ETHICS Hotline

TOP TEN QUESTIONS

by Thomas K. Byerley

Short Answers to Common Ethics Concerns

The Ethics Hotline [(517) 485-ETHX] was created to offer Michigan lawyers and judges confidential ethics guidance for prospective conduct. Each day, 30 to 40 calls are received from Michigan lawyers and judges who seek guidance on a full array of ethics issues. Although questions are often unique, many are asked on a frequent basis.

In no particular order, here are the top 10 questions received by the Ethics Hotline:

Do I have a conflict of interest?

This question comes in infinite varieties that are always fact-specific. Conflicts may involve two or more current clients or a current client and a former client. Conflicts may also be imputed to the law firm if one of the lawyers in the firm is disqualified from representing a client. Lawyers who remember the former Michigan Code of Professional Conduct often try to apply the "appearance of impropriety" standard. However, that standard was abandoned in the current Rules of Professional Conduct and the more "objective" tests found in MRPC 1.7 through 1.12 now apply.

A great beginning resource on conflict of interest questions is the two-part article written by John W. Allen entitled "Conflicts of Interest—the Basics" found in the January and February 1999 editions of the *Michigan Bar Journal*. That article references many applicable rules and ethics opinions involved in making these important decisions. The Ethics Committee has also issued over 100 written opinions dealing with conflict of interest issues.

My basement is full of old client files. What can I do with them?

There is no specific time period required for retaining old client files. Each firm may set its own record retention policy based upon the type of practice it undertakes. The minimum record retention policy should include

- Instructions to lawyer and nonlawyer personnel concerning their obligations under the policy
- Information on the location of storage facilities
- Methods for eventually disposing of records and files
- Information on retention periods and establishing retention periods
- A system for monitoring lawyer and nonlawyer employee compliance with the plan

A good record retention policy will involve clients in the decision-making process of when files will be destroyed. Client participation may involve offering the file to the client or reaching an agreement with the client about disposing of the file after an appropriate retention period.

The State Bar has compiled a group of articles and ethics opinions on the subject of record retention. This "Record Retention Kit" may be found on the ethics home page on the State Bar's Internet site. Also see MRPC 1.6 and 1.15, plus ethics opinions R-5, R-12, R-19, RI-109, RI-178, and RI-240.

Who "owns" the representation file?

Sometimes, a client will ask the lawyer to turn over the representation file. Does the lawyer need to turn over the original file, or may a copy suffice? What if the client owes the lawyer money for fees? What if the client needs the file to continue with pending litigation?

During this past year, the Ethics Committee completed a major reassessment of all of the ethics issues on the release of the representation file to the client. At the conclusion of the study, formal opinion R-19 was released with the approval of the Board of Commissioners. R-19 modified some and overruled other previous opinions on the subject and merits study by all lawyers. In that opinion, the committee opined that the representation file belongs to the lawyer and if the client desires a "copy of the file," the lawyer may properly charge reasonable costs for search

Fast Facts:

The State Bar's ethics hotline responds to 30–40 inquiries a day from Michigan lawyers and judges seeking confidential advice.

Lawyers and judges ask about identifying conflicts of interest, handling old client files, advising clients when lawyers switch firms, sharing office space, finding new clients, and dividing fees.

and reproduction of information in the lawyer's file to which the client is legally entitled.

A detailed discussion of R-19 and the opinions that it modified is found in an article by John W. Allen, "Ownership of Lawyer's Files About Client Representations—Who Gets the 'Original'? Who Pays for the Copies?" in the August 2000 edition of the *Michigan Bar Journal*. That article also includes a sample provision to be included in a lawyer's retainer agreement pertaining to the custody and control of the representation file.

I am changing firms. What can I say to "my" clients?

First, clients do not "belong" to the lawyer. Clients always have the unconditional right to choose a lawyer of their own choice. However, when a client goes to a law firm and retains the firm, there is a presumption that the client hired the firm, not the individual lawyer assigned to the case.

Whenever possible, it is best for the departing lawyer and the lawyer's former firm to send a jointly signed letter to the clients of the lawyer. Usually this letter will state that the lawyer is leaving the firm and that the client has the choice to decide whether to stay with the firm, leave with the departing lawyer, or choose a new lawyer of the client's choosing. Any decision by the client to transfer the representation should be in writing.

If the parting is less than cordial, the departing lawyer and the former firm may issue separate letters to the client. The firm's letter may notify the client of the three choices but may recommend that the client allow the reassignment of counsel within the firm. The departing lawyer's letter may also notify the client of the three options and may disclose the departing lawyer's new contact information, but may not directly solicit the client to "come with" the departing lawyer.

There are good resources to assist lawyers when a law firm changes personnel. An article entitled "Break Away Lawyers" by Angus Goetz, Jr., in the October 1998 edition of the *Michigan Bar Journal*, provides an overview. Ethics opinions R-4, RI-49, RI-86, and RI-245 provide additional guidance.

May I share office space with another lawyer or other professional?

