

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 46
Issued on October 27, 2011.

BACKGROUND

The Committee received a request from a legal document service that performs various tasks for Nevada attorneys, such as process serving, document filing and courier services for an opinion on whether an attorney failing to pay legal documents service providers for costs incurred on behalf of clients is a violation of the Nevada Rules of Professional Conduct.

QUESTION PRESENTED

Is failure to pay legal document service providers, or other third-party providers, for services incurred on behalf of clients a violation of the Nevada Rules of Professional Conduct?

ANSWER

If an attorney receives payment from a client for expenses incurred and then fails to pay a third-party provider for those expenses, it may be considered dishonesty or misrepresentation which is professional misconduct under RPC 8.4(c). However, in the absence of circumstances that indicate dishonesty, fraud, deceit or misrepresentation, an attorney may be responsible for payment for services rendered but the responsibility is not the result of an ethical obligation.

AUTHORITIES

- a. Nevada Rules of Professional Conduct 1.5, 4.1, 8.4 (2010)
- b. ABA Model Rules and Accompanying Commentary

DISCUSSION

I. A Failure to Pay One's Bills Is a Legal Issue More Appropriate for the Courts than the Ethics Committee.

In the preamble of the Model Rules of Professional Conduct, the ABA notes that the Model Rules are "designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."¹ They are "not designed to be a basis for civil liability."² When the issue of an attorney's obligation to pay for services rendered has been reviewed, the American Bar Association and the Delaware Bar Association have both based opinions in contract law rather than ethical obligations.³ In a situation where one lawyer sought

¹ Model Rules, Preamble and Scope, ¶ 20.

² *Id.*

³ See ABA Informal Op. No. 664 (1963); see also ABA Informal Op. No. C-482 (1961); Del. State Bar Ass'n Professional Ethics Comm. Op. No. 1981-2.

assistance from another lawyer for his client, the second lawyer billed the first lawyer for his services.⁴ When the first lawyer refused to pay for the services, the ABA concluded that it was not an ethical question that existed, but rather a matter of contract law to be determined by the Courts.⁵

The situations in which a party has a contractual dispute require an evaluation of contract construction and good faith defenses. For example, an attorney may fail to pay an invoice for services rendered because the services were inadequate or the invoice inaccurately reflected the work completed. These issues would be properly adjudicated in a court of law, and are not proper to be evaluated by the State Bar. Merely because an attorney is the one who fails to pay the bills, a creditor should not have more available avenues for recourse than what is available to the average creditor.

II. An Attorney's Failure to Pay For Services Rendered May Become An Ethical Issue When It Involves Fraud or Deceit.

The Nevada Rules of Professional Conduct ["NRPC"] prohibit an attorney from engaging in conduct that involves dishonesty, fraud, deceit or misrepresentation.⁶ An attorney is also prohibited from collecting "an unreasonable amount for expenses."⁷ When an attorney bills a client for services rendered, the charge must reasonably reflect the attorney's actual costs for the services rendered.⁸ Any invoices for these services should fairly reflect the basis on which the client's charges have been determined.⁹ Thus, an attorney may only charge a client for costs actually incurred by the attorney. Should an attorney collect costs from a client and fail to forward that payment onto a third party who provided services, those costs would clearly be an unreasonable amount for expenses as the attorney has not suffered any out-of-pocket loss. In addition, this would clearly amount to the dishonesty and misrepresentation prohibited in NRPC 8.4(c).

Not only do attorneys have a duty of candor to their clients, attorneys may not make a false statement of material fact or law to a third person.¹⁰ If an attorney has in fact received funds from clients for services that have been performed and tells the party who performed the services that the client has not paid, this would be a false statement that would also rise to a violation of the NRPC. In these situations, it is proper to notify the State Bar as to a potential ethical evaluation.

⁴ ABA Formal Op. No. 63.

⁵ *Id.*

⁶ NRPC 8.4(c).

⁷ NRPC 1.5(a).

⁸ ABA Formal Op. No. 93-379 (1993).

⁹ *Id.*

¹⁰ NRPC 4.1(a).

CONCLUSION

In general, an attorney's failure to pay for services rendered is a matter of law to be determined by the courts and does not involve an ethical question. There is little precedent to indicate that this controversy would rise to the level of an ethical violation unless there is fraud, deceit, or misrepresentation alleged.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 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.