Common Ethical Misconceptions

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Boone County Bar Association

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MYTHS

1. **It is not permissible to make direct contact with a former managerial employee of a represented opposing party.**

2. **Counsel for an organizational party can declare that counsel represents everyone who works or worked for the organization, without having actual contact with those individuals.**

It is permissible to directly contact former employees of an organization, regardless of their role while they were employed by the organization. However, it is not permissible to make direct contact if the former employee is represented by counsel. It is possible for the employee to be represented by the organization's counsel.

Generally, a person must consent to representation by an attorney before an attorney represents that person. There may be instances in which this consent is a condition of employment but it cannot extend beyond employment to former employees of an organization. The counsel for an organization may represent former employees, but it must be with the knowledge and consent of the former employees.

3. **It is permissible to opt out of participation in IOLTA.**

4. **All lawyer trust accounts must be IOLTA accounts.**

It is still necessary to have a separate, interest-bearing account, with the interest going to the client, if the interest generated would more than cover all the costs associated with the separate account. However, for the typical trust account, IOLTA is now mandatory, unless an exemption is obtained from the IOLTA program. In other words, the opt out provision has been eliminated. In addition, specific requirements are imposed for a financial institution to be eligible to have IOLTA accounts.

5. **Former client conflicts automatically go away after a period of time.**

There is no time limit on conflicts involving former clients. Under Rule 4-1.9, there are two types of conflicts involving former clients. (1) There is a conflict if the attorney will now be adverse to the client in the same or a substantially related matter. (2) Even if the matters are unrelated, if the attorney obtained information related to the previous representation that could be used to the former client's disadvantage in the current matter.

Often, the passage of time will affect the second type of conflict. Financial information the attorney learned 10 years ago may have no relevance today, depending on the circumstances. On the other hand, information regarding the former client's mental illness may still have quite a bit of relevance, depending on the circumstances.

If it is the same or a substantially related matter, it doesn't matter how much time has passed – it is a conflict. If it isn't the same or a substantially related matter, it is necessary to review information obtained, in the context of the circumstances.

6. **The firm the attorney is with when the client hires the attorney owns the client.**

In the Matter of Cupples, 952 S.W.2d 226, 234-236 (Mo.banc 1997):

> The client has the right to choose the attorney or attorneys who will represent it. Rule 4-1.16(a)(3) (1997); see also Model Code, DR 2-110 (B)(4). "[C]lients are not the `possession' of anyone, but, to the contrary, control who represent them." Kelly v. Smith, 611 N.E.2d 118, 122 (Ind. 1993). "Clients are not merchandise. They cannot be bought, sold, or traded. The attorney-client relationship is personal and confidential, and the client's choice of attorneys in civil cases is near absolute." Koehler v. Wales, 556 P.2d 233, 236 (Wash. App. 1976); see also Ellerby v. Spiezer, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985); Resnick v. Kaplan, 434 A.2d 582, 588 (Md. Ct. Spec. App. 1981); Corti, supra; HENRY S. DRINKER, LEGAL ETHICS 211 (1953); HILLMAN, supra, sec. 2.3.1.1; HAZARD & HODES, supra, sec. 7.3:202, at 885. The client's files belong to the client, not to the attorney representing the client. The client may direct an attorney or firm to transmit the file to newly retained counsel. In re Grand Jury Proceedings, 727 F.2d 941, 944 (10th Cir.), cert. denied, 469 U.S. 819 (1984); Rose v. State Bar of Cal., 779 P.2d 761, 765 (Cal. 1989); HILLMAN, supra, sec. 2.3.2.1. Finally, an attorney representing a client has a duty to communicate with the client regarding the client's representation. Rule 4-1.4(b)(1997); see also Model Code, EC 9-2. This duty includes communicating with the client about material changes in who represents the client. See Rule 4-1.16(d) (1997); Rule 4 (Preamble);

Vollgraff v. Block, 458 N.Y.S.2d 437, 440 (1982); Judy R. May, COMMENT: In Search of Greener Pastures: Do Solicitation Rules and Other Ethical Restrictions Governing Departing Partners Really Make Sense Today?, 40 VILL. L. REV. 1517, 1528 (1995).

