has discretion to reveal the information. It draws the line between not being an "instrument of fraud", on the one hand, and not being a "policeman" on the other. It prevents disclosure of fraud that the lawyer discovers "incidental" to representation as opposed to that which is committed in the course of representation. The rule also includes both prevention rectification of fraud and requires warning and effort to persuade the client to take corrective action. *Id.*, 308-309.

The second issue to be considered is conflict of interest with respect to continued representation. The general rule concerning conflict of interest is embodied in SCR 157.

Subsection 2 of the rule states:

"2. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

- a) The lawyer reasonably believes the representation will not be adversely affected; and
- b) The client consents, preferably in writing, after consultation."

Since the insured is the client, not the insurance company (third party), the attorney must use his skill to present the best defense he can for the client. The Committee has previously stated this opinion is rendered on the assumption that the attorney is hired solely to represent the insured in defense of the negligence lawsuit. Were it otherwise, the attorney would have to determine if his representation of the insured would be "adversely affected" by his responsibilities to the insurance company on questions of coverage and would further be required to obtain the client's consent to dual representation. In such case, it is likely the attorney would find himself in a position of conflict of interest.

The conflict of interest problem where disclosure of confidential information occurs is demonstrated in *Parsons v. Continental National American Group*, 113 Arizona 223, 550 P.2d 94 (1976). In *Parsons*, the attorney obtained information from the insured client indicating the client had intentionally injured plaintiffs. The attorney felt compelled to convey the information to the company resulting in refusal to settle and pay judgment. The attorney continued to represent the insured and insurance company, and was further retained by the insurance company in defense of a subsequent garnishment proceeding to collect on the judgment. The Arizona Supreme Court, in its analysis of the conflict of interest created by the disclosure and continued representation, determined that the attorney should have notified the company that he could no longer represent it when he obtained information that could be detrimental to the client's interest in policy coverage. Relying on *Parsons* the Arizona State Bar Ethics Committee in Opinion No. 79-16, June 7, 1979, determined that an attorney involved in a similar fact situation must withdraw as counsel for the insurance company to avoid a conflict.

The problem with attorney withdrawal, either from representation of the client or the employment relationship with the insurance company is that the mere announcement or act of withdrawal, even without disclosure, is likely to place the insurance company on notice there is a problem which may result in defeat of coverage or other adverse consequences for the client. See comment in HAZARD, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* (1985), P. 430.1 ("an announcement of withdrawal usually signifies much more than the 'mere fact' of withdrawal.").

The client's "paramount" interest is obviously better served by the attorney continuing his employment relationship with the insurance company and his representation of the client where it is clear that his responsibility is to provide for the insured's defense and not to advise the insurance company on questions of coverage. This avoids the conflict of interest problem. It also avoids having to consider withdrawal under SCR 157 or SCR 166

for the reasons previously stated in the Committee's answer to question two.

The third issue is whether the attorney has a conflict of interest which ethically prohibits his accepting compensation from the insurance company under SCR 158(6), which states:

"6. A lawyer shall not accept compensation for representing a client from one other than the client unless:

- a) The client consents after consultation;
- b) There is no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship; and
- c) Information relating to representation of client is protected as required by Rule 156".

The requirement of SCR 158(6) (c) is satisfied since the information conveyed by the client is confidential and protected by SCR 156. It is thus incumbent upon the attorney to see that the requirements of SCR 156 (6) (a) and (b) are met. Presumably, the client will consent to the attorney's compensation by the company unless the client wishes to pay the attorney himself. It is further presumed acceptance of compensation from the company will not interfere with the attorney's independence of professional judgment or client-lawyer relationship since the attorney should know whether or not his employment relationship with the insurance company requires that he render advise on questions of coverage.

## CONCLUSION

The information communicated by client to attorney should be considered a confidential communication subject to SCR 156 which prohibits the attorney from disclosing to the insurance company the potential fraud of client in obtaining vehicle insurance for his brother. The attorney does not have a conflict of interest under SCR 157 provided he has been retained by the insurance company for the purpose of defending client in the negligence lawsuit and not for the purpose of advising the insurance company on questions of coverage. Attorney is not prohibited under SCR 158 from accepting compensation from the insurance company provided the client consents and there is no interference with attorney's independence of professional judgment or with the attorney-client relationship. Although not specifically required under the Nevada Rules of Professional Conduct, it is recommended that the attorney counsel with the client to refrain from future conduct of a fraudulent nature, including obtaining future vehicle insurance coverage for client's brother. This is consistent with the provision in SCR 156 (3) (a) to rectify client fraud and to avoid any appearance of impropriety in condoning fraudulent conduct.

*This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.*



# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 10 June 3, 1988

**QUESTION** - What are the ethical and professional responsibilities of an attorney whose client informs the attorney that the client has embezzled funds from his employer and the client induces the attorney to take possession of the embezzled funds?

**ANSWER** - An attorney cannot assert the attorney-client privilege as a justification for taking possession of and retaining the fruits of a crime. The funds should be surrendered to an appropriate law enforcement official having jurisdiction, with identification of the right owner, if known. The attorney should not disclose the client's communications surrounding the attorney's receipt of the funds.

#### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rules) 152 and 156.

#### **DISCUSSION**

An individual in the course of seeking advice from an attorney discloses the fact that he has embezzled monies from his place of employment. He informs the attorney he desires to admit his wrong, make partial restitution by returning the remaining balance of the monies, and appeal to the court for leniency.

Later the individual asks to place the remaining embezzled funds in the attorney's trust account for safekeeping to evidence his early intent to make partial restitution, while he counsels with his family and seeks counseling. The attorney accepts the money.

Subsequently, the individual in writing informs the attorney he has changed his mind, does not want to make disclosure of the facts, and asks for the return of the monies deposited in trust.

SCR 156 addresses confidentiality of information. The rule reads:

1. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections 2 and 3.
2. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.
3. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (a) to prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action; or
  - (b) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The effect of SCR 156 is modified by SCR 152, subsection 4, which reads as follows:

4. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

While SCR 156 is to be considered in deciding the question presented, the Committee is of the opinion that the confidentiality gained in the attorney-client relationship is not absolute. The common law prohibits an attorney from taking possession of the fruits of a crime, except for the limited purpose of turning them over to proper authority.

Though arising under variant fact patterns and under differing statements of the rule supporting the attorney-client privilege, all opinions addressing the subject hold that if counsel possesses the proceeds of a crime, counsel must disclose such to the appropriate authority. In re January, 534 F.2d 719 (7th Cir. 1976); In re Ryder, 263 F.Supp. 360 (E. D. Va. 1967) aff'd, 381 F.2d 713 (4th Cir. 1967); People v. Superior Court, 192 Cal. App. 3d 32, 237 Cal.Rptr. 158 Ct. App. 1987); People v. Meredith, 175 Cal.Rptr. 612, 613 P.2d 46 (1981); Morrell v. State, 575 P.2d 1200 (Alaska 1978); Anderson v. State, 297 So. 2d 871 (Fla. Dist. Ct. App. 1974) State v. Olwell, 394 P.2d 681 (Wash. 1984); California

State Bar comm. on Professional Responsibility and Conduct, Op. 1986-1989.

The policy compelling this result is best stated in *In re January*, 534 F.2d at 727: The recognition that an attorney need not produce stolen monies . . . would provide a mechanism by which a member of a learned profession could become the privileged repository of the fruits of a . . . crime. There is no reason for thinking that the policy of respecting the private enclave of individual citizens reaches that far.

While apparently unanimous in respect to compelling surrender of the fruits of a crime, the authorities are in disagreement as to whether or not the communications surrounding the possession of the property must or should be compelled. The Committee adopts the holding in *State v. Olwell* and *Andersons v. State*, supra, that though it is proper to turn over the property the attorney cannot be compelled to testify when, how and from whom the property was received.

### **CONCLUSION**

A lawyer who takes possession of the proceeds of a crime from his client must surrender them to the appropriate law enforcement official and identify the rightful owner if known. The attorney should not divulge the communications of the client surrounding the receipt of the proceeds.

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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 11  
May 10, 1989**

**QUESTION** - May a Nevada law firm's letterhead, which otherwise complies with SCR

199, show the firm's affiliation with an out-of-state law firm?

**ANSWER** - Yes.

### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rules) 199 (1988)

### **DISCUSSION**

A lawyer licensed to practice law in this state is interested in maintaining an office in one or more locations in Nevada. These offices will operate under the name of this attorney. The attorney is a member of an out-of-state law firm that maintains offices in other states. The attorney wants to demonstrate this affiliation with the out-of-state firm on his Nevada firm's letterhead. A specimen of the letterhead format is set out below.

Licensure Information (Name) Additional Offices  
 |For Named Attorney (Attorney at Law) (Name of Out-of-State Firm)  
 (Address) (Office Locations)  
 (Telephone) (Name of Out-of-State Firm)  
 (Office Location)

SCR 199 provides in part: "It shall be unprofessional conduct to use a firm name for a law firm unless each and every person whose name is used is a member of the state bar in good standing and a bona fide member of the firm." This rule is satisfied in this circumstance because the firm name used is the name of a member in good standing of the state bar and a bona fide member of the firm. The Nevada attorney is not attempting to practice in this jurisdiction under the name of the out-of-state firm. If that were the case, each person whose name appears in the name of the out-of-state firm would have to be a member of the Nevada bar.

A rule like SCR 199 has as its predicate the prevention of potentially misleading the public or prospective clients about the composition of the law firm based on the firm's name. In re Professional Ethics Advisory Comm. Opinion, 444 A.2d 1092, 1097-98 (N.J. 1982); but see New York Criminal and Civil Court Bar Ass'n v. Jacoby, 460 N.E.2d 1325, 1327 (N.Y. 1984). The Committee is of the opinion that the proposed letterhead is not misleading, since it is clear that the Nevada firm is practicing under the name of a Nevada attorney in compliance with SCR 199.

### **CONCLUSION**

A Nevada law firm satisfying the requirements of SCR 199 may indicate its affiliation with an out-of-state law firm on the law firm's letterhead.

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Bar



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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 12 May 10, 1989

**QUESTION** - May a private attorney or law firm send companies engaged in international business a form letter representing that the attorney or firm offers legal services in the areas of import-export and customs law?

**ANSWER** - Yes, with some qualifications. The attorney or firm must possess no information indicating that any recipient of the letter needs specific legal services in a specific matter; an attorney in the firm must have devoted at least 300 hours each year for the preceding two years in the field of practice being communicated to the public as a particular specialty of the firm; and the firm must comply with other requirements of SCR 198.

### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rules) 197, 198 (1987)

### **DISCUSSION**

Supreme Court Rule 197 states that lawyers shall not solicit professional employment by mail from individuals with whom the lawyer has no family or prior professional relationship if the lawyer's motive is pecuniary gain. These unlawful solicitations do not include "letters distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful." As long as the attorney possesses no information indicating that a recipient of the letter needs services in a specific legal matter of the type provided by the attorney, then the general prohibitions of SCR 197 are

not violated.

A separate issue is suggested by the communication to a targeted group that an attorney or firm offers services in a particular area of the law. Supreme Court Rule 198 states that an attorney may communicate that the attorney's practice is limited to a particular area of practice or that the lawyer practices primarily in a particular area. But this communication is allowed only if the attorney has devoted at least 300 hours in each of the preceding two years to the particular specialty and has completed at least six hours of accredited continuing legal education in the designated field during the preceding calendar year. The lawyer must notify the Board of Continuing Legal Education in writing that these requirements have been completed, specifying the courses, hours, and fields of practice. Also, the lawyer who communicates a field of practice pursuant to SCR 198 must keep time records to demonstrate compliance with the rule and make them available to the Board and to the State Bar Association on request. Finally, any communication to the public of a field of practice must identify the member or members of the firm together with their fields of practice and must be accompanied by the "Notice to the Public," as prescribed in SCR 198 (3) (a) and (b).

A final issue is whether a lawyer may communicate to the public that he or she practices in the specific area of "Import-Export and Customs Law." Supreme Court Rule 198 lists "Immigration and Customs Law" as an approved designation, but not "Import-Export and Customs Law." Nevertheless, SCR 198 specifies that a lawyer may communicate that the lawyer's practice is limited to the approved designations "and such others as are not false or misleading." As long as the representation that an attorney or firm practices "Import-Export and Customs Law" is not false or misleading, it does not violate SCR 198.

## **CONCLUSION**

A private attorney or law firm may write to companies engaged in international business and offer legal services in the areas of import-export and customs law if the attorney or firm possesses no information indicating that any recipient of the letter needs specific legal services in a specific matter, the attorney or an attorney in the firm devoted at least 300 hours each year for the preceding two years to the area of practice, the attorney complied with the other requirements of SCR 198, and the communication of the particular area of practice is not false or misleading.

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 13 May 28, 1993

**QUESTION** - May a lawyer who has been certified as a Certified Bankruptcy Attorney by the American Bankruptcy Board of Certification list this certification on his or her letterhead and business cards?

**ANSWER** - A lawyer who has been certified as a Certified Bankruptcy Attorney by the American Bankruptcy Board of Certification may list this certification on his or her letterhead and business cards so long as the disclaimer found in SCR 196(4) which states that: "The State Bar of Nevada does not certify any lawyer as a specialist or expert" is also included.

#### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rules) 195, 196, 196.5, 198; Bates v. State Bar of Arizona, 433 U.S. 350 (1977); In re R.M.J., 455 U.S. 191 (1981); Gary E. Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990); Ex Parte Howell, 487 S.2d 848 (Ala. 1986).

#### **DISCUSSION**

American Bankruptcy Board of Certification

The American Bankruptcy Board of Certification ("ABBC") is a private organization which provides a program for certification of bankruptcy attorneys.

ABBC provides certification for both consumer and business bankruptcy specialists. Generally applicants for ABBC certification have to provide proof of being in the active practice of law for at least five years, with at least 30% of their practice being devoted to bankruptcy-related matters for the last three years. Applicants must give evidence of handling a minimum number of diverse bankruptcy matters, including contested proceedings. The applicants also must sit for a day-long examination or have passed a state certification examination.

An attorney who has been certified by ABBC now asks if this certification may be included on letterhead and business cards.

## Supreme Court Rules

Effective April 24, 1993, the Nevada Supreme Court repealed previous Supreme Court Rules 195, 196 and 197 and substituted new rules in their place. References herein to these rules will be to the latest versions.

Supreme Court Rule (SCR" 195 is the same as Rule 7.1 of the ABA Model Rules of Professional Conduct ("Model Rules"). In pertinent part it states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

1. Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
2. Is likely to create an unjustified expectation about results the lawyer can achieve,.... (emphasis added)

SCR 196.5 also contains another general statement against false or misleading statements:

7. Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this rule shall not:

- (a) Be directly or impliedly false or misleading;
- (b) Be potentially false or misleading;
- (c) Fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;

SCR 196 provides that:

4. Except as provided in this section, all advertisements shall contain the following disclaimer: "The State Bar of Nevada does not certify any lawyer as a specialist or expert."

7. Every advertisement and written communication that indicates one or more areas of law in which the lawyer or law firm practices shall conform to the requirements of Rule 198."

12. The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 195:

(c) Technical and professional licenses granted by the state or other recognized licensing authorities.

(e) Fields of law in which the lawyer is certified or designated, subject to the requirements of Rule 198.

(emphasis added)

SCR 196.5 provides that lawyers may include in a "Lawyer's Biographical Data Form" areas of specialization under Rule 198, and other information detailing background, training and experience.

SCR 196.5(5)(b) further provides that whenever a potential client shall request information regarding the lawyer, the lawyer may furnish such additional factual information as is "deemed valuable to assist the client."

The Nevada Supreme Court Rules do not provide for specialty certification. SCR 198 is patterned after Rule 7.4 of the Model Rules and provides that properly registered patent attorneys and those engaged in admiralty practice may so designate themselves. SCR (198(3) states that a lawyer may communicate to the public that the lawyer's practice is limited to no more than three fields of practice from the group there listed, including "Bankruptcy Law," or such others as are not "false or misleading." Under SCR 198(s)(b), such a communication to the public must contain a somewhat longer version of the disclaimer contained in SCR 196(4). In addition, any attorney communicating such a limitation of practice must devote at least 300 hours per year to each field and complete at least 6 hours of accredited continuing legal education in the field.

### The Bates Case and Its Progeny

The answer to the present question is best considered in historical context. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the U.S. Supreme Court concluded that attorney advertising was a form of commercial speech, protected by the First Amendment and that "advertising by attorneys may not be subject to blanket suppression." In *re R.M. J.*, 455 U.S. 191, 199 (1981) (emphasis added).

In *re R.M.J.*, the Supreme Court reiterated the message of Bates that:

False, deceptive, or misleading advertising remains subject to restraint, and the (Bates) Court recognized that advertising by the professions poses special risks of deception-"because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."

In *re R.M.J.*, 455 U.S. 191, 200.

[T]he States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests.

In *re R.M.J.*, 455 U.S. 191, 207.

With some developments not relevant to the present inquiry, that is where the matter stood until the U.S. Supreme Court decided *Gary E. Peel v. Attorney Registration and Disciplinary Commission of Illinois*. 496 U.S. 91 (1990).

Gary Peel, like the inquirer, was certified by a private certifying group, in his case as a Certified Civil Trial Specialist by the National Board of Trial Advocacy ("NBTA"), which has similarly strict certifying requirements to those of the ABBC. His letterhead listed his certification.

Like Nevada, Illinois has no specialty certification program, but allows patent, trademark, and admiralty lawyers to identify themselves (See SCR 198 above; Illinois also has Disciplinary Rule 2-101(b) which parallels SCR 195's prohibition of false or misleading communications, including those communications made misleading by their failure to include necessary information).

Citing *In re R.M.J.*, five U.S. Supreme Court justices concluded that Mr. Peel's letterhead was constitutionally protected from a blanket ban, because it was not actually or inherently misleading. *Peel*, 496 U.S. 91, 110. They found that the facts stated on the letterhead were true and verifiable, and that there was no contention that any potential clients had actually been misled or deceived by the stationery. *Peel*, 496 U.S. 91, 100. This distinguished between statements of opinion or quality and statements of objective facts from which a potential client might draw an inference of quality. *Peel*, 496 U.S. 91, 101. A plurality opined that the public understands that licenses are issued by governmental agencies and that certificates are issued by private organizations. *Peel*, 496 U.S. 91, 102.

Responding to concerns that certifications might be issued by spurious certifying organizations whose certifications might be meaningless, the majority noted that there had been no showing that the burden of distinguishing between bona fide and bogus organizations would be significant or that state bar disciplinary committees could not police deceptive practices effectively. 496 U.S. 91, 109 In a statement that has particular applicability to the present inquiry, the Court said:

To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of specialty. *In re R.M.J.*, 455 U.S. 191, at 201-203. N17 A State may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA.

*Peel*, 496 U.S. 91, 110 (emphasis added)..

Justices Marshall and Brennan separately concurred that the letterhead was not actually nor inherently misleading. *Peel* 496 U.S. 91, 110. Noting that facts as well as opinions may be misleading when presented without adequate information, they concluded that the letterhead in question was potentially misleading in that it might imply governmental sanction of Mr. Peel's certification. *Peel* 496 U.S. 91, 112, 115. Because they felt that the claim of NBTA certification was potentially misleading, they suggested that states might enact measures other than a total ban to prevent deception and confusion. *Peel*, 496 U.S. 91, 116. A disclaimer was specifically suggested as a possible option. *Peel*, 496 U.S. 91, 117.

So, while a majority of the *Peel* court did not find his listing of his NTBA certification actually or inherently misleading, five of the *Peel* justices found the letterhead in that

case at least potentially misleading.

