



Newsletters

11 Legal Ethics Opinions You May Have Missed in 2021

January 4, 2022

Life happens fast. Blink, and you may miss important legal ethics opinions that capture the latest risk management trends. Our New Year's Edition of the *Lawyers' Lawyer Newsletter* highlights 11 opinions from 2021 that may not have made front-page legal news but should be on your radar.

- [The Professional Ethics Committee for the State Bar of Texas Opinion 692: Correcting False Statements by Clients](#)**
 - One heart-sinking moment some attorneys face is when their client lies when testifying in deposition or at trial. This opinion tackles the question of what to do when your client admits to you that he was looking at his cell phone when the car accident happened but later testifies in deposition that he was not looking at his cell phone when the car accident occurred. The answer may surprise you. Read the opinion to find out how Texas handles this thorny issue.
- [Colorado Bar Association Opinion 143: Foundations of a Fee Agreement](#)**
 - Risk Management 101 includes having an effective engagement agreement. This opinion offers best practice tips and a checklist for the foundational components of a fee agreement. As with all ethics opinions, the practical tips suggested by the Colorado Bar Association serve only as a limited guide and are not intended to establish the standard of care. Highlights from the opinion include: 1) use plain language; 2) identify the client and the capacity in which the lawyer represents the client; 3) set forth the scope and purposes of representation; 4) provide the basis or rate of fees and costs; 5) define the duty of communication and set reasonable expectations; 6) address file retention, return, and destruction; 7) inform the client of their right to terminate the lawyer-client relationship at any time; and 8) address third party considerations and joint representation issues, if applicable.
- [North Carolina State Bar Formal Ethics Opinion 2021-2: A Lawyer's Professional Responsibility in Identifying and Avoiding Counterfeit Checks](#)**
 - This opinion addresses the ethical obligations of an attorney faced with the Trust Account Scam. In one version of the Trust Account Scam, a prospective client seeks the lawyer's last-minute assistance in finalizing a complex deal. They enter into what seems to be a legitimate engagement agreement, but the new client has other plans. When the deal is made (usually shortly after the attorney is retained), the attorney is given a fraudulent cashier's check to deposit into the client's trust account. The attorney then wires the proceeds of the deal to another

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account and only later learns that the cashier's check was fake. This opinion cautions that the lawyer has a duty of competence and diligence to know that this scam exists and to recognize the suspicious nature of the transaction.

4. [New Jersey Advisory Committee on Professional Ethics Opinion 739: Lawyers Who Include Clients on Group Emails and Opposing Lawyers Who "Reply All"](#)
 - Do you cc your client on emails to the opposing counsel? Probably not a good idea. Keeping them informed about the significant developments in their case is one thing. But including them directly on emails with opposing counsel invites an implied consent to the opposing counsel "replying all," including to your client. A better practice is to forward important emails to your client separately. See the opinion for a deeper discussion.
5. [California Lawyers Association Ethics Committee Formal Opinion No. 2021-1: Elements of Effective Ethical Screens](#)
 - Conflicts always top the list of risk management concerns. This opinion discusses six universally mandated elements for an effective ethical screen: 1) prompt imposition of the screen; 2) no fee-sharing; 3) notice to affected clients; 4) prohibiting communications across the screen; 5) limiting access to screened matter's file; and 6) limiting access to the prohibited person's documents. The opinion adds that monitoring the ethical screen should be performed on a quarterly basis.
6. [DC Bar Ethics Opinion 380: Conflict of Interest Issues Related to Witnesses](#)
 - Imagine you are knee-deep in fact discovery for a hotly contested case you have handled for the past two years when the opposition discloses your former client as a key witness. This opinion squarely addresses the thorny legal ethics issues that arise from this simple fact pattern, along with issuing subpoenas to current or former clients, cross-examining clients, and imputation of confidences and secrets of clients. The opinion also highlights how some jurisdictions have reached different conclusions about whether a conflict exists under similar circumstances.
7. [Florida Bar Ethics Opinion 21-1: Responding to Negative Online Reviews](#)
 - Negative online reviews are one sure-fire way to boil an attorney's blood, especially when posted by a non-client. This opinion is short – but to the point. While the knee-jerk reaction may be to respond by stating the facts – because the opposing party who posted the review clearly lied – don't do it without thoughtfully considering your ethical obligations and obtaining the client's informed consent. See also [ABA Formal Opinion 496](#) ("Responding to Online Criticism" from clients, opposing parties, and others).
8. [Illinois State Bar Association Opinion 21-02: Lawyer's Disclosure of Client Estate Planning Documents After Client's Death](#)
 - A frequent risk management question is whether and to what extent an attorney may provide estate planning documents to someone after their client's death. This opinion offers the hypothetical where the decedent's family requests the estate planning file – but a non-family member is an executor or personal representative of the estate. One key takeaway: have an informed discussion about this issue *before* your client dies – and explicitly state in the engagement letter to whom you may disclose the documents after the client's death. Absent an express instruction or implied consent, an attorney's obligations depend on the facts and circumstances.
9. [Missouri Bar Informal Advisory Opinion 2021-13: Ethical Obligations with respect to Metadata in Electronic Documents](#)
 - Missouri issued 13 trend-worthy advisory opinions in 2021. The link takes you to the general search function – type 2021 in the "Search by Opinion Number" option and hit the "Search" button. At the top of the list is a three-part discussion about an attorney's ethical obligations regarding metadata in electronic documents. Metadata is a set of data that describes and gives information about other data (e.g., the author, file size, create and modified dates, and keywords to describe an electronic document). When you produce electronic documents, if you do not "scrub" the metadata, you may be providing your opponent with confidential information. This opinion, which offers useful information, is just the tip of the iceberg.
10. [State Bar of Nevada Formal Opinion 58: Advance Waivers](#)
 - Advance conflict waivers are often a hot topic. In this opinion, Nevada finds that advance waivers may be permitted if they meet all of the requirements for waiving a present conflict of interest under Nevada Rule of Professional Conduct 1.7(b). The attorney must undertake an analysis of whether the conflict can be consented to and whether the client has given actual informed consent.



11. [State Bar of New Mexico Formal Ethics Advisory Opinion 2021-001: Fee Splitting When One Lawyer Provides No Services](#)

- Fee splitting rules vary from state to state. This opinion cautions that fee splitting is not permitted when one of the attorneys performs no work and assumes no responsibility for the matter. In other words – attorneys practicing in New Mexico cannot pay other attorneys a referral fee. The opinion also addresses the three requirements for sharing fees with an attorney in a different firm: 1) the total fee is reasonable; 2) the division is proportional to each attorney's services or each attorney assumes joint responsibility; and 3) the client consents in writing.

In closing, be mindful that ethics opinions serve only as a guide for ethical lawyering and that opinions vary from state to state. Consult the professional conduct rules and the laws of your state to determine whether and to what extent your professional obligations differ from the ethics opinions listed above.