Review of ABA Formal Ethics Opinions

DAVID L. HUDSON, JR.

BELMONT LAW SCHOOL

Five formal ethics opinions from the ABA in 2023

- Opinion 504 – Choice of Law
- Opinion 505 - Retainers, Engagement Fees – Fees Paid in Advance
- Opinion 506 – Responsibilities over Nonlawyer Legal Assistants – Client Intake
- Opinion 507 – Office Sharing with Other Lawyers
- Opinion 508 – Ethics of Witness Preparation

ABA Formal Ethics Opinion 504 – Choice of Law

- When a lawyer practices in multiple jurisdictions, which state's ethics rules govern?

Rule 8.5(a)

- "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs."

Rule 8.5(b)

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Formal Ethics Opinion 504

- For litigation matters, a lawyer is subject to the rules of the jurisdiction of the court before which she is litigating a case. For other matters, the rule generally provides that the rules apply where the lawyer's conduct occurred unless "the predominant effect of the conduct is in a different jurisdiction.

Formal Ethics Opinion 504 (cont.)

- In its opinion, the Committee identifies several factors as relevant to determining predominant effect:
  - the client's location, residence, and/or principal place of business;
  - where the transaction may occur;
  - which jurisdiction's substantive law applies to the transaction;
  - the location of the lawyer's principal office;
  - where the lawyer is admitted;
  - the location of the opposing party and other relevant third parties (residence and/or
  - principal place of business); and
  - the jurisdiction with the greatest interest in the lawyer's conduct.

Formal Ethics Opinion 504 (cont.)

- The rule has a safe harbor provision, providing that a lawyer will not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur

Formal Ethics Opinion 504 (cont.)

- The opinion examines the application of Rule 8.5 in five areas: (1) fee agreements; (2) law firm ownership; (3) reporting professional misconduct; (4) confidentiality duties; and (5) screening for laterals.

Opinion 504 (cont.)

- The client resides in State X and the lawyer will work from her office in State X, but the litigation will occur in State Y, another state where Lawyer is licensed.
- The opinion explains that while a lawyer is generally subject to the ethics rules of the jurisdiction when appearing before a tribunal, Comment 4 to Rule 8.5 explains that "conduct in anticipation of a proceeding not yet pending before a tribunal" is covered by Rule 8.5(b)(2), not 8.5(b)(1). In other words, drafting a fee agreement is conduct not yet pending before a tribunal rather than litigation before a tribunal. This means that Rule 8.5(b)(2) would govern and the question becomes where is the "predominant effect" of the lawyer's conduct.

Opinion 505 – Retainer Fees

- This opinion deals with "Fees Paid In Advance of Contemplated Services."

- This opinion explains that lawyers often cannot keep such monies even though the fee agreement is termed "nonrefundable." Instead, lawyers may need to return the portion of the unearned money when the attorney-client relationship ends, the opinion explains.

505 (cont.)

- Sometimes lawyers label fees as "nonrefundable" and place those funds directly into their own accounts. Such a practice can conflict with the Model Rules of Professional Conduct, namely Rules 1.5, 1.15, and 1.16.
- Model Rule 1.5 generally prohibits attorneys from charging unreasonable fees. Model Rule 1.15 provides that lawyers must place client monies into a special fund that is separate from the lawyer's account. This rule furthers the so-called anti-commingling principle – that a lawyers shall not commingle client money with the lawyer's money.

505 (cont.)

- Model Rule 1.15(c), which was adopted in 2002, provides that "[a] lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."

505 (cont.)

- "Advances are unearned because they are payment today for work to be performed in the future. They were unearned upon receipt and remain unearned until the work is performed. The Model Rules mandate that advances belong to the client, must be preserved until they are actually earned, and must be refunded if the representation terminates before the fees are earned."

505 (cont.)

- Lawyer charges client a $6,000 retainer to handle a client's divorce to be billed against at $300 an hour. The agreement states that after the lawyer works 20 hours, the attorney can charge additional retainers. However, after the lawyer has drafted a complaint, worked 5.5 hours, and paid a $150 filing fee, the client reconciles with her spouse and wants to terminate the relationship.
- The opinion explains that the client is entitled to a portion of that $6,000 even though the agreement labeled the retainer as "nonrefundable." The opinion explains that "[t]he $6,000 entitles Client to 20 hours of Lawyer's work on the matter." Thus, the lawyer must refund $4,200 --- the $6,000 minus the earned lawyer fees of $1,650 (for 5.5 hours of work) and the $150 filing fee.

505 (cont.)

- "Under the Model Rules, there are no magic words that a lawyer can use to change what is actually an advance payment for fees into a general retainer: an attorney cannot treat a fee as 'earned' simply by labeling the fee 'earned on receipt' or referring to the fee as an 'engagement retainer.'"