Lawyers may share office space with other lawyers or other professionals as long as the lawyer keeps the law practice separate and can guarantee that all client confidences and secrets may be maintained. Each firm should have its own telephone line and the phones may not be answered as "Lawyer A and B" when the two lawyers sharing office space are not actually practicing together.

Lawyers who share space with nonlawyer professionals must take extra precautions to ensure that the law practice is completely separate from the non-law business. In addition to file separation, extra care must be taken to convey to the public that the law business is not affiliated with the non-law business in any way. For example, a conference room used by the non-law business should not also be the law library for the lawyer.

A detailed discussion of office sharing situations is found in my article "Lawyers Sharing Office Space," first published in the February 1998 edition of the *Michigan Bar Journal*.

What special rules are involved when I run for judicial office?

The Michigan Code of Judicial Conduct, Canon 7, applies to individuals running for judicial office, whether they are incumbent judges or lawyers seeking judicial office. These rules are unique to judicial elections and are often confusing to judicial candidates.

To assist judicial candidates, the State Bar of Michigan has published a booklet entitled "Becoming a Judge—Ethics and Campaign Practices" that may be obtained through the publications office at the State Bar. The Ethics Committee also conducts a half-day seminar for judicial candidates at the beginning of the campaign season.

A detailed discussion of the most frequently asked questions by judicial candidates is found in the July 2000 edition of the *Michigan Bar Journal*.

May I mail a "client solicitation" letter to individuals who may need a lawyer?

Direct mail advertising or solicitation is governed by MRPC 7.3(a). That rule is further supplemented by the United States Supreme Court case of *Shapiro v Kentucky Bar Association*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988). Under these rules, a lawyer may send a "truthful and nondeceptive" letter to potential clients known to face particular legal problems. Also, a lawyer may send letters or advertising circulars to the general public not known to need legal services of the kind provided by the lawyer but who are so situated that they might in general find such services useful.

In-person or telephone solicitation of legal business is specifically prohibited by MRPC 7.3. For further guidance on this issue a review of ethics opinions RI-18, RI-49, RI-74, RI-193, and RI-244 is helpful.

8 How do I set a reasonable fee or divide a legal fee with another lawyer?

MRPC 1.5(a) lists eight criteria to be used by a lawyer when setting a fee for legal services. Using these criteria, a lawyer may set the "reasonable" fee. Nonrefundable retainers are allowed by the ethics rules as long as the amount is reasonable and the client consents to this arrangement in writing at the beginning of the attorney-client relationship. RI-010.

Although most fee agreements do not have to be in writing, MRPC 1.5(b) expresses a preference that they be in writing. Under MRPC 1.5(c), contingent fee agreements must be in writing to be enforceable.

Legal fees may be shared with other lawyers, but almost never with nonlawyers. MRPC 1.5(e) allows fee sharing among lawyers if the client is advised of and does not object to the participation of all the lawyers involved and the total fee is reasonable. MRPC 5.4(a) specifically prohibits sharing fees with nonlawyers, except in three very limited circumstances.

Two recent articles deal with legal fees and the sharing fees. The article entitled "Legal Fees and Ethics" found in the July 1999 edition of the *Michigan Bar Journal* and the article entitled "Sharing Legal Fees" found in the February 2000 edition of the *Journal* offer more detailed discussions on these issues.

9 What charitable and civic activities are proper for judges to participate in?

Ethics rules allow a judge to serve on the board of directors of a nonprofit organization if the organization is not likely to be involved in litigation. Many ethics opinions help define a judge's proper role in charitable and civic activities, most notably formal opinion J-1. In that opinion, the Ethics Committee opined that a judge may participate in civic and charitable activities if the activities do not

- Detract from the dignity of the judicial office
- Interfere with the performance of judicial duties
- Reflect adversely on the judge's impartiality
- Give the appearance of impropriety

A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, fraternal, or other civic/charitable organization only if

- it is unlikely that the organization will be engaged in proceedings that would ordinarily come before the judge
- it is unlikely the organization will become engaged in adversary proceedings in any court
- the judge does not personally solicit funds
- the prestige of the judicial office is not used for solicitation of funds.

Some important ethics opinions on this topic include J-1, J-3, J-6, JI-33, JI-48, JI-49, JI-54, JI-66, JI-103, and JI-121.

10 How do I get copies of ethics opinions and articles?

One of the primary goals of the Ethics Committee is to make all of the ethics resources readily available to lawyers and judges. To that end, the committee publishes all ethics materials on the Bar's website, www.michbar.org, under the "Opinions" tab. Materials published there include all written ethics opinions issued by the committee, the Michigan Rules of Professional Conduct, the Michigan Code of Judicial Conduct, articles on ethics issues that have been previously published in the *Michigan Bar Journal*, ethics resource "kits" and other ethics research material.

Obviously, the answers given in this article are greatly abbreviated and merit further amplification. If any of these questions cross your lips, please read the ethics opinions and articles cited for a more complete answer. Then, if you still have questions or if your question is not covered here, please call the Ethics Hotline [(517) 485-ETHX] for confidential consultation. ♦

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