

ETHICS 2009: BEING GOOD GETS HARDER EVERY YEAR

Presented to the
Southern Nevada Association of Women Attorneys
February 20, 2009

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ETHICS 2009

BEING GOOD GETS HARDER EVERY YEAR

1. Adventures in Lerner land: Using an unlicensed lawyer in his Nevada office nets the heavy hitter a public reprimand for assisting the unlicensed practice of law.
2. Have you updated your mandatory biographical data form lately? Recent amendments to Nevada R.P.C. 1.4 require you to do so.
3. You can't threaten me . . . Or can you? Can you threaten criminal prosecution in order to gain an advantage in civil litigation?
4. I know I'll miss you, especially the ten phone calls per day. Things to know about firing a client.
5. What's in a name? The rules governing the use of trade names, and other designations by lawyers.
6. Outsourcing: The do's and don't's of engaging persons outside your firm to perform legal work for clients.
7. What can you do with privileged materials inadvertently sent by the adverse party?
Answer: Not much, and a lawyer who tried was recently disciplined by the Bar.
8. Sealing and redacting records. The Nevada Supreme Court adopts some rules (ADKT 410).
9. Gag Orders. The Nevada Supreme Court greatly restricts their use. *Johanson v. District Court*, 124 Nev. Adv. Op. 23, 182 P.3d 94 (2008).
10. Representing entities and their individual constituents; be careful of conflicts and their attendant fee forfeitures. *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. Adv. Op. 98, 197 P.3d 1051 (2008).

1. In recent years, there have been numerous bar discipline cases involving lawyers who improperly delegated authority to paralegals and other non-lawyer employees. *In re Lerner*, 124 Nev. Adv. Op. No. 100, 197 P.3d 1067 (Dec. 24, 2008) deals with the situation where a Nevada lawyer assisted in the unauthorized practice of law by allowing an Arizona lawyer – not licensed in Nevada – to practice law in his office. The case also allows the Supreme Court to revisit the meaning of the “practice of law” for the first time since the 1958 *Pioneer Title* case.

2. Have you updated your biographical data form lately? If you have no idea what I'm talking about, read on.

- A. The Rule. In September 2007, the Nevada Supreme Court amended Nevada Rule of Professional Conduct 1.4 by adding a requirement that “[e]ach lawyer or law firm shall have available in written form to be provided upon request of the State Bar or a client or prospective client a factual statement detailing the background, training and experience of each lawyer or law firm.” RPC 1.4(c).
- B. What was required. RPC 1.4(c) required, *inter alia*, the listing of the lawyer’s name, address, jurisdictions and dates of admission, law school and graduation date, and RPC 7.4 areas of specialization.
- C. The 2008 Amendments. RPC 1.4(c) was amended, effective November 21, 2008, to require the disclosure of two more things: discipline and insurance.
 - (i) RPC 1.4(c)(1)(vi) requires the disclosure of all prior public discipline, and all post-3/1/07 private discipline.
 - (ii) RPC 1.4(c)(1)(vii) requires lawyers engaged in the private practice of law to disclose whether the lawyer maintains professional liability insurance, and if so, the name and address of the carrier.
- D. What does that mean to you? In addition to the basic biographical information previously required, lawyers and law firms must now have available in writing the details of each lawyer’s insurance and prior discipline.

3. Under the ABA Model Code of Professional Responsibility, threats of criminal prosecution in order to gain an advantage in a civil case were prohibited. DR 7-105(a). In 1983, the Model Rules of Professional Conduct were adopted (1986 in Nevada), and that provision was dropped. This resulted in the ABA Standing Committee on Ethics and Professional Responsibility issuing formal opinion 92-363-Use of Threats of Prosecution in Connection with A Civil Matter, which reached the following conclusion:

...[T]he Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as a part of a settlement agreement, so long as such agreement is not itself in violation of law.

