



ETHICS ADVISORY OPINIONS

BY KENNETH L. JORGENSEN

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Beyond investigating and prosecuting complaints of unprofessional conduct, another primary function of the Office of Lawyers Professional Responsibility is to issue telephone advisory opinions. Last year the Director's Office handled 1,825 advisory opinion requests from Minnesota lawyers and judges. Over the last decade the number of advisory opinions has steadily increased, while the number of ethics complaints against lawyers has remained flat, and during the last two years, even declined.¹ It is hardly a coincidence that with more lawyers seeking ethical guidance, clients find fewer reasons to complain about lawyers.

Advisory opinions run the gamut in terms of subject matter and complexity. Some are routine, like those seeking guidance on establishing a separate trust account for individual clients with significant trust account funds.² Others, including those involving the conflicting interests of multiple corporate clients and their subsidiaries, are far more complex and can require several calls before an opinion is given.

In comparison to reported lawyer discipline cases, advisory opinions are far more representative of the ethical issues confronted by most lawyers. Advisory opinions are confidential and limited to specific facts and circumstances provided by the caller. Consequently their usefulness as educational tools is to some extent limited. What follows are condensed and sanitized versions of several advisory opinions given to Minnesota lawyers. While the opinion summaries below are somewhat reflective of advisory opinions, they hardly do justice to the variety of questions received daily.

Lateral Hire Conflict. The caller was in the process of negotiating the lateral hire of a lawyer employed by a law firm defending several related lawsuits instituted by the caller's firm. The caller's firm was impressed with the lateral's litigation skills and expertise it had observed during the pending litigation. An advisory opinion was requested about whether the lateral could be immediately hired and then screened to comply with the

ethics rules and avoid disqualification in the pending cases.

Rule 1.10(b), Minnesota Rules of Professional Conduct (MRPC), imputes conflicts of interest from a lateral hire's former firm if the representations are substantially related and the lateral obtained confidential information while at the former firm. Imputation of conflicts can only be remedied through screening where the confidential information obtained by the lateral "is unlikely to be significant in the subsequent matter." Here, the lateral was actively representing defendants against the caller's firm in pending litigation, and was therefore in possession of significant confidential information. The caller was advised that screening was insufficient to avoid imputation of the lateral's conflict to the caller's firm, and that hiring the lateral could require the caller's firm to withdraw from the pending cases.³ Coincidentally, this call was received within weeks of the Minnesota Supreme Court's *Lennartson* decision,⁴ which upheld the disqualification of a law firm who, under similar circumstances, attempted to deal with a lateral hire conflict by screening.

Receipt of Adversary's Privileged Information. The caller had represented the wife in her divorce. After the caller had withdrawn from representing the wife, the husband filed an ethics complaint against the caller. Included within the ethics complaint was the husband's recount of discussions with his own lawyer about the marital termination agreement, which was potentially useful to the wife and her new counsel in

defending against the husband's attempts to reopen the divorce decree. The caller inquired about her ability to share the ethics complaint (including the husband's discussions with his counsel) with the wife and her new counsel.

Two issues were presented: (1) whether the confidentiality of the ethics complaint process prevented the caller from sharing the information with others; and (2) whether the caller could disclose privileged discussions that were inadvertently disclosed if it were determined that the husband had not waived the privilege by filing the ethics complaint. Although the ethics complaint process, as well as dismissed complaints, is confidential, the confidentiality is for the protection of the lawyer. See Rule 20, Rules on Lawyers Professional Responsibility. Nothing within Rule 20 prohibits disclosure of information by the complained-against lawyer.

As to the privileged discussions, the proper procedure upon receiving inadvertently disclosed privileged information is to notify the affected party that the information has been received.⁵ Assuming the lawyer has done nothing improper to come into possession of the information, determinations as to waiver, admissibility, or whether the information must be returned are legal issues for the trial court. This procedure represents a change from that previously recommended by the aba in Ethics Opinion 92-363 (1992), which admonished lawyers to refrain from reading the materials and to abide by the instructions of the sending lawyer as to disposition of the confidential materials.

Direct Mail Advertising. The caller had obtained a favorable settlement for a

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public organization client in a statute of limitations-related legal malpractice claim. The caller later read an appellate decision dismissing a similar claim by an unrelated public organization represented by the same law firm. The caller was interested in offering the public organization his services and expertise in a legal malpractice claim.

The caller recognized that under Rule 7.3, MRPC, solicitation through in-person or telephonic contact was improper because he did not have a prior professional relationship with the public organization. Instead the caller desired to have his client, for whom the settlement had been obtained, contact the public organization and recommend the lawyer's services. The solicitation method was deemed improper. Because the rule prohibited the lawyer from in-person or telephonic solicitation, the lawyer could not "assist or induce another to do so." See Rule 8.4(a). Nevertheless, the rules did permit the sending of a letter directly to the potential client as long as the word "ADVERTISEMENT" appeared clearly and conspicuously at the beginning of the letter. See Rule 7.2(f).