7. The attorney can withhold the client's file until fees are paid.

Paragraph 9 of the Comment to Rule 4-1.16:

> Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain items for which the attorney has paid out of pocket and has not been reimbursed but may not retain papers as security for a fee. See Rule 4-1.15.

ADVISORY COMMITTEE
MISSOURI BAR ADMINISTRATION

FORMAL OPINION #115, as amended

ATTORNEY MAY NOT WITHHOLD PROPERTY BELONGING TO HIS CLIENT TO ENFORCE PAYMENT OF FEES OR EXPENSES.

Question: May a Missouri Attorney ethically withhold from his client papers, books, documents or other personal property which belong to the client and came to the attorney in the course of his professional employment to enforce payment of fees or expenses owed to the attorney by the client?

Answer: It is the opinion of the Advisory Committee that under the Rules of Professional Conduct, such action by an attorney is improper. The Advisory Committee is of the opinion that the file belongs to the client, from cover to cover, except for those items contained within the file for which the attorney has borne out-of-pocket expenses such as, but not limited to, transcripts. The attorney may retain those items until such time as he is reimbursed for the out-of-pocket expense and then they must be immediately delivered to the client. Those items which have commonly been denominated as "work product" of the attorney actually belong to the client because those are the result of services for which the client contracted.

The basis given for such action by attorneys in Missouri has been the so-called Attorney's Common Law Retaining Lien, said lien having existed in the English Common Law and being recognized in a number of states of which Missouri is not one. It

is strictly a passive lien inasmuch as the attorney has no power to enforce payment other than to embarrass, inconvenience or to cause worry to the client by the withholding of his papers. The legal question of whether or not the Attorney's Common Law Retaining Lien exists has not been affirmatively answered by the Missouri Courts.

The Advisory Committee recognizes the Statutory Attorney's Lien created in Missouri by the act of 1901 and it, in no way, is affected by this Opinion. This Lien is embodied in Sections 484.130 and 484.140 of the Missouri Revised Statutes 1986. It has been held to give the attorney a lien on the fund or funds produced for the client by his action where he filed a petition or counterclaim and/or where he has given sufficient notice to the defendant of the existence and nature of his contract with the plaintiff.

Even if the Attorney's Common Law Retaining Lien were deemed to be in existence, the question of the ethical propriety of its exercise must still be answered with reference to the Rules of Professional Conduct. The situations under which this question normally arise will be where the attorney has withdrawn from the representation of his client or where the client has discharged the attorney because the representation has been completed or prior to the time of the completion of the representation. For purposes of this discussion, however, the aforementioned situations do not differ inasmuch as Rule 1.15(b) of Missouri Supreme Court Rule 4 states "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request of the client or third person, shall promptly render a full accounting regarding such property." Furthermore, Rule 1.16(d) of Rule 4 of the Missouri Supreme Court Rules states that "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law." (Emphasis added) If a lawyer wishes to keep a copy of the file for his own use or protection, then the lawyer must bear the costs of copying the file.

The above quoted disciplinary rules require the lawyer to turn over such property to which the client is "entitled". It could be argued that the disciplinary rules constitute an exception which would include the property over which the lawyer has a recognized lien. However, in the opinion of the Advisory Committee, for a lawyer to force payment of his fees or expenses by resorting to a lien which can only be effective by causing embarrassment, inconvenience or worry to his client is for the lawyer to act in a manner totally inconsistent with the above-cited disciplinary rules and, further, is inconsistent with the spirit of his professional responsibility. This is particularly true since

other methods are available for use by an attorney for the collection of those fees and expenses to which he may be legally entitled.