What about the threat of filing a disciplinary complaint? See Formal Opinion 94-383, Use of Threatened Disciplinary Complaint Against Opposing counsel, which concludes:

A lawyer's use of the threat of filing a disciplinary complaint or report against opposing counsel, to obtain an advantage in a civil case, is constrained by the Model Rules, despite the absence of an express prohibition on the subject. Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness or fitness as a lawyer, because in these circumstances, the lawyer is ethically required to report such misconduct,. Such a threat would also be improper if the professional misconduct is unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has non substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice.

4. A survey of the cases and commentary regarding Nevada R.P.C. 1.16 and its Model Rule counterpart points out five things to keeping mind when you fire a client.

- A. Notice. Give notice in writing, and allow the client time to get new counsel. The notice should point out all deadlines and other important dates.
- B. Withdrawal. If you have to move to withdraw (as opposed to substituting out), be aware of EDCR 7.40, which specifies the procedure for withdrawal and prohibits withdrawal where a delay would result.
- C. Surrender of documents and papers. RPC 1.16(d) requires that a withdrawing attorney return the client's papers and property. Keep in mind that in Nevada a lawyer may claim a retaining lien. *Figliuzzi v. District Court*, 111 Nev. 338, 890 P.2d 798 (1995).
- D. Refund unearned fees. RPC 1.16(d).
- E. Otherwise protect the client's interests. RPC 1.16(d). Generally speaking, cooperate with your successor counsel.

5. Advertising by lawyers has led to some disputes over the use of names. Generally speaking, lawyers can use names which are not false or misleading. RPC 7.1. There are some common situations where questions arise:

- A. Law school graduate not admitted. UPL rules treat them as non-lawyers.
- B. Law school graduates awaiting bar results. Can be listed on firm letterhead or business cards as long as public is not misled – i.e., disclaimer is used. ABA Informal Opinion 89-1527 (1989).
- C. Licensed in another state. Can be listed on firm letterhead and business cards, so long as public is not misled.
- D. “And Associates.” RPC 7.5 likely prohibits the use of the term where no “associates” exist; for example, a sole practitioner using the name “John Doe and Associates.”

6. The ABA recently issued opinion 08-451 dealing with the obligations of a lawyer who outsources legal work or non-legal support services. There are two things which you need to know

- A. You are responsible for the conduct of these persons and the quality of their work.
- B. You need to disclose the matter to the client and obtain the client's consent.

7. Permissible conduct upon receipt of confidential documents has become complicated for the receiving party. There are three rules which you need to know:

- A. RPC 4.4.
- B. Fed. R. Civ. P. 26(b)(5)(B) [No Nevada counterpart].
- C. Fed. R. Evid. 502

A Nevada lawyer was recently reprimanded by the Bar for failing to comply with his RPC 4.4 obligation. File No. 07-189-1865.

8. The Nevada Supreme Court recently adopted rules governing the sealing and redacting of records. These rules are very specific and greatly limit courts' ability to seal files and prevent public access to material.

9. The Supreme Court greatly restricted the use of gag orders. *Johanson v. District Court*, 124 Nev. Adv. Op. No. 23, 182 P.3d 94 (May 1, 2008). Such orders constitute a restraint on parties' First Amendment rights, and are now permitted only where there is a "clear and present danger or a serious and imminent threat" to the administration of justice.

10. Representing entities and their principals is always a problem. In *Steelemeyer & Sons v. Smith & Harmer*, 124 Nev. Adv. Op. No. 98, 197 P.3d 1051 (2008), the Supreme Court determined that no conflict existed where a law firm represented both an entity and its majority shareholder in the defense of a dissolution action brought by the minority shareholder. In so doing, the Court made two interesting points:

- A. An attorney disqualified on conflict of interest grounds is generally barred from receiving any fee.
- B. Only an “actual” conflict of interest will support disqualification – a “potential conflict” is not enough.

The Court also re-affirmed the rule that a party [including a lawyer] which represents itself cannot recover attorneys’ fees – even where those fees are recoverable by statute or contract.