



STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 51
Issued on August 18, 2014

BACKGROUND

The Committee received a request from a practicing attorney regarding ethical and legal obligations arising when fees are paid by a third party on behalf of a client. The hypothetical and questions presented are as follows:

Lawyer A has been retained to represent Defendant 1 and Defendant 2, who are co-defendants in a criminal drug case. Both clients have signed conflict waivers allowing Lawyer A to represent them. A potential third defendant, Defendant 3, will be added to the cases via a superseding indictment. Lawyer B has been retained to represent Defendant 3. Defendants 1, 2 and 3 are all related to each other and their mutual family is paying the legal fees.

Recently, Lawyer A has received from an unknown/anonymous source a cash payment of \$29,000 dropped off at his/her office related to Defendants 1, 2 and 3.

Questions Presented:

Question 1a: Does receiving the payment from an unknown/anonymous source have an effect on ethical and legal considerations Lawyer A has for reporting these funds as income?

Question 1b: Does the form of payment in cash affect how the income is reported?

Question 2a: Under what scenarios could Lawyer A give Lawyer B a portion of these funds as payment for services rendered to Defendant 3?

Question 2b: How does Lawyer A apportion the payment when Lawyer A has reason to believe a portion of the funds are for the services of Lawyer B?

Question 2c: How does the answer to Question 2 affect the ethical and legal considerations posited in Question 1?

Question 3: Are there any other ethical or legal considerations Lawyer A should be aware of under these facts?

Short Answers:

Answer No. 1a: Yes. Nevada Rule of Professional Conduct (“NRPC”) 1.8(f) places restrictions on a lawyer accepting compensation to represent more than one client. Even if both Defendants 1 and 2 give their informed consent to Lawyer A to accept the compensation from the anonymous source, the funds create a conflict of interest because the funds are not solely for Defendant 1 and 2 but also purportedly for Defendant 3, who is not represented by Lawyer A. Additionally, utilization of the funds by Lawyer A may result in the disclosure of confidential information.

Answer No. 1b: Yes. Receiving over \$10,000 in a lump sum for legal services must be reported to the Internal Revenue Service (“IRS”) in accordance with IRS Form 8300. Additionally, the payment itself, raises ethical considerations pursuant to NRPC 1.6 which may require reasonable diligence on behalf of Lawyer A to determine the source of the payment and to report to the IRS and Federal Bureau of Investigation (“FBI”) the receipt of suspicious compensation.

Answer No. 2a: Although the NRPC does not expressly address this situation, NRPC 1.5(e)(2-3) permit lawyers of different firms to split fees for representing the same client(s) when the client(s) are informed in writing of the lawyers’ arrangement, the division is explicit in writing, the clients agree in writing to the division and the entire fee is reasonable. Likewise, in the spirit of NRPC 1.5(e)(2-3), Lawyer A and Lawyer B could give a portion of the funds to Defendant 3 only if all Defendants agree in writing with the division, they are informed in writing of the division, and the division is fair to all Defendants.

Answer No. 2b: NRPC 1.5(e) requires Lawyer A to safeguard the \$29,000 until a resolution is reached between Defendant 1, Defendant 2 and Defendant 3 on how to apportion the funds.

Answer No. 2c: In addition to the legal and ethical obligations imposed by the receipt of the funds as discussed in Answer No. 1a, apportioning the funds creates an additional ethical obligation to safeguard the property until the clients reach an agreement as to how the funds for legal representation should be spent.

Answer No. 3: In addition to aforementioned legal and ethical considerations imposed by the receipt of the funds, Lawyer A must keep in mind NRPC 8.4(e), which prohibits Lawyer A from engaging in dishonest, fraudulent or deceitful conduct. Additionally, NRPC 4.2 prohibits Lawyer A from actually discussing the payment with Defendant 3 as he is represented by Lawyer B.