Adopted March 4, 1988

8. **A fee can be made nonrefundable, even though it has not been reasonably earned.**

Informal Opinion 2005-0059

QUESTION: [omitted]

ANSWER: …. There are no "nonrefundable" fees in Missouri. The only fee where a client is not entitled to a refund is a fee that has been earned by the attorney. In determining whether the fee has been earned, all factors set forth in Rule 4-1.5(a) may be considered.

9. **It is OK to use a subpoena to obtain records from a third party without a deposition or appearance at trial.**

The federal rules allow for subpoenas or other procedures to compel production of documents from third parties in the absence of an appearance in court or at a deposition. However FRCP 45(b)(1) spells out how this should work and has a specific provision that requires notice to all parties.

In Missouri, the rules do not provide for subpoena solely for production of documents. An attorney misuses a Missouri subpoena that calls for attendance by indicating that the attorney waives attendance but the subpoena still compels the production of documents. This approach violates the rights of the opposing party.

10. **The Chief Disciplinary Counsel (or some variation) requires e-mail disclaimers.**

E-mail Communications with Clients and E-mail Disclaimers

Duty of Prior Consultation

An attorney should consult with a client before communicating with the client by unencrypted e-mail. It is not necessary to obtain express consent but it is necessary to consult with the client about the risks of communicating by unencrypted e-mail *before* doing so. American Bar Association Formal Opinion 99-413 concluded that communication with a client

by unencrypted e-mail does not violate the Model Rules of Professional Conduct. In reaching that conclusion the ABA cautioned:

> The conclusions reached in this opinion do not, however, diminish a lawyer's obligation to consider with her client the sensitivity of the communication, the costs of its disclosure, and the relative security of the contemplated medium of communication. Particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters. Those measures might include the avoidance of e-mail, [footnote omitted] just as they would warrant the avoidance of the telephone, fax, and mail. See Model Rule 1.1 and 1.4(b). The lawyer must, of course, abide by the client's wishes regarding the means of transmitting client information. See Model Rule 1.2(a).

E-mail communications have become widespread but, from an attorney ethics perspective, it is probably not safe to assume that clients have an adequate understanding of the risks involved in communication by e-mail. In particular, it seems unlikely that clients will identify the risk that e-mail will be accessed by others who have legitimate access to a shared computer or network. Requests for informal advisory opinions, from attorneys whose clients have accessed materials on a legitimately shared computer, reinforce the concern that clients may not understand some of the risks.

Many e-mail attorney-client communications involve relatively innocuous information and do not present a great concern even if they are intercepted. On the other hand, any communication from an attorney that can be accessed by others may be of concern in some situations. For example, a client who is considering filing for dissolution could be significantly impacted if *any* communication from the attorney is received on a computer shared with the client's spouse. Therefore, in order to be sufficient, consultation with an existing client prior to communicating by e-mail should take into consideration the nature of the client's legal matter and the environment in which the client sends and receives e-mail. In some situations, similar concerns can arise regarding communications by regular mail or telephone.

If an engagement letter or fee agreement is used, it is advisable to include a provision regarding e-mail communication. However, this cannot substitute for actual consultation regarding the client's situation. Appropriate questions included on an intake form or intake checklist could make consultation on this subject much quicker and easier. Some of the questions that might be asked include: Where is the computer you use for e-mail? Does anyone else use or have the ability to use that computer? Is that computer connected to a network?

Disclaimer Not Required by Rules of Professional Conduct

The informal advisory opinions referenced above and the consultation requirement have given rise to a misconception that the Office of Chief Disciplinary Counsel or Legal Ethics Counsel have said that disclaimers must be included on e-mails. To the contrary, the ethical rules do not require a disclaimer on e-mails. The communication with a client or prospective client about the risks of e-mail communication must come *before* communication by e-mail. A

disclaimer that comes with the e-mail is ineffective. The disclaimer doesn't hurt anything but it does not fulfill the need to communicate the risks before actually communicating by e-mail.

The risks of interception through the internet are probably relatively small, but real. The biggest risk, and one that most certainly has happened, is interception in the environment in which the e-mail is sent and received.