So, the power of states to regulate lawyer advertising may be summarized as follows:

- (1) Advertising which is false, deceptive, or misleading may be prohibited entirely.
- (2) Advertising which is presented in a way that is not deceptive, but is nonetheless potentially misleading, cannot be subject to a blanket prohibition. In those cases the state may require disclaimers or explanations or impose whatever other restrictions are necessary to prevent deception.
- (3) Advertising which is neither inherently nor potentially misleading may be regulated only if there is some substantial state interest involved. In that instance the state may promulgate regulations which are narrowly drawn so that they limit free speech only to the extent that the regulations further the state's substantial interests.

Ex Parte Howell, 487 S.2d 848, 850 (Ala. 1986) (citations omitted).

Note that the Peel decision did not change these parameters; the debate in Peel was as to which of the above categories might describe his communication.

Parenthetically, the American Bar Association Standing Committee on Specialization has been looking into the issue of private certifying organizations. It has developed a set of proposed standards. The purpose of the ABA Standards is to provide a national accreditation mechanism and uniform standards to permit state licensing agencies the option of using these private certifying groups rather than developing and administering their own separate specialty certifying plans.

In Nevada we have the advantage of empirical evidence that advertising in a particular area of practice is potentially misleading. The Nevada Study Committee On Lawyer Advertising, chaired by Peter Chase Neumann, commissioned a survey of public opinion on attitudes relative to lawyer advertising. The survey revealed that many Nevada residents believed that an attorney who advertised in an area of practice was certified as a specialist in that area and could be expected to give higher quality service. For this reason, the study committee recommended a disclaimer similar to the one adopted in SCR 196 to advise the public that Nevada did not offer specialty certification.

With narrow exceptions, SCR 196 requires a disclaimer in all advertisements and that no information be included other than that listed in SCR 196(12)(a)-(h) of the rule. One could argue that groups like ABBC and NBTA are "recognized licensing authorities" under SCR 196(12)(c) and that therefore a lawyer could list certification by one of these groups in his advertising, but the reference in SCR 196(12)(e) to "[f]ields of law in which the lawyer is certified or designated, subject to the requirements of Rule 198" effectively rules out this reading. (emphasis added) So any advertisement besides those excepted in SCR 196(4) must contain the disclaimer which informs the public that Nevada does not certify lawyers as specialists or experts.

However, that does not end the present inquiry, since SCR 196 requires a disclaimer only

in "advertisements." The specific question addressed to this committee relates to inclusion of certification information on letterhead and business cards.

A bald statement on letterhead and business cards that the inquirer's practice is limited to "Bankruptcy Law" would definitionally not be false or misleading and would be allowed under SCR 198(3).

Under Peel, inclusion of the ABBC certification information would not be false or misleading, because ABBC, like NBTA, has "objective and demanding" standards for certification. Cf. Peel, 496 U.S. 91, 95 ("(NBTA) standards ...are objective and demanding."). The prohibition in SCR 195(3) against creating "unjustified" expectations about results the attorney can achieve are probably countered by the experience requirements for certification by ABBC, which qualifies certification as an object fact from which an inference of quality may be drawn under Peel. Peel, 496 U.S. 91, 101.

However, even the plurality opinion in Peel suggested that potentially misleading statements of private certification might confuse consumers and that therefore the states might consider alternatives other than categorical prohibition, including a disclaimer. Peel, 496 U.S. 91, 110, 117 This committee reads the survey results developed by the Nevada Study Committee On Lawyer Advertising as showing that there is significant potential for confusion among consumers about relative qualifications of attorneys. It is a fair inference that this confusion would exist in connection with private communications as well as advertisements.

## CONCLUSION

Therefore, even though Peel can be read as following the inclusion on letterhead and business cards of the information that the lawyer is certified as a bankruptcy specialist by ABBC, this committee believes the better course is to include also the disclaimer required with advertisements under SCR 196(4). The disclaimer addresses directly the issue of private certification not being officially sanctioned by the State and goes far to eliminate the potentially misleading aspect of the claim-just as it is intended to do in the advertising area.

*This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar*



**STATE BAR OF NEVADA**  
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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 14  
October 8, 1993**

**QUESTION** - May a lawyer list on his or her office letterhead the states where he or she has been admitted to practice law, but is currently an inactive member of the state bar association?

**ANSWER** - A lawyer who is admitted to the state bar association in states where he or she is currently inactive may list the states on his or her letterhead so long as a qualification is included indicating the inactive status.

**AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rules) 195,196.5 Formal Opinion No. 13 of the Standing Committee on Ethics and Professional Responsibility, Gary E. Peck v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990); In re R.M.J., 455 U.S. 196 (1981).

**DISCUSSION**

**INTRODUCTION**

The following Opinion relies heavily on Formal Opinion No. 13, issued by the State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, dated May 28, 1993. That opinion also dealt with what a lawyer could include on his or her letterhead. Specifically, the Opinion addressed whether a lawyer could include that he or she was a Certified Bankruptcy Attorney by the American Bankruptcy Board of Certification. That question and the present one are analogous because both must address whether the letterhead is potentially misleading, thereby subjecting it to possible regulation by the State.

**SUPREME COURT RULES**

Supreme Court Rule ("SCR") 195 is identical to Model Rule 7.1 of the ABA Model Rules of Professional Conduct. SCR 195 states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

1. Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
2. Is likely to create a unjustified expectation about results the lawyer can achieve, ....

SCR 196.5 further defines the prohibition of misleading statements with more relevance to the question presented:

8. Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this rule shall not:

- (a) Be directly or impliedly false or misleading;
- (b) Be potentially false or misleading;
- (c) Fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;
- (d) Be unsubstantiated in fact; or
- (e) Be unfair or deceptive.

## HISTORICAL BACKGROUND

In *In re R.M.J.*, 455 U.S. 191 (1981), the United States Supreme Court effectively discussed how and why advertising by lawyers should be regulated. The court cited the public's lack of knowledge concerning legal services as an important reason that potentially deceptive advertising be subject to regulation. *In re R.M.J.*, 455 U.S. 191, 200; State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 13, May 28, 1993, p. 4. The court went on to state that the individual states have the authority to enact such regulation, albeit in a careful and limited manner. "[A]lthough the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests." *In re R.M.J.*, 455 U.S. 191, 207; Formal Opinion 13, at 4.

In the recent Supreme Court case of *Gary E. Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), Mr. Peel listed his certification as a Certified Civil Trial Specialist by the National Board of Trial Advocacy on his letterhead. A five justice majority of the United States Supreme Court concluded that Mr. Peel's letterhead was not actually or inherently misleading and, therefore, did not warrant a strict regulation banning the letterhead. *Peel*, 496 U.S. 91, 110; Formal Opinion No. 13, at 4.

Without reiterating verbatim the test of Formal Opinion No. 13, the importance and relevance of *Peel* is that despite concluding that Mr. Peel's letterhead did not warrant and elimination of the certification listing, five justices nonetheless viewed the letterhead as potentially misleading. As a result, Justices Marshall and Brennan suggested the state institute less restrictive measures against such letterheads, including disclaimers. The information is still present on the letterhead, but the risk of deception is lessened. *Peel*, 496 U.S. 91, 112, 115-117; Formal Opinion No. 13, at 5.

As noted above, SCR 196.5 prohibits any written communication from an attorney from being "potentially false or misleading." SCR 196.5 8(b). Furthermore, the U.S. Supreme Court authorized the regulation of potentially misleading information in *Peel*. Thus the State may intervene if listing inactive State Bar Association memberships on one's letterhead is potentially misleading.

Formal Opinion No. 13 addressed this question by referring to a study conducted by the Nevada Study Committee On Lawyer Advertising. The Committee surveyed Nevada residents regarding their opinions and views related to lawyer advertising. The Committee concluded that "many" Nevada residents believed that lawyers who advertised in a specific area of practice "could be expected to give higher quality service." Formal Opinion No. 13, at 6. The Standing Committee on Ethics and Professional Responsibility referred to this evidence in concluding that there is a "significant potential for confusion among consumers about relative qualifications of attorneys" and went on to determine that this confusion is likely to exist for private communications as well. Formal Opinion No. 13, at 7.

The issue addressed herein is whether listing inactive State Bar Association memberships on one's letterhead is as potentially misleading as being certified by the American Bankruptcy Board of Certification as a Bankruptcy Attorney. The study commissioned by the Nevada Study Committee On Lawyer Advertising found that there is significant potential confusion concerning qualifications of lawyers. The States where a lawyer is licensed to practice law is as much a "qualification" as being a certified Bankruptcy Attorney.

A lawyer's letterhead is a form of public communication and as such is subject to the general directive of Rule 7.1 that it not contain material that is false or misleading. What this means in specific terms is that the lawyers listed should be currently practicing with the firm and in that way available to the client as indicated by the appearance of their names on the letterhead. The jurisdictional limitations on each lawyer's admission to practice should be evident.

ABA/BNA Lawyer's Manual on Professional Conduct, 81.3004 (1989). The questions presented in this opinion and Formal Opinion No. 13 are essentially identical and warrant the same conclusion.

## **CONCLUSION**

The authority provided in Peel, Formal Opinion No. 13, and the Supreme Court Rules persuades this Committee to require a qualification if a lawyer decides to list on one's letterhead those states of which he or she is presently an inactive member of the state bar association. The state can effectively intervene without placing too heavy a burden on lawyers. Requiring lawyers who are on inactive status in some states to indicate as such on their letterhead with an asterisk (\*) by each inactive state is a simple solution. The lawyer is still able to inform the public where he or she has been admitted to practice law without the possible deception that exists with no qualifications.

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# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 15 August 20, 1993

**QUESTION** - Are non-refundable retainer agreements ethical in domestic relations and criminal cases?

**ANSWER** - While non-refundable retainer agreements are not specifically prohibited in Nevada Supreme Court Rule 155, any such agreement would be unethical if, considering all the surrounding circumstances, the fee would be considered unreasonable.<sup>1</sup>

#### **AUTHORITIES RELIED ON**

Nevada Rule of Professional Conduct (Supreme Court Rule) 155.

#### **DISCUSSION**

Nevada Supreme Court Rule 155 reads in pertinent part as follows:

A lawyer's fee should be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

1 The question posed to this committee contained a written fee agreement which appeared to charge the bulk of the anticipated total fee in advance of service for a divorce proceeding. The lawyer was discharged after six hours of work, but insisted that his contract for keeping the entire \$7,500 was enforceable. The fee agreement contemplated that the retainer would be earned because of the complexity of the case even if the matter were resolved by "reconciliation; settlement, judgment or dismissal ...". Ironically, discharge of the attorney was not foreseen as an event contemplated by the parties as justifying the non-refundable nature of the retainer.

(b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

- (c) The fee customarily charged in the locality for similar legal services;
- (d) The amount involved and the results obtained;
- (e) The time limitations imposed by the client or by the circumstances;
- (f) The nature and length of the professional relationship with the client;
- (g) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (h) Whether the fee is fixed or contingent.

When Nevada Supreme Court Rule 155 governing the determination of the reasonableness of an attorney's fee was adopted, the threshold standard of "clearly excessive" was eliminated from the prior rule thus prohibiting as unethical both unreasonable as well as patently unconscionable fees. 2

The Committee on Professional Ethics of the Association of the Bar of the City of New York has concluded that a lawyer may not characterize a fee as non-refundable or otherwise suggest that any fee paid before services rendered is not subject to refund or adjustment. What is acceptable are minimum fees paid in advance, flat fees for contemplated services, or retainers reserving the availability of a lawyer for a certain period of time. However, unearned fees, resulting either from withdrawal or discharge of the lawyer, must be refunded. NYC 1991-03.

The Tennessee Board of Professional Responsibility has likewise concluded that fees that may have appeared reasonable at the outset of a case may have appeared reasonable at the outset of a case may result in the unjust enrichment of the lawyer based upon changed circumstances. A refusal to adjust fees accordingly resulted in censure of the attorney. In *Re Quillen*, 1

2 Nevada Supreme Court Rule 155 is based upon the ABA Model Rule 1.5. The courts uniformly use the ABA Model Rules in deciding whether a fee charged by an attorney is enforceable. *Hensley v. Ekerhart*, 461, U.S. 424 (1982), *In re National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (CA D.C. 1982), *Johnson v. Georgia Highway Express*, 488 F.2d 714 (CA 1974). The courts place the burden on the attorney to demonstrate the reasonableness of a fee based largely upon the results, obtained and time expended. (Although time is of relative importance; otherwise inefficiency may be rewarded. *Blank v. Talley Industries, Inc.*, 390 F.Supp 1 (SDNY 1975).)

Lawyers Manual of Professional Conduct 574 (Tenn. Bd. Of Prof. Resp. 1984), see also, *Terzis v. Estate of Whalen* 489 F2d 608 (NH 1985).

The ABA Ethical Considerations formulated pursuant to DR 2-106, the predecessor to Nevada Supreme Court Rule 155, required a lawyer to refund unearned fees if that lawyer is discharged or withdraws from representation.

The argument in support of enforcing non-refundable retainers is that an attorney should

be free to contract for such a fee based upon his skill or reputation, the difficulty of the issues, the lack of desirability of the case or the time requirements of the case. We agree that all of these factors are consistent with Nevada Supreme Court Rule 155, but they do not overcome the ultimate requirement to gauge the reasonableness of a disputed fee against the factors listed in the rule, such as the results obtained, the time expended, and the uniqueness of the case. Nevada Supreme Court Rule 155 would be meaningless if an attorney could defend a disputed fee simply on the basis that the client made a contract and the result and efforts expended are irrelevant. Indeed, a non-refundable retainer agreement may have the inappropriate effect of suggesting to the client that there can be no challenge to such a fee agreement in the event that the attorney is discharged or withdraws .3

Even if an attorney were to call a non-refundable retainer a minimum fee or a fixed fee, the analysis would be no different. The contemplated fee must be reasonable, and if the attorney is discharged or withdraws, the attorney cannot keep any amount of a fee which cannot be justified based upon a time expended and results obtained analysis. If the attorney is particularly experienced in the matter or enjoys an enhanced reputation, this may certainly be reflected in an hourly rate. Likewise a demonstrable lost opportunity for taking the client may also be reflected. SCR 155. But absent such unique factors, the committee views a non-refundable retainer agreement as an oxymoron; because if a retainer is not earned, and thus cannot be considered reasonable under the circumstances, it cannot be re-fundable.

3 See 57 Fordham Law Review 149, 1988-89, Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law.

## **CONCLUSION**

Non-refundable retainer agreements, while not specifically prohibited, should be reviewed with caution, as they do not relieve an attorney from the burden of considering and utilizing all the factors listed in SCR 155 in initially setting a fee, and justifying the reasonableness of the fee ultimately charged on those same factors.

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# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 16 October 22, 1993

**QUESTION** - In a situation where there has been a property settlement agreement which was not merged in a subsequent decree of divorce, can an attorney represent one spouse on a contingency fee basis in that spouse's attempt to rescind the property settlement agreement and seek a greater share of the community property through an independent action?

**ANSWER** - Even though a decree of divorce has already been entered, a lawyer may not represent one spouse on a contingency fee basis in a subsequent independent action seeking to alter or otherwise attack a property settlement agreement related to the original divorce action.

#### **AUTHORITIES RELIED ON**

Nevada Rule of Professional Conduct (Supreme Court Rule) 155; Daniel v. Baker, 106 Nev. 412, 794 P.2d 345 (1990); Gilbert v. Warren, 95 Nev. 296, 594 P.2d 696 (1979); Meyers v. Handlon, 479 N.E.2d 106 (Ind. Ct. App. 1985); Stepp, Groce, Pinales & Cosgrove v. Thompson, 319 SE2d 315 (NC App. 1984).

#### DISCUSSION

#### **INTRODUCTION**

The Nevada Rules of Professional Conduct clearly prohibit an attorney from representing a client in an action to secure a divorce, alimony or support on a contingency fee basis. This is also true of representation related to a property settlement agreement settling such matters. However, this Opinion addresses the situation where a divorce has already been entered into which was merged with the divorce decree, and one of the spouses wishes to attack the agreement in a independent action.

#### **SUPREME COURT RULES**

The Nevada Supreme Court Rules state that "[a] lawyer shall not enter into an arrangement for, charge, or collect: (a) any fee in a domestic relations matter, the

payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof." S.C.R. 155(4) Under this rule it is clear that a lawyer cannot represent a client on a contingency fee basis in helping that client secure a divorce, alimony or support. The rule appears at face value only to apply to property settlement agreements when they are in lieu of an action for divorce, alimony or support. However, in most cases, the property settlement is inextricably intertwined with the amounts agreed upon for alimony or support. For example, the Nevada Supreme Court has recently held that it was an abuse of discretion for a court not to consider the wealth of the husband in making an award of alimony. *Daniel v. Baker*, 106 Nev. 412, 794, P.2d 345 (1990). Almost every property settlement agreement is in lieu of an action for divorce, alimony or support.

## DISCUSSION

The issue presented is whether the status of a property settlement agreement which has not been merged with the divorce decree offers a loophole to the ban on contingent fee agreements. The nonmerged agreement stands as an independent contract which may not be modified by the district court, but may be enforced or challenged as other written contracts in an independent action. See, *Gilbert v. Warren*, 95 Nev. 296, 594 P.2d 696 (1979).

The ethical rule is derived from the majority rule of common law that contingent fee cases in domestic relations cases are void as against public policy. See, *Stepp, Groce, Pinales & Cosgrove v. Thompson*, 219 SE2d 315 (NC App. 1984). The rule in Nevada, while somewhat specific, expresses public policy and should not be thwarted by superficial appearances. The reality of any subsequent attack on a property settlement agreement is that it is an action in a domestic relations matter which seeks to change the parties settlement of the amount of alimony and/or support. The fact that the challenge comes after entry of divorce does not eliminate the public policy concerns behind the rule.

In *Meyers v. Hanlon*, 479 N.E.2d 106 (Ind. Ct. App. 1985), the Indiana Court of Appeals specifically address the situation where an attorney took a case, on a contingency fee basis, involving the distribution of marital assets after a divorce degree had already been issued. The Meyers Court held that this arrangement went against public policy and that therefore the contingency fee contract was void. *Id.* At 111. In reaching this conclusion, the Meyers Court discussed several reasons for prohibiting contingency fee agreements in divorce related cases. The Committee agrees with this court's analysis.

Generally speaking the state has a strong interest in promoting and preserving marriage. Because the policy of the state is to promote marriage, the rationale for prohibiting attorneys from taking divorce related cases, on a contingent fee basis, is that it prevents attorneys from promoting divorce and hindering reconciliation between spouses as a result of the attorney's financial interest in the divorce proceeding. *Id.* at 108.

Even when a divorce has already been obtained, several factors suggest that contingent fee arrangements are still undesirable. As suggested by the Meyers court, if contingent fees are permitted in the property distribution portion of bifurcated divorce proceeding, a lawyer might encourage his client to seek a bifurcated hearing and then negotiate a separate contingency fee arrangement covering the subsequent property settlement action. Under this situation, an attorney might be inclined to encourage delay as a tactical device to pressure an opposing party to make a financial decision that would ultimately enhance the attorney's contingent fee. This course of action by an attorney is particularly undesirable in the matrimonial context where the interests of society and the parties is best served by expediting an end to hostilities and the unfreezing of the marital estate. This prompt end to litigation permits the parties to resume normal and productive lives.

In addition, the nature of a contingency fee agreement in general dictates that this type of arrangement is not desirable in most domestic relations cases. The all-or-nothing risk to the attorney which justifies a contingent fee agreement does not exist in most divorce proceedings. In fact, each spouse generally has a statutory right to an equitable share of the marital property and also a possible award of attorneys fees. *Id.* at 110.

Finally, the trial court's duty to provide an equitable property settlement and establish support for minor children or a disabled spouse might be hampered by the existence of a contingent fee arrangement-especially where the court has not been informed of the contingency fee. In this situation, a court's effort to make suitable provisions for one spouse might be severely frustrated if ultimately a contingent fee is deducted from the court awarded amount. *Id.* at 111.

