STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 28

OPINION 28-*originally issued 11/19/02, conclusion amended 9/24/07*

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 Counsel 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 Counsel 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, D*oes 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.

NOTE: The Nevada Supreme Court has expressly held that when an insurer retains a lawyer to represent an insured, the lawyer represents both the insured and the insurer. *Nevada Yellow Cab Corp. v. Eighth Judicial District Court*, 123 Nev. Adv. Op. No. 6 (March 8, 2007). Although the insured remains the lawyer's "primary" client, the retention also establishes an attorney-client relationship between the lawyer and the insurer, absent a conflict of interest. *Id.* While statements to the contrary in this opinion are thereby superseded, the Court's holding does not otherwise overrule or alter this opinion or its conclusions.

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.