FREQUENTLY ASKED ETHICS QUESTIONS

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I. GENERAL QUESTIONS

1. What is the difference between the OBA’s Offices of General Counsel and Ethics Counsel?

   Generally, under the supervision of the Professional Responsibility Commission, the Office of General Counsel is charged with the investigation and prosecution of alleged misconduct or incapacity of any lawyer. The prosecutions are done pursuant to the Rules Governing Disciplinary Proceedings.

   The Office of Ethics Counsel was created to provide all Oklahoma lawyers a resource for specific and confidential guidance as to ethics questions and to encourage the proactive consideration and handling of ethics issues. The guidance provided is a privileged communication. RPC 8.3 (d)

2. Is there a “federal” code of professional conduct?

   There is not a “national” code of professional conduct, although federal courts have their own admission requirements and local rules that must be followed and which may provide rules of “conduct”. The ABA has promulgated “model” rules of professional conduct that have been widely adopted by various states, with various modifications. The Oklahoma RPC closely tracks the ABA’s model rules.

3. With what code of professional conduct am I bound when I am practicing law outside the state of Oklahoma, when in a case pro hac vici for example?

   You are subject to the disciplinary authority of this jurisdiction regardless of
where the conduct occurs- as is a lawyer from another jurisdiction practicing in Oklahoma. You may be subject to the disciplinary authorities of both jurisdictions for the same conduct. RPC 8.5 (a)

Choice of law rules in the RPC seek to limit the exercise of only one set of rules to a lawyer. Generally, with matters pending before a tribunal, the rules of the jurisdiction in which the tribunal sits will control. RPC 8.5 (b)(1) For any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred should control, unless the predominant effect of the conduct is in a different jurisdiction. RPC 8.5 (b)(2)

5. Are the “Standards of Professionalism” and “Lawyer’s Creed” adopted by the OBA’s Board of Governors part of the RPC?

No. The “Standards of Professionalism” and “Lawyer's Creed” are separate from the RPC. They were promulgated by the OBA’s Board of Governors to articulate the high ideals and civil behavior that every Oklahoma lawyer should emulate and honor. They were not intended as a basis for discipline or to establish standards of conduct in an action brought against a lawyer.

6. Does the violation of a RPC give rise to a cause of action or a presumption that a legal duty has been breached?

No. The rules are designed to provide guidance and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. RPC Scope [20].

7. What resources are available to attorneys on ethics issues through the Office of Ethics Counsel?
There are a variety of resources:

- Use the “Ethics & Professionalism” tab on the OBA’s web-site www.okbar.org. The tab has links to applicable rules, comments, opinions, ethics articles and tips.
- Email your question to the Ethics counsel at travisp@okbar.org
- Call the Ethics counsel at (405) 416-7055, or toll free at 1-800-522-8065.

8. **What should I expect when I call or write the Ethics Counsel with a question?**

   The office is primarily a resource for lawyers with questions pertaining to their own practices and cases. Therefore, when *you* call with a question pertaining to your own situation, the advice will be advisory in nature, but still direct and specific. Research into Oklahoma ethics opinions, ABA ethics opinions and case-law may be necessary to give you the best advisory advice possible based upon the time allowed.

   If you call with respect to the behavior or ethical issue as to another lawyer, counsel will endeavor to provide you references to the portions of the RPC and ethical opinions or cases that may apply to the question but does not offer an “opinion” or pre-judge the situation as there are undoubtedly other pertinent facts or factors that might affect the advice. The Ethics Counsel does not arbitrate or “decide” ethics issues.

   No advice or ethics guidance is provided to clients or members of the general public who may call except perhaps for polite referral to the OBA’s web-site. The Office Ethics Counsel is a resource to help lawyers. On average, ten–twenty calls or contacts with ethics questions are made to the Office each day.
9. **What is the procedure to obtain a written ethics opinion?**

The OBA Legal Ethics Advisory Panel, with the Office of Ethics Counsel, serves in an advisory capacity for OBA members seeking written opinions concerning compliance with the RPC. The opinions are intended as a guide to responsible professional behavior. Advisory opinions are simply that and shall only have such force and effect as they are given by the Oklahoma Supreme Court.