Whether required by the ethical rules or not, most attorneys include a disclaimer on their e-mails and faxes. The disclaimer may be useful in deterring those who have obtained an e-mail through inadvertent or improper means from using the communication or the information contained in the communication. Attorneys considering how and whether to use a disclaimer may want to check with their malpractice carriers for recommendations regarding placement, form, and content.

Some laws prohibit improper interception of e-mail and would provide a basis for action against the person who wrongfully intercepts e-mail. Whether any law addresses the actions of a person who uses a communication inadvertently received is beyond the scope of this article.

11. The attorney can disclose the PR's misconduct to the court without the PR's consent.

This is based on the erroneous belief that the attorney represents the estate rather than the personal representative in a probate matter. Unless there is a specific agreement and understanding to the contrary, the attorney represents the PR. The PR has to be able to get advice in a confidential relationship. Under Rule 4-3.3, the attorney may be required to disclose to the court, if the attorney has unknowingly provided false information to the court and learns that it was false when the attorney learned of the PR's misconduct.

12. The personal representative of a deceased client's estate can waive privilege and confidentiality.

Confidentiality is personal to the client. It survives death. *Swidler & Berlin v. U.S.*, 524 U.S. 399, 118 S.Ct. 2081 (1998).

Under Rule 4-1.6, confidential information is "information relating to representation of a client." This is a very broad definition. An attorney may not disclose confidential information unless disclosure was impliedly or expressly authorized by the client. The scope of any implied authority to disclose should be determined with caution. For example, in an estate planning context, the attorney may disclose a will or trust, if the attorney believes it to still be valid, to the person or court that will act on the document. However, disclosure of other communications and circumstances would normally not be impliedly authorized. Express consent from a deceased client is sufficient for this purpose.

If an attorney who is representing a client identifies a realistic possibility that there will reasons to disclose confidential information, the attorney should discuss the extent of the client's consent for the attorney to disclose information without a court order, if the client is unavailable for consultation. Any consent given by the client should be documented.

In a situation where an attorney has been requested or subpoenaed to provide information and the client is unwilling or unable to consent, the attorney may not provide that information without a court order, after the issue of confidentiality has been fully presented to the court. If the attorney has been subpoenaed to a deposition, the attorney may attend the deposition and refuse to answer. Alternatively, the attorney may work with the parties to present the issues to the court short of going through that process. The procedures used in getting to a court order are not important. The important thing is that the court makes the decision after having all of the issues fully presented. The attorney should seek to have the court order as specific and limited as possible. A subpoena, by itself, does not authorize disclosure.

13. Websites are not advertising.

Informal Opinion 2006-0005

QUESTION: Rule 4-7.2(f) states that advertisements or communications must conspicuously contain the statement: "The choice of a lawyer is an important decision and should not be based solely on advertisements." Attorney has a website and a small listing in the Yellow Pages. Does the information referred to in Attorney's website and Yellow Page ad need to contain the statement set forth in Rule 4-7.2(f)?

ANSWER: Rule 4-7.2(f) applies to websites. **Websites are considered advertising.** It is not necessary to include the Rule 4-7.2(f) statement in a print ad or website that is limited to the information listed in Rule 4-7.2(g). Rule 4-7.2(g) exempts an advertisement from 4-7.2(f) if it is limited to some or all of the following:
(1) the name of the law firm and the names of lawyers in the firm;
(2) one or more fields of law in which the lawyer or law firm practices;
(3) the date and place of admission to the bar of state and federal courts; and
(4) the address, including e-mail and web site address, telephone number, and office hours.

(emphasis added).

14. OCDC and the Legal Ethics Counsel are part of The Missouri Bar.

They are both part of the attorney discipline system created by Supreme Court Rule 5. The attorney discipline system is completely separate from The Missouri Bar. The attorney discipline system also consists of the Advisory Committee, Disciplinary Hearing Panels, and Regional Disciplinary Committees.