Authorities:

- a. *American Bar Association Model Rule of Professional Conduct (“MRPC”) 1.5*

- (2013).
- b. *MRPC 1.6 (2013).*
 - c. *MRPC 1.7 (2013).*
 - d. *MRPC 1.8 (2013).*
 - e. *MRPC 1.15 (2013).*
 - f. *MRPC 4.1 (2013).*
 - g. *MRPC 5.4 (2013).*
 - h. *Bank Secrecy Act (or Currency and Foreign Transactions Reporting Act) Pub. L. No. 91-508, 84 Stat. 1114-2 (codified in scattered sections of 12 U.S.C. and 15 U.S.C.).*
 - i. *Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989).*
 - j. *International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 31 U.S.C., 28 U.S.C. and 12 U.S.C.).*
 - k. *NRPC 1.0A (2013).*
 - l. *NRPC 1.2 (2013).*
 - m. *NRPC 1.5 (2013).*
 - n. *NRPC 1.6 (2013).*
 - o. *NRPC 1.7 (2013).*
 - p. *NRPC 1.8 (2013).*
 - q. *NRPC 1.15 (2013).*
 - r. *NRPC 4.1 (2013).*
 - s. *NRPC 4.2 (2013).*
 - t. *NRPC 5.4(2013).*
 - u. *NRPC 8.4 (2013).*
 - v. *U.S. Dep't of Treasury, IRS, Reporting Cash Payments of Over \$10,000 (Received in Trade or Business), IRS Publication 1544, Cat. No. 12696A (Rev. Sep. 2012).*

DISCUSSION

The purpose of this Committee is to make available advisory opinions on the ethical considerations of the practice of law, which shall function to prevent harm to the public from the unethical practice of law and to provide a clear understanding of the ethics of practicing law. As such, the opinion below focuses primarily on the ethical concerns raised by your the questions. There are significant legal issues as well which, although commented on below, require a separate detailed analysis which are not subject to this memo. For example, a cash payment of \$29,000 under these circumstances almost certainly necessitates may require the filing of a Currency Transaction Report.¹ Additionally the treatment of the payment of \$29,000 as “income” is a legal issue not covered by this opinion.

¹See IRS Publication 1544, September 2012.

Question 1: Does receiving the payment from an unknown anonymous source² have an effect on the ethical and legal considerations Lawyer A has for reporting these funds as income?

Yes. NRPC 1.8 governs as follows:

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.

A key point to this scenario is set forth in Comment 11³ of MRPC 1.8,⁴ which states that “[l]awyers are frequently asked to represent a client under circumstances in which a ‘third person will compensate the lawyer, in whole or in part ... **[B]ecause third-party payers frequently have interests that differ from those of the client,** including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, **lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.**” (Emphasis added). *See also* MRPC 5.4(c)⁵ (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).” Comment 1 of MRPC 5.4⁶ further explains that when “someone other than the client pays the lawyer’s fee ... that arrangement does not modify the lawyer’s obligation to the client.” (Emphasis added.)”

Thus, in order for Lawyer A to ethically and legally receive \$29,000.00 from an unknown source as income, Lawyer A must overcome certain hurdles. First, NRPC 1.8(f)(1) requires Lawyer A to obtain informed consent from his two clients, Defendants 1 and 2. However, Lawyer A may run into some certain issues with NRPC 1.8(f)(2)-(3). . Comment 12 of MRPC

² Complications arise from the anonymous nature of the payer. Lawyer A owes the payer fiduciary duties to see that the funds entrusted to the lawyer are used in accordance with the payer's instructions. If the lawyer received instructions directly from the payer, then Lawyer A can presumably satisfy those duties. If, on the other hand, the purported instructions were conveyed by someone other than the payer, Lawyer A may not be able to act with the requisite certainty as to the payer's actual intent or instructions.

³ NRPC 1.0A permits consultation or “guidance in interpreting and applying the Nevada Rules of Professional Conduct” from Comments to the corresponding MRPC.

⁴ MRPC 1.8 is identical to NRPC 1.8, with three minor exceptions that do not apply to this case.

⁵ MRPC 5.4(c) is identical to NRPC 5.4(c).

⁶ MRPC 5.4 is identical to NRPC 5.4, with one minor exception that does not apply to this case.

1.8⁷ states that:

[s]ometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7.⁸ The lawyer must also conform to the requirements of Rule 1.6⁹ concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Here, the identity of the third-party payer is unknown, which complicates ethical and legal matters.¹⁰

This cash payment may run afoul with of NRPC 1.8(f)(2) because the \$29,000.00 was not delivered to Lawyer A for the benefit of his clients, Defendants 1 and 2, alone. The \$29,000.00 was delivered to Lawyer A to pay for the legal expenses of Defendants 1, 2, and 3, but Defendant 3 is not Lawyer A's client. An issue arises because Lawyer A has just received legal fees for the benefit of Lawyer B's client as well. Moreover, the \$29,000 was a lump sum payment without any instruction as to allocation of the fee among Defendants 1, 2, and 3's legal representation. This scenario raises serious conflict of interest questions because Lawyer A has funds for another lawyer's client without any instructions on how much to apportion the funds to that other lawyer or client.

