

ETHICS OPINIONS

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May a retainer agreement include a clause requiring the client to arbitrate any fee or malpractice claims that may arise? When an attorney is pro se may the attorney directly contact a represented opposing party? If a marriage dissolution client intercepts a communication from the spouse's attorney, what are the attorney's obligations?

Opinion committees of bar associations and lawyers boards in various states offer answers to these and many other thorny questions. These opinions and those of the ABA are digested in the ABA/BNA *Lawyer's Manual* and made available on a regular basis. Here is a sampling of the questions and opinions.

May a lawyer use a retainer that requires arbitration of fees in malpractice disputes?

In analyzing Rule 1.8, Rules of Professional Conduct, the Michigan and Philadelphia ethics committees agree that such arbitration clauses are not forbidden.^{Ftn 1} But, written disclosures must be made of the rights being waived and the client must have the opportunity to consult independent counsel.

Are sexual relationships between a lawyer and client during representation improper *per se*?

Several states have opined that such relationships are not necessarily improper, but that they may violate rules, depending on certain circumstances. As the Alaska committee indicated, "Where the client is in an emotionally fragile condition, and the sexual relationship may have an adverse effect on the client's emotional stability, the sexual relationship would be improper."^{Ftn 2} In Minnesota, private disciplines have been issued for conflicts of interest in several situations involving sexual relationships with vulnerable clients. Exchanging sexual favors for legal representation would also be unprofessional. Of course, harassment and any nonconsensual sexual approaches are also forbidden.

May a lawyer require, as a condition of settling a legal action against him or her, that an ethics complaint be withdrawn or not filed?

The West Virginia Committee answers the question in the negative.^{Ftn 3} In Minnesota, lawyers have been subject to discipline, for violation of Rule 8.4(d) (conduct prejudicial to the administration of justice), for attempting to prohibit or discourage an ethics complaint. *In re Himmel*, 553 N.E.2d 790 (Ill. 1988) resulted in suspension of a lawyer for misconduct including having drafted an agreement for a client not to report theft by her first lawyer.

Must fees paid to lawyers before services are rendered be deposited in the trust account?

Several ethics committees have divided in their responses to this question. It is generally agreed that a reasonable sum paid as a retainer *for the lawyer's availability* may be earned upon receipt and deposited

into the business account. However, the fee must be reasonable in amount and the client must be clearly informed of the nonrefundable nature of the fee. If the fee is an *advance for future services*, the majority view is that it must be deposited in the trust account and withdrawn only as earned.[Ftn 4](#) In Minnesota, the Director's Office has taken the majority view on fees for future services. This view has also been applied in at least two lawyer discipline decisions of the Minnesota Supreme Court. *In re Green*, unpublished order (Minn., Mar. 6, 1984); *In re Getty*, slip. op. 3 and 6 (Minn., Mar. 16, 1990).

May a lawyer acting pro se in litigation contact an adverse party directly?

Rule 4.2 forbids such contact by a lawyer, "In representing a client, . . ." Noting that the rationales for the rule apply whether the lawyer is pro se or representing another party, Michigan has opined that the pro se lawyer may not contact the represented adverse party.[Ftn 5](#) The language "In representing a client . . ." is, in effect, construed to mean that a lawyer appearing pro se has a client, namely himself or herself.

What should a lawyer do when a divorce client intercepts mail from the opposing counsel to the spouse?

The New York City Bar Committee has concluded that the lawyer must disclose the client's interception of the adverse party's mail to opposing counsel; and if the client objects, then the attorney must withdraw from representation.[Ftn 6](#) Counseling a client to open the spouse's mail from anyone would involve a violation of the rule against deceitful conduct.

May a lawyer agree to provide free legal services in a divorce to the winner of a contest?

The Alabama State Bar recently stated that such an agreement would entail that the lawyer would be required to provide services for a divorce.[Ftn 7](#) The opinion concluded that, because the lawyer could not know in advance that a divorce was the appropriate legal service to be rendered, such an agreement would conflict with the requirement that a lawyer offer independent professional judgment. The Alabama opinion noted that the radio contest format would present "a grave appearance of professional impropriety." The words "appearance of impropriety" do not appear in the Minnesota Rules of Professional Conduct.

May a law firm that represents both A and B reveal to B A's intention to sue B?

"No" is the answer, according to the Delaware Committee's interpretation of Rule 1.6.[Ftn 8](#)

May a lawyer directly advance living expenses to a client when the client is suffering dire financial need?

The Connecticut committee construes Rule 1.8(e) to forbid such direct advances.[Ftn 9](#) It should be noted that 1.8(e)(3) allows a lawyer to guarantee a loan to a client in certain circumstances.

Other Opinions. In addition to the opinions of various state committees, the ABA issues about six formal and informal written opinions each year. The Minnesota Lawyers Professional Responsibility Board has 13 written opinions, published in the November 1989 *Bench & Bar*. The Minnesota Office of Lawyers Professional Responsibility also provides telephone advisory opinions to Minnesota attorneys and judges: (612) 296-3952; (800) 657-3601.

Other Resources. ABA members may request ethics research assistance by writing to the Center for Professional Responsibility, 750 North Lakeshore Drive, Chicago, IL 60611, or telephoning (312) 988-5000,

ext. 5323. Telephone requests usually take five to seven working days for response.

Other useful resources for legal ethics include *ABA/BNA Lawyers Manual of Professional Conduct*; Hazzard, *The Law of Lawyering*; American Bar Association, *Annotated Model Rules of Professional Conduct*; Wolfram, *Modern Legal Ethics*; Sheppards *Professional and Judicial Citations*. State ethics opinions prior to 1975 can be found in Maru, *Digest of Bar Association Ethics Opinions*, (1970 and Supp. 1975). Maru's Digest is somewhat outdated due to the adoption of the Rules of Professional Conduct.

NOTES

- ¹ *Michigan State Bar Committee on Professional and Judicial Ethics, Opinion RI-2 (January 28, 1989). Philadelphia Bar Association Professional Guidance Committee, Opinion 88-2 (March 22, 1988).*
- ² *Alaska Bar Association Ethics Committee, Opinion 88-01 (January 29, 1988). See also California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1987-92.*
- ³ *West Virginia State Bar Legal Ethics Committee, Opinion 88-3.*
- ⁴ *Wisconsin State Bar Committee on Professional Ethics, Formal Opinion E-86-9 (July 22, 1986). Cf. New York State Bar Association Committee on Professional Ethics, Opinion 570 (June 5, 1985).*
- ⁵ *Michigan State Bar Committee on Professional and Judicial Ethics, Opinion CI-1206 (August 2, 1988).*
- ⁶ *Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 1989-1 (March 13, 1989).*
- ⁷ *Alabama State Bar Disciplinary Commission, Opinion 89-116 (December 21, 1989).*
- ⁸ *Delaware State Bar Association Committee on Professional Ethics, Opinion 1990-1 (January 24, 1990).*
- ⁹ *Connecticut Bar Association Committee on Professional Ethics, Informal Opinion 90-3 (January 29, 1990.)*