10. **What is the “Discipline Diversion Program?”**

The Discipline Diversion program was set up to provide awareness of ethical obligations and remedial education to those attorneys whose actions constitute certain types of misconduct (eg., procrastination, disorganization, poor office management, etc.) that would probably not result in public discipline by the Court, but would reflect adversely upon the legal profession and is harmful to the administration of justice and the provision of legal services to the public. The General Counsel has the sole discretion to “divert” attorneys into the program. Participation is voluntary and may be refused, but the alternative is continued consideration for the filing of a formal grievance.

Prevention, not punishment, is the goal. The program is implemented and monitored by Ethics Counsel.

**II. SUBSTANTIVE QUESTIONS**

1. **Am I responsible for the conduct of non-lawyers such as paralegals and law clerks I supervise?**

Non-lawyers such as student law clerks and paralegals are not directly bound by
the RPC, but their supervising lawyers are and must make reasonable efforts to ensure that the firm has effected precautionary measures and the non-lawyer assistants' conduct is compatible with the professional obligations of the lawyer. The supervising lawyer will be responsible for the RPC violations of the people they supervise if the supervising lawyer orders, ratifies or fails to mitigate the result of the misconduct. RPC 5.3

2. **How long should I keep a closed case file?**

Unfortunately, there is no hard and fast answer to this question. Most state ethics committees agree that lawyers are not obligated to keep client files indefinitely. However, most jurisdictions concur that “clients and former clients reasonably expect from their lawyers that valuable and useful information in the lawyer's files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed.” ABA Standing Committee on Ethics and Professional Responsibility, Informal Op. 1384 (1977)

The RPC do not provide specific direction or guidelines on the subject of file retention. However, RPC 1.15(a) does require that complete records of client account funds and other client property be kept for five years after termination of the representation. However, the length of time that a file should be retained may depend on various factors, such as:

- Files pertaining to claims of minors should be maintained until the child is beyond the age of majority and any statutes of limitations have expired.
- Some probate, estate, and/or guardianship matters may require an indeterminate
retention period.

- Real estate title opinions and title insurance work may require a far more lengthy retention of work product.
- Statutes of limitation.
- The substantive law.
- The nature of the particular case.
- The client’s needs.
- Your fee agreement or other understanding with the client.
- Requirements of your malpractice carrier.

**A. Should our firm have a document retention policy?**

Yes. All lawyers and law firms should implement a written file storage, management and retention policy and should follow the policy uniformly. Considerations for the retention policy should include at least the following:

- Files will be maintained only for a specified period of time.
- Original documents will be returned to the client upon conclusion of the representation.
- The client may have the file upon expiration of the time period.
- If not retrieved by the client, the file will be destroyed once the time period passes.
- Clients should be sent a closing letter notifying them of their right to take any documents not previously furnished to them and advising them of the date that the file documents will be destroyed.
• The law firm’s file retention policy should be set out in the fee agreement.

B. How should I dispose of a client’s file material?

A lawyer must protect a client’s confidences when disposing of file contents. This generally means that the file must be shredded or incinerated. Care should be taken if these tasks are contracted to outside companies. The lawyer should ensure that documents are disposed of without review of confidential information by the contractor’s employees or others. You should consider retaining an index of destroyed files, copies of your fee agreement, as well as a closing letter or other correspondence which notifies the client of your file retention policy.

