



ADVISORY OPINION SAMPLINGS

BY KENNETH L. JORGENSEN

For nearly 25 years, the Director's Office has been available to advise and assist Minnesota lawyers in their compliance with the profession's ethical standards. Several years ago, the number of advisory opinion requests received annually surpassed the number of ethics complaints filed against lawyers. Last year the number of advisory opinions far exceeded the number of complaints received against lawyers.¹

Advisory opinions are available by telephone to all licensed Minnesota lawyers and judges who are current in the annual license fee. The opinions are confidential and limited to the inquiring lawyer's prospective compliance with the Rules of Professional Conduct. Opinions about past conduct or the propriety of another lawyer's compliance with the ethics rules are not available. Advisory opinions may be obtained by calling (651) 296-3952. What follows are summaries of a few of the many telephone advisory opinions issued to lawyers over the past year.

JOINT REPRESENTATION CONFLICT.

Husband and wife retained the lawyer to explore the possibility of filing bankruptcy. The critical issue was whether the clients should attempt to restructure their debt or file a straight Chapter 7 bankruptcy to discharge the debts. During this representation, wife instituted divorce proceedings against husband. After the divorce petition was filed, husband directed the lawyer to file a straight Chapter 7 bankruptcy. Wife objected to a Chapter 7 petition. Despite the lawyer's advice that a Chapter 7 petition would needlessly expose nearly \$60,000 of husband's nonexempt retirement benefits to creditors, husband insisted that a Chapter 7 petition be filed.

The lawyer advised husband that if he insisted on pursuing the Chapter 7 filing, the lawyer intended to withdraw from representing the husband. Wife agreed with the lawyer's advice to restructure the marital debts and asked lawyer whether he would continue to represent her. The lawyer sought an advisory opinion about whether he could continue to represent the wife after he withdrew from representing husband.

As a general rule, when joint or common representation fails because the interests of the clients become antagonistic, the lawyer must withdraw from representing all clients. See paragraph 29 of the Comment to Rule 1.7, ABA Model Rules of Professional Conduct. Here the lawyer was required to withdraw from representing wife because Rule 1.9(a) prohibits representation against a former client (i.e., husband) in a substantially related matter. Although conflicts of this nature are capable of being waived, husband refused to consent to the lawyer's continuing representation of his wife.

UNTIMELY WITHDRAWAL FROM REPRESENTATION. The lawyer had been representing the husband in his divorce for the past 18 months. For the past four months the lawyer had been pressing the client to pay a \$10,000 advance fee retainer for the upcoming trial. On several occasions the client failed to follow through on promises to pay the retainer. Approximately six weeks before trial, the lawyer told the client that the retainer needed to be paid by the end of the week or the lawyer would withdraw. The client paid \$5,000 of the retainer and promised to pay the other half within the next week.

Over the next three weeks, the client again failed to make good on promises to pay the balance of the retainer. Less than two weeks before trial was scheduled to start, the lawyer sought an advisory opinion about whether she could ethically withdraw from representing the husband due to his failure to pay the remainder of the trial retainer.

Although the lawyer's fee agreement provided for withdrawal for nonpayment of fees, Rule 1.16(d) requires that *reasonable notice* of withdrawal be given to the client. In addition, sufficient time must be allowed for employment of other counsel. The lawyer had been representing the client for 18 months. At the time the lawyer was considering whether to withdraw, the client had a \$4,000 credit balance. Because the lawyer had previously obtained a trial continuance, a second request for continuance was not likely to be granted. The lawyer's withdrawal, less

than two weeks before trial, did not provide the client with sufficient notice under Rule 1.16(d) and would have exposed the lawyer to professional discipline.

The lawyer expressed concern about being able to competently represent the client because a substantial portion of the \$10,000 retainer was needed to pay an expert for trial testimony. The lawyer was advised to write the client about the importance of the expert's testimony and the consequences of proceeding to trial without an expert if the funds were not received.

CROSS EXAMINATION OF FORMER CLIENT.

The lawyer was appointed to represent a client charged with possession of a handgun by a felon. The gun was found by police in the locked glove compartment of a car being driven by the client, but owned by the client's girlfriend. The lawyer had previously defended the client's girlfriend against charges of fraudulently obtaining public assistance. The lawyer understood that the state intended to call the client's girlfriend to disclaim ownership of the gun.

The lawyer was advised to seek court permission to withdraw from representing the client. Rule 1.7(b) states that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client. The lawyer's ongoing confidentiality duty to the girlfriend (a former client) created a material limitation on the lawyer's ability to zealously represent his client because the girlfriend's prior conviction for falsely obtaining public assistance was likely admissible as cross-examination impeachment evidence. The lawyer was advised to inform the court of

KENNETH L. JORGENSEN is director of the Office of Lawyers Professional Responsibility. He has served the

cause of lawyers' self-regulation in Minnesota for over 20 years.



his prior representation of one of the state's witnesses and of the need to vigorously cross-examine the state's witnesses in order to effectively defend his client.

