

Beware Of What You Ask Nonlawyers To Do On Your Behalf

by
Craig D. Klausing, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Minnesota Lawyer* (June 5, 1998)

Every lawyer understands that the Rules of Professional Conduct place certain restrictions upon the lawyer's conduct. For example, even if unaware of the specific rule provision, every lawyer knows (we hope) that a lawyer shall not communicate about the subject of a representation with a party the lawyer knows to be represented by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Rule 4.2, Minnesota Rules of Professional Conduct (MRPC).

What may be less clear is how the Rules of Professional Conduct apply to the conduct of someone acting either at the lawyer's behest or on the lawyer's behalf. Not surprisingly, the lawyer is clearly prohibited from using others to engage in an act which the lawyer herself could not engage in. "A lawyer may not circumvent the prohibition by delegating the task to a non-lawyer." ABA/BNA Lawyers' Manual on Professional Conduct. Citing *In re Burrows*, 291 Or. 135, 629 P.2d 820 (Or. 1979).

The Minnesota Rules of Professional Conduct (MRPC) also prevent a lawyer from using another to attempt to circumvent the Rules of Professional Conduct. "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another" Rule 8.4(a), MRPC.

In addition, Rule 5.3 provides that regarding a non-lawyer employed or retained by or associated with the lawyer, a lawyer "shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders . . . the conduct involved" Rule 5.3(c)(1), MRPC.

Giving Directions

Consider for example the conduct of attorney Smith. Smith represented the former wife in an action against the ex-husband seeking an increase in child support. Smith directed his client to send a letter to her former husband providing the statutory notice required before automatic payroll deductions could be made for child support. Even though lawyer Smith knew the former husband was represented by counsel, Smith directed his client to send the letter, provided her with his standard form which he used in this regard, and directed her to obtain a return receipt.

Even though the Comment to Rule 4.2 provides that "parties to a matter may communicate directly with each other," Smith was not permitted to direct the communication. By acting through another to contact a party he knew was represented by counsel, Smith violated Rules 4.2 and 8.4(a) and received an admonition for his misconduct.

In addition, even if not directing the unethical conduct, the lawyer is responsible for the conduct of another that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if "with the knowledge of specific conduct, [the lawyer] ratifies the conduct involved." Rules 5.1(c)(1) and 5.3(c)(1).

Failing to Give Directions

Lawyer Jones represented his client against her ex-husband and others over ownership of Vacation Resort. Jones hired two investigators to investigate ownership of the resort. While Jones did not specifically instruct the investigators to talk with the former husband (who was represented by counsel), he also did not instruct them not to talk to him. The investigators stayed at the resort and questioned the former husband directly on several occasions, including questioning him as to his ownership interest. During the subsequent trial, Jones attempted to introduce into evidence admissions made to the investigators concerning the former husband's ownership of the resort.

Respondent received an admonition for violating Rules 4.2, 5.3 and 8.4(a), MRPC. Although he had not specifically directed the violation of the Rules, respondent's attempt to use the information garnered constituted a ratification of what would have been unprofessional conduct if engaged in by him.

If the Rules of Professional Conduct prohibit you as a lawyer from engaging in certain conduct, you cannot circumvent the Rules by delegating the task to another. The practicing lawyer should take steps to assure that the directions given to those acting on the lawyer's behalf clearly convey the limitations imposed by the Rules. In addition, even if the lawyer has not specifically directed others to act in violation of the Rules, the lawyer with knowledge of such unethical conduct should be careful not to ratify the conduct.