## **CONCLUSION**

Under Nevada Rule of Professional Conduct 155, an attorney is prohibited from taking a domestic relations case on a contingency fee basis. For the public policy reasons explained in the Meyers case, Rule 155 should be interpreted to prohibit attorneys from accepting contingency fees not only in the original divorce action, but also in any subsequent independent action that seeks in any manner to alter alimony or support or the terms of enforceability of a related property settlement agreement.

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# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 17 February 25, 1994

**QUESTION** - May a lawyer advertise that the lawyer is willing to accept cases in more than three areas of law?

**ANSWER** - Supreme Court Rule 198 prohibits the advertising of more than three designated areas of practice.

#### **AUTHORITIES RELIED ON**

Nevada Rule of Professional Conduct (Supreme Court Rule) 151, 195 and 198, and Peel v. Attorney Registration and Disciplinary Commission of Illinois, 446 U.S. 91 (1990).

#### **DISCUSSION**

Nevada Supreme Court Rule 198 reads in pertinent part as follows:

"A lawyer shall not communicate that the lawyer ....does or does not practice in particular fields of law, except in accordance with this Rule."

The fundamental question is whether an attorney who does not intend to indicate either special skill or concentration in fields of practice is covered by SCR 198. The answer lies in the misleading or deceptive nature of a listing of particular fields of practice without either a comprehensive disclaimer or words of limitation such as "Practice limited to ...," or "Practicing primarily in ....".

The committee cannot envision an advertisement which lists several areas of practice for a lawyer which, without an appropriate explanation or disclaimer<sup>1</sup>, would not mislead the

<sup>1</sup>The committee recommends the following disclaimer language: "This attorney has not met the minimum training and experience requirements of SCR 198 for the fields of practice listed herein." As uninviting as this language may appear, it would otherwise be reader into assuming that the lawyer concentrates in those fields of practice.

A lawyer who properly complies with SCR 198 must meet stringent continuing legal education requirements as well as annual practice requirements for the field(s) listed. Such requirements provide at least a minimal level of assurance that lawyer has a degree

of experience and training in the listed field(s) which another lawyer may not have. SCR 198 would be meaningless if any lawyer could imply the same level of competence simply by eliminating the phrase "practice limited to ..." or "practicing primarily in ...".

A review of the lawyer section of the yellow pages reveals that the attorneys who list more than three fields of practice appear to do so by listing numerous fields under the heading of "General Practice". The rationalization appears to be that such a listing educates the public as to what a general practitioner does, and because the listing is definitional in nature, no specific skill is intended or implied. 2

The impact of each advertisement must be reviewed on its own, but generally, such a comprehensive listing, if definitional in nature, may not appear to be misleading and may, therefore, be constitutionally permitted<sup>3</sup>. However, a listing of only 4 or 5 areas under a heading of "General Practice" would appear to be a misleading and deceptive attempt to limit one's practice and imply areas of concentration, and thus be in violation of SCR 198. (An attorney who meets the requirements of SCR 198 in up to three fields of practice, but wishes to list more than three areas, may do so, but only with an appropriate explanation or designation as to those fields of practice in which the attorney meets the CLE and experience requirements and those fields of practice in which the attorney does not.)

Impossible to perceive a difference between those attorneys whose advertisements comply with SCR 198 and those attorneys whose advertisements do not comply.

<sup>2</sup>The yellow pages also reveals that some attorneys advertise three or less areas of practice without any indication as to whether the requirements of SCR 198 are being met. The bar is reminded that the disclaimer language of SCR 198(3)(b) is required for advertisements of three or less fields of practice. Otherwise, a suitable explanation, such as the one suggested in footnote 1 above, must be included to avoid the deception inherent in such an advertisement.

<sup>3</sup>See *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990).

## **CONCLUSION**

While every advertisement must be reviewed on its own, the committee believes that a listing of more than three areas of practice would be a violation of SCR 198 unless such a listing does not imply special training, skill, or experience in the areas listed and contains an appropriate disclaimer.

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# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 18 April 29, 1994

**QUESTION** - What portion of a contingent fee is a discharged attorney entitled to when the discharge occurs after an initial offer of settlement has been made?

**ANSWER** - The attorney is entitled to a recovery in quantum meruit.

#### **AUTHORITIES RELIED ON**

Nevada Rule of Professional Conduct (Supreme Court Rule) 155, and 166.4, NRS 18.015, Formal Opinions #4 and #17, *In re Kaufman*, 93 Nev. 452, 567 P.2d 957 (1977)), ABA Informal Op. 86-1521 (1986), *Hayes v. Secretary of Health and Human Services*, 923 F.2d 418 (6th Cir. 1991), G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1985); R. Aronson, *Professional Responsibility in a Nutshell* (1990).

#### **DISCUSSION**

Supervision of contingent fee agreements rests with the state supreme courts. In Nevada, as in the majority of jurisdictions, the supreme court has determined through case law that disputes arising out of contingent fee agreements based upon the discharge of the attorney are to be determined in quantum meruit. 1

The question asked of this committee presupposes that the contingent fee agreement at issue was in writing, that the terms were reasonable and that the discharge was without cause. This committee's response is based upon those presuppositions, but would point out that an attorney normally has an obligation to advise a prospective client of alternative fee arrangements, such as a reasonable fixed fee, if there exists any doubt as to the

1Because of the universal application of this standard, attorneys are advised to keep complete and accurate time records in contingency fee cases. See Closen and Tobin, *The Contingent Contingency Fee Arrangement: Compensation of the Contingency Fee Attorney Discharged by the Client*, 76 Ill. B.J. 916 (1987).  
reasonableness of a contingent fee under the circumstances. ABA Informal Op. 86-1521 (1986).

If a dispute and subsequent discharge arises between an attorney and a client, the attorney must take affirmative steps not to prejudice the client's case. NRS 18.015, authorizes and sets out the procedure for exercising an attorney's lien for an attorney's lien for fees. It does not authorize the retention of a client's papers. While SCR 166.4 recognizes that an attorney " ...may retain papers relating to the client to the extent permitted by other law", the case law developed pursuant to the issue appears to condemn such an approach. (The case law specifically recognizes NRS 18.015 as the charging lien, as opposed to a common law retaining lien). The exercise of retaining liens in Nevada has resulted in sanctions against the attorney when the client can demonstrate prejudice. *In re Kaufman*, 93 Nev. 452, 567 P.2d 957 (1977). SCR 166.4 calls upon the terminated attorney to "surrender papers and property to which the client is entitled..". SCR 166.4 also calls upon the terminated attorney to "take steps to the extent reasonably practicable to protect a client's interests..".

Since an attorney's fee in a contingent fee case has not been earned until there has been a recovery, an attorney acts at extreme risk in exercising a lien against a client's file. The preferred method, as set out in NRS 18.015, would be to notify the client, the succeeding attorney and the insurance carrier (if one exists) as to the written agreement, so that when the matter is resolved, the fees of the first attorney, to the extent earned, will be protected.

Ethics authorities have recognized that a strict application of the terms of the contingent fee, for example a claim of one third of the settlement after the deduction of expenses, would work an undue hardship on the client in the pursuant of subsequent legal help. See G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1985); R. Aronson, *Professional Responsibility in a Nutshell* (1990). The first attorney is obligated to wait for the conclusion of the case in order to determine what, if any, fee the attorney is entitled to. It is possible that a subsequent loss of the case at trial will result in no recovery to the first attorney, even if a settlement offer had been previously advanced.

Once the case is resolved and the total recovery is known, the two attorneys can then determine how much of their individual efforts should be proportioned against a total legal fee of one third. If NRS 18.015 is utilized, the court can be asked to settle the matter if the attorneys cannot come to an agreement. Since the one third fee (or other agreed amount) can be placed in escrow pending this resolution and one third would be the total legal fee under most circumstances, distribution of proceeds in whole or substantial part can be made to the client, thus avoiding unnecessary delay.2

Quantum meruit is simply the application of a reasonable fee based upon the results, the time expended and the other factors enumerated in SCR 155. See our Formal Opinion #17. The Sixth Circuit has opined that a fee is presumed to be reasonable if it does not exceed twice the prevailing fee in the relevant market for comparable work charged on an hourly basis. *Hayes v. Secretary of Health and Human Services*, 923 F.2d 418 (6th Cir. 1991). However, what is reasonable will always be fact specific and is an issue for the court (or fee dispute committee) to decide on a fully developed record. See our Formal Opinion #4.

This committee does not have enough information to offer an opinion as to whether one third of the initial offer is reasonable, with the second attorney taking one third of any subsequent increases of that offer. The initial offer may have been made based upon an immediate recognition of liability and damages. The first attorney may have received such an offer only after a few hours of time expended. In such a situation, the hourly rate may amount to several thousand dollars an hour, which would be unreasonable and a violation of SCR 155. On the other hand, the first attorney may, by reputation, experience and ability have acquired an offer which would not normally have been made at a given stage in the case, and which offer constitutes a significant percentage of the total recovery. In that event the first attorney may be entitled to a proportion of the legal fees in excess of twice the hourly rate. The novelty and complexity of the case and the issues it presents, the more reasonable it becomes to apply a time expended/hourly rate analysis.

An additional consideration would be whether the fee agreement contains a clause which sets the fee amount in the event of a termination without cause. Such a clause, if openly arrived at and reasonable under the circumstances, would be given significant weight in the event of termination and a subsequent fee dispute.

This committee cannot emphasize enough the importance of advising the client as to his or her fee options, drafting a comprehensive and fair fee agreement which takes into account the demands of the case, and of keeping good time records. For when a fee dispute arises, the burden will be placed upon the attorney to establish the reasonableness of the fee. What is reasonable will

2SCR 165.2 requires a prompt notification and delivery of funds received on behalf of a client. SCR 165.3 permits any disputed portion of funds (property) to be set aside until the dispute is resolved. Caution must be exercised here as at least two reported cases have held that a refusal to turn over unearned fees constitutes misappropriation. See *In Re Garcia*, 366 N.W. 2d 482 (N.D. 1985); *In Re Hedrick*, 301 Or. 750, 725 P.2d 343 (1986).

be based upon the time expended, results obtained, the nature of the case and the understanding of the parties.

## **CONCLUSION**

A terminated attorney is entitled to a quantum meruit settlement of fees at the conclusion of the client's case. The total fee must be reasonable, and the terminated attorney should protect his or her fee in accordance with NRS 18.015. The fact that an offer of settlement has been made to the first attorney is just one factor to be considered in reaching an equitable division of fees.

*This opinion is based by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.*



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**Formal Opinion No. 19  
June 16, 1994**

**QUESTION** - May a nonresident attorney who is admitted to the State Bar of Nevada maintain a general litigation practice without associating local counsel and satisfy the requirements of Nevada Supreme Court Rule 42(10) under the following situations:

1. Utilizes any space made available to the attorney by the Nevada client when the attorney is in Nevada, which space is not otherwise clearly designated as the attorney's law office;
2. Utilizes a clearly designated area within a client's place of business located in Nevada and arranges for one of the client's employees to act as a receptionist/secretary, as above, but does not have a separate telephone number, using, instead, the client's telephone number;
3. Utilizes as office space in Nevada a clearly designated area with a client's place of business located in Nevada, where the attorney places signs on the interior and the exterior of the building designating the location of the office, where the attorney has his/

her own telephone number operating through the client's switchboard, and where the attorney arranges with one of the client's employees to act as receptionist/secretary to receive phone messages, accept mail, and service of legal documents, and where that employee forwards such telephone messages and documents to the out of state attorney.

**ANSWER** - The legitimate interests of the Nevada courts and Nevada clients which support SCR 42 cannot be served by a nonresident attorney who uses as an office in this state a space located within the confines of another client's business, which is staffed by persons who are not employed directly by the attorney, but by the client.

### **AUTHORITIES RELIED UPON**

Nevada Supreme Court Rules 42 and 156; Supreme Court of New Hampshire v. Piper, 470 U.S. 274; 105 S. Ct. 1272; 84 L. Ed. 1d 205 (1985); Supreme Court of Virginia v. Friedman, 587 U.S. 59; 108 S. Ct. 2260; 101 L. Ed. 2d 56 (1988); Barnard v. Thorstenn, 489 U.S. 546; 109 S. Ct. 1294; 103 L. Ed. 2d 559 (1989); Archer v. Ogden, 600 P.2d 1223 (Okla. 1979); Dyche v. Crawford, 327 P.2d 1047 (Kan. 1958); Taylor v. Taylor, 342 P.2d 192 Kan.1959); and Naimo v. Fleming, 95 Nev. 13; 558 P.2d 1025 (1979).

### **DISCUSSION**

Nevada Supreme Court Rule (SCR) 42 generally regulates the practice of law in Nevada by attorneys not admitted in this state, and by attorneys who, though admitted and active members of the State Bar of Nevada, are not residents of Nevada. Specifically, SCR 42(10) provides:

10. An attorney admitted to practice in Nevada but who does not maintain an office in Nevada, on filing any pleadings in the courts in Nevada, either associate an attorney maintaining an office in Nevada, or designate an attorney maintaining an office in the county in Nevada wherein the pleading or paper is filed, upon whom all papers, process or pleadings required to be served upon an attorney may be so served. A post office box shall not constitute an office under this rule. The name and office address of such attorney so designated shall be endorsed upon the pleading or paper so filed, and service upon such attorney shall be deemed to be service upon the attorney filing the pleading or other paper.

The rule by its terms applies to attorneys who are engaged in litigation practice before the courts of the State of Nevada, since the triggering event requiring the consideration of whether or not to associate an attorney who has an office in Nevada is the filing of any pleadings in the courts of Nevada.

In considering the questions which have been posed, it is assumed that the nonresident attorney would engage in a general practice of law dealing with clients other than the Nevada client whose place of business the proposed office would be maintained.

The United States Supreme Court has considered the related issue of whether a state

court may require those seeking admission to the bar to be residents of that state. The United States Supreme Court held in the case of *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274; 105 S. Ct. 1271; 84 L. Ed.2d 205 (1985) that the right to practice law is protected by the privileges and immunities clause. However, the Court observed that:

"The clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) discrimination practiced against nonresidents bears a substantial relationship to the State's objective."

The Court ultimately decided that there was no reason advanced by the state of New Hampshire which justified the refusal of the state to admit non residents to the New Hampshire Bar, and specifically rejected the argument that nonresident members are less likely to become and remain familiar with local rules and procedures as justification for the discrimination against nonresident attorneys.

The Piper opinion suggested, however, that the argument that nonresident attorneys might be unavailable on short notice for court proceedings may have some merit, but could be handled in a manner less restrictive than barring admission to practice. In that regard, the Court observed:

There is ore merit to appellant's assertion that a nonresident member of the bar at times would be unavailable for court proceedings. In the course of litigation, pretrial hearings on various matters often are held on short notice. At times a court will need to confer immediately with counsel. Even the most conscientious lawyer residing in a distant State may find himself unable to appear in court for an unscheduled hearing or proceeding. Nevertheless, we do not believe that this time of problem justifies the exclusion of nonresidents from the state bar. ...Furthermore, in those cases where the nonresident counsel will be unavailable on short notice, the State can protect its interest through less restrictive means. The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings.

The Piper decision has been upheld by the United States Supreme Court on two subsequent occasions, in the case of *Supreme Court of Virginia v. Friedman*, 487 U.S. 59; 108 S. Ct. 2260; 101 L. Ed. 2d 56 (1988); and in *Barnard v. Thorstenn*, 489 U.S.546; 109 S. Ct. 1294; 103 L. Ed. 2d 559 (1989). Like Piper; both of these later cases also dealt with court rules that prohibited non residents from admission to practice law. In both cases, the Court recognized the legitimate state concern that nonresident attorneys may be unavailable to appear before the courts on short notice, and suggested and supported the solution of requiring the non resident attorneys to associate local counsel. In *Virginia v. Friedman*, *surpra*, the association of local counsel requirement of the Virginia bar was cited as the mechanism by which the courts could assure that nonresident attorneys would be present as required by the courts of that state, and to assure that nonresident attorneys would have a significant interest

in respecting the bar and promoting its interests. The U.S. Supreme Court observed in that case as follows:

The question, however, is whether lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents. We cannot say this is the case. ...She [Friedman] earns her living working as an attorney in Virginia, and it is of scant relevance that her residence is located in the neighboring state of Maryland. It is indisputable that she has a substantial stake in the practice of the law in Virginia. Indeed, despite appellants' suggestion at oral argument that Friedman's case is "atypical," ....the same will likely be true of all nonresident attorneys who are admitted on motion to the Virginia bar, in light of the State's requirement that attorneys so admitted show their intention to maintain an office and a regular practice in the State [citations omitted]. This requirement goes a long way toward ensuring that such attorney will have an interest in the practice of law in Virginia that is at least comparable to the interest we ascribed in Piper to applicants admitted upon examination. ...Virginia already requires pursuant to the full-time practice restriction of Rule 1A:1, that attorneys admitted on motion maintain an office for the practice of law in Virginia. As the Court of Appeals noted, the requirement that applicant maintain an office in Virginia facilitates compliance with the full-time practice requirement in nearly the identical manner that the residency restriction does, rendering the latter restriction largely redundant [citation omitted]. The office requirement furnishes an alternative to the residency requirement that is not only less restrictive, but also a fully adequate to protect whatever interest the State might have in the full-time practice restriction.

The U.S. Supreme Court observed in *Barnard v. Thorstenn*, supra that the requirement that out of state lawyers associate local counsel would satisfy the concern that the court's calendars would be delayed and burdened by attempting to accommodate nonresidents' travel schedules. The Court noted in *Barnard* that any burden to accommodate nonresidents' travel schedules can be relieved by requiring them to associate with local counsel, stating:

Although that observation is not applicable here, we went on to hold in Piper that, for lawyers who reside a great distance from New Hampshire, the State could protect its interest by requiring

the lawyer to retain a local attorney who will be available for unscheduled meetings and hearings [citations omitted]. The same solution is available to the Virgin Islands. The exclusion of nonresidents from the bar is not substantially related to the District Courts' interest in assuring that counsel will be available on short notice for unscheduled proceedings.

Thus the U.S. Supreme Court has suggested two possible legitimate justification for requiring the association of local counsel by nonresident members of the Nevada Bar, those being to assure that attorneys representing clients in litigation matters in this state

are readily accessible to the courts, and that such attorneys are committed to the best interests of the state bar in which they are practicing, though not residing.

Turning now to those legitimate justifications for SCR 42, the question is whether any of the three alternatives posed in this opinion satisfies those legitimate concerns, and satisfies the requirement of "maintaining an office in the county of Nevada where the pleading or paper is filed."

SCR 42 requires something more than a mail stop as an office, but does not specify the nature of the "office" specifically contemplated, except that such office must be available for the service of papers, process and pleadings upon the attorney, which in Nevada may include delivery to the attorney in person as well as by mail. In order to answer the questions raised, it is necessary to review the functions of an attorney's office with reference to the clients which the attorney serves, the Nevada Courts, and opposing counsel.

The Supreme Court of Kansas has considered the issue of whether Kansas attorneys who maintain their regular practice in bordering state Missouri may practice law in Kansas, with out associating local Kansas counsel. The Kansas Rules of Professional Conduct do not include an exception for nonresident Kansas attorneys who maintain an office in Kansas. Discussion in those cases of the reason for requiring association with Kansas attorneys who do maintain an office in that state are helpful to an understanding of the reasons for such requirements. In *Dyche v. Crawford*, 327 P.2d 1047 (Kan. 1958), an attorney admitted to practice both in Kansas and Missouri who reside in Kansas, but practice law primarily in Missouri and maintained his office in Missouri, was allowed nevertheless to take cases in Kansas. The Court found that his regular presence at his home in Kansas provided ample opportunity for the courts and opposing counsel to contact him as necessary. The dissenting opinion, however, provided a more detailed expression of the reason for the rule, which was stated as follows:

But, where the language is uncertain in meaning it is necessary to resort to ascertainment of the legislative intent behind its enactment. Here, I believe, the intent is obvious. It is to protect the interests of those in need of legal representation. In *Felton v. Rubow* [citation omitted] it was held: "A nonresident attorney, unfamiliar with our statutes and the jurisdiction of our courts, may sacrifice his client's interests by not complying with our statute respecting appearance in the courts of this state by a nonresident attorney. \* \* \*"

The Kansas Supreme Court reconsidered its application of this rule in the later case of *Taylor v. Taylor*, 342 P.2d 192 (Kan. 1959), in which the court upheld the dismissal of an action filed by an attorney licensed in both Missouri and Kansas, who in fact had an office in Kansas, but regularly practiced in Missouri, for failure to associate local Kansas counsel.

