

## ADVISORY OPINION SERVICE UPDATE

By

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Advisory opinions concerning questions of professional responsibility continue to be available from the director's office to all licensed Minnesota attorneys and judges. Advisory opinions are available only with respect to prospective conduct of the caller. They are not issued where: a) the facts or legal issues involved are very complex; b) the opinion would require resolution of questions concerning substantive law outside the area of legal ethics; c) the conduct in question has already occurred or is that of another lawyer; or d) the request concerns advertising or solicitation.

All opinions are the personal opinion of the issuing attorney in the director's office. Opinions are usually given by telephone the same day the inquiry is received. Attorneys are generally advised to conduct their own research and contact other attorneys who are experts in the substantive law or in legal ethics.

The number of advisory opinions given by the director's office has grown steadily over the past six years. In 1986, the office provided 780 advisory opinions. By 1992, that number increased to 1,216, with an additional 182 opinions declined, translating into 312 hours of attorney time.

Conflicts of interest remains a frequent topic of advisory opinions. Trust account advisory opinion inquiries have dramatically increased since the inception of the Trust Account Overdraft Notice Program in August 1990.

The Lawyers Professional Responsibility Board has issued a number of opinions in recent years which provide the basis for resolution of a significant number of advisory opinion inquiries. For example, attorneys calling with questions about their obligation to return a former client's file or ability to charge copying costs are referred to Opinion No. 13. Opinion No. 15 regarding advance fee payments and availability or nonrefundable retainers and Opinion No. 16 regarding interest and late charges on attorney fees are also frequently cited to callers. A brochure containing the Board Opinions is available from the director's office.

### SUMMARIES

Following are summaries of some of the opinions issued since 1992 regarding recurrent or interesting matters.

■ **CONTROLLING LEGAL AUTHORITY.** An attorney is preparing a response to a summary judgment motion brought against his client. Opposing counsel has failed to cite an unpublished opinion by the Minnesota Court of Appeals, adverse to the client, which is the only opinion on point in the jurisdiction.

Does the attorney have to cite the unpublished opinion in light of Minn. Stat. §480.08, subd.3, which provides that unpublished Court of Appeals opinions are not precedential?

Yes, the attorney must disclose the adverse unpublished opinion. ABA Formal Opinion 280 states:

“We would not confine the Opinion to ‘controlling authorities’ — i.e., those decisive of the pending case — but ... would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.”

In his treatise, *The Law of Lawyering: Annotated Model Rules of Professional Conduct*, Geoffrey C. Hazard, Jr. notes:

“Rule 3.3(a) refers to ‘legal authority,’ which should be understood to include not only case law precedents, but also statutes, ordinances, regulations, and administrative rulings. Indeed, the duty to reveal the latter kinds of authority is of greater practical significance, precisely because they are less likely to be discovered by the tribunal itself.” [Ftn 1](#)

This opinion should not be construed to *require* attorneys to research unpublished opinions as a matter of course. [Ftn 2](#)

■ **CONFLICT OF INTEREST.** An attorney drafted wills for a husband and wife. Several years later, the wife wants the attorney to represent her in dissolution proceeding.

The attorney must decide if the will drafting is substantially related to the dissolution. Depending on the extent of the estate planning, this question could be decided either way. In addition, the attorney must consider whether information relating to the former representation would be used to the husband’s disadvantage in the contemplated representation. Obtaining written consent of the husband to the attorney’s representation of the wife is the safest course. If the attorney decides to represent the wife without the husband’s consent, he should discuss with the wife the possibility of a disqualification motion being filed, including the anticipated costs associated with its defense. [Ftn 3](#)

■ **UNCLAIMED FUNDS IN TRUST ACCOUNT.** A client did not cash a check issued on her attorney’s trust account for settlement proceeds. Time has passed, and the attorney cannot find the client at the client’s last known address.

The attorney must use reasonable efforts, in light of the amount at stake, to locate the client. The attorney should keep a detailed record and documentary evidence, such as certified letters, of her attempts to reach the client. If the attorney is unable to locate the client, she should review the Unclaimed Property Act, Minn. State. §§345.31 to 345.60, to determine her obligation, if any, to pay unclaimed funds to the state of Minnesota. [Ftn 4](#)

■ **FILE OF DECEASED CLIENT.** The attorney’s client was murdered. The client’s parents were also murdered. The client’s husband, who is the chief suspect in the investigation, will likely be named the personal administrator of the estate. The police want to see the attorney’s client file.

In general, courts have held that the death of the client does not end the attorney-client privilege.

Attorneys therefore have a continuing obligation to assert the privilege on behalf of their other clients. Some authorities have held that an attorney may disclose a privileged communication after the death of the client for the benefit of the client's estate with the consent of the personal representative or heirs.

The attorney may provide the file to police with the personal representative's consent or if he believes that the client herself would wish to waive the privilege if she were alive. The attorney may also provide the file to police pursuant to a court order.[Ftn 5](#)

■ LIENS. A client signed a confession of judgment for past due attorney fees. The attorney reduced the confession to judgment and wants to file against the client's homestead and other real property.

Lawyers Professional Responsibility Board Opinion No. 14 applies only to attorney liens, which are unproven claims. Opinion 14 protections are not necessary for judgment liens, which have been reviewed and approved by the court. The statutory homestead exemption also protects the client's interests in the event the attorney makes further collection attempts.[Ftn 6](#)

■ PHYSICAL EVIDENCE OF CRIME IN ATTORNEY'S POSSESSION. The mother of a client, a juvenile who has been charged with aggravated robbery and assault in the second degree, gives the attorney a handgun to "get it off the streets." The police allege that a handgun was used in the commission of the robbery, but there was no discharge of the firearm. There is no evidence that the gun in the attorney's possession was, in fact, the gun used in the robbery.

The attorney must deliver the gun to law enforcement authorities if it is physical evidence of a possible crime or possession of the gun is illegal (*i.e.*, because it is unregistered or possession is otherwise prohibited). A majority of jurisdictions have held that physical evidence of a possible crime, which is in the possession of a criminal defense attorney, is not subject to the attorney-client privilege. Information regarding the location of the gun or its ownership from the client, or arguably his mother, could constitute a confidence or secret protected by Rule 1.6.[Ftn 7](#)

For additional information, attorneys may consult the October 1984 and July 1986 *Bench & Bar* articles concerning the advisory opinion service. Advisory opinions are available by calling (612) 296-3952, or 800-657-3601 from 8:30 A.M. to 5:00 P.M., weekdays.

## NOTES

<sup>1</sup> *Id.* at §3.3:206, p. 587 (1991 supplement).

<sup>2</sup> See Rule 3.3(a)(3), which requires a "knowing" failure to disclose legal authority "known" to the attorney.

<sup>3</sup> See Rule 1.9(a) and (b); Rule 1.6; Rule 1.4(b).

<sup>4</sup> See Rule 1.15(a) and (b)(4); Rule 1.16(d).

<sup>5</sup> See Rule 1.6; ABA Informal Opinion 1293; ABA Formal Opinion 91.

<sup>6</sup> See Opinion 14; Rule 1.8(j)(1).

<sup>7</sup> See Rule 1.6; Rule 8.4(b); Rule 8.4(d); John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer*, 341-160 (1987); ABA Standards for Criminal Justice, Std. 4-4.6, "The Defense Function," (2d Ed. 1980).