DUTY TO REPORT ANOTHER LAWYER'S ETHICAL VIOLATIONS. The lawyer was representing a small corporation in litigation. Opposing counsel, who was aware that the lawyer represented the corporation, contacted an officer of the corporation and asked for information relating to the pending litigation. The lawyer sought an advisory opinion about whether he was *required* to report opposing counsel's violation of Rule 4.2, which prohibits communication with a party known to be represented by counsel.

The ethics rules do not require a lawyer to report each and every ethical violation committed by another lawyer. Rather, Rule 8.3(a) *requires* a lawyer to report another lawyer's violation of the Rules of Professional Conduct only when the violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Here, the unauthorized contact with the corporate officer was not only isolated but also insignificant in that the corporate official declined to speak with opposing counsel without first consulting with the corporation's lawyer. The lawyer was not obligated to report the violation.

OPPOSING PARTY WHOSE LAWYER IS SUSPENDED. The lawyer was representing a client in a litigation matter in which the opposing party's counsel was suspended for disciplinary violations before the litigation concluded. Because discovery responses were long overdue, the lawyer intended to move the court to compel discovery. The lawyer had not received any communication from the opposing party's counsel for several months, nor had the suspended lawyer notified the lawyer of his suspension from the practice of law. The lawyer was hesitant to serve the represented client directly and at the same time was concerned about the effectiveness of service upon counsel who the lawyer knew was no longer authorized to represent clients in Minnesota.

When Minnesota lawyers are suspended or disbarred, they are required to send notice of their suspension to all clients, courts and opposing counsel in pending litigation matters within 15 days of their suspension or disbarment. Suspended lawyers are also required to urge the client to seek other counsel in the matter. Because opposing counsel had only recent-

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ly been suspended, the lawyer was advised to wait 15 days and then contact the client directly to determine whether substitute counsel had been retained or the client intended to proceed *pro se*.

REPRESENTATION ADVERSE TO A FORMER CLIENT. Daughter consulted with lawyer about bringing an emergency petition to establish a conservatorship for her mother. The mother, who was opposed to the conservatorship, had been represented by the lawyer about ten years earlier in a misdemeanor criminal assault charge. The lawyer inquired as to whether his representation of the daughter in petitioning for the appointment of a conservator against the wishes of his former client (the mother) constituted an impermissible conflict of interest.

Representation against a former client is prohibited only where the representation of the new client is substantially related to the representation of the former client. See Rule 1.9(a). Under certain circumstances, a prior defense of an assault charge could relate to a subsequent attempt to establish a conservatorship for that client. Here, however, the assault matter was so remote in time (ten years ago) that it was irrelevant to the daughter's recent attempt to have a conservator appointed for her mother.

IMPLIED CONSENT TO DISCLOSE CONFIDENTIAL INFORMATION. The client had retained the lawyer to create two testamentary trusts for the benefit of his two sons. The lawyer and a bank were named as cotrustees of both trusts. One of the trusts contained a spendthrift provision and the other did not.

After the client's death, the beneficiary of the spendthrift trust became dissatisfied with the conservative manner in which the cotrustee bank was exercising its discretion to make distributions to the beneficiary. The cotrustee lawyer did not agree with the beneficiary's interpretation of the

spendthrift provisions. Nevertheless, based upon conversations he had with the decedent when the trusts were created, the lawyer believed that the bank's interpretation of the distribution provisions was unnecessarily conservative.

The beneficiary had twice asked the lawyer to explain why his father had included the spendthrift provisions in his trust and not in his brother's trust. When the lawyer declined to disclose this confidential client information, the beneficiary threatened to commence suit against the lawyer and the bank. The lawyer sought an advisory opinion about whether he could disclose confidential conversations he had with the decedent to the cotrustee bank or the beneficiary.

The confidentiality exceptions authorizing permissive disclosure under the Rules of Professional Conduct do not address the confidentiality of deceased clients. See Rule 1.6(b). Many lawyers in the estate planning area look to the American College of Trusts and Estate Counsel (ACTEC) for assistance with this issue. ACTEC has formulated its own commentaries and annotations to the Rules of Professional Conduct that substantially influence the area of estate planning and trust and estate administration. ACTEC's commentary to the confidentiality rule recognizes that in certain instances a lawyer is authorized to disclose deceased client information, including client communications, relating to a dispositive instrument or even a prior instrument.

ACTEC advises that confidential information may be disclosed to an interested party, including a potential litigant, after a client's death if the client's personal representative gives consent, or if the decedent had "expressly or impliedly authorized the disclosure." According to the commentary, "implied authority" exists if disclosure of confidential information would "promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention."²

The lawyer was advised to apply ACTEC's *implied authority* factors to determine whether he could permissibly disclose conversations with the decedent to the cotrustee or the beneficiary. □

NOTES

1. In 2003 there were 1889 advisory opinion requests and only 1168 ethics complaints filed.
2. The implied authority exception for deceased clients is discussed in greater detail at <http://www.courts.state.mn.us/lprb/fc01/fc051401.html>