The Supreme Court of Oklahoma in *Archer v. Ogden*, 600 P.2d 1223 (Okla. 1979), reviewed a rule similar to SCR 42(10), with the exception of the fact that the Oklahoma

rule specifies that the "office" which must be maintained is a "continuously operating law office." Although it was determined that the nonresident attorney had violated the rule by failing to maintain a law office in the state before attempting to appear before the Oklahoma courts, the rule was held unconstitutional, as having been enacted by the legislature rather than the Supreme Court.

In *Naimo v. Fleming*, 95 Nev. 13, 558 P.2d 1025 (1979), the only Nevada case discussing SCR 42(10), the Court considered the application of SCR 42(10) in dismissing a complaint filed by out of state counsel where local counsel had not been associated. Unfortunately, the Court did not discuss the policies underlying the rule, or what type of office would satisfy the requirements of the rule.

The primary legitimate justification (according to Piper, supra, its progeny, and the Kansas and Oklahoma cases cited above) to either maintain an office in Nevada or associate local counsel is to assure that the attorney will be accessible to the courts and able to appear on short notice. The first alternative suggested, that of the non resident attorney utilizing space made available by a client in Nevada whenever the attorney visits this state, does not satisfy this legitimate concern. The attorney would have virtually nothing more than a place to sit in Nevada during irregular visits, with no guarantee that pleadings could be served upon the attorney in this state or that the courts could contact the attorney on short notice to require appearances in this state or that the courts could contact the attorney on short notice to require appearances in this state. Thus, the first alternative appears even less satisfactory than a mail drop.

With respect to the second and third alternatives, it is assumed in the light of current technological advancements, that the ability to transmit information to out of state attorneys via telephone, telefax and one day mail service would allow the transmission of information to an attorney residing outside of the state of Nevada as quickly and easily as to an attorney within the state. Nevertheless, although a secretary/receptionist is capable of transmitting messages, the purposes of SCR 42 still cannot be satisfied by an attorney who only irregularly appears in Nevada. The physical replacement of an empty office inside the state, with a telephone line and someone to answer it and receive the mail is an improvement over the post office box only in that the mail and telephone messages may be regularly picked up and transmitted. This type of office does not assure that the non resident attorney would be available to the courts and counsel as may be required in a particular case.<sup>1</sup>

The further question is whether these functions alone characterize a law office which is fully responsive to clients and the courts. A law office should be an extension of the attorney in the performance of legal services for clients. In that regard, SRC 156 mandates that law office personnel must maintain the confidentiality of clients, and are typically employed for the exclusive purpose of assisting the attorney in providing services to the clients of the firm.<sup>2</sup> Where a secretary/receptionist is primarily employed (and presumably compensated) by a non-attorney, his or her loyalties will, logically, reside primarily with the non-attorney employer in terms of the carrying out of the daily job responsibilities. Moreover, since the secretary/receptionist would conceivably be

taking telephone calls and receiving communications from clients, that individual would be privy to confidential communications with perhaps no understanding of the obligation to maintain the confidentiality of clients. Such an individual would have no strong inducement to maintain confidentiality since the secretary/receptionist's primary employment is not within the law firm, but as a secretary for non-lawyers. The second and third alternatives suggested raise a legitimate concern about confidentiality of client communications where sensitive documents may be received by employees of another client, as well as the lack of commitment of the secretary/receptionist provided by the other client to the attorney and his practice in this state. Moreover, in the case of the second alternative, it is conceivable that courts and counsel, as well as clients, would be confused by the fact that telephones were answered by employees of a business seemingly unrelated to the lawyer's practice.

1 With reference to the ability to appear promptly as required by the courts, we note that Nevada resident attorneys residing in remote areas of this state may in some cases have a more difficult time than out of state lawyers in making such appearances, and yet are not required to retain local counsel. Nevertheless, that is but one of the justifications for SCR 42(10), the other being the commitment to service and respect for the state bar by such nonresident attorneys, according to Friedman, *supra*.

2 SCR 156 (1) states:

1. A lawyer shall not reveal information relating to representation of client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections 2 and 3.

## CONCLUSION

The legitimate interests of the Nevada courts and Nevada clients which support SCR 42 cannot be served by a nonresident attorney who uses an office in this state a space located within the confines of another client's business, which is staffed by persons who are not employed directly by the attorney, but by the client.

*This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.*



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**Formal Opinion No. 20  
February 24, 1995**

**QUESTION** - May an attorney who is licensed to practice law in States A and B but lives in Nevada, where the attorney is not licensed and does not practice law, have as his letter:

John Doe  
Attorney And Counselor At Law  
123 Any Street  
Anyville, Nevada 89523  
ADMITTED TO PRACTICE:  
State A  
State B

**ANSWER** - Not unless the letterhead is modified to disclose that the attorney is not licensed to practice in Nevada.

**AUTHORITIES RELIED ON**

Supreme Court Rule 199, Rule 7.5(b) of the A.B.A. Model Rules of Professional Conduct, Pioneer Title v. State Bar, 74 Nev. 186, 189 (1958), N.Y. County Lawyers Assn'n, Comm. on Professional Ethics, Op. 683 (1990), In Re Waters, 84 Nev. 712 (1968)

**DISCUSSION**

Subject to certain limited exceptions relating to deceased or retired members, Supreme Court Rule 199 provides that it shall be unprofessional conduct to use a name for a law firm unless every person whose name is used is a member in good standing of this state's bar. The Committee takes no position as to whether this rule would stand constitutional challenge<sup>1</sup>, but its purpose is nonetheless laudatory: to

<sup>1</sup>In Fact, SCR 199 is at variance with Rule 7.5(b) of the A.B.A. Model Rules of Professional Conduct which provides that "A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not prevent those who have not demonstrated their competency through the bar admission process from holding themselves out, directly or by implication, as being legally qualified to practice law in the State of Nevada. "The public interest....requires that in the securing of professional advice and assistance upon matter affecting one's legal rights one must have

assurance of competence and integrity." *Pioneer Title v. State Bar*, 74 Nev. 196, 189 (1958).

In Formal Opinion 11, this Committee approved a form of letterhead which reflected a Nevada firm's affiliation with an out-of-state law firm. In that case, the Nevada attorney practiced in Nevada under his own name and not the name of the out-of-state firm, so the Nevada firm name was in conformance with SCR 199.

However, the question posed by the present inquiry is different. The attorney is not practicing in the State of Nevada, though he lives in Nevada and may be assumed for the purposes of this inquiry to maintain an office in Nevada solely for the purpose of providing legal services for clients in states in which he is licensed. Is the Nevada address misleading as to the attorney's Nevada licensure status? Or put another way, does the letterhead imply that the attorney is licensed to practice law in Nevada?

If the attorney were to indicate on his letterhead that he is not admitted in Nevada, or that he is only admitted in States A and B, there would be no reason to question the propriety of its use. By not limiting his letterhead, one who receives correspondence from him might easily conclude that the attorney is licensed in States A and B in addition to being admitted in Nevada.

Individual attorneys who are listed on the letterhead of Nevada firms are required to list their jurisdictional limitations so as to not mislead the public about their ability to practice law in Nevada. See: N.Y. County Lawyers Ass'n. Comm. on Professional Ethics, Op. 683 (1990) (Lawyer admitted in another state may sign documents and letters on law firm stationary provided the attorney's status is disclosed in a notation such as "Not Admitted in New York" or "Admitted only in New Jersey."). The reason for this explicit disclosure is because the law firm stationary may be sent to prospective clients who may have legal matters they want handled in Nevada.

However, the attorney in this hypothetical is a sole practitioner and not a member of a Nevada firm, and states categorically that he does not intend to send correspondence to prospective Nevada clients, but only to clients or prospective clients for legal services to be performed in the states in which he is licensed. Even so, his clients in States A and B might be misled into believing that he is licensed to practice in Nevada for them, should the occasion arise. Presumably he would decline such representation, but the assumed ability to practice in Nevada might provide him licensed to practice in the jurisdiction where the office is located." With an advantage in the securing of clients.

Of course an attorney licensed and practicing in Nevada who is also licensed in States A and B may use the proposed letterhead without objection, since sole practitioners licensed in Nevada customarily indicate their licensure status by use of "Attorney And Counselor At Law" or some such other term.

The argument for allowing the proposed form of letterhead is that it accurately states the

geographic location of the attorney's office and so is not objectionable unless the attorney is representing Nevada Clients. It is further argued that the propriety of the letterhead is supported by the Nevada Supreme Court decision in the case of *In Re Waters*. 84 Nev. 712 (1968). For the following reasons, the Committee does not believe that *Waters* is controlling under this scenario.

In the *Waters* case, an attorney living in Nevada but licensed in Texas corresponded with two San Quentin Prison inmates. For this correspondence, *Waters* used stationary in which his former Texas address had been crossed out and his Carson City address typed in. The Supreme Court found that both prisoners knew that *Waters* was a Texas lawyer and that *Waters* had not advised them otherwise, and that neither prisoner was involved in the Nevada courts. The Supreme Court concluded that the Nevada rules of professional conduct did not preclude a Texas attorney from corresponding with California prisoners about cases in California, nor did the rules prevent a Texas attorney from mailing his letters from somewhere other than Texas. 84 Nev. 712, 175.

The opinion is very case specific on its facts. The Nevada Supreme Court did not directly opine on whether *Waters* could have corresponded with the out-of-state prisoners about matters before the Nevada courts or on points of Nevada law. Because the prisoners were apparently fully aware of *Waters*' licensure status, the issue of whether his letterhead could have been misleading to less well-informed, prospective clients with matters in Nevada was never directly addressed.

The Committee is, of course, in no position to comment on whether use of such letterhead to contact clients in States A and B about work to be performed in those states would constitute a violation of those states' rules governing professional conduct. However, the Committee finds that use of the proposed letterhead to contact potential clients who may in the future need representation in Nevada has such a great potential for being misleading that it should not be used in its present form. The letterhead must contain some specific disclosure that the attorney is not licensed in Nevada. To do otherwise may lead even his State A and B clients to be misled as to his qualifications.

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# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 21 March 31, 1995

**QUESTION** - May an attorney licensed in the State of California represent Nevada residents in front of the Tahoe Regional Planning Agency concerning land use issues involving property located in Nevada?

**ANSWER** - The Tahoe Regional Planning Agency has bi-state jurisdiction and statutorily broad purposes. Based on that unique status and applicable law, an attorney licensed in the State of California may represent Nevada residents in front of the Tahoe Regional Planning Agency concerning land use issues involving property located in Nevada.

#### **AUTHORITIES RELIED ON**

Nevada Supreme Court Rule 189; Florez v. City of Glendale, 463 P.2d 67 (Ariz. 1969); Denver Bar Association v. Public Utility Commission, 391 P.2d 467, 471 (Colo. 1964); Nevada A.G.O. No. 87-9 (May 11, 1987); Nevada A.G.O. No. 83-14 (October 27, 1983); People v. City of South Lake Tahoe, 466 F.Supp. 527, 537 (E.D. Cal. 1978); Tahoe Regional Planning Agency Compact, Articles III(d), X(b); Tahoe Regional Planning Agency v. McKay, 590 F. Supp. 1071, 1074 (D.Nev. 1984); Nevada Administrative Code § 278.800 et seq.; ABA Model Rule 5.5(a).

#### **INTRODUCTION**

The Tahoe Regional Planning Agency ("TRPA") is a bi-state agency established by a Compact, under the Compact Clause of the United States Constitution, Article I, section 10, clause 3. The Nevada and California legislatures and the United States Congress passed the compact and President Jimmy Carter signed it into law. The Compact is codified in NRS § 277.200.

The Compact's purpose is to provide unified rules and regulations for development and conservation of properties within the Lake Tahoe basin. The Agency's jurisdiction includes areas of both California and Nevada. Its office is currently located in Zephyr Cove, Nevada, although the Agency was previously headquartered in California. The Agency's governing body consists of seven members from Nevada and seven members from California. Meetings are held in both states.

## DISCUSSION

Supreme Court Rule 189 provides:

A lawyer shall not:

1. Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
2. Assist a person who is not a member of the bar in the Performance of activity that constitutes the unauthorized practice of law.

SCR 189 (1994).

To be guilty of the unauthorized practice of law, the activity in question must necessarily involve the practice of law. Although there are few cases that define the practice of law, several courts have determined what constitutes the practice of law in front of administrative agencies. Generally, the practice of law involves "the preparation for another of matters for courts, administrative agencies and other judicial or quasi-judicial bodies and officials as well as the acts of representation of another before such a body or officer." *Florez v. City of Glendale*, 463 P.2d 67 (Ariz. 1969); Nevada A.G.O. No. 87-9 (May 11, 1987). One also practices law before an administrative agency when the representative "instructs and advises another in regard to the applicable law on an agency matter so that he may properly pursue his affairs and be informed as to his rights and obligations" or prepares for another procedural papers which require legal knowledge and technique. *Denver Bar Association v. Public Utility Commission*, 391 P.2d 467, 471 (Colo. 1964); Nevada A.G.O. No. 87-9 (May 11, 1987).

The activity at issue here largely consists of obtaining permits from the TRPA for property owners who wish to develop their property and other land use issues. It is difficult to dispute that such activity does not relate to one's "rights and obligations," or involve advice related to "the applicable law on an agency matter." Therefore, the land use issues brought before the TRPA and addressed in this opinion involve the practice of law.

The fact that the representation of Nevada residents and land owners concerning their various land issues constitutes the practice of law does not, however, automatically render SCR 189 applicable to attorneys who practice in front of the TRPA. A bi-state agency is not subject to the laws of either state unless the specific Company reserves to a state the right to impose and enforce laws applicable to the agency's activities. *People v. City of South Lake Tahoe*, 466 F. Supp. 527, 537 (E.D.Cal. 1978). The TRPA Compact provides:

The agency shall have such additional powers and duties as may be hereafter be delegated or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other.

Article X(b).

An illustration of a specific authorization regarding the applicability of one state's law involves the public nature of TRPA meetings. The Company provides that "(a)ll meetings shall be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held." Article III(d). It has been held that Nevada's Open Meeting Law applies to TRPA meeting because Nevada's law imposes greater requirements on local governments to visibly perform their public functions. *Tahoe Regional Planning Agency v. McKay*, 590 F. Supp. 1071, 1074 (D.Nev. 1984). The TRPA Compact does not authorize either state to regulate the licensing requirements of attorneys appearing before the Agency.

At least two Nevada Attorney General Opinions have held that an attorney must be licensed in Nevada in order to represent a client in front of a state agency. A licensed Nevada attorney must represent a state employee who challenges a dismissal, demotion, or suspension pursuant to NRS § 284.390. Nevada A.G.O. 87-9 (May 11, 1987). The opinion reasoned that if the subject matter being heard by the state department of personnel involved the practice of law, then the public interest is served by requiring the participation of licensed attorneys rather than lay persons. Another opinion held that a licensed Nevada attorney must participate in hears before an appeals officer in matters relating to industrial insurance claims under the provision of NRS § 616 et seq. Nevada A. G.). 83-14 (October 27, 1983). The holding relied on the fact that the relevant statutes referred several times to "attorneys" or "private counsel" in a representative capacity. Because of this language and the absence of any statutory exception to the requirements of a licensed attorney, the opinion held that non-attorney representative may not appear at such hearings.

Along these lines, it is necessary to review any rules which address who may practice before the TRPA. The Nevada Administrative Code ("NAC") § 278.840 provides, in part:

1. Any interested person may petition the governing body for the adoption, filing, amendment or repeal of any regulation. The petition must be accompanied by relevant data, view and arguments.
2. The petition need not be in a particular form but must be in writing and include a statement of the applicant's interest, the nature of the request the reasons therefor and such other matters as the applicant believes may be helpful to the governing body in determining the proper action to take in the matter. All petitions must be signed by or on behalf of the applicant.....

NAC § 278.10(1) (1973).

The above opinions and the following NAC provisions should be interpreted together to determine who may appear before the TRPA. In light of TRPA's make up and jurisdiction and the broad rules set forth in the NAC, Nevada A.G.O. 87-9 should be limited to

situations involving a purely state agency, such as the state department of personnel. By definition, the TRPA is a bi-state agency. It also has all of the characteristics of bi-state representation. Its governing body consists of an equal number of Nevada and California officials. Its jurisdiction covers areas on both Nevada and California, as the Lake Tahoe basin expands across the two states. Requiring a Nevada land owner to retain Nevada counsel because the Agency is presently headquartered on the Nevada side of the state line, or simply because an issue involving Nevada land is brought before the TRPA, conflicts with these facts and the NAC. It also conflicts with the concept behind the TRPA, that land use issues in the Tahoe basins transcend state boundaries.

SCR 189 is modeled after the language of ABA Model Rule 5.5(a). The ABA discussion of Model Rule 5.5(a) states:

The demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of the lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

This language is applicable to the present issue. Attempting to impose a requirement that would require one appearing in front of the TRPA to be a licensed Nevada attorney would be unreasonably impose territorial limitations on California attorneys who are just as able to represent Nevada land owners in the Tahoe basin as are Nevada attorneys. Of even more importance is the interest of the client. It is unreasonable to limit a Tahoe basin landowner's choice of counsel in this situation if the TRPA has not imposed such limitations.

## **CONCLUSION**

The restrictions in the TRPA Compact regarding the applicability of state law to the regulation of the TRPA, the rules set forth in the NAC, and the ABA comments regarding Model Rule 5.5(a) clearly support the conclusion that a California attorney may represent Nevada residents in front of the TRPA concerning land use issues involving property located in Nevada.

*This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 1225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.*



# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 22 July 28, 1995

**QUESTION** - Whether sending a written offer of employment at light duty as prescribed by NAC 616.085(1) by employer's counsel directly to an employee without a copy to the known counsel of the employee is a violation of Supreme Court Rule 182.

**ANSWER** - Mailing the notice to the employee without mailing a copy to known counsel for the employee is a violation of Supreme Court Rule 182.

#### **AUTHORITIES RELIED ON**

Nevada Supreme Court Rule 182, NAC 616.085(1); Holiday Inn vs. Barnett, 103 Nev. 60, 732 P.2d 1376 (1987); Annotated Model Rules of Professional Conduct (2nd Ed.) American Bar Association 1992, A.B.A. Comm. on Ethics Informal Opinion 1373 (1976), A. B.A. Informal Decision 570 (1962), In re Marrietta, 569 P.2d 921 (1977), Crane v. State Bar of Cal., 635 P.2d 163 (1981), NRCP 5.

#### **DISCUSSION**

Nevada Supreme Court Rule 182 provides as follows:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

NAC 616.085 regarding offers of employment sets forth the following applicable general requirements:

- "(1) An offer of employment at light duty to an injured employee by his employer must
- (a) be in writing;
  - (b) be mailed to both the insured and the injured employee,....)

Three separate questions have been asked concerning the interplay between this

regulation and SCR 182, which present variations on the same theme:

- (a) Is an offer of employment at light duty tendered by employer's counsel B to the employee, who is represented by attorney C, a violation of SCR 182?
- (b) If the offer of employment at light duty is generated by counsel B but presented to the employer for transmittal on the employer's letterhead to C's client with a copy to C is there a violation of Supreme Court Rule 182?
- (c) What ethical implications are there if the offer of employment at light duty mentioned in question (b) is communicated by the employer to the injured worker without a copy to attorney C?

