

By MARTIN COLE

## Beware of Ethics Information Overload

**H**ave we run out of useful things to say or write about professional responsibility? While this question easily could apply to me and this column, in fact, I refer to various entities that have, over the years, regularly issued opinions on topics related to professional responsibility. I sense a marked decline of such opinions in recent years.

For example, the Minnesota Lawyers Professional Responsibility Board (LPRB) has not issued a formal opinion since Opinion No. 22 (a lawyer's ethical obligations regarding metadata) was issued in March 2010.<sup>1</sup> While the board and its opinion committee have considered some proposed topics on which to issue an opinion, none of these deliberations have culminated in an opinion for almost four years.

Similarly, the American Bar Association has issued fewer formal ethics opinions in recent years. For the first time since 1989, no formal ABA opinions were released in 2012. In 2013, there have been three opinions released, dealing with judges' use of electronic social networking media;<sup>2</sup> client due diligence, money laundering and terrorist financing;<sup>3</sup> and division of legal fees with other lawyers who may lawfully share fees with nonlawyers.<sup>4</sup>



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Several state bar associations and disciplinary systems that historically have issued opinions on numerous topics seem to have done so with reduced frequency in the past few years. For example, the Indiana State Bar has issued only one opinion since 2008; the Florida Bar, a frequent source of opinions, last issued one in January 2013. Other than for the LPRB, I have no information

on the thought processes that have led such groups to reduce their output of formal opinions. Ironically, I have an opinion, however.

### Information

When I studied professional responsibility in law school, when I started in private practice, and then when I started working in the lawyer disciplinary field, intelligent or scholarly information about lawyer ethics or professional responsibility was hard to find, if not nonexistent. When some of the first scholarly offerings came along, such as Charles Wolfram's *Legal Ethics* hornbook and the quarterly *Georgetown Journal of Legal Ethics*, it was exhilarating to have access to intelligent and academic discourse about a previously neglected area of study that was of special interest to me. Such publications provided some of the first available authoritative citations for briefs or other submissions to courts, joining formal ethics opinions (if there happened to be one on your topic) and the rare case citation. Just as important, such sources slowly generated more articles and more study. There were perhaps few sources, but they were reasonably authoritative and could be relied upon.

Today, professional responsibility is far more universally recognized as an area worthy of serious legal study, just like substantive areas of law such as contracts, criminal law, or civil procedure. Not all of that effort results in well-written scholarly output, of course, but even shorter pieces may be of value. The LPRB/OLPR website hosts over 640 (I counted!) articles, including these monthly *Bench & Bar of Minnesota* professional responsibility columns, explaining various disciplinary rules and procedures and related topics, written by board members and OLPR attorneys.<sup>5</sup>

There also is a wide range of other professional responsibility writings available now, the quality and usefulness of which may vary. Specialized list-serve services exist for many groups, including disciplinary counsel and lawyers who represent attorneys in disciplinary proceedings. Here in Minnesota, a

localized ethics treatise exists.<sup>6</sup> My own experience indicates that lawyers in the ethics field will regularly take advantage of these resources as a means of effective research, hoping to obtain a quick answer to an ethics question, even if not always a highly scholarly one.

After that, some degree of caution may be in order. A wide selection of online legal ethics blogs exist. But along with some accurate and objective information may come considerable amounts of personal opinion and commentary, which may or may not be accurate or valuable. As with so many blogs in so many fields, biases and agendas may permeate the blog posting, the actual purpose of which may be to entertain as much as to educate. Add in the myriad listings of ethics-centered Continuing Legal Education programs that are available, both live presentations here in Minnesota and especially online, and there is almost an overload of information on professional responsibility available today! While it is a pleasant change in many ways, seeking solid answers to ethics questions can require some careful sorting. And shaping your conduct pursuant to some blogger's view of ethics may be risky indeed.

### Overload?

The point is that perhaps there exists a perception that the need for formal ethics opinions has decreased, and thus those entities that issue such opinions don't feel the need to provide an authoritative answer to as many questions as before. Where once a formal opinion may have been the only source of analysis on a topic, now lawyers often can pick between multiple sources opining on the meaning of a particular rule of professional conduct or on how to analyze a conflict of interest—there may even be contradictory opinions available. Resolution of an "ethics" issue frequently involves some shades of gray; maybe a "marketplace of ideas" mentality is now working against trying to determine the "right" answer.

But is a glut of information necessarily a good thing? For example, what should a disciplinary counsel make of an attorney who responds to a complaint

by claiming she researched her dilemma before acting and then relied upon the answer provided by a source with which few, if any, would agree (we will assume she can produce a link to such a site)?

If you can locate some “expert” in cyberspace who offers an opinion you like, are you immune to a complaint?

Some guidance may be provided in Rule 5.2, Minnesota Rules of Professional Conduct (MRPC), dealing with the responsibilities of a subordinate lawyer. Rule 5.2(b) states that, “A subordinate lawyer does not violate the Rules ... if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” Regardless whether determining the questionable reliability of a web authority relied upon is or is not necessary, note that even an experienced supervisory lawyer’s opinion may be relied upon only if she is offering a *reasonable resolution of an arguable question of professional responsibility*. Just because someone (be it supervisor or obscure web savant) says it is okay to steal

your client’s money, doing so can still result in disbarment! The information highway needs a “beware” warning.

#### Conclusion

Accurate and reliable ethics answers and advice is now available from multiple sources. Thus, it is quite possible that a renewed increase in formal ethics opinions will not occur in the near future. But as a result, a definitive answer to many ethics questions may not always be available. The Director’s Office will continue to provide advisory opinions to Minnesota-licensed attorneys, teach at CLE courses, and write articles on ethics topics—we will back up our own answers and advice if these are followed. There are several top-notch professional responsibility lawyers in Minnesota from whom advice may be sought. When relying on other sources, however, know your source’s qualifications; and if in doubt, research further until you determine at least that a clear consensus exists before acting in reliance on such a source. ▲

#### Notes

<sup>1</sup> All LPRB opinions are available at <http://tinyurl.com/oeeyrme>.

<sup>2</sup> ABA Formal Opinion 462 (02/21/2013). See Burns, “Rules of engagement: judges and ESM,” *Minnesota Lawyer* (06/03/2013).

<sup>3</sup> ABA Formal Opinion 463 (05/23/2013).

<sup>4</sup> ABA Formal Opinion 464 (08/19/2013). As an aside, up through 2011, the ABA numbered their formal opinions with the last two digits of the year preceding the opinion number. For example, the most recent opinion before this year had been 11-461 (advising clients regarding direct contacts with represented persons). See Cole, “Scripting Contacts with Represented Persons,” 69 *Bench & Bar of Minnesota* 10 (November 2011), p. 12. Beginning in 2013, the year designation was discontinued.

<sup>5</sup> <http://tinyurl.com/nuf15nv>

<sup>6</sup> <http://minnesotalawyring.com/>.

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