The State Bar of Nevada's ETHICS HOTLIN

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We get calls. Lots of calls. Every year, the Office of Bar Counsel receives, literally, thousands of phone calls from attorneys. Most of these are ethics calls, where the attorney calling in speaks with one of the bar counsel regarding Nevada's Rules of Professional Conduct. Since the mid-1990s, the State Bar of Nevada has had an Ethics Hotline; the toll-free number is (800) 254-2797.

The hotline began as a response to the observation that many bar complaints stemmed from attorneys, often sole practitioners or in small firms, who simply did not have a colleague with whom to discuss ethical issues. For example, say a client's personal injury case settles for less than the outstanding medical bills and the medical provider won't budge on his lien. Given the impasse, the attorney decides the fairest way to resolve the matter is to give all parties involved, attorney included, a pro-rata reduction of the recovery.

Although this approach may seem logical and fair to all involved parties, such a distribution, in fact, violates the Rules of Professional Conduct. The upset doctor often responds by filing a bar complaint.

These days, if the attorney calls us first, we advise the caller of the proper procedure, i.e. file an interpleader suit. When the state bar began promoting the ethics hotline, it was receiving approximately 2,500 bar complaints annually.[1] Last year the state bar received approximately 1,900 bar complaints, despite the fact that the number of Nevada attorneys has doubled since 1994. As Bar Counsel Rob Bare would say, the easiest bar complaint to resolve is the one that never occurs.

Bar Counsel is Standing By...

How does it work? Each day, one of the four bar counsel is assigned to ethics calls duty. Typically, an attorney calls in, although sometimes the query is made via letter or e-mail. The attorney is usually from Nevada, but

sometimes an out-of-state attorney calls in with concerns regarding the unauthorized practice of law. The calls are confidential.

On occasion the attorney's paralegal or legal secretary places the call. A legal assistant calling is not problematic when the question is straightforward, e.g., "where is the pro hac vice rule?" However, our experience is that, when the question becomes more complex, the information going from bar counsel, to assistant, to attorney often resembles the children's game of "telephone." On more than one occasion, the attorney called back with a follow-up question and it soon became apparent that the assistant either gave the attorney advice that was opposite to our opinion, or missed essential aspects of the opinion. So, if we anticipate that the answer will be detailed and ask to speak directly with the attorney, please tell your assistant not to be offended.

knowledge of the professional conduct rules and not any specific research or investigation.

As such, our opinions aren't formal; should we direct the attorney to a specific rule, statute or case, it usually provides the attorney with all the authority that he or she needs.

Further, although we use the term "ethics calls" to denote any legal questions we receive from attorneys, the ethics call often implicates various areas of law, and the caller often seeks legal guidance on those matters. For example, we sometimes get calls regarding how to construe the applicable motion-filing deadlines pursuant to NRCP 6 (Time), particularly when calculating additional time for mailing. Fortunately, the Nevada Supreme Court has addressed the issue, and it's readily answered.[2]

However, these questions usually concern issues that have not been decided

E: REDUCING THE NUMBER OF BAR COMPLAINTS SINCE 1994

We're Sometimes Confused With the Standing Committee on Ethics and Professional Responsibility.

We occasionally get asked for written opinions, particularly when hypothetical situations are involved. Sometimes, the caller is actually seeking an opinion from the Standing Committee on Ethics and Professional Responsibility.

As you may be aware, the committee's opinions are thoroughly researched, and the questions presented are debated by the committee's members prior to the opinions being issued. It's a time-consuming task that, in fact, warrants a separate committee.

However, ethics calls to the Office of Bar Counsel are informal by nature, and usually take about 5-10 minutes each. Unsurprisingly, the opinions we offer are generally on-the-spot and based upon our knowledge of the professional conduct rules and not any specific research or investigation.

by the Nevada Supreme Court and our answer would, at best, be an educated guess at how a court might rule on an issue. These questions are best handled by the formal ethics opinions issued by the Standing Committee on Ethics and Professional Responsibility. In fact, if the hypothetical concerns legal issues far outside the ethics realm, we refer the caller to the committee.

In addition, the Office of Bar Counsel frequently receives 20-plus ethics calls daily. If we were required to give written opinions for each, we would not have time to perform our other duties, most importantly investigating and prosecuting attorneys for committing professional misconduct.

Not Every Ethics Call Is Made With a Noble Intent

Our office sometimes receives bar complaints on matters that were the subject of an ethics call. When we do,

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it's often fee-dispute related. And if it's a complex issue, and the attorney's response to the state bar notes that he called our office for guidance and that call was made in good faith, we take that fact into account in determining the relevant discipline.

Why do we mention good faith? The reason is that certain attorneys seek to use our ethics calls to gain a tactical advantage against opposing counsel in pending litigation matters. At least once a month, an attorney will call in with a hypothetical, usually concerning a conflict of interest. Under the attorney's fact pattern, the opposing counsel appears to have a definite conflict or has clearly engaged in misconduct. The telephone call ends and, shortly thereafter, the complained-about attorney calls in, often upset, asking "how we could see a conflict when…" and then proceeds to describe a fact pattern that has no apparent conflict and often indicates misconduct by the other attorney.