Nevada's Supreme Court Rule 182 is identical to ABA Model Rule of Professional Conduct 4.2. The purpose of the rule is twofold: to insure that lawyers do not take advantage of unrepresented laypersons and to preserve the lawyer-client relationship. Annotated Model Rules at page 424. NAC 616.085(1) does not specifically provide for an employer's attorney to contact an employee, and when read in light of the purpose behind SCR 182, such a contact would appear to be specifically prohibited.

The Nevada case of *Holiday Inn v. Barnett*, 103 Nev. 60,732 P.2d 1376 (1987), illustrates the Nevada Supreme Court's view of the interplay between the SIIS statutes and the Supreme Court Rules. The *Holiday Inn* case dealt with a statute, NRS 616.567(2), whereas the issue in question pertains to a regulation. Nevertheless, NRS 616.567(2) describes the party to receive the communication in language similar to the regulation in question. The statute reads " , , , , the insure shall send a written notice of its intention to close the claim to the claimant...addressed to the last known address of the claimant."

In that case, the Supreme Court held that the appeal period specified in NRS 616.567(2) did not begin to run until counsel for the claimant was notified of the notice of closure of claim. 103 Nev. at 64. The employer, although notified of the existence of counsel for the claimant, and having been requested to send all correspondence to claimant's attorney, nevertheless directly communicated with the claimant on a number of occasions. The opinion clearly implies that the party doing the communicating was the employer's attorney, because the opinion relies upon SCR 182. The Supreme Court found that this conduct was expressly forbidden by SCR 182's predecessor statute, and that the conduct was, in fact, "reprehensible." 103 Nev. at 64-65. This decision is in harmony with SCR 182 and not in conflict with it.

The answer is different under the facts of question (b), where the offer of employment is drafted by counsel to be sent on the employer's letterhead. NAC 616.085 clearly requires the employer to communicate the offer of light duty to his employee in writing. The fact that counsel for the employer drafted the offer makes no material difference.

The answer relating to the facts of question (c) is squarely answered by *Holiday Inn v. Barnett*, supra. The lawyer is the agent of the party for litigation purposes. Included within the prohibition of SCR 182 are direct settlement negotiations with an opposing

party. After the service of the initial complaint, NRCP 5 requires service upon the lawyer unless a court orders otherwise.

Two A.B.A. Opinions reach similar conclusions as to factual situation (a). In informal Opinion 1373, The Committee on Ethics was asked whether sending a defendant a copy of a form letter addressed to his attorney which contained a plea bargain offer was unethical. The Opinion concluded that it was, because it violated the DR prohibiting communication to a represented client. Informal Decision 570 found a similar violation where a plaintiff's attorney sent counsel for the insurance carrier a letter and copied the insurance company's president.

While a lawyer has no duty to discourage a client from speaking directly to another lay party, the lawyer may not direct the client to communicate with the represented party in contravention of SCR 182. In *re Marrietta*, 223 Kansas 11, 569 P.2d 921 (1977). Once the initial communication of the written offer of employment at light duty by the employer is complete, as required by NAC 616.085, all further correspondence and negotiations are required to be handled between counsel, unless the exceptions in SCR 182 are met.

## **CONCLUSION**

NAC 616.085 authorizes and appears to require the employer to directly communicate to the employee in writing an offer of employment at light duty. NAC 616.085 does not authorize an employer's counsel to contact a represented employee, as that constitutes a violation of SCR 182.

*This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.*



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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 23**  
**October 25, 1995**

**QUESTION** - May a criminal defense attorney urge a domestic battery victim to avoid service of a subpoena, to refrain from testifying against his client, or to not cooperate with the prosecuting attorney.

**ANSWER** - A defense attorney who discourages a domestic battery victim from testifying, urges the victim not to cooperate with the prosecuting attorney, or attempts to influence the testimony of the victim, is in violation of Supreme Court Rules 173 and 203 and his or her actions may rise to the level of a criminal offense. Further, if the criminal defense attorney gives legal advice or counsel to the domestic battery victim/prosecution witness, the defense attorney's action would be a conflict of interest under Supreme Court Rule 157.

**AUTHORITIES RELIED ON**

Nevada Supreme Court Rule 173; ARA Model Rule 3.4; Nevada Supreme Court Rule 203 (d); ARA Model Rule 8.4(d); Nevada Supreme Court Rule 203; ABA Model Rule 8.4; North Carolina State Bar v. Graves, 274 S.,E.2d 396 (N.C. App. 1981); People v. Kenelly 648 P.2d 1065 (Col. 1982); Nev. Rev. Stat. §§ 199.305, 193.330; Nevada Supreme Court Rule 157; ABA Model Rule 1.7; and People v. Stewart, 511 N.Y. S2d 715 (1987).

**INTRODUCTION**

There have been increasing incidences of victims of domestic violence alleging that the defense attorney, either directly or through his or her client, has discouraged the victim from cooperating with the prosecuting attorney. Such incidences have included requesting that the victim avoid service of the subpoena, requesting that the victim not appear in court, and attempting to influence the testimony of the victim. Such activities are potentially obstructive to the criminal justice process and may rise to the level of a criminal offense. Further, if the criminal defense attorney provides legal counsel or advice to the victim/prosecution witness, a conflict of interest exists.

This opinion specifically addresses only domestic battery situations. Members of the bar should recognize that this opinion is applicable to all cases whether criminal or civil. This Committee sees not ethical distinctions between a defense attorney's obligation in a domestic battery case or any other criminal or civil matter where similar issues arise.

**DISCUSSION**

I. Conduct That is Prejudicial To The Administrative of Justice.

Supreme Court Rule 173 provides in relevant part:

A lawyer shall not:

1. Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having any potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; . . .

6. Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (a) the person is a relative or an employee or other agent of the client; and
- (b) the lawyer reasonably believes that the person's interest will not be adversely affected by refraining from giving such information.

SCR 173. Nevada's Supreme Court Rule 173 is identical to ABA Model Rule 3.4. The purpose of the rule is to ensure fair competition in the adversary system by prohibiting destruction or concealment of evidence, abusive tactics in the discovery process, and the improper influence of witnesses.

Further, Nevada Supreme Court Rule 203 states in relevant part:

It is professional misconduct for a lawyer to:

.....

- (d) engage in conduct that is prejudicial to the administration or justice.

SCR 203. Nevada's Supreme Court Rule 203 is identical to ABA Model Rule 8.4. This rule overlaps with other provisions of the rules of professional conduct that prohibit an attorney from dishonesty or misrepresentation, and the board language of the rules allows its application in a wide variety of situations.

Both SCR 173 and 203 would be violated if a defense attorney attempted to discourage or influence the testimony of a domestic battery victim in a criminal proceeding.

In *People v. Kenelly*, 648 P.2d 1065 (Colo. 1982) the Supreme Court of Colorado, sitting En Banc, addressed a situation where an attorney aided and abetted parties in reaching an agreement whereby the attorney's client received a favorable monetary settlement in a related civil action, in exchange for the client making himself unavailable for the service of a subpoena or testimony at the related criminal trial of the defendant. The attorney had indicated that if his client were to receive \$5,000, his client might find himself with the means "to end up in Switzerland or Jamaica, some place like that". *Id.* at 1066. The Grievance Committee of Colorado specifically found that the attorney "knew from the beginning of the settlement negotiations that the primary consideration for the payment" was that the attorney's client "would make himself unavailable for the service of a subpoena or testimony at the criminal trial". *Id.* at 1066. The Grievance Committee concluded that the attorney's conduct was "prejudicial to the administration of justice and reflects his unfitness to practice law and was therefore in violation of DR1-102 (a) (5) and (6)." *Id.* at 399.

In affirming the Grievance Committee's recommendation that discipline be instituted against the attorney, the Colorado Supreme Court stated:

If the legal system in this country is to survive, courts of law must have the testimony of necessary witnesses. An attorney, who is sworn to uphold the law and to aid in the

administration of justice, has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process.

Id. at 1066.

Likewise, in *North Carolina State Bar v. Graves*, 274 S.E.2d 396 (1901), the Court of Appeals of North Carolina addressed a situation where a defense attorney representing a client charged with driving under the influence of alcohol attempted to influence a witness to not testify in the criminal case. The Court determined that "[c]onduct by an attorney in influencing a potential witness not to testify by which relevant and material evidence is knowingly concealed at trial has been considered unethical". Further, the defense attorney's conduct could "frustrate any prosecution of the case, as relevant evidence as to the identity of the driver would be hidden from view." Id. at 399.

1DR 1-102(A) (5) is identical to SCR 203(d) and was the predecessor to ABA 8.4 (d).

The activity in the present domestic violence cases involves a similar type of conduct as that of the attorneys in *People v. Kenelly* and *North Carolina State Bar v. Groves*. If defense attorneys are discouraging victims of domestic violence from testifying at the pending trial, including encouraging the avoidance of the service of subpoena, the defense attorney is "engaged in conduct that is prejudicial to the administration of justice" in violation of SCR 203. Furthermore, the defense attorney's conduct could be deemed to [u]nlawfully obstruct another party's access to evidence" in violation of SCR 173. Finally, under SCR 173 an attorney shall not "request a person other than a client to refrain from voluntarily giving relevant information". SCR 173.

The defense attorney's conduct could even rise to the level of a criminal offense under NRS 199.305 which states in part:

1. Every person who, by intimidating or threatening another person, prevents or dissuades a victim of a crime, a person acting on his behalf or a witness from:
  - b) Commencing a criminal prosecution or a proceeding for the revocation of a parole or probation, or seeking or assisting in such a prosecution or proceeding; or
  - (c) Causing the arrest of a person in connection with a crime, or delays such a victim, agent or witness in his effort to carry out any of those actions shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, and may be further punished by a fine of not more than \$10,000.

NRS 199.305 (emphasis added). Further, an "attempt" to commit such an act could be punishable under NRS 193.330. A defense attorney's action of "intimidating or threatening another person" which "prevents or dissuades a victim of a crime" from "assisting in the prosecution or proceeding" could rise to the level of a criminal offense under the above referenced statute. NRS 199.305. If a defense attorney were to be convicted under NRS 199.305, it would clearly be a violation of Supreme Court Rule 203 which provides in relevant part:

It is professional misconduct for a lawyer to:

....

2. Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

SCR 203(2). ARA Model Rule 8.4. This general prohibition to dishonesty and misrepresentation overlaps with other provisions of the Rules of Professional Conduct.

## II. Conflicts of Interest.

Representation of a criminal defendant while providing advice or counsel to the victim/prosecution witness could create a conflict of interest in violation of Supreme Court Rule 157. Specifically, the restraints placed on the defense attorney's advocacy and independent judgment while advising the victim/prosecution witness, in light of that attorney's duty to the defendant, clearly creates divided loyalties.<sup>2</sup> Such a conflict could interfere with the defense attorney's professional judgment. A defense attorney's representation must be "untrammelled and unimpaired," his loyalty undivided. See *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1941).

Loyalty to a client prohibits undertaking representation adverse to a client without first obtaining that client's consent. In certain circumstances, an impermissible conflict of interest may exist which entirely prohibits representation. This general proposition is codified in Supreme Court Rule 157 which provides:

1. A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (a) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and
- (b) each client consents, preferably in writing after consultation.

2. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

- (a) the lawyer reasonably believes that representation will not be adversely affected; and
- (b) the client consents, preferably in writing after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

SCR 157. Rule 157(1) governs representation of opposing parties in litigation, while subsection (2) addresses the simultaneous

2The Committee recognizes a defense attorney may interview witnesses, including the victims of domestic battery, the defense attorney must be sensitive to the difference between interviewing and counseling witnesses.

representation of co-parties or one party and a potentially damaging witness. Nevada's Supreme Court Rule 157 is nearly identical to ABA Model Rule 1.7, with the exception being that Rule 157 suggests that the client's consent be in writing.

In *People vs. Stewart*, 511 N.Y.S.2d 715 (N.Y. 1987), the New York Appellate Court considered whether a conflict of interest existed in ruling on whether the criminal defendant had been provided effective assistance of counsel. The defendant's attorney not only represented the defendant, but also represented the defendant's father, who was the chief prosecution witness. The Court stated:

Here, the attorney's representation of both the chief prosecution witness and the defendant presented an actual conflict of interest from which prejudice must be presumed. (citations omitted)

*Id.* at 717. In ruling that an actual conflict of interest existed, the Court focused on the defense attorney's cross-examination and impeachment of the prosecution witness, who was also the defense attorney's client. The Court reasoned:

The nature and character of counsel's cross-examination of the father

is also significant to our determination. An attorney's decision whether and how best to impeach the credibility of a witness to whom he . . . owe[s] a duty of loyalty necessarily place[s] [the attorney] in a very awkward position, where prejudice to [defendant] need not be precisely delineated but must be presumed.

*Id.* at 717. The Court ruled that "because of the conflict of interest, defendant was deprived of the effective assistance of counsel". *Id.* at 717. The conviction was reversed and a new trial was ordered.

## **CONCLUSION**

Discouraging a domestic battery victim from testifying the court, or urging the victim to be uncooperative with the prosecuting attorney, is clearly a violation of Supreme Court Rules 173 and 203. Further, the defense attorney should not take any action, either personally or through his or her agent or client, to discourage the witness or victim from testifying, or seek to influence the content of such testimony. Finally, if the defense attorney's conduct is "intimidating or threatening" and prevents an adverse witness or victim from testifying the defense attorney may be subject to criminal charges under NRS 199.305. The defense attorney should avoid providing any legal advice or counsel to the victim/prosecution witness, as such action would violate conflict of interest Rule 157. In this way the individual litigants, as well as the integrity of the legal system, will be protected.

*This Opinion is issued by the Standing Committee of Ethics and Professional Responsibility of the State Bar of Nevada pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.*



# STATE BAR OF NEVADA

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 24 June 18, 1987

**QUESTION** - May a lawyer accept an ongoing referral fee from an investment advisor/broker where the fee payments are disclosed in advance to an existing client and the lawyer monitors the account, but the investment advisor/broker has exclusive responsibility for managing the account?1

**ANSWER** - The conflict of interest inherent in the situation is not waivable as the lawyer cannot continue to act as the client's lawyer once he assumes the role and responsibilities of a broker. If an investment is made through the lawyer/broker, the client must first obtain independent legal advice and it must be objectively clear that the lawyer/broker is acting only as a broker.

### **AUTHORITIES RELIED ON**

Nevada Rules of Professional Conduct (Supreme Court Rule) 157.2, 158.6, 167 and 188; Annotated Rules of Professional Conduct, American Bar Association, 1992; New Hampshire Bar Ethics Committee Opinion #1994/95-2 ABA Informal Op. 1482 (1982); In re Singer, 109 Nev. 1117, 865 P.2d 315 (1993); Louisiana State Bar Assn.. v. Drury, 455 So. 2d 1387 (La 1984) cert denied, 470 U.S. 1004 (1985); Attorneys' Conflicts of Interest in the Investment Company Industry, 6 U. Mich. J.L Ref. 58.

### **DISCUSSION**

The New Hampshire Bar Ethics Committee wrestled with a nearly identical question in its Opinion #1994/95-2 and was unable to agree on a majority opinion. Some New Hampshire committee members believed that the lawyer could not give truly

1 The question as presented to the committee points out that Nevada law requires the referring lawyer to be licensed as an investment advisor in order to receive a portion of the management fee.

Independent advice--the motivation being a fee for the lawyer--and therefore there was no real benefit from the advice to the client and the conduct was unreasonable. But other New Hampshire committee members were concerned that a fully informed client is free to reject the referral after disclosure of the lawyer's interest, and the comments to A.B.A. Model Rule 1.7(b) imply that a lawyer may allow such a referral given full written disclosure. (The

A.B.A. comments to Rule 1.7(b) state that, "a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.")

SRC 158.6 precludes a lawyer from taking compensation from one other than his client if there is any interference with the lawyer's "independence of professional judgment". An application of that concept to the present issue is critical. In making that analysis, this committee notes that while a lawyer can have business interests which may be affected by representing a client, and such a conflict may be remedied by full disclosure and a valid waiver, we do not believe that any such conflict should involve the actual payment of a legal fee to that lawyer by the differing interest for the same subject matter upon which the lawyer is rendering advice, and in fact the case law on that subject consistently upholds that interpretation. See Annotated Rules of Professional Conduct, American Bar Association, 1992, pg. 146. See also *In re Singer*, 109 Nev. 1117, 865 P.2d 315 (1993), (There is a presumption of impropriety in any business transaction between lawyer and client which benefits the lawyer.)

The situation posited, upon close examination, is far more complex than a run-of-the-mill third party payment situation, such as an insurance company paying a lawyer for representing an insured. In the instant matter, the client of the lawyer is likely asking investment advice based upon the receipt of a settlement or inheritance acquired through the lawyer's services. More likely than not, there will not be a direct billing to the client by the lawyer for the investment advice, and more likely than not the subject matter for which the lawyer was hired is essentially over. The person paying for the lawyer's services is actually the investment advisor. Yet, unlike an insurance carrier paying for an insured, the investment advisor does not expect any significant services to be rendered to the client by the lawyer, and certainly does not expect to pay for any such services, as the fee paid to the lawyer is a fixed percentage of a management fee, not an hourly rate.

This committee is particularly troubled by that portion of the question which would have

the referring lawyer monitor the client's investments without the ability to affect the investment decisions. SCR 188.3 precludes a lawyer from permitting one who pays him to render legal services for another to direct or regulate the lawyer's professional judgment in rendering those services. How can a lawyer possibly act as an independent monitoring agent if he not permitted to affect the investment decisions? How can the lawyer realistically be expected to suggest to the client that the investment strategy is unsound when the lawyer is being paid by the investment company on a continuing basis? What exactly is the lawyer expected to do for the fee being paid to him by the investment advisor? To whom does the lawyer owe a duty of loyalty? When looked at in this context, the lawyer has taken off his lawyer hat that when asked by the client about where to place the funds, and has put on his broker/investor hat. A written disclosure agreement is meaningless and may even be misleading since the lawyer is not acting in the client's interest, but in his own interest and that of the investment advisor. The client is being denied "independence of professional judgment".

In *Louisiana State Bar Assn. V. Drury*, 455 So. 2d 1387 (La 1984) cert denied, 470 U.S. 1004 (1985), a lawyer was suspended for taking a referral fee from a doctor in a personal injury case. Although the lawyer failed to disclose the "kick-backs", the court noted the following:

" . . . Drury had a substantial interest in the doctor's medical fees which might tempt him to overlook overcharges, excessive treatment or poor medicine, should any occur. He clearly was not insulated from the desires of others or pressures that might influence his free professional judgment. The primary object of DR 5-107 is to prevent an attorney from becoming involved in conflicts of interests which may lead to the harm of his clients, the bar or the public. The harm does not have to occur in order for a prohibited conflict to exist."

Analogizing the client and his invested and managed resources to a fund such as a mutual fund (investment company), the inherent nature of the conflict becomes readily apparent:

"The Code implies that an attorney can continue to represent differing interests so long as there is full disclosure to all clients and their consent to such representation is obtained. In the investment company industry, however, dual representation should not be permissible. The attorney for the fund is usually retained by the management company, which pays his salary and to which he is ultimately responsible. Counsel's loyalty, whether consciously or unconsciously, is directed primarily toward the management company and not toward the fund. . . . Judge McGowan feels that disclosure of conflicts to the client simply shifts the burden of avoiding or approving the conflict to the client. He suggests that this is unrealistic, because "it is [not] the client who can best make the decision as to whether there is a harmful conflict, even though he knows all the facts.'" *Attorneys' Conflicts of Interest in the Investment Company Industry*, 6 U. Mich. J.L. Ref. 58, 67-68 (1972).

When a client asks a lawyer for investment advice, a number of obligations come into

question. Has the lawyer made an independent assessment of the skill and advantages or disadvantages of all of the investment advisors in the area? What is the lawyer's knowledge and understanding in the investment field? Does the referral fee increase the management fee to the client? Could the lawyer negotiate for the client a reduced management fee with or without the referral fee included in the equation? What is the lawyer's liability to the client for a mismanaged account?

