

Ethics 2000: A Preview

By

Edward J. Cleary, Director

Minnesota Office of Lawyers Professional Responsibility

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Back in 1997, the ABA announced that a commission was being formed "to undertake the first comprehensive review in nearly 20 years of the rules governing the professional conduct of lawyers."Ftn 1 Previous canons, codes, and rules had been promulgated by the ABA in 1908, 1969, and 1983. The members of the commission appointed in 1997 included experts on ethical issues from around the nation.

The threshold issue for the commission was to determine the scope of the undertaking. The commissioners decided that the recommendations would take the form of proposed changes "to the existing platform provided by the Model Rules of Professional Conduct,"Ftn 2 rather than recommendations leading to a thorough revision of the regulatory scheme for the legal profession. Previous efforts to mold a set of rules to govern professional conduct had different parameters. In the 1960s, the Model Code of Professional Responsibility was created with a three-tier approach to regulation: canons, disciplinary rules, and ethical considerations. The focus was primarily on the practice as it pertained to litigation. By the 1980s, with the Model Rules of Professional Conduct, the activities of transactional attorneys were also addressed, as were other developments in the law, including advertising.

Now, two years into the Ethics 2000 Commission's work, we are beginning to see some of the *recommended* changes and the direction they take the profession. The text of the proposed changes, which are discussed below, is given in the sidebar accompanying this article.

CONFLICTS (CURRENT PROVISION: 1.7, MRPC)

Loyalty to the client has always been a key basic tenet of the practice of law. Addressing conflicts of interest responsibly has continually been crucial to maintaining both the perception and the reality of such loyalty. The current rule distinguishes between "direct adversity" conflicts and "material limitation" conflicts.

The commission decided that the current approach was confusing and inefficient, since many attorneys have had difficulty in deciding what constitutes direct adversity and because they have also failed to recognize that most cases that involve direct adversity, impact both "the relationship with the current client and the representation of the new client." Consequently, any potential conflict needs to be evaluated under both sections of the current rule.

In response, the commission drafted a single paragraph defining conflict of interest, adding a second paragraph to explain when client consent is effective in removing the conflict (for instance, client consent is not enough when the representation is prohibited by law or when the lawyer attempts to represent both clients on opposite sides in the same litigation). The second paragraph also includes a new requirement of *written* informed consent from *each* client, allowing the lawyer to continue (or begin) representation in the face of a conflict of interest (when consent is sufficient), ostensibly to protect both the lawyer and the client.

The latter requirement incorporates the California model, where the lawyer must obtain the client's written agreement to representation following written disclosure by the lawyer of the conflict of interest.^{Ftn 3}

FEES/SCOPE OF REPRESENTATION (CURRENT PROVISION: 1.5, MRPC)

Although current Rule 1.5 provides that fees must be reasonable, proposed new language would make this requirement more explicit, stating unequivocally that unreasonable fees are prohibited. Other changes proposed by the commission include a *written* engagement agreement for all clients "not regularly represented" by the lawyer. In contrast to a written retainer agreement, this document would spell out the scope of representation as well as fees and disbursements. The previous rule suggested it was "preferable" to have a written fee agreement but did not require disclosure of disbursements nor a summary of the scope of representation (previously outlined in 1.2, MRPC); all would now be mandated.

In evaluating the reasonableness of a fee, the proposed new rule would add a factor regarding "the degree of risk assumed by the lawyer." In addition, the new rule would require lawyers from different firms who wish to divide a fee to get "informed consent in writing" from the client as to the participation of all the lawyers involved. Notably, the commission decided against requiring client notification of the specific terms of the fee division, even though this has been required since 1985 in Minnesota under 1.5(e)(2), MRPC.

SAFEKEEPING PROPERTY (CURRENT PROVISION: 1.15, MRPC)

The new language in this rule addresses a lawyer's responsibility for funds in the event of a dispute between "two or more persons (one of whom may be the lawyer)" over ownership of property. Perhaps the change in this rule that may cause the most concern among practitioners is the language that mandates that the "property shall be kept separate by the lawyer until *any* dispute about the interests is resolved." From a practical standpoint, this could force an attorney to hold onto funds indefinitely in her trust account without a lien, letter of protection, or other threshold showing of validity of a claim against such funds. While the motivation appears to be to make clear that "lawyers may not legally give in to client pressure to ignore the creditor's possible rights," it seems likely that this provision may create more problems than it solves.

PROSPECTIVE CLIENTS (NEW PROPOSED RULE 1.18)

The commission recommended the creation of a new rule, 1.18, which would extend the lawyer's duty of confidentiality to prospective clients while addressing conflicts of interests involving those same clients. The commission proposed the new rule out of a belief that "important events occur in the period during which a lawyer and prospective client are considering whether to form a lawyer-client relationship."

Among the recommendations in addition to the duty of confidentiality to a prospective client (not currently spelled out in 1.6 or 1.9, MRPC), is a prohibition against later representation adverse to the prospective client.

