



CURRENT DEVELOPMENTS IN LEGAL ETHICS

Children in the Courts
Conference
April 26, 2016

Chief Justice Howard W. Brill
Arkansas Supreme Court

Recent Ethics Opinions

American Bar Association: the summary is taken from the opening paragraphs of the opinion:

Formal Ethics Opinion 14-466 (April 24, 2014)

Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Formal Ethics Opinion 14-467 (September 8, 2014)

Managerial and Supervisory Obligations of Prosecutors under Rules 5.1 and 5.3

Model Rules 5.1 and 5.3 require lawyers with managerial authority and supervisory lawyers, including prosecutors, to make "reasonable efforts to ensure" that all lawyers and nonlawyers in their offices conform to the Model Rules. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to ensure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices.

Formal Ethics Opinion 14-468 (October 8, 2014)

Facilitating the Sale of a Law Practice

When a lawyer or law firm sells a law practice or an area of law practice under Rule 1.17, the seller must cease to engage in the private practice of law, or in the area of practice that has been sold, in the relevant jurisdiction or geographic area. But the selling lawyer or law firm may assist the buyer or buyers in the orderly transition of active client matters for a reasonable period after the closing of the sale. Neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent only on the transition of matters.

Formal Ethics Opinion 14-469 (November 12, 2014)

Prosecutors and Debt Collection Companies

A prosecutor who provides official letterhead of the prosecutor's office to a debt collection company for use by that company to create a letter purporting to come from the prosecutor's office that implicitly or explicitly threatens prosecution, when no lawyer from the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted or reviews the letter to ensure it complies with the Rules of Professional Conduct, violates Model Rules 8.4(c) and 5.5(a).

Formal Ethics Opinion 15-470 (May 20, 2015)

Judicial Encouragement of Pro Bono Service

A state supreme court judge may sign a letter printed on the judge's stationery that is duplicated and mailed by the unified state bar association directed to all lawyers licensed in the state encouraging those lawyers to meet their professional responsibility under Rule 6.1 of the Model Rules of Professional Conduct and provide pro bono legal services to persons in need and to contact the bar association for information about volunteer opportunities.

Formal Ethics Opinion 15-471 (July 1, 2015)

Ethical Obligations of Lawyer to Surrender Papers and Property to Which Former Client Is Entitled

Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled. A client is not entitled to papers and property that the lawyer generated for the lawyer's

own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

Formal Ethics Opinion 15-472 (November 30, 2015)

Communication with Person Receiving Limited-scope Legal Services

Under Model Rule 1.2(c), lawyers are authorized to provide limited-scope legal representation. Although not required by Rule 1.2(c), the Committee recommends that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client.

Although Rule 4.2 does not require a lawyer to ask a person if he or she is represented by counsel before communicating with that person about the subject of the representation, a lawyer's knowledge that the person has obtained assistance from another lawyer may be inferred from circumstances. If the lawyer has reason to believe that an unrepresented person on the opposing side has received limited-scope legal services, the Committee recommends that the lawyer begin the communication with that person by asking whether that person is or was represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. When a lawyer has knowledge that a person is represented on the matter to be discussed, the lawyer must obtain the consent of counsel prior to speaking with the person.

If the person states that he or she is or was represented by counsel in any part of a matter, and does not articulate either that the representation has concluded or that the issue to be discussed is clearly outside the scope of the limited-scope representation, the lawyer requesting information should contact the lawyer providing limited-scope services to identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services.

The lawyer must comply with Rule 4.2 and communicate with the person's counsel when the communication concerns an issue, decision, or action for which the person is represented. Under Rule 4.3, however, the lawyer may communicate directly with the person on aspects of the matter for which no representation exists. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. Communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about protected communications between the person and the lawyer providing limited-scope services.

Formal Ethics Opinion 16-473 (February 17, 2016)

Obligations upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information

A lawyer receiving a subpoena or other compulsory process for documents or information relating to the representation of a client has several obligations. If the client is available, the lawyer must consult the client. If instructed by the client or if the client is unavailable, the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other initial demand on any reasonable ground. If ordered to disclose confidential or privileged information and the client is available, a lawyer must consult with the client about whether to produce the information or appeal. If the client and the lawyer disagree about how to respond to the initial demand or to an order requiring disclosure, the lawyer should consider withdrawing from the representation pursuant to Model Rule 1.16. If disclosure is ordered and the client is unavailable for consultation, the lawyer is not ethically required to appeal. When disclosing documents and information--whether in response to an initial demand or to an order, and whether or not the client is available--the lawyer may reveal information only to the extent reasonably necessary. The lawyer should seek appropriate protective orders or other protective arrangements so that access to the information is limited to the court or other tribunal ordering its disclosure and to persons having a need to know.