

ANNUAL CHILD SUPPORT CONFERENCE

PRESENTED BY:
LAURA L. CHASTAIN
ETHICS COUNSEL BOARD OF PROFESSIONAL
RESPONSIBILITY

ESCAPING THE BPR NET



Laura Chastain
Ethics Counsel

BEST AND WORST THINGS TO DO WHEN DEALING WITH THE BPR



I. ALWAYS RESPOND TO BPR REQUESTS FOR INFORMATION

THE SINGLE **WORST** THING YOU CAN DO, ASIDE FROM STEALING TRUST ACCOUNT MONEY, IS **FAILURE TO RESPOND** WHICH WILL PUT YOU INTO IMMEDIATE SUSPENSION OF YOUR LICENSE TO PRACTICE LAW.



DON'T PUT OFF OR DELAY RESPONDING

IT REALLY LOOKS BAD WHEN THE CLIENT IS COMPLAINING ABOUT YOU NOT WORKING ON THEIR CASE AND YOU FAIL TO TIMELY RESPOND TO THE COMPLAINT.



DON'T GUESS AT WHEN THINGS HAPPENED IN YOUR RESPONSE

ALWAYS REVIEW YOUR FILE BEFORE YOU RESPOND. IT APPEARS THAT YOU ARE BEING DISENGENUOUS IF YOU HURRIEDLY MAKE A RESPONSE THAT IS NOT CONSISTENT WITH FACTS AND DATES IN YOUR FILE.



KEEP YOUR RESPONSE SIMPLE AND INCLUDE SUPPORT FOR YOUR POSITION

EXAMPLE: COMPLAINT ABOUT FAILURE TO COMMUNICATE -- BE SURE TO SEND COPIES OF COMMUNICATIONS, I.E. LETTERS, EMAILS, RECORDS OF PHONE CALLS.



DON'T ATTACK YOUR CLIENT IN YOUR RESPONSE.

BUT, IF YOU HAVE PROOF OF CLIENT MENTAL ILLNESS, OR OTHER PROBLEM, LET DISCIPLINARY COUNSEL KNOW.



II. COMMUNICATE WITH YOUR CLIENTS

FAILURE TO COMMUNICATE WITH YOUR CLIENT IS PRESENT SOMEWHERE IN ALMOST ALL OF THE COMPLAINTS THAT THE BOARD RECEIVES FROM CLIENTS.



III. CHARGE REASONABLE FEES

MANY OF THE COMPLAINTS RECEIVED BY BPR ARE ABOUT WHAT THE CLIENT CONSIDERS TO BE

UNREASONABLE FEES.



RPC 1.5 FEES

- **CONTINGENT FEES** NEED TO BE IN WRITING, SIGNED BY THE CLIENT.
- FEES DIVIDED WITH A LAWYER **NOT IN YOUR LAW FIRM** MUST BE IN WRITING AGREED TO AND SIGNED BY THE CLIENT.
- **NON-REFUNDABLE FEES** HAVE TO BE IN WRITING SIGNED BY THE CLIENT.

IV. AVOID CONFLICTS OF INTEREST

BY FAR, THE MOST QUESTIONS THAT I AM ASKED, AS ETHICS COUNSEL, INVOLVE CONFLICTS OF INTEREST.



V. MEET DEADLINES AND WORK YOUR CASE FILES

A GREAT MAJORITY OF THE COMPLAINTS THAT THE BOARD RECEIVES INVOLVES **NEGLECT** OF THE CLIENT'S CASE.



VI. WHEN IN DOUBT ABOUT AN ETHICAL DILEMMA CALL THE ETHICS "HOTLINE".

YOU CAN GET ADVICE WHEN YOU DON'T KNOW WHAT TO DO WITH REGARD TO THE ETHICS OF A SITUATION IN YOUR PRACTICE.



HOW TO GET ASSISTANCE WITH AN ETHICAL DILEMMA?

- 1. PICK UP THE PHONE AND CALL 615-361-7500 EXTENSION 212; OR
- 2. USE THE BOARD'S ONLINE INFORMAL ETHICS INQUIRY PROGRAM; OR
- 3. SEND AN EMAIL WITH THE FACTS AND YOUR QUESTION(S) TO lcstain@fbpr.org .

WHEN GIVING ETHICS OPINIONS, ETHICS COUNSEL IS PROHIBITED FROM GIVING ETHICS OPINIONS BY BOARD POLICY IN THE FOLLOWING SITUATIONS:

1. MATTERS PENDING BEFORE A COURT OR ADMINISTRATIVE BODY;
2. ANOTHER LAWYER'S CONDUCT;
3. YOUR OWN PAST CONDUCT.

WHEN CAN ETHICS COUNSEL GIVE AN INFORMAL ETHICS OPINION?

- WHEN YOU ARE SEEKING GUIDANCE REGARDING YOUR OWN PROSPECTIVE CONDUCT.
- WHEN YOU ARE SEEKING WHAT YOU SHOULD DO UNDER THE CIRCUMSTANCES CONSIDERING THE RULES OF PROFESSIONAL CONDUCT.
- WHEN YOU ARE SEEKING THE RULES OF PROFESSIONAL CONDUCT THAT APPLY TO YOUR SITUATION.

IS MY ETHICS INQUIRY CONFIDENTIAL?