⁷ MRPC 1.8 is identical to NRPC 1.8, with three minor exceptions that do not apply to this case.

⁸ MRPC 1.7 is identical to NRPC 1.7.

⁹ MRPC 1.6 is identical to NRPC 1.6, with three minor exceptions that do not apply to thisour case.

¹⁰ *See also* MRPC 1.7, comment 13.

NRPC 1.8(f)(3) deals with protecting a client's confidential information as described under NRPC 1.6.¹¹ Defendants 1, 2 and 3 are represented by two separate lawyers, and thus may have two completely different sets of confidential information.¹²

Question 1b: Does the form of payment in cash affect how the income is reported?

Yes, any cash payments over \$10,000 received in a trade or business must be reported to the IRS under through IRS Form 8300.¹³ This form is to help the federal government track money laundering, tax evasion, or other criminal activities under the Bank Secrecy Act (or Currency and Foreign Transactions Reporting Act)¹⁴ and Title III: International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001 of the USA Patriot Act.¹⁵ Criminal and civil penalties, including heavy fines, may apply for failure to properly and timely file a IRS Form 8300. Lawyer A should conduct his due diligence in identifying the source of the cash payment because IRS Form 8300 specifically asks for the identity of the source of the cash payment.

Because this is a large amount of cash paid by an unknown source in one lump sum in connection with a drug case, the payment could be flagged by the federal government as suspicious activity. Since 1989, the U.S. Supreme Court has held that the government has the power to require the forfeiture of legal fees paid to lawyers derived from tainted funds, such as drug money.¹⁶ In some extreme cases, a lawyer who obtains tainted funds as legal fees can become an accessory to money laundering and other crimes. Comment 3 to MRPC 4.1¹⁷ states that "[i]n extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud...unless disclosure is prohibited by Rule 1.6." NRPC 1.2(d) adds that a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Thus, subject to the requirements of NRPC 1.6, Lawyer A should evaluate the necessity of: (1)

¹¹ However, NRPC 1.6(c) states that "[a] lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm." This clause broadly preempts the general rule in dire instances in which a client's information relating to his representation may be compromised. The fact that Defendants 1, 2, and 3 are related to one another seems irrelevant to NRPC 1.6(c).

¹² The facts here also do not presently suggest reasonable probability of bodily harm or death.

¹³ See e.g., *U.S. Dep't of Treasury, IRS, Reporting Cash Payments of Over \$10,000 (Received in Trade or Business)*, *IRS Publication 1544*, Cat. No. 12696A (Rev. Sep. 2012).

¹⁴ *Bank Secrecy Act (or Currency and Foreign Transactions Reporting Act)* Pub. L. No. 91-508, 84 Stat. 1114-2 (codified in scattered sections of 12 U.S.C., and 15 U.S.C.).

¹⁵ *International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified in scatted sections of 31 U.S.C., 28 U.S.C. and 12 U.S.C.).

¹⁶ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989).

¹⁷ MRPC 4.1 is identical to NRPC 4.1.

conducting due diligence in identifying the source of the payment and (2) determining whether to notify the IRS and possibly the FBI to report a suspicious activity.

Question 2a: Under what scenarios could Lawyer A give Lawyer B a portion of these funds for payment for of services rendered to Defendant 3?

NRPC 1.5(e)(2)-(3) provides that lawyers of different firms may split fees when representing the same client(s) under the following circumstances:

- (e) A division of a fee between lawyers who are not in the same firm may be made only if: ... (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

NRPC 1.5 was not intended to address a situation where attorneys representing different clients split fees from a single source of payment.

Comment 7 to MRPC 1.5¹⁸ states that “[a] division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well...” NRPC 1.5 was not intended to address a situation where lawyers of different clients split fees from a single source of payment.¹⁹ However, the Committee believes that where all clients and their attorneys agree to a division of fees, the spirit of NRPC 1.5 is satisfied.

Question 2b: How does Lawyer A appropriate apportion the payment when Lawyer A has reason to believe a portion of the funds are for the services of Lawyer B?