3. What rights do I have to retain the file from the client or successor counsel if I have not been paid?

Two different scenarios prompt the same inquiry. Is it proper to retain, until the fee is paid, a client’s papers, money, and other property that came into the attorney’s possession in the course of the professional employment? Oklahoma recognizes the common law retaining lien, also known as a general lien or possessory lien. The retaining lien is an attorney’s claim to hold a client’s file, money, or property until the fee is satisfied. The retaining lien may be applicable when a client’s failure to comply with a fee agreement has led to a lawyer’s withdrawal or when a client has discharged an attorney and there remains an outstanding fee balance.

In the case Britton and Gray, P.C. v. Shelton, 2003 OK CIV APP 40, 69 P3d. 1210, the Oklahoma Court of Civil Appeals set forth guidelines to assist in determining when it is proper to assert and enforce a retaining lien. “Oklahoma law recognizes two
types of lien by which a lawyer may secure payment for services: (1) a statutory charging lien and (2) a common-law general possessory or retaining lien.... The retaining lien generally attaches to all property, papers, documents, securities and monies of the client coming into the hands of the attorney in the course of the professional employment.”

However, “a lawyer [may not] take money or property entrusted to him for a ‘specific purpose’ and apply it to the attorney’s fee claim.” State ex rel. Oklahoma Bar Ass’n v. Cummings, 1993 OK 27, 863 P.2d 1164, 1170. For example, money paid to an attorney for the “specific purpose” of taking a deposition would not be subject to a retaining lien.

The attorney’s common law right to a retaining lien must be weighed against the potential harm or prejudice to the former client. See RPC 1.16(d)

In Britton, the Court held that the assertion of a retaining lien that is prejudicial to the client is inconsistent with the lawyer’s continuing duty to the client. When determining whether nor not to claim a retaining lien to original documents you should assess (1) whether the client will suffer serious consequences without the documents and (2) whether any prejudice to the client can be mitigated by means other than a return of the documents.

A valid retaining lien will only attach when there are reasonable fees due and owing. It may not be asserted for legal services not yet performed, whether or not the client has agreed to pay for the future services. The attorney claiming the lien has the burden of proof on reasonableness and indebtedness. Once met, it is upon the client to
prove prejudice.

The attorney’s legal rights to secure payment for services rendered must be balanced with the ethical responsibilities not to harm the client. Before you hold a client’s file “hostage” weigh the competing factors.

- By holding the property do I prejudice the client’s ability to go forward with the matter?
- Can the client get the retained material by other means?
- Are my fees reasonable?
- Are my claimed fees for completed work?

4. **When is it proper to communicate with a represented person?**

RPC 4.2 prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. By restricting lawyers from communicating directly with persons who are represented, Rule 4.2 preserves the attorney-client relationship, protects clients against overreaching by other lawyers, and reduces the likelihood that clients will disclose confidential or damaging information. See ABA Formal Ethics Op. 95-396 (1995).

The rule applies even though the represented person initiates the communication. You should immediately terminate the conversation once you learn the person is represented in the matter.

**A. May I give a second opinion?**

Must you seek the consent from the current attorney before advising the

B. What if I am not sure the person is represented?

Consent of the opposing lawyer is not required to talk with a represented person unless you know a person is represented. “Knowledge” has been defined as actual knowledge, but it may be inferred from the circumstances. The smart thing to do is to ask first. See, e.g., State ex rel. Oklahoma Bar Ass’n v. Harper, 2000 OK 6, 995 P.2d 1143 (Okla. 2000).

C. What if their client calls my client?

A party to a matter may speak to other parties, even though both are represented by counsel. See RPC 4.2. However, lawyer may not “mastermind” the communications between a client and a represented person in an effort to elicit confidential information.

D. Is videotaping the opposing party the same as “communicating”?

Observing a party is not the same as “communicating” with the party. Hill v. Shell Oil Co., 209 F.Supp. 2d 876 (N.D. Ill. 2002). However, taking the act beyond mere observation to contact with the represented person may be improper. A lawyer should not cause a non-lawyer to contact a represented person. The lawyer may not use an investigator or other person to do what the attorney may not. Therefore, the investigator should not engage the represented person in conversation or ex parte communications.