Another scenario we encounter with some frequency is the attorney who doesn't like the advice he received, e.g., that keeping the entire retainer is probably unreasonable in the proposed scenario, and calls back the following day with a slightly revised scenario hoping for a different answer and, if the attorney still doesn't like the subsequent answer, calls again on the third day.

We're a small office, we all work closely together, and we often roundtable an ethics question, especially if the query is not readily answered by a rule or case law. In other words, we figure out soon which calls are legitimate and which are being placed with ulterior motives. Accordingly, the quality of the advice you receive is necessarily dependent on how honestly the pertinent facts are presented.

What Are the Most Frequent Types of Ethics Calls?

We often get asked what the most common types of ethics calls are. Two of the most popular subjects are conflicts of interest and confidentiality, and these are discussed further below.

Conflicts of Interest

Calls regarding conflicts of interest typically involve a potential client who didn't retain the attorney, or a former client from years ago, sometimes a decade after the initial case was completed and all the files were destroyed. The questions tend to be fact-specific, but there is some guidance in the rules and Nevada case law.

Since 2007, there has been a specific rule regarding an attorney's duties to prospective clients; RPC 1.18 (Duties to Prospective Clients), and RPC 1.9 (Duties to Former Clients) specifically address when an attorney is precluded from accepting a case without the former client's waiver.

In short, if the former matter is the same or substantially related to the present case, a waiver is needed from the former client. Although the issue is ultimately decided on a case-by-case basis, the Nevada Supreme Court has issued guidance on determining whether two matters are the same or substantially related. In short, courts ruling on a disqualification motion are directed to:

(1) make a factual determination concerning the scope of the former representation,
(2) evaluate whether it is reasonable to infer that the confidential information allegedly given

would have been given to a lawyer representing a client in those matters, and

(3) determine whether that information is relevant to the issues raised in the present litigation.[3]

The Supreme Court also noted that a superficial resemblance between the matters is not sufficient; "rather, the focus is properly on the precise relationship between the present and former representation."[4]

Confidentiality

Ethics calls concerning confidentiality often involve a client who threatened to commit suicide or harm another person, sometimes the attorney himself or herself. Attorneys can usually sense when a client is blowing off steam – the ethics calls are made when the attorney is genuinely concerned about legitimacy of the client's threat.

The attorney often recalls the Tarasoff[5] case from law school, which concerned a psychotherapist whose patient had made threats regarding a female who the patient felt scorned him. Although the psychotherapist informed campus police, the intended victim was not informed, and she was subsequently murdered by the patient. In Tarasoff, the Supreme Court of California stated that a psychotherapist has a duty to protect the intended victim when he or she believes the patient poses a serious threat of violence to another. The caller asks whether there is a Tarasoff-type exception to the attorney-client privilege. The answer is yes.

The exception is contained in RPC 1.6 (Confidentiality of Information), which allows the attorney to disclose privileged information if the attorney reasonably believes the disclosure necessary in order to prevent reasonably certain death or substantial bodily harm to another. The disclosure becomes mandatory if the threat concerns a criminal act that is likely to result in reasonably certain death.[6] The rule does not dictate whom must be informed, leaving that task to the discretion of the attorney.

Confidentiality is also implicated when an attorney calls in and is in a quandary because the client just stopped by the law office and, literally, dropped off the smoking gun, or the attorney realizes that the client has been lying about material aspects of the case and the trial is next week.

In the first instance, you cannot keep the evidence, but you don't have to reveal that it came from your client. Assistant Bar Counsel Phil Pattee, who had his own criminal law practice prior to joining the state bar, suggests that if the weapon is loaded, the attorney retain counsel to anonymously drop off the item to the police. Otherwise, the attorney may provide it anonymously to the local authorities.

In the second instance, the professional conduct rules prohibit you from providing evidence that you reasonably believe is false. The rules also allow you to disclose confidential information when the client has been using your services to perpetrate criminal or fraudulent acts.

Lastly, we get calls from attorneys whose former clients either filed a bar complaint or sued them in court. They ask whether or not they can disclose attorney-client privileged information in order to defend themselves. The answer is yes: RPC 1.6(b)(5) allows a lawyer to reveal information 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...."

Again, Our Number is (800) 254-2797

If you have an ethics-related question, please give us a call. Even if you think the question is dumb or embarrassingly simple, we'd rather deal with it in an informal ethics call rather than through a bar complaint. You might also find it a lot less stressful. ■

1 See Dawn Reid, A Look Back at the Creation of the Office of Bar Counsel, *Nevada Lawyer*, June 2008.
2 See *Winston Products Co., Inc. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006).
3 *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, P.3d 737, 742 (2007).
4 See id.
5 *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976).
6 See RPC 1.6(c).
7 See RPC 1.6(b)(2)-(3) (Confidentiality of Information); see also RPC 3.3 (Candor Toward the Tribunal).