Clients take recommendations of lawyers as advice to be trusted. It is one thing for a knowledgeable client to sign off on a written disclosure of the lawyer's interest, including an understanding of the necessity to seek independent legal advice. It is quite another thing for this committee to presume that the lawyers making such referrals would not be affected in making the suggestion by the lure of a continuing fee, magnified over time by the many fees that might be forthcoming based upon the referral of many clients.

## **CONCLUSION**

A lawyer is not precluded from acting as a broker, so long as it is clear that the person being provided brokerage service is not a client of the lawyer's firm and cannot be confused as such. If the funds in question were obtained for the person seeking investment advice by the broker's law firm, the committee believes that circumstance would constitute prima facie evidence of a conflict which would require that the person seeking investment advice first obtain independent legal counsel before the investment can be made through the lawyer/broker.

*This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.*



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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 25**

## QUESTION

What are the ethical and professional responsibilities of an attorney who discovers subsequent to offering advice to a former client that the former client used the attorney's services to perpetrate a fraudulent act in a State or Federal Court?

## ANSWER

An attorney may at the attorney's own discretion disclose information relating to the representation of the client. The attorney should first try to persuade the former client to correct the fraud before revealing such fraud. If the former client does not do so, the attorney may reveal the information to the former client's current attorney. If the former client still does not rectify the fraud, the attorney may disclose to the court such information.

## AUTHORITIES RELIED ON

Nevada Rules of Professional Conduct (Supreme Court Rules) 156, 159, 172; 18 U.S.C. § 4; Sloan v. State Bar, 102 Nev. 436, 726 P.2d 330 (1986); Annotated Model Rules of Professional Conduct (2nd Ed.) American Bar Association (1992); A.B.A. Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990); LR IA 10-7; LR 1001(b)(1); ABA/BNA Lawyer's Manual on Professional Conduct (1994); Clark v. United States, 289 U.S. 1 (1933); United States v. Zolin, 491 U.S. 554 (1989) In re Rindlisbacher, BAP No. cc-97-1831-PJO (9th Cir. 1998); Todd v. State of Nevada, 113 Nev. 18, 931 P.2d 721 (1997); and Lewis v. Statewide Grievance Committee, 669 A.2d 1202, 1210 (Conn. 1996).

## INTRODUCTION

An individual consults an attorney about bankruptcy. The individual reveals to the attorney the type of assets the individual owns and the attorney tells the individual that these assets are non-exempt under Nevada law. The individual does not retain the attorney.

Later, the attorney sees the individual in bankruptcy court and hears the individual tell the trustee that the individual did not own any of the assets that the individual had previously told the attorney that she owned.

## DISCUSSION

A. Rules of Professional Conduct.

The United States District Court for the District of Nevada and the Bankruptcy Court in

Nevada apply the Nevada Supreme Court Rules of Professional Conduct. LR IA 10-7. LR 1001(b)(1). Obviously, they are applicable to state court.

Confidentiality: S.C.R. 156

Nevada Supreme Court Rule 156 addresses confidentiality of information:

1. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections 2 and 3.
2. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.
3. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(a) to prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action; or

(b) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

SCR 156 (1986).

The ABA, in Formal Opinion 90-358 addressed the scope of "information relating to representation of a client" with regards to a prospective client. The opinion stated that information imparted to a prospective client seeking legal representation is protected from revelation by confidentiality even if the attorney does not represent or perform legal services for the prospective client. A.B.A. Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990). The confidentiality rule "covers all information relating to the client's representation, whether or not it came from the client and whether or not it was imparted in confidence. It even extends to information that may be known to others." ABA/BNA Lawyer's Manual on Professional Conduct (1994). An attorney-client relationship can be implied in a situation such as this when the person consults an attorney for a legal matter, even if that attorney was not hired. *Todd v. State of Nevada*, 113 Nev. 18, 931 P.2d 721 (1997). Thus, all information that an attorney discovers about a client relating to why the client consulted a lawyer is covered by rule 156.

A lawyer "may", however, reveal confidential information if the prospective client used the attorney's services to commit a fraudulent or criminal act under Supreme Court Rule 156(3)(a) (if not subject to privilege restrictions, *infra*). The rule does not place an affirmative duty on an attorney to disclose such a fraud. Instead, the rule leaves to the discretion of the attorney whether to disclose a fraud or crime. *Sloan v. State Bar*, 102 Nev. 436, 443 (1986).

This situation is somewhat different from the facts in *Sloan* because the attorneys services were not used directly to commit a fraud. However, the attorney was consulted and the attorney's advice educated the client to conceal information from the next attorney making it arguable the attorney's services were used to commit a fraud.

An attorney may reveal confidential client information as allowed in Supreme Court Rule 156(3)(a) even if the attorney no longer represents the client. Nevada Supreme Court Rule 159(2) explicitly authorizes discretionary disclosure of information from a former client:

A lawyer who has formerly represented a client in a matter shall not thereafter:

2. Use information relating to the representation to the disadvantage of the former client except as Rule 156 would permit with respect to a client or when the information has become generally known.

SCR 159(2). The "except as Rule 156 would permit" language of Rule 159(2) explains that the attorney may still take actions allowed by Rule 156(3)(a) with regard to former clients.

On the surface, a recent bankruptcy case will seem to be authority prohibiting disclosure. The Ninth Circuit Bankruptcy Appellate Panel addressed a variation of this situation in *In re Rindlisbacher*, BAP No. cc-97-1831-PJO (9th Cir. 1998). In that case, an attorney represented a client in a divorce proceeding. During the course of the representation, the client confidentially told the attorney that the client actually received rental income that the client had denied in his deposition. After the divorce was completed, the client filed for bankruptcy while still owing a substantial fee to the attorney. The client did not disclose the rental income in the bankruptcy. The attorney, on behalf of himself, filed a motion to block the former client's discharge on the basis the client failed to disclose the rental income. The Bankruptcy Appellate Panel affirmed the summary judgment granted to the client which dismissed the attorney's claim. Among other findings, the Panel held that : (1) information about the rental income was confidential; and (2) the attorney's use of the information was not related to the attorney's protection of his own rights against a breach of duty by the client, and thus not excepted from nondisclosure pursuant to California ethical rules. The issue addressed was the California rule (Cal.Evid. Code B 958) which is somewhat similar to Rule 156(3)(b). The Court and apparently the parties did not address any issues implicated by Rule 156(3)(a) (Cal.Evid. Code B 956). Therefore, this case does not alter the conclusion herein.

It is perjury and a felony to lie under oath in regard to a material fact. NRS 199.120. It is also felony perjury to conceal from a trustee or other officer of the court, any property belonging to a debtor. 18 U.S.C. § 152. It should also be noted by attorneys that there is a federal law requiring the reporting of felonies.

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4. We have not located any case discussing the interplay between this statute and state ethical rules concerning attorney's duties relating to client confidences. However, mere silence is not considered to be concealment, which requires an affirmative act. *U.S. v. Ciambone*, 750 F.2d 1416 (9th Cir. 1985). Thus an attorney that knows the truth but chooses to remain silent has not violated 18 U.S.C. § 4 *id.*

To encourage full and open communication between a client and attorney, the attorney should employ the least harmful means to prevent or rectify the consequences of a client's criminal or fraudulent act. Supreme Court Rule 156 states that the attorney should first try to persuade a client to correct the client's act. By first consulting the client, the attorney may uncover an explanation for an apparently fraudulent act. If this does not persuade the client to correct the client's action, the former attorney may disclose to the client's present attorney the information that the former attorney obtained from the client. As a last resort, Rule 156(3)(a) allows the former attorney to disclose the information to the court. By following the preceding order of disclosure, the attorney provides the greatest protection to the client's information and helps protect himself against possible ethics violations or malpractice.

In a recent decision by the Connecticut Supreme Court, the reprimand of an attorney for disclosing client confidences was upheld. The attorney claimed, in part, that the disclosure was permitted under the Connecticut rule similar to SCR 156. The attorney's former clients asserted a complaint against their real estate agency asserting it improperly released a deposit of \$19,100 from escrow. At the request of the representative of the real estate agency, the attorney wrote a letter saying his former clients never disclosed to him that the funds were supposed to be put in escrow. The Court held that the disclosure was not proper to rectify an alleged fraud because the clients had not used the attorney's services to commit the alleged fraud. The Court said "general legal advice in which an attorney explains, in good faith, why a client's case is unlikely to succeed or is destined to fail does not, however, constitute aiding a fraud if the client chooses to hire another attorney and attempts later to prosecute the case." *Lewis v. Statewide Grievance Committee*, 669 A.2d 1202, 1210 (Conn. 1996). *Lewis* is different from the facts in this matter in that the attorney was, at most, presented with an inconsistency in his former client's claim, not the specific information revealed in this matter. The Connecticut court noted that the alleged inconsistency was not necessarily a fraud because the former clients claim against the real estate company could be

reconciled with the information provided to the attorney.

## Candor Toward the Tribunal: SCR 172

Even though SCR 156 allows the attorney to disclose confidential information at the discretion of the attorney, SCR 172 (Candor toward the tribunal) places an affirmative duty on the attorney to disclose client perjury. Mandatory disclosure applies pursuant to Rule 172 even if the information to be disclosed is information protected by Rule 156. Rule 172 reads as follows:

1. A lawyer shall not knowingly:

(a) make a false statement of material fact or law to a tribunal;

(b) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(c) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(d) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

2. The duties stated in subsection 1 continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 156.

3. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

4. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

## SCR 172.

There is very little authority as to whether Rule 172 applies to former clients in our fact scenario. Subsection 2 of Rule 172 states that the duty to disclose client perjury continues to the end of the proceeding. The subsection where this applies in the situation under discussion is Subsection 1(b) of Rule 172. This duty to disclose in Rule 172(1)(b) is triggered only if disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Analysis of SCR 159 suggests that the duty in SCR 172(1)(b) does not relate to a former client.

Nevada Supreme Court Rule 159(2), supra, only allows an attorney to disclose disadvantageous information relating to the representation of a former client if disclosure is allowed under SCR 156. The Nevada Rules of Professional Conduct were modeled after the ABA Model Rules of Professional Conduct. ABA Model Rule 1.9(c) is the ABA's equivalent rule to Nevada Supreme Court Rule 159(2). ABA Rule 1.9(c) reads as follows:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client. ABA Rule 1.9(c) [emphasis added].

ABA Model Rule 3.3, referred to above in ABA Model Rule 1.9(c), has the exact wording of Nevada Supreme Court Rule 172 concerning candor toward the tribunal. Thus, the ABA Model Rules specifically relates to information from a former client in order to comply with the requirements of "Candor toward the tribunal."

The Nevada Supreme Court in its rule 159(2) appears to have intentionally omitted the application of Rule 172 (Candor toward the tribunal) to prior clients whereas the ABA Model Rules specifically applies Rule 3.3 to information obtained from prior clients. This omission of the requirement of disclosing former client perjury suggests that the Nevada Supreme Court intended for attorneys to have no affirmative duty or ability to disclose former client perjury in order to comply with SCR 172. Thus, the attorney cannot disclose a former client's perjury if the lawyer's services were not used by the former client to commit the perjury or commit the fraud.

## CONCLUSION

Since the client actually used the services of the first attorney consulted to perpetrate a fraud on the bankruptcy court, the attorney may disclose the information received from the client to prevent the continued fraud but is not required to do so.

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## STATE BAR OF NEVADA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

### Formal Opinion No. 26

March 20, 2001

#### QUESTION

Can an insurance company demand information from the law firm it hires to represent the insured, relating to the case, when that information might be used by the insurance company to deny benefits to the named insured?

#### ANSWER

No.

#### AUTHORITIES RELIED UPON

NRS 49.095

Nevada Supreme Court Rules 151, 156(1), 169(1), 182

Model Rule of Professional Conduct 5.4(c)

Ballard v. Eighth Judicial Dist. Court, 106, Nev. 83, 787 P2d. 406 (1990)

Cronin v. Eighth Judicial Dist. Court ex rel. County of Clark, 105 Nev. 635, 781 P.2d 1150 (1989)

Ricketts v. Farmers Group, Inc, BC 165961 (Superior Court of Los Angeles)

## INTRODUCTION

Law firms are hired by insurance companies to defend policy-holders. The question posed involves a Law Firm retained by an Insurance Company to act as defense counsel on behalf of Client, a subcontractor, involved in complex construction defect litigation. The basis of the claims against Client is that Client is responsible for the existence of construction defects at a construction project.

It is the Insurance Company's position that, pursuant to the terms of its insurance contract with the Client, damages to the Client's own work are not covered losses. However, damages caused by the Client to the work or property of other parties (i.e., resultant damages) are covered losses under the policy. During the litigation, Insurance Company requested that Law Firm identify those items of damages claimed by the Plaintiff which were resultant damages.<sup>1</sup> Therefore, by omission, the Law Firm would provide the Insurance Company with its opinion as to which damages were not resultant damages, and thus were not covered under the insurance policy.

The Law Firm's concern was whether the request for information posed a conflict of interest. Specifically, the Law Firm was concerned that it was being asked to render an opinion that could be used by the Insurance Company to deny coverage to the Client. The Insurance Company took the position that there was no conflict of interest.

## DISCUSSION

The question of potential conflict of interest does not appear to be an ethical issue per se. Rather, the appropriate first issue is the identification of the client. The Law Firm was retained by the Insurance Company to act as insurance defense counsel on behalf of Client. Accordingly, the "Client" of the "Insurance Company" is actually the client of the Law Firm, as to the claims defended by the Law Firm. There is no attorney/client relationship between the Insurance Company and the Law Firm on those claims. If coverage of a claim is the issue, the Insurance Company should hire its own counsel.

The agreement by which the Insurance Company hired the Law Firm is a third-party-beneficiary contract intended for the benefit of Client; the Insurance Company's obligation to hire the law firm is an outgrowth of its contract of insurance with Client. Release of information by the Law Firm to the Insurance Company would apparently constitute breach of that third-party-beneficiary contract.

Model Rule 5.4(c) states that "A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." This rule would appear to apply to Insurance Company's employment of Law Firm. It could be argued that requiring information from the Law Firm does not itself constitute "directing" or "regulating" the Law Firm's professional judgment.

There could be no other purpose for the request for the information, however, except to allow the Insurance Company to decide what position it would take regarding whether to cover losses suffered by the Client, including whether it would pay the Law Firm to do so. The position taken by the Insurance Company would, or at least could, result in expanding or restricting the scope of the Law Firm's defense of the Client, and thus would amount to directing or regulating the Law Firm's judgment in rendering legal services. Where furnishing the requested information would likely lead to the Insurance Company informing the Law Firm that it would not pay for the defense of some portion of the claims against the Client, the Law Firm would be precluded from supplying the information directly.

The applicable statutory and case law apparently point counsel toward not disclosing to the Insurance Company any potentially damaging admissions made by the Client to the Law Firm. In the context of disclosure to the opposing party in litigation, the attorney-client privilege (see NRS 49.095) has been held to apply to statements made by an insured to an insurer, when that statement was taken at the express direction of counsel. *Ballard v. Eighth Judicial Dist. Court*, 106 Nev. 83, 787 P.2d 406 (1990). It obviously would apply to a statement made directly by the Client to the Law Firm.

Even if the Insurance Company could be considered another client of the Law Firm, the normal conflict rules would prohibit the Law Firm from simply providing adverse information from or about the Client to the Insurance Company:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except disclosures that the law impliedly authorizes to carry out the representation . . . .

SCR 156(1). If the lawyer believed that the information would be utilized by the Insurance Company to the detriment of the Client, it would not be able to disclose the information to the Insurance Company as an independent Client, even as a matter of the Law Firm's evaluation of the information for the use of the Insurance Company, without the Client's consent:

A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

- (a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
- (b) the client consents after consultation.

SCR 169(1).

While not directly addressing the question posed here, a series of decisions and initiatives in the parallel area of insurance company authority to manage litigation is illustrative. In

at least one recent decision, one basis of a court's award of punitive damages against an insurance company was its instructions to an English/Spanish translator to report privileged information to the company for the purpose of voiding the insured's coverage. *Ricketts v. Farmers Group, Inc.*, BC 165961 (Superior Court of Los Angeles). Presumably, it would have been just as prohibited for the insurance company to obtain the information from the attorney directly as it was to obtain it from the translator.

The economic interdependence of defense counsel and insurance companies has caused some third party entities to recommend a middle ground when counsel is asked for information. The Defense Research Institute issued case handling guidelines in April, 2000, that sought to comply with Rule 5.4(c) of the Model Rules of Professional Conduct by providing that insurance companies have the right to review counsel's files in most circumstances, but only in a manner that will not compromise attorney-client or work product protection and only if the material reviewed is not privileged or intended by the insured to be confidential, in which case consent of the insured would be required for the attorney to make a disclosure. Michael M. Bowden, *Seeking Common Ground; Insurance Industry Works with DRI to Avert Crisis*, in *Lawyers Weekly USA*, May 29, 2000, at B12.

It thus appears that, at least if the Law Firm knows that the information it has developed or accumulated would be used by the Insurance Company to the detriment of the Client, the Law Firm is not permitted to disclose that information to the Insurance Company upon the latter's request.

The Insurance Company may have a separate right to demand such information from the Client, however, under a duty to cooperate or similar clause in the contract of insurance between the Insurance Company and the Client. The Insurance Company may, therefore, be allowed to compel the Client to direct the Law Firm to release the information.

Further, the Law Firm probably has a duty to at least ask the Client if the requested disclosure should be made when the Insurance Company requests it. As soon as it begins representation of the Client, the Law Firm becomes the only legitimate means by which information can be requested of the Client by the parties in litigation. SCR 182; *Cronin v. Eighth Judicial Dist. Court ex rel. County of Clark*, 105 Nev. 635, 781 P.2d 1150 (1989).

Therefore, the Law Firm has a duty to pass along to the Client such requests for information, and to inform the Client of the ramifications for disclosure and non-disclosure, under the general duty of competence. SCR 151. If the underlying contract of insurance contains a clause that would penalize the Client for not revealing information indicating that there is no insurance coverage, the Law Firm would have to inform the Client of the potential damages for the non-disclosure.

## CONCLUSION

It is improper for the Law Firm to provide information relevant to resultant damages to the Insurance Company except with the consent of the Client.

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1 The question posed was not precise as to whether the information sought by the Insurance Company is what the Plaintiffs to the claims have identified as resultant damages, or what the Law Firm has concluded are resultant damages. Presumably, the question posed goes to the Law Firm's conclusions, since there appears to be no ethical issue in truthfully reporting to the Insurance Company what claims have been asserted that the Law Firm is being asked to defend.



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**Formal Opinion No. 27**

**NOTICE:**

**Palmer v. Pioneer Hotel is under appeal. See 9th Cir. Case No. 00-15397  
(July 2001)**

**Formal Opinion Number 27**

**September 10, 2001**

**QUESTION NO. 1**

May opposing counsel make ex parte contact with lower level employees of a corporate defendant? The corporation is represented by counsel.

**ANSWER**

Yes, within limits.

## **AUTHORITIES RELIED UPON**

Nevada Supreme Court Rule 182. Official comment to Model Rule 4.2. *Palmer vs. Pioneer Hotel*, 19 F.Supp.2d (D NV 1998). Cases and articles cited herein.