A lawyer should not necessarily accept a person’s statement that he has fired his attorney. Some states hold that you must contact the opposing counsel to confirm the termination. At a minimum, you should get written confirmation from the client that the
attorney has been fired. ABA Formal Ethics Op. 95-396 (1995) states that a lawyer should seek confirmation that a representation has been terminated. In a case involving a court appointment, the lawyer should confirm that the court has granted counsel leave to withdraw.

These are only but a few of the dilemmas faced by attorneys when complying with Rule 4.2 communications. Much more complex issues are raised when the represented party is an organization with current and former employees. Care should be taken to review the applicable case law before contacting persons who may be represented in a matter. Violation of the rule may result in suppression of the evidence, return of documents, monetary sanctions, disqualification, and discipline.

5. *My client owes me a lot of money for legal services and advanced expenses. May I charge the client interest on the unpaid balance?*

Yes, assuming the money is overdue and the client has agreed. See Ethics Opinion No. 286, which can be found at [http://www.okbar.org/ethics/286.htm](http://www.okbar.org/ethics/286.htm). Ethics Opinion No. 286 notes that attention should be paid to applicable state and federal law.

In light of the Committee’s opinion it merits mention that there are specific requirements under the Oklahoma Uniform Consumer Credit Code providing for the disclosure of interest under various situations. It is suggested that the attorney review the statutes before proceeding with the charging of interest so that he fully complies with the requirements applicable to his situation.

Ethics Opinion No. 286 does not require the agreement to be memorialized nor does Oklahoma require all fee agreements to be in writing. RPC 1.5 requires only contingency fees be in writing while encouraging other fee agreements to be communicated to the client in writing. However, if an Oklahoma attorney intends to
attach finance charges to an unpaid legal fee, he would be wise to get the client’s agreement to same in writing. The following are suggested:

- Communicate the basis or rate of the fee along with the intent to charge interest on any unpaid balance to the client both orally and in writing.
- Communicate to the client how the interest will be computed both orally and in writing.
- Affirm the client’s agreement to the fee and interest by having the client sign the fee agreement.
- Keep the original of the fee agreement and give the client a copy.
- The interest rate must be reasonable, within legal limits, and not usurious.
- The total amount sought from the client (fees plus interest) must be reasonable.

6. **Can I lend my client money?**

   It is not uncommon during the course of litigation for a client, especially one with a pending injury claim, to ask for financial assistance from his or her attorney. The request may be for an “advance”, “loan”, or “guarantee”. Regardless of the form, RPC 1.8(e) provides “A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.”

   Advancing living expenses (eg. rent) to a client is prohibited in Oklahoma. See *State ex rel. Oklahoma Bar Ass’n v. Smolen*, 2000 OK 95.

   The exception for “costs” and “expenses” encompasses most of the generally
accepted charges directly associated with litigation. Costs include filing fees, fees for service of process, and other disbursements that are taxable and included in the judgement. *Sellers v. Johnson*, 719 P.2d 476, 479 (Okla Ct.App 1986). Expenses of litigation have been interpreted to include investigation costs, expenses of medical examinations, and the costs of obtaining and presenting evidence. Fees for legitimate travel related to litigation have been held to be expenses of litigation. However, other jurisdictions have held the advancement of funds for transportation to a medical office for treatment or for payment of treatment to be improper.

The rule prohibits an attorney from “making” a loan to a client and likewise prohibits the “guaranteeing” of same. The attorney, subject to attorney/client confidence considerations, may confirm the pendency of a settlement and recognize any lawfully obtained liens or encumbrances.

