Louisiana Legal Ethics

STANDARDS AND COMMENTARY

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2013

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About the Book

Louisiana Legal Ethics: Standards and Commentary contains (1) the full text of the Louisiana Rules of Professional Conduct, (2) "background" information about the adoption of each rule by the Louisiana Supreme Court, (3) related ABA resources, including comments to the corresponding ABA model rule, and (4) annotations discussing Louisiana case law, administrative decisions and other authorities relevant to each rule. It also contains selected "professionalism" materials, ABA materials and practice materials.

Dane S. Ciolino edits and annotates this book. He serves as the Alvin R. Christovich Distinguished Professor of Law at Loyola University New Orleans College of Law. His current scholarly and teaching interests at Loyola include Professional Responsibility, Evidence, Advocacy and Criminal Law.

Professor Ciolino graduated *cum laude* from Rhodes College in 1985, and *magna cum laude* from Tulane Law School in 1988, where he was inducted into Order of the Coif and selected as Editor in Chief of the *Tulane Law Review*. After graduation, he clerked for the United States District Court, Eastern District of Louisiana, and practiced law at Cravath, Swaine & Moore LLP in New York City, and Stone Pigman Walther Wittmann LLC, in New Orleans.

He has served as reporter to the Louisiana State Bar Association Ethics 2000 Committee, as chairperson of a Louisiana Attorney Disciplinary Board Hearing Committee, as Chair of the Lawyer Disciplinary Committee of the United States District Court for the Eastern District of Louisiana and as a member of various Louisiana State Bar Association committees including the Professionalism Committee, the Lawyer & Judicial Codes of Conduct Committee, and the Ethics Advisory Service Committee. His weblog,Louisiana Legal Ethics, is located at www.lalegalethics.org.

Professor Ciolino engages in a limited law practice and in law-related consulting, principally in the areas of legal ethics, lawyer discipline, judicial discipline and federal criminal law. He represents clients in disciplinary matters before the Louisiana Supreme Court, the Louisiana Attorney Disciplinary Board and the Louisiana Judiciary Commission. He also handles legal malpractice cases, lawyer disqualification motions and lawyer fee disputes. He also consults and serves as an expert witness in the fields of legal ethics, legal fees and the standards of conduct governing lawyers.

MAY I ADD AN ARBITRATION CLAUSE TO MY ENGAGEMENT AGREEMENT?

Yes. Most state courts that have considered the enforceability of lawyer-client arbitration clauses have approved them. The issue was an open question in Louisiana, however, until the Louisiana Supreme Court addressed the issue in *Hodges v. Reasonover*, 103 So. 3d 1069 (La. 2012). Noting that an arbitration clause "does not inherently limit or alter either party's substantive rights; it simply provides for an alternative venue for the resolution of disputes," the court held that a "binding arbitration clause between an attorney and client does not violate Rule of Professional Conduct 1.8(h) provided the clause does not limit the attorney's substantive liability, provides for a neutral decision maker, and is otherwise fair and reasonable to the client." *Hodges*, 103 So. 3d at 1076. However, the court imposed a number of "minimum" requirements for enforceable arbitration clauses:

"At a minimum, the attorney must disclose the following legal effects of binding arbitration, assuming they are applicable:

- Waiver of the right to a jury trial;
- Waiver of the right to an appeal;
- Waiver of the right to broad discovery under the Louisiana Code of Civil Procedure and/or Federal Rules of Civil Procedure;
- Arbitration may involve substantial upfront costs compared to litigation;
- Explicit disclosure of the nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims;
- The arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities;
- The client has the opportunity to speak with independent counsel before signing the contract."

See id. at 1077. If a Louisiana lawyer includes these terms in the lawyer's engagement agreement, it will be enforceable.

Must I Report My Own Misconduct?

No, but sometimes self-reporting is advisable.

Louisiana Rule 8.3(a) provides that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel."

Self-reporting is not required by Rule 8.3, which pertains only to a violation of the Rules of Professional Conduct by "another" lawyer. Moreover, compelled self-reporting of lawyer misconduct could raise Fifth Amendment issues.

Nevertheless, self-reporting is sometimes the prudent course of action. The Office of Disciplinary Counsel may consider a lawyer's self-report as a "mitigating" factor if disciplinary sanctions are ever imposed after litigation or by consent. The best advice is to consult with counsel experienced in dealing with disciplinary matters before making a final decision to self-report.

How Long Must I Keep This File?

It depends. In deciding to discard a file, the lawyer should consider the nature of the client, the matter and the document. Louisiana Rule 1.15(a) provides as follows:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a bank or similar institution in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. . . . Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Furthermore, under Louisiana Civil Code Article 3496, "[a]n action by a client against an attorney for the return of papers delivered to him for purposes of a law suit is subject to a liberative prescription of three years. This prescription commences to run from the rendition of a final judgment in the law suit or the termination of the attorney-client relationship."

Given these standards, a good rule of thumb is to keep client files for five (5) years following termination of the matter, unless there is a good reason for maintaining the file for a longer period of time. Such a good reason would exist if the file contains promissory notes, wills, trusts or similar documents.

Model Fee Agreements

MODEL LAWYER-CLIENT HOURLY FEE AGREEMENT

LAWYER-CLIENT HOURLY FEE AGREEMENT

1. Parties. This Lawyer-Client Agreement ("Agreement") is entered into by and between _____("Lawyer"), and _____ ("Client") as of the latest date set forth below. Lawyer is an independent contractor. There are no other parties whatsoever to this Agreement.

2. Scope of Representation. Client has engaged Lawyer in connection with _____("Matter"). Lawyer's representation is in connection with Matter only, unless otherwise agreed in a signed writing.

3. Fees and Costs

   a. Costs. Client will be responsible for all costs. Lawyer, however, may advance such costs. As used herein, the term "Costs," includes, but is not limited to, filing fees, filing boxes and supplies, copying costs, deposition costs, computerized research costs, outsourced document scanning/coding/indexing costs, travel expenses, expert fees, court costs, postage expenses, witness fees, and reasonable interest paid by Lawyer to third-party lenders to cover any cost advances.

   b. Hourly Fee for Billable Time

      i. Rates

         (1) Lawyers. Client agrees to pay Lawyer at Lawyer's regular hourly rate, currently $_____ per hour, for all Billable Time incurred by lawyers associated with Lawyer.

         (2) Paraprofessionals. Client agrees to pay Lawyer at the hourly rate of $_____ per hour for all Billable Time incurred by paraprofessionals associated with Lawyer (including law clerks, paralegals, research assistants and investigators). Paraprofessional Billable Time includes, among other things, time incurred scanning and electronically indexing documents.

      ii. Billable Time. Billable Time includes *all* time spent on the Matter, including, but not limited to, the following: legal research; drafting/reading email, letters, pleadings and documents; telephone calls;

Lawyer _____ Client(s) _____

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