

BY MARTIN COLE

Friends and Family

We have just concluded the holiday season, when people traditionally spend time with their family and with close friends, basking in the warmth of good feelings. While this idyllic scenario does not in fact play out for everyone, it still represents most people's dream image of the holidays. Friends and family also find their way into several aspects of professional responsibility, in various rules and matters that have led to discipline. Not all have shown friends and families at their best, unfortunately.

Some of the most intensely contested complaints arise out of family law or estate or conservatorship matters involving children and elderly family members. Lawyers who practice in these areas are no doubt aware of the emotional nature of disputes that may arise between spouses (or exspouses), between siblings, or between parent and child over custody or distribution of assets. Family businesses are also a frequent backdrop to complaints against lawyers. The bitterness between family members often will be transferred onto the unfortunate lawyers, who are seen as conspiring with their individual clients to "rob" other family members of what they believe is rightfully theirs.

Even more intense are the feelings when the lawyer is a participant in the underlying proceeding — as a sibling, child or parent — and is representing herself as well.¹ Legal training is suddenly seen as an unfair advantage, especially by relatives paying for their own lawyers in the matter.

Thus lawyers, especially those who practice in the area of family law, know their practice is at high risk of complaints, sometimes despite their best efforts. Complaints from an opposing party

may be difficult to predict or avoid. There are many quality family law practitioners, however, who never generate complaints from clients or from the other party. Diligence, good communication skills, and civility towards all participants in the process (even when your client desires you not to be civil) usually are the keys to professionalism.

WHERE THERE'S A WILL

Within the Minnesota Rules of Professional Conduct (MRPC), there are two rules that specifically apply to friends and families, and each rule treats them somewhat differently. Rule 1.8(c) restricts lawyers in most instances from drafting instruments that leave substantial gifts to the lawyer or to the lawyer's family. Rule 7.3 restricts most in-person and telephone solicitation of legal business except from close personal friends and family, and individuals with whom the lawyer has a prior professional relationship.²

Rule 1.8(c) states that a lawyer "shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." The American Bar Association (ABA) Model Rules of Professional Conduct extend the exception contained in Rule 1.8(c) further than does Minnesota. The Model Rule also allows lawyers to prepare instruments leaving gifts to the lawyer or her family for clients "with whom the lawyer or the client maintains a close, familial relationship." When the MRPC were comprehensively amended in October 2005, even with the goal to bring Minnesota's version of the rules closer to the Model Rules, this language was not adopted.

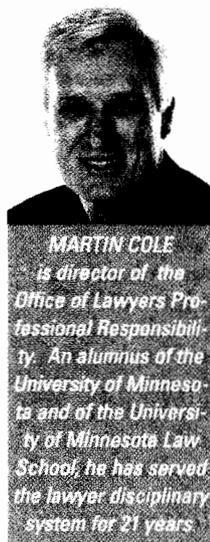
Complaints have arisen in the past two years from an attorney's drafting of a will for a client and from the handling of a real estate transfer. Had the "close, familial" language been part of Minnesota's rule, it could have changed the result in both cases. In the one matter, the attorney asserted that the close, family-like relationship he had maintained with his client, for whom he had drafted a will, was such that a bequest of \$10,000 to the lawyer should

not be found improper. A Lawyers Board panel disagreed and issued an admonition to the lawyer,³ since, as noted, Minnesota does not recognize such an exception to Rule 1.8(c). Nevertheless, the fact that the lawyer in fact was a close friend of the testator likely was a significant factor in keeping the panel from finding that public discipline was warranted.

The second matter also resulted in a panel issuing an admonition to the attorney. In that instance the dynamic of the modern extended and blended family also was at issue. The lawyer drafted a deed for his wife's elderly stepfather, transferring property to the lawyer's daughter. His wife's mother had died previously. The lawyer argued that the client still was a family member. While the step-grandfather/step-granddaughter relationship was arguably "family-like," in fact the grantor and grantee were not related. Other family members, who may have been beneficiaries of the stepfather's will, complained that valuable property no longer was a probate asset. The admonition also was premised on the conflicted advice provided by the lawyer, who did not advise the former stepfather to seek independent counsel, even though the transaction benefited the lawyer's immediate family.⁴

UP CLOSE AND PERSONAL

Just such a "close personal" relationship exception was added, rather than deleted, in the October 2005 amendments to Minnesota's Rule 7.3, to match the ABA Model Rule. Previously, Minnesota's solicitation rule allowed in-person or live telephone



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contact, when the motive is pecuniary, only with family members or individuals with whom the lawyer had a prior professional relationship.⁵ Now the lawyer is permitted such contact with individuals with whom the lawyer has a "close personal" relationship.⁶

Why the differing treatment? Solicitation of legal business does not involve the transfer of possibly large amounts of money or property to the lawyer or her family, as does the drafting of a will or deed. The potential for an overly elastic interpretation of who is such a close, personal friend (or family-like person) is therefore less of a concern in the solicitation situation. Individuals who have such a relationship with the lawyer may well turn to the attorney naturally to handle their legal affairs. Thus, the need for time to reflect or seek independent advice does not seem as essential in this situation. Complaints concerning in-person or telephone solicitation of legal business are uncommon, so it may take some time to determine whether the addition of the "close personal" relationship to the rule's exceptions will have much impact.

OTHER RULES

Family relationships figure prominently in certain other rules connected with the lawyer discipline system. For example, Rule 30, Rules on Lawyers Professional Responsibility, established

an administrative suspension for an attorney who is in arrears in payment of maintenance or child support and who has not entered into a payment agreement. Upon receipt of a court order or report from an administrative law judge pursuant to Minn. Stat. §518.551(12), the Director's Office shall file a motion with the Supreme Court requesting administrative suspension until the arrearages are paid or the attorney enters into a payment plan.

Finally, attorneys who failed to comply with the requirements for continuing legal education (CLE) and were then placed on restricted status once had particular reason to attend to their family relationships. Prior to 2000, an attorney on restricted status was authorized to represent himself and certain close relatives. Under Rule 12, Rules of the Board of Continuing Legal Education, a restricted attorney is now prohibited from representing anyone except himself or herself. Many lawyers remain unaware of this change, thinking that they can still represent their spouse or child in a legal matter despite their non-compliance with CLE. Such representation would constitute the unauthorized practice of law and violate the MRPC.

The support of caring family and friends can be a blessing. Handling legal matters for family and friends, however, can create professional responsibility issues that must be recognized and dealt with appropriately.

NOTES

¹A clear example of such a situation may be found in *In re Perry*, 494 N.W.2d 290 (Minn. 1992).

²Another rule, 1.8(i), used to deal with family relationships as well. The rule limited representation of clients against clients represented by certain family members. This rule was eliminated as of October 2005, and is now addressed in Comment [11] to Rule 1.7. This change was discussed more fully in this column in the August 2006 issue of *Bench & Bar*.

³More serious violations of Rule 1.8(c) may warrant public discipline. See, *In re Prueter*, 359 N.W.2d 613 (Minn. 1984).

⁴Conflicts of interest covered by Rule 1.7(a)(2), MRPC, for "personal interests of the lawyer" may include matters involving friends or family members.

⁵Comment [4] to Rule 7.3, MRPC, indicates that the term "prior professional relationship" means a former client.

⁶In-person and telephone solicitation of other lawyers is also permitted since the October 2005 amendments.

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