In the past, clients were ultimately liable for all advanced court costs and expenses of litigation. Rule 1.8(e) allows repayment to be contingent upon the outcome of the litigation. The contingent fee agreement must be in writing and must state whether the client is responsible for reimbursement of expenses. RPC 1.5(c)

7. **How do I make clear the scope of my representation and authority for the client?**

RPC 1.2 states that “A lawyer shall abide by a client’s decisions concerning the objectives of representation…. [1.2 (a)], and [a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” 1.2 (c)
The practitioner should consider including the objectives of the representation in an engagement letter or in the written fee agreement. The initial meeting between lawyer and client should establish the scope of the representation, time lines, probable outcomes, and fees. This agreement should be memorialized in a letter or within the fee agreement and should be signed by both lawyer and client.

Although the lawyer and client (through informed consent) may limit the scope of the representation, the limitation must be reasonable under the circumstances and does not exempt the lawyer from the duty to provide competent representation.

Oklahoma and the majority of jurisdictions agree that the lawyer must abide by a client’s decision whether to accept an offer of settlement in a matter. Accordingly, a lawyer shall have the client’s specific authorization to enter into a settlement agreement on the client’s behalf. Whether a lawyer has such authority is generally a matter of state substantive law. Reducing such authority to writing will protect the attorney in client challenges to the enforceability of the settlement agreement. In criminal cases, it is the client’s decision, after consultation with the lawyer, as to the plea to be entered, whether to waive a jury trial, and whether the client will testify. RPC 1.2(a)

8. May I split a fee with another lawyer who only refers the case?

Fee division among lawyers most commonly occurs when one lawyer refers a case to another lawyer. Other scenarios may include when a client’s original attorney withdraws and is replaced by a successor or a lawyer withdraws or retires from a firm. Regardless of the circumstances, lawyers from different firms who work on the same case may agree to split the legal fees earned on the case. RPC 1.5(e)
A division of fee between lawyers who are **not** in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

The attorney is not required to disclose to the client the percentage share each attorney is to receive. Whichever fee agreement the attorneys choose, the total fee must be reasonable.

Joint responsibility entails the obligations required of the lawyer in RPC 5.1. This rule places the attorney in a “supervisory capacity” to be responsible for the other lawyer’s work and to make reasonable efforts to ensure the other lawyer conforms to the rules of professional conduct. Joint responsibility includes assumption of responsibility to the client “comparable to that of a partner in a law firm under similar circumstances, including financial responsibility [and] ethical responsibility to the extent a partner would have ethical responsibility for actions of other partners in a law firm in accordance with Rule 5.1.” ABA Informal Ethics Op. 85-1514 (1985).

The best practice is to have fee division agreements in writing specifying the referring attorneys role in the case and the terms of the split.

9. **How should solo practitioners “associated” with a small firm or other solos handle conflicts?**
Solo practitioners practicing with a small firm or other solos, and using a common letterhead and sharing the same malpractice policy, should treat the association as a “firm” for purposes of the RPC and conflicts. Hence, the conflict that bars one lawyer in the group from a matter will be imputed to the other lawyers that share the letterhead and malpractice policy. Conflict searches should be done as to every matter and documented. The search should be done before any legal advice is provided to the prospective client.

10. **What if there is a dispute as to the distribution of the settlement funds in my possession (and in my trust account)?**

   In Oklahoma, a lawyer may have a statutory duty to protect the claims of third parties against client funds or property in the lawyer’s possession. RPC 1.15(b) and (c) provide:

   (b) 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 by the client or third person, shall promptly render a full accounting regarding such property.

   (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

   The most prevalent example is when a medical provider files a lien for services rendered. If a medical lien comports with the applicable statutory requirements, an attorney must recognize the validity of the lien and safeguard the funds. *See Saint*

If there is a legitimate dispute over the distribution of the funds or ownership of the property, the lawyer should not unilaterally assume to arbitrate a dispute between the client and a third party. Further, where there is a dispute over entitlement to the funds, the attorney cannot simply hold the funds indefinitely. The attorney should seek, if necessary, to institute appropriate proceedings to resolve the dispute. See State of Oklahoma ex rel. Oklahoma Bar Association v. Taylor, 2003 OK 56, 71 P.3d 18.