## **DISCUSSION**

This opinion discusses the ethical issues raised in Nevada when counsel for a party suing a corporation contacts ex parte "lower level" employees of the corporation. Supreme Court Rule 182 governs the issue:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

This Rule is adopted from ABA Model Rule 4.2., S.C.R. 150. While the comments to the Model Rules were not adopted, they may be used as guidance. S.C.R. 150(2). Personal interviews of witnesses by counsel are the time honored means by which an attorney develops and refines his case. *IBM v. Edelstein*, 526 F.2d 37 (S.D. N.Y., 1975). Interviews are one method of satisfying an attorney's obligations under Rule 11 to conduct a reasonable inquiry to ensure that a claim is well grounded in fact. NRCP 11. The purpose of Rule 182 is to protect laypersons from being taken advantage of by lawyers, to protect the attorney/client relationship, and to prevent the inadvertent disclosure of privileged information. *In re Discipline of Schaeffer*, 25 P.3d 191, 198 (NV 2001). The issue arises in connection with contacting non-managerial corporate employees. Ex parte contact with managerial employees of a corporation is prohibited by the Rule. *Cronin v. Eighth Judicial District Court*, 105 Nev. 635, 781 P.2d 1150 (1989). The issue in the case of corporations is: Which individuals constitute the represented party?

Some courts embrace the position that no corporate employees, even lower level employees, should be contacted ex parte when that corporation is represented. *Public Service Elec. & Gas Co. v. Associated Elec. & Gas Ins. Svcs., Ltd.*, 745 F. Supp. 1037 (D. N.J. 1996) (superseded by Rule and Reg.). The majority take the position that some communication may take place. *Niesig v. Tenant*, 76 N.Y.S. 2d 363, 558 N.E. 2d 1030 (1990).

The scope of corporate employees covered by the Rule has been broadened by courts over the years. The narrowest test is the control group test. Those courts which adopt the control group test, reason that the maximum amount of information should be readily available through informal discovery. *Fair Automotive Repair, Inc. v. Car-X Service*

Systems, Inc., 128 Ill. App. 3d 763, 471 N.E.2d 554 (Ill. App. 1984). In Wright v. Group Health Hospital, 691 P.2d 564 (S. Ct. Wash 1984), the Court used a "managing-speaking" agent test that defines a manager as one who in words or actions bind the corporation ("speaker-manager"). By identifying a speaker-manager as the party, the Court reasoned that the purpose of the Rule was satisfied by preventing an adverse attorney from contacting someone who could bind the corporation. 691 P.2d at 569. The Wright Court refused to distinguish between employees who witnessed the damaging act from the employees who caused it, reasoning that the Rule is not meant to shield a corporation from discovery of the facts of a matter, even if they are prejudicial. 691 P.2d at 569.

Other courts have followed this "binding admission" approach. Strawser vs. Exxon Co., U. S.A., 843 P.2d 613, 621 (Wyoming 1992). In Strawser, the court allowed the plaintiff to interview all of Exxon's employees except the following:

(1) Those who may legally bind Exxon by their having acted or failed to act in the alleged course of defaming Strawser or invading the Strawser's privacy; (2) those whose actual conduct in the claimed incidence may be imputed to Exxon; and (3) those employees implementing the advice of Exxon's counsel.

The ABA Model Rule takes the position that the proscription of the Rule applies only to (1) managers, (2) persons whose act or omission would bind the corporation, or (3) employees whose statement may constitute an admission. The comment to Model Rule 4.2 says:

(4) In the case of an organization, this Rule prohibits communications ...with persons having a managerial responsibility...and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Nevada District Court Judge David Hagen thoroughly analyzed and applied all three factors found in the comment to Model Rule 4.2 in Palmer v. Pioneer Hotel & Casino, 19 F. Supp.2d 1157 (D. Nev. 1998). The court held that the comment to Model Rule 4.2 is the proper test to determine who is the party for the purposes of communications by opposing counsel. 19 F.Supp.2d at 1162. Judge Hagen also opined that Rule 182 comes into play before a complaint is filed if the organization has retained counsel or referred the specific matter to in-house counsel. The Palmer court adopted the "managing-speaking agent" test from Wright, supra, to define who is meant as a person with managerial responsibility.

In Cronin, the court referenced the Wright case, managing-speaker test, but distinguished Wright as having discussed an earlier version of S.C.R. 182. Cronin appears

to apply the Rule to management employees in general, although this is not crystal clear. Cronin did not discuss lower level employees at all. Judge Hagen emphasized them. His opinion applied all three ABA Comments tests to the various employees whose interviews were the subject of the case. He reasoned that the Wright "managing-speaking" analysis is the correct interpretation of Cronin due to its flexibility.

The test, as developed by Judge Hagen, precludes conversations with three levels of employees: the manager-speaker (a supervisor with authority in the area in which the subject of the lawsuit); an actor (a person whose acts potentially subject the corporation to liability); and, an authorized speaker (one whose statements uttered within the course of his employment duties will bind the corporation).

The discussion in Palmer provides good examples of the application of the test. One employee was identified as a manager, who had not participated in the actions giving rise to the lawsuit. Thus, he was not covered by the first or second test. However, the court held that he fell within the third category because his managerial position gave him the ability to make binding statements concerning the company's policy on the subject matter. As a result, he could not be contacted ex parte. A second employee was neither a supervisor nor had she committed any act in relation to the subject matter of the lawsuit. She had, at a previous time, held a managerial position, but since she was no longer a manager, she could not make admissions on behalf of the corporate client. Accordingly, she could be interviewed. The third employee was neither a direct manager nor an actor. That employee had relayed a conversation she had with an actor. The court determined that the conversation was not within the scope of her duties as an employee, therefore she could not bind the corporation and could be interviewed.

The opinion discussed a fourth person who was, at the time of the case, a former employee. The court held that Rule 4.2 does not apply to former employees, but added a caveat that an attorney may not question about any area subject to the attorney-client or attorney-work product privilege.

In a thorough analysis of the issues, Eighth Judicial District Court, Discovery Commissioner Thomas W. Biggar concluded that a policy which would exclude all contact with lower level employees who are essentially percipient witnesses would unnecessarily frustrate the general policy of seeking the truth in litigation. Biggar, Thomas W., Nevada Law Review 1998. Discovery and Ethics: Dilemma in Interviewing Corporate Employees ("Dilemma"). Comm. v. Biggar suggests eight guidelines for conducting such an interview, beginning with the inquiry whether the individual is represented by counsel. Dilemma at p. 19. Finally, the Commissioner recommends seeking court permission for interviews where uncertainty is strong, using the "as authorized by law" language of Rule 182.

## **CONCLUSION**

While a "bright line" test prohibiting all contact with employees of a corporate party would make the ethical decision as to who to interview a very simple one, such a restrictive test defeats the ability of an opposing attorney to gather evidence economically and informally. Application of the three tests embodied in ABA Model Rule 4.2 to identify those corporate employees who are considered parties for the purposes of Rule 4.2 strikes a balance allowing informal and inexpensive discovery while providing a represented party with the advice and protection of counsel. A witness may be interviewed unless he is a manager-speaker, an actor, or one whose statements would constitute an admission by the corporation.

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**STATE BAR OF NEVADA  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 28**

November 19, 2002

## **QUESTIONS**

1. After conclusion of a matter, are case files of an attorney the "property" of the insurance company that defended the claim or are they the property of the policyholder (1) defended by the insurer?

2. Is the policyholder entitled to possession of the original file or a copy of the file upon request?
3. If copies are made for the benefit of either insurer or policyholder, who must bear the cost?
4. May counsel and client agree that counsel may destroy the files within a time period less than the seven year retention requirement set forth in Nevada SCR 165? Does counsel's representation of a policyholder-defendant require different considerations?
5. If counsel returns non-reproducible documents in a matter to the client, may counsel destroy the balance of the file that is replicable if required? Does counsel's representation of a policyholder-defendant require different considerations?

## **ANSWERS**

1. Under Nevada law, the attorney's client is the policyholder. See Standing Committee on Ethics and Professional Responsibility, *Formal Opinion No. 9* (April 21, 1988); Standing Committee on Ethics and Professional Responsibility, *Formal Opinion No. 26* (March 20, 2001). Therefore, the greatest claim to the files lies with the policyholder. Although the insurer operating under a duty to defend established in the policy ordinarily retains and compensates counsel on behalf of the policyholder, the policyholder has the rights of a client while the insurer has the subordinate rights of a third party payer, albeit one with significant contractual rights vis-a-vis the policyholder and counsel. The liability insurer and its policyholder have usually agreed by contract (the terms of the insurance policy) that the insurer may control the defense and settlement of the case. The insurer has a contractual relationship with counsel retained by the insurer and ordinarily has rights to the file arising out of contract, provided that ethically protected material and documents potentially adverse to the policyholder are redacted from the file by counsel prior to delivery of the file to the insurer.

Because the policyholder is counsel's client, counsel must take care to remove from the materials provided to the insurer any privileged or ethically protected documents that may bear on any actual or reasonably likely coverage disputes between insurer and policyholder.

2. A copy of the file must be delivered to the policyholder on request at the conclusion of the matter notwithstanding that the insurer ordinarily has a contractual right to control the defense and settlement of the matter. However, as noted above, the insurer may demand file documents from counsel as well, so long as these do not contain privileged or ethically protected information. To avoid misunderstandings and future questions as to authenticity or alteration of the file, it is recommended that counsel retain a copy of the

file in its entirety, providing on request the original file to the policyholder and a copy to the insurer, appropriately redacted as necessary. If the file is not requested by either policyholder or insurer, counsel has no affirmative duty to provide copies of the file.

3. The responsibility for paying for copies of the file generally resides with the insurer. Pursuant to its retention of counsel to defend the policyholder, the insurer will ordinarily be obligated to reimburse counsel in the ordinary course of business for such copying. Pursuant to the insurer's duty to provide representation to the policyholder, the insurer will ordinarily be expected to pay counsel's reasonable copying costs for providing file materials to the policyholder.

4. Counsel and the policyholder may address the issues of file duplication in the retainer agreement and reach a mutually acceptable arrangement as to cost allocation, provided the agreement is not unconscionable regarding the client's rights. Similarly, counsel and the insurer may agree to terms different than what would otherwise be provided by law so long as the agreement is reasonable and does not violate the rights of the policyholder client.

5. For both policyholder-clients and non-insurance defense clients, counsel and client may agree to a period of file retention shorter than the presumptive seven years provided for by Nevada SCR 165(1). However, counsel must consult with the client, adequately explaining the risks of any shorter retention period and the selected retention period must be reasonable. The Committee believes that no retention agreement for a period of less than four years, the applicable limitations period for legal malpractice claims, can reasonably provide sufficient protection to the client or other parties that may require file materials. This applies both to clients retaining counsel directly and to situations where counsel is retained by an insurer to represent a policyholder. However, counsel should be aware that it is the position of the State Bar of Nevada Bar Council that the seven-year time period of file retention set forth in SCR 165 is a duty owed to the state and cannot be altered by contract with the client. Consequently, a four-year file retention agreement may be effective as between lawyer and client but be ineffective as a defense to State Bar disciplinary action.

6. For both policyholder-clients and non-insurance defense clients, counsel is under an obligation to retain non-reproducible file items for the agreed period of retention and should provide the client with copies rather than non-replicable originals. Replicable file materials such as hardcopy of cases or documents retained in other files may be discarded when they are no longer necessary to the representation. This applies both to clients retaining counsel directly and to situations where counsel is retained by an insurer to represent a policyholder. Counsel are again cautioned that the State Bar Council believes the time period of SCR 165 requires retention of all file materials for the seven-year period provided in the rule. In addition, it should be noted that this Committee's opinion does not apply to financial records subject to SCR 78.5.

## **AUTHORITIES RELIED ON**

Nevada Supreme Court Rules 151, 153, 154(1), 156, 157(2), 158(6), 159, 165, 188.

AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS " 19, 43, 46, 134 (2000).

Cases and scholarly articles cited in Discussion segment of Opinion

## **INTRODUCTION**

Members of the bar have requested an opinion of the Committee pursuant to SCR 225.1 and 227.1(a). The requests presented the following hypothetical facts that are assumed for purposes of this analysis:

1. The client represented by the attorney is insured under an automobile liability policy and has been sued for allegedly causing bodily injury to a third-party complainant arising out of the use of an automobile.
2. The attorney became involved at the request of the insurer, who designated the attorney as assigned counsel to defend the policyholder against the claim. The insurer paid for the defense of the matter, including counsel fees and disbursements.
3. The claim against the policyholder was settled and the settlement was paid by the insurer without any contribution from the policyholder client (other than payment of premiums).
4. At the conclusion of the matter, the policyholder requests the original file. The insurer asserts a right to possession of the original file on the ground that it paid for the legal services defending the policyholder. The insurer concedes that the policyholder is entitled to a copy of the file, but only at the expense of the policyholder. The policyholder continues to assert a right to the original file and maintains that copies of the file retained by counsel or provided to the insurer must be funded by the insurer or counsel.
5. Counsel is considering an agreement with the client (either a policyholder client or a non-insurance defense client) to permit counsel to retain files in a matter for a period of less than seven years, the retention period set forth in Nevada SCR 165(1). Specifically, counsel seeks and the client will sign an agreement limiting file retention to three years.

6. Counsel is also considering returning to the client (either a policyholder client or a non-insurance defense client) originals of nonreplicable file items. Counsel wishes to destroy the balance of the file, which can be retrieved if required from other sources.

## **DISCUSSION**

### Entitlement to the File

#### The Policyholder=s Status as Client

The policyholder is the client of the attorney. See Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 9 (April 21, 1988); Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 26 (March 20, 2001) It is the policyholder against whom a third-party liability claim has been made. It is on behalf of the policyholder that counsel enters an appearance. It is the policyholder that may make statements about the matter to counsel in confidence. It is the policyholder who will be named in any complaint and who will sit at counsel table with the attorney.

All of this suggests that in the triangular relationship between attorney-policyholder-insurer, the policyholder is a "client" and the insurer is more of a third-party payer, although both policyholder and insurer have rights vis-a-vis the attorney. For example, the liability insurer ordinarily has authority to settle the matter and indeed is often required to make reasonable efforts to settle the matter. Notwithstanding this feature of the typical liability insurance arrangement and the important contractual rights of the insurer relative to appointed counsel, the policyholder is the client. See Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 9 (April 21, 1988); Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 26 (March 20, 2001). This Opinion does not purport to address all aspects of the triangular relationship involved in these cases. See generally John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825 (1992); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationship: An Exploratory Analysis*, 1 GEO. J. LEG. ETHICS 15 (1987).

For example, in discussing the relations of counsel-policyholder-insurer, the American Law Institute's *Restatement of Law Governing Lawyers* addresses the issue in Section 134 entitled Compensation or Direction of a Lawyer by a Third Person. The Restatement provides

(1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in '122 and knows of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if:

- (a) the direction does not interfere with the lawyer's independence of professional judgment;
- (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
- (c) the client consents to the direction under the limitations and conditions provided in '122.(2)

*Restatement '134* is consistent with Nevada Supreme Court Rule 158(6), which states that

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (a) the client consents after consultation;
- (b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (c) information relating to representation of a client is protected as required by Rule 156.

Nevada Supreme Court Rule 188(3) takes a similar position, providing

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Comment f to *Restatement '134* specifically addresses "Representing an insured." Comment f accepts the general practice in liability insurance matters of the insurer discharging its duty to defend by designating counsel to represent the policyholder. The insurance policy, which commonly contains language giving the insurer the "right" as well as the "duty" to defend is implicitly deemed effective to indicate policyholder consent to the arrangement and to provide a contract whereby the policyholder accepts the insurer-provided defense so long as counsel is competent to the task and unburdened by conflicts of interest or other ethical bars to the representation. (3)

According to *Restatement '134* Comment f:

**It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer.** Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined [according to other considerations listed in Section 14 of the Restatement]. . . . Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful conduct of the lawyer.

AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) LAW GOVERNING LAWYERS '134 (2000)(emphasis added).

The Committee is aware that there currently exists considerable divergence of judicial and scholarly opinion as to the precise rights and obligations of policyholder, insurer, and counsel in the triangular relationship in which they find themselves in the typical liability insurance defense of claims. Compare Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27 (1998); Robert O'Malley, *Ethics Principles for the Insurers, the Insured and Defense Counsel: the Eternal Triangle Reformed*, 66 TULANE L. REV. 511 (1991)(taking view that policyholder is counsel's sole client) with Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994)(arguing that both policyholder and insurer are clients) and Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995)(taking similar position but suggesting insurer may not have all rights ordinarily accorded client). See also *Paradigm Insurance Co. v. Langerman Law Offices*, 24 P.3d 593 (Ariz. 2001) (although insured is primary client of counsel, counsel owes obligations to insurer and may be sued for breach of those responsibilities); *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P. 3d 806 (Mont. 2000)(insurer-retained defense counsel violate Rules of Professional Conduct by following management protocols set by insurers); *Cincinnati Ins. Co. v. Wills*, 717 N.E. 2d 151 (Ind. 1999)(counsel for policyholder may be insurer's "captive" law firm or staff counsel so long as this is disclosed to policyholder); *American Ins. Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996)(staff counsel and flat fees violate Rules of Professional Conduct).

The Committee does not in this opinion take a position on these matters beyond stating that in such situations the policyholder is counsel's client and counsel's conduct toward the policyholder is governed by the attorney-client relationship and applicable law in that regard. Consequently, the file must be delivered to the policyholder on request at the conclusion of the matter. Although the insurer ordinarily has a contractual right (set forth in the typical liability policy) to control the defense and settlement of the matter, the insurer may not interfere with the lawyer-client relationship between the policyholder and counsel.

However, as noted above, the insurer may demand file documents from counsel as well. The insurer has selected counsel for the policyholder and has a contract with counsel whereby counsel will defend the policyholder on behalf of the insurer. The insurer has paid counsel for these services. Under these circumstances, the insurer has a right to the case file just as the client has a right to the file, subject to the need to protect the confidences of the policyholder-client. See Comet Casualty Co. v. Schneider, 98 Ill. App. 3d 786, 424 N.E.2d 911 (Ill. App. 1981)(attorney found in contempt for failing to abide by agreement to return case files to insurer after attorney discharged by insurer). The availability of malpractice actions against counsel and a complete delineation of the relative rights and responsibilities of insurers and policyholders is beyond the scope of this opinion. However, as discussed below, it should be stressed that the insurer=s rights to the file are not absolute. Rather they are secondary to the policyholder=s rights as a client, requiring counsel to withhold from the insurer portions of the file that contain privileged or ethically protected information.

### Relative Rights of Access to the File Counsel's Responsibilities Regarding Protected Information

The applicable ethics norms and rules make it clear that the policyholder enjoys the benefits of client status and the insurer enjoys the benefits of a contracting party with counsel. Nevada Supreme Court Rules requiring competency (Rule 151) and diligence (Rule 153) by counsel suggest that counsel should respond promptly and fully to client requests for information. Both policyholder and insurer therefore have a right to see counsel's file in the matter.

However, because of the policyholder's rights as a client, counsel must remove material in the file subject to the attorney-client privilege or that is ethically protected and disadvantageous to the policyholder should there be a dispute between the insurer and policyholder over coverage or the insurer's treatment of the policyholder. See Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 9 (April 21, 1988) (primary client of counsel appointed by insurer is the policyholder; counsel may not reveal to insurer information adverse to policyholder absent consent); Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 26 (March 20, 2001)(same). Nevada Supreme Court Rule 156(1) provides that

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections 2 and 3 [relating to disclosure in order to prevent future crimes involving serious bodily harm, to rectify criminal or fraudulent acts by a client involving services of counsel, or to defend counsel if charged with criminal or civil claims relating to the representation].

Rule 156 suggests that insurer-appointed counsel defending a policyholder may not share

with the insurer ethically protected information adverse to the policyholder. For example, an insurer-appointed attorney may not disclose to the insurer protected information learned during the representation that might tend to defeat coverage. See Formal Opinion No. 9, *supra*, and Formal Opinion No. 26, *supra*. In the hypothetical facts provided in the instant request for an Opinion, there was apparently no dispute as to coverage.

Another example requiring attorney discretion may arise if the policyholder accuses the insurer of bad faith handling of the matter or the insurer seeks to rescind or diminish coverage because of policyholder misconduct. If counsel is aware of any protected material useful to the insurer in this type of situation, Rule 156 would appear to forbid counsel sharing it with the insurer. Because counsel represents the policyholder and not the insurer, counsel must take care to remove from the materials provided to the insurer any privileged or ethically protected documents that may bear on any actual or reasonably likely coverage disputes.