RESPECTS FOR RIGHTS OF THIRD PERSONS

(CURRENT PROVISION: 4.4, MRPC)

This amended rule would keep the current language of the rule and add two other provisions, one of which would prohibit lawyers from seeking privileged information when communicating with third persons and the other instructing lawyers who receive documents inadvertently to notify the sender.

This latter provision is notable for the fact that although it makes clear the lawyer's obligation to notify a sender under these circumstances, it extends the obligation no further. Earlier ABA opinions defined the lawyer's obligation more broadly. A 1992 opinion recommended that a lawyer should refrain from examining materials acquired inadvertently, notify the sending lawyer, and abide by any instructions that the lawyer gave him regarding the documents.^{Ftn 4} A 1994 opinion gave the receiving lawyer the additional option of reviewing the documents to the extent necessary to determine how to proceed and, if she disagreed with her adversary's lawyer's instructions, the lawyer was instructed to refrain from using the materials until "a definitive resolution of the proper disposition of the materials" was obtained from a court.^{Ftn 5} In this instance, the commission goes one step beyond the 1994 opinion in limiting the receiving lawyer's obligation. Lawyers should be aware of this recommendation as it regards inadvertent disclosure of documents and they should take all necessary steps to improve office procedures to prevent inadvertent disclosure from occurring.

CONCLUSION

A thorough review of the rules that govern the legal profession has occurred only once in the past 30 years since the passage of the Model Code of Professional Responsibility in 1969. Although the review of the rules currently being undertaken by the ABA's Ethics 2000 Commission is comprehensive, the review is being undertaken within the framework of the Model Rules of Professional Conduct drafted 16 years ago. By the time the commission's work is finished, a review of all of the current rules and some suggested new provisions will have occurred. The updated work plan of the commission suggests a very ambitious schedule for calendar year 2000, with the aim of circulating an overall preliminary report in October of 2000.

Locally, the MSBA's Rules of Professional Conduct Committee and its Ethics 2000 subcommittee have been busy monitoring all of the proposed changes and regularly commenting on behalf of the state bar. The flow of information emanating from the ABA's Ethics 2000 Commission has been, and continues to be, prodigious. Although review of that material is being handled by members of the committee, all lawyers in Minnesota should be aware of possible changes in the regulation of the profession in the future. Several years from now, when specific changes are being proposed to the Minnesota Rules of Professional Conduct based on the ABA's recommendations, the legal community of Minnesota should be conversant with the recommendations and should be prepared to respond.

ABA Proposed Changes to the Ethics Rules

PROPOSED RULE 1.7:

Concurrent Conflict Of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's duties to another client or to a former client or by the lawyer's own interests or duties to a third person.

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a

client if each affected client gives informed consent in writing and

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation.

PROPOSED RULE 1.5:

Fees

(a) A ~~lawyer's fee~~ lawyer shall ~~be reasonable~~ not make an agreement for, charge, or collect an unreasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the degree of risk assumed by the lawyer when the fee is fixed or contingent on the outcome of a matter.

(b) When the lawyer has not regularly represented the client, the scope of the representation, the basis or rate of the fee and disbursements for which the client will be responsible shall be communicated to the client, ~~preferably~~ in writing, before or within a reasonable time after commencing the representation. Any changes in these terms of the engagement shall also be communicated in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client ~~is advised of and does not object~~ gives informed consent in writing to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

PROPOSED RULE 1.15:

Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which ~~both two or more persons (one of whom may be the lawyer and another person)~~ both two or more persons claim interests, the property shall be kept separate by the lawyer until ~~there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the any dispute about the interests is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.~~

PROPOSED RULE 1.18:

Duties to a Prospective Client

(a) A person who consults with a lawyer concerning the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has consulted with a prospective client

shall not use or reveal information learned in the consultation, except as Rules 1.6 and 1.9 would permit or require with respect to information of a client or former client.

(c) Neither a lawyer subject to paragraph (b) nor a lawyer to whom disqualification is imputed under Rule 1.10 shall represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d).

(d) Representation is permissible if either:

(1) both the affected client and the prospective client have given informed consent in writing to the representation, or

(2) the lawyer who received the confidential information took reasonable steps to avoid exposure to more information than was necessary to determine whether to represent the prospective client and that lawyer is screened as provided in Rule 1.11.

PROPOSED RULE 4.4:

Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) In communicating with third persons, a lawyer shall not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of another.

(c) A lawyer who receives a document and has reason to believe that the document was inadvertently sent shall promptly notify the sender.

NOTES

¹ Steven C. Krane, "Ethics 2000: What Might Have Been," *The Professional Lawyer*, Spring 1999, p. 2.

² Ibid.

³ See also, Kevin McMunigal, "Defining Conflict of Interest: Substantial and Unjustifiable Risks," *The Professional Lawyer*, Spring 1999, p. 26.

⁴ ABA Formal Opinion 92-368: "Inadvertent Disclosure of Confidential Materials," November 10, 1992.

⁵ ABA Formal Opinion 94-382: "Unsolicited Receipt of Privileged or Confidential Materials," July 5, 1994.