The lawyer may be required to protect the interests of a third party that do not have a valid lien. For example, if a client signs an agreement to pay a medical provider out of settlement proceeds, the attorney may be required to recognize the agreement and not follow client’s subsequent instructions to do otherwise. See ABA Informal Ethics Opinion 1295 (1974).

A. Why is it important to have and properly maintain an IOLTA trust account?

Participation in the Interest on Lawyers’ Trust Account (IOLTA) program is mandatory for OBA members that hold client or third-party funds in connection with a representation, unless it is not feasible for the lawyer or law firm to establish an interest-bearing trust account for reasons beyond their control. If the client funds are nominal in amount or to be held for a short period of time they must be placed in an interest bearing pooled trust account with the interest going to the Oklahoma Bar Foundation (OBF). The OBF’s tax I.D. number will be assigned to the IOLTA account. RPC 1.15.

Nominal in Amount or Held for Short Period of Time. To determine whether the
client funds are “nominal in amount” or “to be held for a short period of time”, the lawyer should consider whether the funds could be invested to provide a positive net return or benefit to the client taking the following factors into consideration:

a) the amount of interest the funds would earn during the period the funds are expected to be deposited;
b) the cost of establishing and administering the account, including the cost of lawyer’s services, bookkeeping costs, and the cost of preparing any tax reports required for interest accruing to a client’s benefit; and,
c) the capability of the financial institution to calculate and pay interest to individual clients.

Client funds that do not meet the nominal or short term definitions may be placed in a separate account that may earn interest for the client’s benefit. The client’s tax I.D. number should be used on such an account.

**Bank Fees.** Only reasonable applicable service fees may be netted or deducted from interest earned by the IOLTA account. Applicable service fees are routine maintenance fees only. Other bank fees such as check and deposit slip printing charges, wire transfer fees, and online access fees are considered ordinary business expenses of the lawyer and must not be deducted from the interest earned by the account. The lawyer may deposit personal funds into the trust account in an amount necessary to pay these ordinary business expenses and to comply with the bank’s minimum balance requirements for the maintenance of the account. The principal of the account cannot be used to pay or offset service charges of any kind.

**B. 2009---Amendment to RPC:** RPC 1.5 (g) has been amended to require changes pertaining to IOLTA accounts to be reported within thirty days of when the changes were actually made, not annually as formerly required. 1.5 (g) now reads, in
part, as follows:

Effective January 1, 2009, each member of the Bar shall provide the Oklahoma Bar Association with the name of the bank or banks in which the lawyer carries any trust account, the name under which the account is carried and the account number. The lawyer or law firm shall provide such information within thirty (30) days from the date that said account is opened, closed, changed, or modified. The Oklahoma Bar Association will provide on-line access and/or paper forms for members to comply with these reporting requirements. Provision will be made for a response by lawyers who do not maintain a trust account and the reason for not maintaining said account. Information received by the Association as a result of this inquiry shall remain confidential except as provided by the Rules Governing Disciplinary Proceedings. Failure of any lawyer to respond giving the information requested by the Oklahoma Bar Association, Oklahoma Bar Foundation or the Office of the General Counsel of the Oklahoma Bar Association will be grounds for appropriate discipline.

**Bonus: What is the best advice you can give to avoid bar complaints?**

- Update your case management systems and technology.
- Know your limitations.
- No work is better than bad work.
- Seek the best people, not the best clients.
- Make sure your client knows you care what happens, but remain low-key and positive.
- Hire the best staff you can afford.
• Greed is bad, but profit is good.

• Manage expectations; clients prefer to hear bad news before all their money is gone!

• Make someone in your office the RPC “expert”.

• Read the Rules, and call our office with questions (it is confidential, and a member-service).