In addition, Nevada Supreme Court Rule 157(2) provides that

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless

- (a) the lawyer reasonably believes the representation will not be adversely affected; and
- (b) the client consents, preferably in writing, after consultation.

A lawyer who has formerly represented a client in a matter shall not thereafter:

\* \* \* \* \*

2. Use information relating to the representation to the disadvantage of the former client except as Rule 156 would permit with respect to a client or when the information has become generally known.

It would thus appear to be required that in providing a copy of the case file to the insurer, counsel take steps to protect the policyholder-client's interests pursuant to Rules 156, 157 and 158. Although the hypothetical facts of the requested opinion appear to assume completion of the case through settlement, there may well remain potential areas of dispute between insurer and policyholder, requiring counsel to protect the

interests of the policyholder-client. However, because the policyholder is the client of the lawyer, counsel should not withhold from the file provided to the policyholder material that may be useful to the policyholder in any dispute with the insurer.

Counsel must provide the policyholder with the file because the policyholder is a client and clients have the right to the file unless the file is subject to an attorney's retaining lien because of a client's refusal to pay an outstanding legal fee. See Nev. Rev. Stat. '18.015 (establishing retaining lien). In Nevada, as in most all states, a lawyer has a "retaining lien" on client and file papers in his possession and may hold the file in the matter until the fee issue is resolved. See Figliuzzi v. District Court, 111 Nev. 338, 342, 890 P.2d 798 (1995).

By implication, the client is also entitled to the file after completion of the case. Under either Nevada law or the *Restatement*, a policyholder-client would clearly have a right to the case file if there is no open fee dispute between counsel and the policyholder. By definition, there cannot be such a fee dispute in most liability insurance defense cases because it is the insurer (not the policyholder) that is responsible for paying the lawyer's fee. See also Nevada Supreme Court Rule 165; *Restatement '44* (Safekeeping and Segregating Property).

#### Rights to Original or Photocopied File

Although applicable legal principles strongly suggest that both policyholder and insurer have a right to the file, there appears to be little authority addressing the question of whether counsel must provide the original file. Pursuant to the foregoing analysis, where both policyholder and insurer request the file, at least the insurer must accept a photocopy because the policyholder would have greater rights to the original because the policyholder is the client of counsel. Upon the request of the policyholder client, counsel should provide the original file at the conclusion of a matter, retaining a copy of the file for counsel's records.

#### Payment for Reproduction of Files

As with the question of whether a photocopy suffices to satisfy counsel's duty to provide the file, there is little law on the question of which entity must pay for copying the file.

Under the terms of most fee agreements, counsel is entitled to its reasonable photocopying expenses in connection with representation. This suggests that the party compensating counsel for legal services is also responsible for compensating counsel for photocopy costs incurred by counsel in providing for the legal services. Where a client's request requires photocopying, the retaining party ordinarily should pay the costs of the copying. Consequently, the responsibility for paying for copies of the file generally resides with the insurer. Pursuant to its retention of counsel to defend the policyholder, the insurer will ordinarily be obligated to reimburse counsel in the ordinary course of business for such copying. Pursuant to the insurer's duty to provide representation to the

policyholder, the insurer will ordinarily be expected to pay counsel's reasonable copying costs for providing file materials to the policyholder.

However, insurers, policyholders, and counsel are free to make alternative arrangements regarding photocopying of files and payment provided that these agreements are fair and reasonable to the policyholder and are clearly delineated. For example, counsel's retainer agreement with the policyholder or its contract with the insurer may address this issue. In appropriate circumstances, the insurance policy itself may address these issues. For example, where the policyholder is sophisticated and the language of the insurance policy clearly addresses this issue, an insurer may be permitted to require the policyholder to pay counsel for copies of file materials. To make this arrangement enforceable, however, the insurance policy must be clear in this regard. Such a provision will not be enforceable where the policyholder is not sophisticated as to the meaning and operation of liability insurance. Such a provision is also subject to review by a court under the doctrine of contractual unconscionability. For example, if the costs of copying the file are substantial, it may be unreasonable to require an individual policyholder to bear these costs, even if the insurer can demonstrate a clear agreement to that effect and sufficient insurance sophistication of the policyholder. See generally Jeffrey W. Stempel, *Reassessing the "Sophisticated Policyholder" Defense in Insurance Coverage Litigation*, 42 *DRAKE L. REV.* 801 (1994) (discussing concept of policyholder sophistication and positing manner in which policyholder's sophistication may or may not be germane to coverage disputes).

#### Time of Required File Retention

##### Ability of Client and Counsel to Agree to Reduced Time

Nevada SCR 165(1) provides that "[c]omplete records of [client] account funds and other [client] property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation."

SCR 165 sets forth a presumptive time limit for retention of client files. Presumptive limits or "default rules" are common. Most can be revised or "customized" by parties to a contract. The lawyer-client relationship is one grounded in contract or agreement. Consequently, a lawyer and client should ordinarily be permitted to agree to a different period of file retention so long as the client is adequately informed and consulted as to the risks involved.

*Restatement '19* provides that a client and lawyer "may agree to limit a duty that a lawyer would otherwise owe to a client" under the following circumstances:

- (a) the client is adequately informed and consents; and
- (b) the terms of the limitation are reasonable in the circumstances.

Under this provision of the *Restatement*, client and lawyer may agree to limit the representation in even substantive ways such as the objectives of counsel or the amount of time and effort expended by counsel. See Illustration Nos. 1 & 2 to *Restatement* '19; *In re Harris*, 514 N.E.2d 462 (Ill. 1987)(client and lawyer agree to permit attorney extended time to attempt to recover escheat funds). By analogy, a more technical and less substantive duty of representation such as file retention would be subject to a reasonable lawyer-client agreement altering the presumptive rules set forth in SCR 165 (1).

The client's consent must of course be knowing and voluntary and should be in writing. If these conditions are met, an agreement shortening counsel's time of file retention will ordinarily be enforceable and will not subject counsel to liability so long as the time of retention agreed upon is reasonable under the circumstances. A minimally reasonable time period for file retention is the statute of limitations period for client actions against counsel. In Nevada, an action for attorney malpractice must be commenced within four (4) years after plaintiff sustains damage or two (2) years after plaintiff discovers or through reasonable diligence should have discovered the "material facts which constitute a cause of action, whichever occurs earlier." See Nev. Rev. Stat. ' 11.207.

Although there is not a great deal of Nevada law interpreting this statute, statutes of limitation are generally tolled if there is fraudulent concealment or during the period of a plaintiff's minority. Where the plaintiff in an action against counsel was a child at the time of representation, the statute might not run for as much as 20 years.

In the Committee's view, it would be unreasonable to require counsel to retain files for such a long time period or for any period in excess of the seven years prescribed by Rule 165. It would also be unwise to prohibit all voluntary agreements for a reduced period of file retention because of a concern that an individual lawyer might engage in concealment. Similarly, it would be unreasonable for lawyer and client to agree to a period of file retention that is less than the time period for the applicable statute of limitations for actions based on attorney representation.

Thus, an agreement allowing files to be retained for less than four years is presumptively unreasonable. Counsel agreeing with a client to a shorter time for retention of files must bear the burden of overcoming this presumption. In addition, where counsel is on notice of a potential or pending dispute with a former client, counsel may not avail itself of the benefit of any agreement permitting file destruction.

This portion of this Opinion relating to file retention applies both to clients retaining counsel directly and to situations where counsel is retained by an insurer to represent a policyholder pursuant to the terms of an insurance policy with a duty to defend obligation.

However, counsel are cautioned that the position of the State Bar Counsel is that the seven-year time period of SCR 165 establishes a minimum duty upon the attorney owed to the State Bar and the Supreme Court that may not be contracted away through even an otherwise valid agreement with a client. Consequently, a lawyer-client agreement for a shorter period of file retention may bind the client but would not bind the State Bar or the Court, possibly subjecting the attorney to discipline if files are retained for less than seven years.

### Return of Non-Replicable Materials to Client Counsel's Ability to Discard Replicable Materials

For the reasons set forth above, counsel should generally retain all file materials and, upon request, provide clients with the original file and insurers with a copy, with counsel retaining a copy of the file for the required time period. Counsel should generally retain in counsel's file all file items that cannot be replicated and would be irretrievable if lost or destroyed after release to a client.

Until the time of required file retention (established either by agreement or pursuant to SCR 165) has passed, counsel should generally retain file materials intact. However, counsel may discard replicable materials in order to achieve spacial economy so long as counsel indicates in the remainder of the file the materials removed or discarded. Where materials otherwise replicable become unique because of the presence of nonreplicable information (e.g., handwritten notes in the margin), counsel should generally not discard these materials if the nonreplicable information bears significantly on the representation of the client.

This portion of this Opinion relating to file retention applies both to clients retaining counsel directly and to situations where counsel is retained by an insurer to represent a policyholder pursuant to the terms of an insurance policy with a duty to defend obligation.

### **CONCLUSION**

Under the hypothetical facts posited in this inquiry, the policyholder has a right to receive the lawyer's file, with photocopying costs borne by the insurer. The insurer also has a right to a copy of counsel's file at the insurer's expense. Before providing a copy of the file to the insurer, counsel must, pursuant to its attorney-client relationship with the policyholder, review the file and redact ethically protected and privileged material. Counsel should retain a copy of the file.

After consultation, Counsel may make a knowing and voluntary agreement with the client for a period of file retention shorter than that provided in Nevada SCR 165(1). Agreements providing for file retention of less than four years are presumptively

reasonable as between attorney and client. However, counsel may still be required to retain client files for the seven years set forth in SCR 165 in order to satisfy duties to the State Bar and Supreme Court. In addition, counsel should retain all nonreplicable items for safekeeping during the time a file must be retained rather than returning them to the client.

**This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.**

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**FOOTNOTES**

**(1)** To avoid confusion, this Opinion will use the term "policyholder" to denote either the named insured that has procured the insurance policy or any other entity that is an "insured" under the policy. Frequently, perhaps usually, the policyholder or named insured is the entity for whom the insurer provides a defense to liability claims. Under the terms of most liability policies, however, the "insured" for whom the insurer provides a defense may be a person or entity not specifically named in the policy and who has not paid premiums to the insurer. For example, a homeowner's policy may provide coverage to a family member. As another example, a commercial general liability policy may provide coverage to employees of the corporate policyholder acting within the scope of their employment.

Under the law, all "insureds" generally have a right to equal treatment by the insurer. *See Smoral v. Hanover Ins. Co.*, 37 A.D.2d 23, 322 N.Y.S.2d 12 (1971); *Strauss v. Farmers Ins. Exchange*, 31 Cal. Rptr. 2d 811, 814 (Ct. App. 1st Dist. 1994); ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* '5.09 at p. 320 (3d ed. 1995); JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* '9.05 at p. 9-107 (2d ed. 1999 & Supp. 2002). *See also* Ronald L. Kammer & Valerie M. Jackson, *Is it Bad Faith to Settle on Behalf of One, But Not All of Your Insureds?*, *COVERAGE* (Jan./Feb. 2002) at p. 11 (reading *Smoral* narrowly but agreeing that all insureds generally

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**(2)** Section 122 of the *Restatement* governs client consent to the lawyer's representation notwithstanding an otherwise prohibited conflict provided that the lawyer reasonably believes the representation will not be adversely affected by the conflict and the client gives "informed consent to the lawyer's representation." Such consent is also required if the lawyer is to be paid by a third party for representing the client. Regarding the quality of consent required, the *Restatement* provides that

Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.

This is consistent with Nevada SCR 157, which provides:

2. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
  - (a) the lawyer reasonably believes the representation will not be adversely affected and
  - (b) the client consents, preferably in writing, after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

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**(3)** Comment f to *Restatement* Section 134 further provides that With respect to client consent . . . in insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent in the form of the acquiescence of the client-insured to an informative letter to the client-insured at the outset of the representation should be all that is required. The lawyer should either withdraw or consult with the client-insured . . . when a substantial risk that the client-insured will not be fully covered becomes apparent.

**STATE BAR OF NEVADA**  
**STANDING COMMITTEE ON**  
**ETHICS AND PROFESSIONAL RESPONSIBILITY**

Formal Opinion No. **29**

**August 7, 2003**

**QUESTION**

Is it ethically proper for an attorney to refer a client having a personal injury claim to a company that will advance money to the client during the pendency of the claim with repayment being made from the settlement?

**ANSWER**

Yes, it is ethically proper for an attorney to refer a client having a personal injury claim to a company that will advance the money to the client during the pendency of the claim, with repayment being made from the settlement.

**AUTHORITIES RELIED ON**

Supreme Court Rule 158; Supreme Court Rule 156; Supreme Court Rule 157; Supreme Court Rule 181; Supreme Court Rule 154; Supreme Court Rule 165, *Achrem v. Expressway Plaza*

*Limited Partnership*, 112 Nev. 727, 917 P.2d 447 (1996); Cal. State Bar Formal Op. No. 2002-159; Ohio S. Ct. Ethics Op. 2002-2; Ariz. State Bar Op. No. 91-22; Md. State Bar Assn. Prof'l Guidance Comm., Guidance Op. No. 91-9; Felicia Galati, Assistant Bar Counsel, *Getting Involved in Getting Money for your Civil Litigation Clients: An Ethical Quagmire*, Nevada Lawyer, March 2002 at 15; *In Re: Discipline of Joe M. Laub*, January 9, 2002, Nev. S. Ct. Appeal No. 36322. [\(1\)](#)

## DISCUSSION

For purpose of this analysis, the following assumptions have been made:

- The lawyer does not represent and has no financial interest in or business or personal relationship with the company making the cash advance, and will not represent either party in connection with the advance or otherwise receive any compensation as a result of the advance (the lawyer's fees for work on the client's claim being entirely contingent).
- The lawyer has no duties or responsibilities, other than those enumerated in SCR 165 (safekeeping property), for the advance to the client.
- Repayment of the advance is contingent upon recovery being made on the claim, and is subject to the payment of all prior liens (including the lawyer's fees). The advance is secured by an assignment of a portion of the proceeds of any recovery.
- The advance is itself legal and otherwise enforceable.

Supreme Court Rule 158(5) states that "a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation," except that in certain cases the lawyer may advance or even pay court costs and litigation expenses. This, with exceptions that are not applicable to the facts assumed here, an attorney is ethically prohibited from advancing money to a client during the pendency of the claim, with repayment being made from any resolution or settlement.

There is nothing in the Rules of Professional Conduct, however, which prohibits a lawyer from referring a client to an independent third party that would make such an advance. Assuming the lawyer does not represent and has no financial interest in or business or personal relationship with the company making the cash advance, and will not represent either party in connection with the advance or otherwise receive any compensation as a result of the advance, there would not be a violation of SCR 158. *Cf.* Cal. State Bar Formal Op. No. 2002-159 ( a lawyer may refer a potential client to a broker for a real property loan to pay for attorney's fees and costs so long as the lawyer does not provide legal representation or receive compensation with regard to the referral or the resulting loan or escrow transactions, and has no undisclosed business or personal relationship with the broker); *see also* Ariz. State Bar Op. No. 91-22 (inquiring attorney may assist his client in obtaining a loan from a personal injury loan service, as long as the attorney has no interest in the loan service, does not guarantee repayment of the loan, and maintains client confidentiality."); Md. State Bar Assn. Comm. On Ethics, Docket 89-15 ("mere referral of clients to a lender willing to make loans would be ethically permissible."); Va. State Bar legal Ethics Op. No. 1155 ("[t]here would not be a violation. . . . as long as the attorney did not guarantee or cosign for the loan and the client remained ultimately liable for the expense."); Phila. Bar Assn. Prof'l Guidance Comm., Guidance Op. No. 91-9 (there is no violation of the ethical rules "[i]f the [attorney] does not have ownership or financial interest in the finance company and is not being paid any fee or other compensation by the finance company.").

For those practitioners considering a third party lender cash advance for their clients, it may be prudent to review an article entitled *Getting Involved in Getting Money for you Civil Litigation Clients: An Ethical Quagmire*, by Felicia Galati, Assistant Bar Counsel, initially published in the April 2001 *Nevada lawyer* and reprinted in the March 2002 *Nevada Lawyer*. The article concludes that "[g]iven the ethical ramifications of third-party lender arrangements, it is advisable to those who brave this territory to do so with extreme caution." *Id.*, at p. 17.

In other words, the lawyer should consider other ethical rules that may come into play with such a referral. For example, Supreme Court Rule 156 provides in pertinent part: "[A] lawyer shall not reveal information relating to representation of a client unless the client consults after consultation. . . ." Before making an advance, the company will likely require information about the claim from the attorney. Such information could include the nature and extent of the client's injuries, the theories of liability, insurance and coverage issues, medical records, and other information regarding the relative strengths and merits of the client's claim. The attorney is ethically prohibited from disclosing any such information under SCR 156, unless the client consents to such disclosure. [\(2\)](#)

An attorney should also be aware of Supreme Court Rule 157, which addresses conflicts of interest. SCR 157 provides in pertinent part: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client;" and "a lawyer shall not

represent a client if the representation of that client may be materially limited by the lawyer's present factual scenario, the lawyer has no financial interest in the lending company, the lawyer does not represent the lending company, and the lawyer has no financial liability for the advance. So long as there is no financial or professional relationship between the attorney and the company, SCR 157 will not be violated.<sup>(3)</sup> Essentially, the attorney has merely referred her client to an independent company that provides a service.

Moreover, in an appeal from a Northern Nevada Disciplinary Board, the Nevada Supreme Court stated that, in furtherance of SCR 151 (Competence), "a lawyer has a duty to conduct a reasonable investigation of persons to whom the lawyer refers his client for services". *In re: Discipline of Joe M. Laub* January 9, 2002, Appeal No. 36322. As such, the referring attorney would appear to have an obligation to conduct a reasonable investigation as to the entity making the advance.<sup>(4)</sup>

Finally, consideration should be given as to whether the cash advance is permissible under Nevada law. Presently, assignment of a personal injury claim is not permissible, however, a personal injury plaintiff may assign a portion of the proceeds of a tort action without violating public policy. *Achrem v. Expressway Plaza Limited Partnership*, 112 Nev. 737, 739-40, 917 P.2d 447, 448-49 (1996) (when only proceeds are assigned, the plaintiff retains control over the action, and the assignee cannot pursue the action independently). If the advance is secured by an assignment of a portion of the proceeds from the claim, the advance is allowed. Further, under the facts presented, repayment of the advance is contingent upon recovery being made on the claim, and is subject to payment of all prior liens. In situations where the attorney is provided notice of a lien that secured the cash advance, the safekeeping of property obligations enumerated in SCR 165 must also be considered and adhered to.

## CONCLUSION

It is ethically proper for an attorney to refer a personal injury client to a company that will advance money to the client, with repayment being made from any settlement or resolution, if the attorney has no financial interest in the company and the client consents after consultation. Given the potential ethical problems arising from such an advance, however, the attorney should be mindful of the corresponding ethical issues addressed herein.

***This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.***

1. Not citable as authority. SCR 123.

2. The Client's consent should only be made after a consultation between the client and the attorney. It would be prudent for the

attorney to advise the client as to the potential ramifications of disclosing such information, including whether the attorney-client privilege may be waived as a result of any such disclosure and whether the company's files and its evaluation of the claim is discoverable in the client's case. Preferably, the client's consent would be in writing.

3. Ohio S. Ct. Ethics Op. 2002-2 ("when a lawyer agrees to provide loan applications for a lender and participates in referrals that provide financial benefit to a lender and a consulting company that have business relationships with the law firm, the lawyer dilutes his . . . loyalty to the client and may create an appearance of impropriety").

4. It does not appear that the Laub opinion was published, rendering it un-citable as authority, under SCR 123.