ETHICS ADVISORY OPINIONS

By Kenneth L. Jorgensen

“Advisory opinions are confidential and limited to specific facts and circumstances provided by the caller.”

ethics rules and avoid disqualification in the pending cases.

Rule 1.19, 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. Consequently, this call was received within weeks of the Minnesota Supreme Court’s Lenzounis decision, 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 After the caller had withdrawn from representing the wife, the husband filed an ethics complaint against the caller.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 re-open the divorce decree. The caller inquired about her ability to share the ethics complaint (including the husband’s discussions with her counsel) with the wife and her new counsel.

Two issues were presented: (1) whether the confidentiality of the wife’s 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 disclosed 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 complainant 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. 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

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.

August 2003 | Bench & Bar
divorce. The husband was unrepresented. The parties were near settlement of the property issues when the husband commit- ted a criminal violation of a bailment order. The carrier wanted to offer the wife’s agreement not to pursue the bailment order violation if the husband made cer- tain property division concessions.

The lower court’s decision of the Code of Professional Responsibilities prohibiting threats of criminal prosecution solely to gain an advantage in a civil matter was not carried forward into the Rules of Professional Conduct. Although several 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 sug- gest improper influence over the crimi- nal process. The most critical require- ment, 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 discriminated if the pecuniary benefit of the threat does not exceed in amount that which the crime victim would be due in restitution. In the lawyer’s case, there was an insufficient nexus between harm associated with the criminal viola- tion of the bailment order and the property division concessions. The carrier was advised that the offer was likely improper.

Unwanted Email. After enhancing its website with an email link, the carrier’s law firm began receiving email from clients and associates requesting that the email link be removed. The carrier was advised that the email was likely to be considered spam, and that there was a risk of legal action if the email was not removed. The carrier was advised to take immediate action to prevent the further dissemination of unwanted email.

Threat of Criminal Prosecution. The carrier was representing the wife in a divorce. The husband was unrepresented. The parties were near settlement of the property issues when the husband commit- ted a criminal violation of a bailment order. The carrier wanted to offer the wife’s agreement not to pursue the bailment order violation if the husband made cer- tain property division concessions.

The lower court’s decision of the Code of Professional Responsibilities prohibiting threats of criminal prosecution solely to gain an advantage in a civil matter was not carried forward into the Rules of Professional Conduct. Although several 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 sug- gest improper influence over the crimi- nal process. The most critical require- ment, 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 discriminated if the pecuniary benefit of the threat does not exceed in amount that which the crime victim would be due in restitution. In the lawyer’s case, there was an insufficient nexus between harm associated with the criminal viola- tion of the bailment order and the property division concessions. The carrier was advised that the offer was likely improper.

Unwanted Email. After enhancing its website with an email link, the carrier’s law firm began receiving email from clients and associates requesting that the email link be removed. The carrier was advised that the email was likely to be considered spam, and that there was a risk of legal action if the email was not removed. The carrier was advised to take immediate action to prevent the further dissemination of unwanted email.

Threat of Criminal Prosecution. The carrier was representing the wife in a divorce. The husband was unrepresented. The parties were near settlement of the property issues when the husband commit- ted a criminal violation of a bailment order. The carrier wanted to offer the wife’s agreement not to pursue the bailment order violation if the husband made cer- tain property division concessions.

The lower court’s decision of the Code of Professional Responsibilities prohibiting threats of criminal prosecution solely to gain an advantage in a civil matter was not carried forward into the Rules of Professional Conduct. Although several 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 sug- suggest improper influence over the crimi- nal process. The most critical require-ment, 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 discriminated if the pecuniary benefit of the threat does not exceed in amount that which the crime victim would be due in restitution. In the lawyer’s case, there was an insufficient nexus between harm associated with the criminal viola- tion of the bailment order and the property division concessions. The carrier was advised that the offer was likely improper.

Unwanted Email. After enhancing its website with an email link, the carrier’s law firm began receiving email from clients and associates requesting that the email link be removed. The carrier was advised that the email was likely to be considered spam, and that there was a risk of legal action if the email was not removed. The carrier was advised to take immediate action to prevent the further dissemination of unwanted email.

Threat of Criminal Prosecution. The carrier was representing the wife in a divorce. The husband was unrepresented. The parties were near settlement of the property issues when the husband commit- ted a criminal violation of a bailment order. The carrier wanted to offer the wife’s agreement not to pursue the bailment order violation if the husband made cer- tain property division concessions.

The lower court’s decision of the Code of Professional Responsibilities prohibiting threats of criminal prosecution solely to gain an advantage in a civil matter was not carried forward into the Rules of Professional Conduct. Although several 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 sug- gest improper influence over the crimi- nal process. The most critical require- ment, 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 discriminated if the pecuniary benefit of the threat does not exceed in amount that which the crime victim would be due in restitution. In the lawyer’s case, there was an insufficient nexus between harm associated with the criminal viola- tion of the bailment order and the property division concessions. The carrier was advised that the offer was likely improper.

Unwanted Email. After enhancing its website with an email link, the carrier’s law firm began receiving email from clients and associates requesting that the email link be removed. The carrier was advised that the email was likely to be considered spam, and that there was a risk of legal action if the email was not removed. The carrier was advised to take immediate action to prevent the further dissemination of unwanted email.

Threat of Criminal Prosecution. The carrier was representing the wife in a divorce. The husband was unrepresented. The parties were near settlement of the property issues when the husband commit- ted a criminal violation of a bailment order. The carrier wanted to offer the wife’s agreement not to pursue the bailment order violation if the husband made cer- tain property division concessions.

The lower court’s decision of the Code of Professional Responsibilities prohibiting threats of criminal prosecution solely to gain an advantage in a civil matter was not carried forward into the Rules of Professional Conduct. Although several 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 sug- gest improper influence over the crimi- nal process. The most critical require- ment, 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 discriminated if the pecuniary benefit of the threat does not exceed in amount that which the crime victim would be due in restitution. In the lawyer’s case, there was an insufficient nexus between harm associated with the criminal viola- tion of the bailment order and the property division concessions. The carrier was advised that the offer was likely improper.

Unwanted Email. After enhancing its website with an email link, the carrier’s law firm began receiving email from clients and associates requesting that the email link be removed. The carrier was advised that the email was likely to be considered spam, and that there was a risk of legal action if the email was not removed. The carrier was advised to take immediate action to prevent the further dissemination of unwanted email.

Threat of Criminal Prosecution. The carrier was representing the wife in a divorce. The husband was unrepresented. The parties were near settlement of the property issues when the husband commit- ted a criminal violation of a bailment order. The carrier wanted to offer the wife’s agreement not to pursue the bailment order violation if the husband made cer- tain property division concessions.

The lower court’s decision of the Code of Professional Responsibilities prohibiting threats of criminal prosecution solely to gain an advantage in a civil matter was not carried forward into the Rules of Professional Conduct. Although several 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 sug- gest improper influence over the crimi- nal process. The most critical require-