Opinion 506 – Role of Nonlawyer Legal Assistants

- "Lawyers may train and supervise nonlawyers to assist with initial client intake tasks if the lawyers have met their obligations for management and supervision of the nonlawyers pursuant to ABA Model Rule of Professional Conduct 5.3 and prospective clients are given the opportunity to consult with the lawyers to discuss the matter."

506 (cont.)

- ABA Model Rule of Professional Conduct 5.3 addresses a lawyer's responsibilities regarding nonlawyer assistants. Rule 5.3(a) provides that lawyers who are partners or managers in a firm must ensure that the firm has policies that assure a nonlawyer's conduct is "compatible" with the professional obligations of the lawyer.
- Paragraph (b) of the Rule requires that lawyers who directly supervise nonlawyer assistants must "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Comment [2] notes, "**A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment** …."

506 (cont.)

- "A lawyer may develop policies, train, and supervise a nonlawyer so that the lawyer **may delegate to the nonlawyer client intake tasks assuming those tasks do not constitute the practice of law in the applicable jurisdiction."**
- "For example, a lawyer may delegate to the nonlawyer obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, answering general questions about the fee agreement or process of representation, and even obtaining the prospective client's signature on the fee agreement as long as the prospective client is offered an opportunity to communicate with the lawyer to discuss the matter."

506 (cont.)

- " … **delegation of prospective client intake must be carefully and astutely managed**. What appears to be a simple question about how long the lawyer will spend on the matter, may actually be a question about the representation itself and cannot be accurately answered without the lawyer's personal knowledge and expertise."

Opinion 507 – Office Sharing Arrangements with Other Lawyers

- Attorneys can engage in office-sharing arrangements with other lawyers but must take care to ensure they comply with legal ethics rules. For example, attorneys must take care with regard to client confidentiality, communication with clients, and the avoidance of conflict tissues. clearly communicate their relationship with other lawyers to their clients, and take care to avoid conflict issues.

507 (cont.)

- "Depending on the specific circumstances of the office sharing arrangement, **lawyers may need to consider additional confidentiality safeguards**. This could include separate lobby or waiting areas; refraining from leaving client files out on workspaces, conference rooms, or kitchen tables; installing privacy screens on computer monitors and locking down computers when not actively in use; clean desk policies; and regular training and reminders to staff of the need to keep all client information confidential."

507 (cont.)

- "Instructing all lawyers and employees, and particularly shared employees, on their confidentiality obligations and the office procedures in place to guard sensitive client documents and communications are examples of reasonable measures to protect client confidentiality. Of course, appropriate supervision of shared personnel is also required under Model Rule 5.3."

507 (cont.)

- "Lawyers who share offices but do not practice together as a law firm must take appropriate steps to clearly communicate the nature of their relationship to the public and to their clients."

- Under Model Rule 7.1, lawyers must not engage in false or misleading communications to clients by implying that they are in the same firm with attorneys with whom they only share office space. Such lawyers also should use separate business cards, letter heads, and be listed separately in directories. The opinion also notes that is "desirable' for lawyers to have separate telephone lines.

507 (cont.)

- "Lawyers in shared office arrangements should pay particular attention to (1) avoiding the imputation of conflicts of interest, (2) taking on potential new matters that are adverse to clients represented by other office sharing lawyers, and (3) consulting with fellow office sharing lawyers."

- The opinion also discusses consultations between office sharing lawyers. If lawyers do engage in such consultations, they need to use hypothetical facts to protect clients' interests. Furthermore, "office sharing lawyers should conduct a conflict check prior to any informal consultation or collaboration."

Opinion 508 – Ethics of Witness Preparation

- "Some quantum of client and witness preparation is appropriate and an affirmative ethical responsibility."

- But, lawyers cannot manipulate testimony and engage in improper coaching of witnesses.

508 (cont.)

- Additionally, a lawyer may not advise or assist a witness in providing false testimony. Such conduct would violate ABA Model Rule 3.4(b), which prohibits counsel from assisting a witness with false testimony, or inducing them to give it.

508 (cont.)

- "Overtly attempting to manipulate testimony-in-progress would in most situations constitute at least conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d)."
- Violation of a court rule or order restricting such coaching behaviors would be knowing disobedience of the rules of a tribunal in violation of Model Rule 3.4(c). That rule prohibits lawyers from "knowingly disobey[ing] an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists ."

508 (cont.)

- The opinion calls for "systemic precautions."
- It lists numerous examples that would provide such protections, including court orders directing uninterrupted testimony, inclusion of protocols in remote deposition orders, inclusion of remote protocols in trial plans and pretrial orders and development of a list of guidelines and best practices for conduct during remote proceedings.