We know that the unknown source clearly intended for the \$29,000 cash payment to pay for the legal representation of Defendants 1, 2, and 3. However, the unknown source sent the entire payment to Lawyer A either with or without the knowledge that Lawyer A only represents Defendants 1 and 2. Lawyer B solely represents Defendant 3, so a portion of the \$29,000 is indeed payment for Lawyer B’s services.

Here, the issue then becomes a matter of how to divide the \$29,000 among Lawyers A and B for the legal fees of their different respective clients. NRPC 1.5 already forecloses the possibility of sharing legal fees in this scenario because Lawyer A and Lawyer B have not come together to dually represent all three Defendants. In this case, NRPC 1.15(e) governs and states that, “[w]hen in the course of representation a lawyer is in possession of funds or other property in which two or more persons (one of whom may be the lawyer) claim interests, **the property shall be kept separate by the lawyer until the dispute is resolved.** The lawyer shall promptly

¹⁸ MRPC 1.5 is identical to NRPC 1.5, with two minor exceptions that do not apply to our this case.

¹⁹ An important issue unresolved by this opinion involves the potential for refunds of unearned fees. See generally NRPC 1.16(d). This opinion does not address the potential.

distribute all portions of the funds or other property as to which the interests are not in dispute.” (Emphasis added.)

Here, the funds are property potentially in dispute under NRPC 1.15 because it cannot be determined how much Lawyer A and Lawyer B are entitled to receive. Thus, there is no undisputed portion of the funds to distribute at this point. Comment 3 of MRPC 1.15²⁰ states that “[t]he disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration.” (Emphasis added.) In the meantime, NRPC 1.15(a) requires a lawyer to “hold funds or other property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property ... Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.” NRPC 1.15(d) further notes that a lawyer must also “promptly notify the client or third person...[u]pon receiving funds or other property in which a client or third person has an interest.”

In sum, Lawyer A must safeguard the \$29,000 until Defendants 1, 2, and 3 and Lawyer A and B have reached an agreement or a resolution over the amount each shall retain.²¹

Question 2c: How does the answer to Question 2 affect the ethical and legal considerations posited in Question 1?

Lawyer A has a legal and ethical duty to safeguard the funds under NRPC 1.15. Lawyer A must also be aware of issues of confidentiality under NRPC 1.6 and possible conflicts of interest under NRPC 1.7. Under NRPC 5.4, Lawyer A must also be aware of how receiving legal fees from a third party may affect his professional judgment in representing his clients.

Above all, Lawyer A must remember to exercise his fiduciary duty in the course of representing his client and keep his client informed.²²

Question 3: Are there any other ethical and legal considerations that Lawyer A should be aware of under these facts?

Generally, Lawyer A must keep NRPC 8.4(c) in mind, in that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Here, there is a possibility that the \$29,000 may be the proceeds or instrumentality of a crime or otherwise derived from unlawful activity, and thus subject to forfeiture. Therefore, Lawyer A must be prudent in filing his IRS Form 8300 and giving full disclosure to his clients concerning the

²⁰ MRPC 1.15 is identical to NRPC 1.15, with one minor exception that does not apply to our this case.

²¹ See MRPC 1.5 Comment 9.

²² Comment 11 will further explain this proposal.

nature of the payment. Failure to take precautions and make proper disclosures could land Lawyer A in ethical and legal trouble.

Lawyer A must be wary of any contact with Defendant 3, who is not his client. In obtaining consent with Defendant 3, Lawyer A must avoid *ex parte* communications. However, his clients, Defendants 1 and 2, are related to Defendant 3, so there may be exposure and a chance of Lawyer A inadvertently communicating with Defendant 3. NRPC 4.2 states that, “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.” Here, Lawyer A should leave it up to Lawyer B to discuss the mysterious \$29,000 cash payment with his client, Defendant 3.

Finally, because the cash came from an anonymous source, under NRPC 1.15, the immediate solution would be for Lawyer A to promptly place the funds in a trust account until a resolution for apportionment of \$29,000 is achieved is made over what to do with the \$29,000. This issue must be resolved immediately because, under NRPC 1.8, Lawyer A may be prohibited from continuing to represent Defendants 1 and 2 unless both clients consent to the cash payment from an unknown source and Lawyer A determines that accepting all or part of the \$29,000 will not interfere with his independent, professional judgment.

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 person or tribunal charged with regulatory responsibilities, or any member of the State Bar.