Deceased Client Confidential

Information. The caller had drafted a will for a terminally ill mother, which provided for placement of the child with a friend after the mother's death. Prior to the mother's death, the father had resisted attempts by the county to establish paternity. After the mother died out-of-state, the father's counsel contacted the caller and wanted to know the name and location of the adult with whom the child was living so that the father could effect service to establish paternity and obtain custody. During the representation, the mother had made it clear that she did not want the father to know where the child was located.

Rule 1.6 prohibits the disclosure of client confidences and secrets without client consent. Where the client is deceased, consent may be inferred where it would serve the deceased client's legal interests and avoid unnecessary litigation.⁶ Because the mother had specifically instructed that the child's location not be disclosed, the implied consent exception was not applicable. The caller was advised not to disclose any information about the child unless the father obtained a court order. See Rule 1.6(b)(2).

Threat of Criminal Prosecution. The caller was representing the wife in a

divorce. The husband was unrepresented. The parties were near settlement of the property issues when the husband committed a criminal violation of a harassment order. The caller wanted to offer the wife's agreement not to pursue the harassment order violation if the husband made certain property division concessions.

The former provision of the Code of Professional Responsibility prohibiting threats of criminal prosecution solely to gain an advantage in a civil matter was not carried forward into the Rules of Professional Conduct.⁷ Absent special circumstances, a threat of criminal prosecution within the context of a civil case still violates the ethical standards. See e.g. Rule 8.4(d) (conduct that is prejudicial to the administration of justice). ABA Opinion 92-363 outlines the narrow circumstances in which lawyers are ethically permitted to simultaneously negotiate criminal and civil claims. The criminal matter must directly relate to the client's civil claim. The lawyer must possess a well-founded belief that the law and the facts warrant the civil claim and the criminal charges. Finally, the lawyer cannot attempt to exert or suggest improper influence over the criminal process. The most critical requirement, that the criminal offense and the civil claim be directly related, stems from the fact that, under the Model Penal Code, threats of prosecution are decriminalized if the pecuniary benefit of the threat does not exceed in amount that which the crime victim would be due as restitution. In the caller's case, there was an insufficient nexus between harm associated with the criminal violation of the harassment order and the property division concessions. The caller was advised that the offer was likely improper.

Unwanted Email. After enhancing its website with an email link, the caller's law firm began receiving email from employment law plaintiffs seeking representation even though the website disclosed that the firm's practice was limited to defense representations. Some of the email included information that could be characterized as confidential or privileged. The caller was concerned that the unsolicited email could serve as a basis for disqualification or an ethics complaint.

New York State Bar Opinion 2001-01 provides a solution for unsolicited email messages and their disqualifying consequences. It recommends that the email link on the website trigger a dia-

logue box when selected. The dialogue box should disclaim any attorney-client relationship or guarantee of confidentiality if the prospective client elects to email information to the firm. In the caller's case, it was also recommended that the dialogue box also remind visitors that the firm limits its practice to defending employers.

Advisory Opinions Generally. Advisory opinions are available to all licensed Minnesota lawyers and judges who are current in the annual registration fee. Opinions are confidential and are 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 conduct are not available. Advisory opinions can be obtained by calling (651) 296-3952. □

NOTES

1. In 2000, 1,362 complaints were received. This number fell to 1,246 in 2001 and to 1,165 in 2002.
2. See Jorgensen, K., "A Safe Solution for Attorneys Stuck with Abandoned Client Funds," *Minnesota Lawyer* (November 14, 1997) reprinted at <http://www.courts.state.mn.us/lprb/fc11497.html>.
3. Although Rule 1.10(d) permits representation if waived by the affected clients, the facts provided by the caller indicated that it was unlikely the clients from the lateral's firm would give their consent.
4. See Lennartson v. Anoka-Hennepin School Dist. No. 11, 662 N.W.2d 125 (Minn. 2003).
5. See e.g. Rule 4.4(b) and Comment paragraph 2 as proposed by the MSBA Rules of Professional Conduct Task Force and approved by the MSBA General Assembly at <http://www2.mnbar.org/committees/task-force-aba-rules/report.htm>.
6. The implied consent exception for deceased clients is discussed in more detail in Jorgensen, K., "Testamentary Exception to Privilege, Confidentiality," *Minnesota Lawyer* (May 14, 2001) reprinted at <http://www.courts.state.mn.us/lprb/fc051401.html>.
7. According to the ABA, DR 7-105(A) was "deliberately omitted" from the ABA Model Rules of Professional Conduct when they were adopted in 1981. The ABA has opined that the rule prohibiting criminal threats in civil matters was not retained because the drafters believed that extortionate, fraudulent or otherwise abusive threats were dealt with by other more general rules (e.g., Rules 4.4 and 8.4). See ABA Formal Ethics Opinion 92-363 (7/6/92).