YES, EVERY ETHICS CALL IS **CONFIDENTIAL**. THERE IS A CONFIDENTIAL RECORD MADE OF EACH CALL THAT IS **NOT SUBJECT TO A PUBLIC RECORDS REQUEST**. THE LAWYER MAKING THE CALL HAS THE RIGHT TO WAIVE THE CONFIDENTIALITY IN THE EVENT THAT THE LAWYER WANTS TO USE THE FACT THAT HE/SHE CALLED THE BPR FOR GUIDANCE.

FORMAL ETHICS OPINIONS

SUPREME COURT RULE 9, SECTION 5 GOVERNS THE ISSUANCE OF FORMAL ETHICS OPINIONS BY THE BOARD OF PROFESSIONAL RESPONSIBILITY.

THESE OPINIONS TAKE AT LEAST 3 MONTHS TO OBTAIN DUE TO THE FACT THAT THE BOARD MEETS QUARTERLY.

THESE OPINIONS MUST BE REQUESTED IN WRITING AND COMPLY WITH SUPREME COURT RULE 9, SECTION 5.4(b).

GENERALLY, THE BOARD WILL ISSUE OPINIONS ON SUBJECTS THAT WILL HAVE MEANING AND GIVE GUIDANCE TO A BROAD SPECTRUM OF LAWYERS RATHER THAN A SPECIFIC NARROW QUESTION AFFECTING VERY FEW LAWYERS.

ETHICS UPDATE

TN FORMAL ETHICS OPINION 2015-F-159



ISSUED 9-11-15

PERMITS DATA STORAGE IN "THE CLOUD" SO LONG AS THE LAWYER'S DUTIES TO CLIENTS ARE FULFILLED. THE OPINION GIVES GUIDANCE ON HOW TO CHOOSE A DATA STORAGE PROVIDER AND SETS OUT THE LAWYER'S OBLIGATIONS WITH RESPECT TO MAINTAINING CONFIDENTIALITY.

OF PARTICULAR INTEREST TO GOVERNMENT OR IN-HOUSE ATTORNEYS IS THE RECOGNITION THAT "OFTEN IN-HOUSE COUNSEL HAS NO INPUT WITH REGARD TO THE TECHNOLOGY USED BY THE CORPORATION, BUT OWES THE DUTY OF COMMUNICATION WITH THE CORPORATE CLIENT REGARDING THE RISKS AND BENEFITS OF CLOUD STORAGE. COMMENT 3 TO RPC 1.13 STATES THAT WHEN CONSTITUENTS OF THE ORGANIZATION MAKE DECISIONS FOR IT, THE DECISIONS ORDINARILY MUST BE ACCEPTED BY THE LAWYER EVEN IF THEIR UTILITY OR PRUDENCE IS DOUBTFUL. DECISIONS CONCERNING POLICY AND OPERATIONS, INCLUDING ONES ENTAILING SERIOUS RISK, ARE NOT AS SUCH IN THE LAWYER'S PROVINCE.

TN FORMAL ETHICS OPINIONS 2015-F-160 AND 2016-F-160(a)

ISSUED DECEMBER 2015 and MARCH 2016

GUIDANCE FOR LAWYERS REGARDING OBLIGATIONS WITH REGARD TO CLIENT FILES

- These opinions recommend that lawyers keep client files for at least five (5) years unless a different time is agreed to between the lawyer and the client. They give guidance to retiring lawyers for disposition of their client files.
- The opinions make it clear that the file belongs to the client and if the lawyer wants a copy, that the lawyer must make copies at the lawyer's own expense.



ABA FORMAL ETHICS OPINION 473

ISSUED FEBRUARY 17, 2016

SUBPOENA



OBLIGATIONS UPON RECEIVING A SUBPEONA OR OTHER COMPULSORY PROCESS FOR CLIENT DOCUMENTS OR INFORMATION

- This opinion is based upon Model Rule 1.6 which is very similar to Tennessee Rules of Professional Conduct 1.6.
- Advises a lawyer receiving a subpoena or other compulsory process for documents or information must consult with the client (if the client is available).
- If instructed by the client or 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 the lawyer should consult with the client on whether to appeal. If lawyer and client cannot agree on how to respond to the initial demand or to an order to disclose, the lawyer should consider withdrawing pursuant to Model Rule 1.16 which is like RPC 1.16.
- If the client is unavailable, the lawyer is not ethically required to appeal.

TENNESSEE RULES OF PROFESSIONAL CONDUCT 1.6 "CONFIDENTIALITY OF INFORMATION"



- RPC 1.6 (c) (2) A LAWYER SHALL REVEAL INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT TO THE EXTENT THE LAWYER REASONABLY BELIEVES DISCLOSURE IS NECESSARY TO COMPLY WITH AN ORDER OF A TRIBUNAL REQUIRING DISCLOSURE, BUT ONLY IF ORDERED TO DO SO BY THE TRIBUNAL AFTER THE ALWYER HAS ASSERTED ON BEHALF OF THE CLIENT ALL NON-FRIVOLOUS CLAIMS THAT THE INFORMATION SOUGHT BY THE TRIBUNAL IS PROTECTED AGAINST DISCLOSURE BY THE ATTORNEY-CLIENT PRIVILEGE OR OTHER APPLICABLE LAW;

CONTACT INFORMATION

- Ethics Counsel – Laura Chastain (615) 361-7500 ext. 212
- Consumer Assistance Program (615) 361-7500
- Tennessee Lawyers Assistance Program (615) 741-3238
- Tennessee Board of Law Examiners (615) 741-3234
- Tennessee Commission on Continuing Legal Education (615) 741-3096
- Tennessee Board of Judicial Conduct (615-649-8851)
- Tennessee Attorney General's Office (615-741-3491)
