

## Ethics 2001: The Rules Take Shape

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Eighteen months ago, I outlined some of the proposed changes to the Rules of Professional Conduct.<sup>[Ftn 1](#)</sup> In November of 2000, the ABA's Ethics 2000 Commission released a "Report on the Evaluation of the Model Rules of Professional Conduct."<sup>[Ftn 2](#)</sup> This report was a culmination of 39 days of meetings, extensive commentary submitted by interested observers (including the MSBA's Rules of Professional Conduct Committee) and eight public hearings over a three and one-half year period. The report, with some revisions announced in June of 2001, will now be reviewed by the House of Delegates of the ABA in August at the annual meeting. In this article, and in next month's column, I will take a close look at how the proposed changes may impact the practice of law in our state.

### 30 YEARS OF FORMAL REGULATION

In February of this year, the Lawyers Board and the Office of Lawyers Professional Responsibility entered the fourth decade of their existence. Beginning in 1971, the office and board were established to monitor compliance with the then newly enacted Code of Professional Responsibility. This code, with its canons, disciplinary rules and ethical considerations, was replaced in 1985 by the Rules of Professional Conduct which remain the framework for the regulation of the legal profession in Minnesota and 41 other states. By 1997, 30 amendments had been made to the ABA Model Rules, leading to a less than cohesive approach to the application of the rules. Further, this past year the American Law Institute finally finished the Restatement Third, The Law Governing Lawyers. The provisions and commentary of the Restatement aided the commission in its deliberations with its scholarly approach along with its analysis of case law on professional responsibility topics.

### THE ABA CATCHES UP

In a number of areas, the ABA is proposing changes that, although deemed controversial by a number of commentators, are already incorporated within the Minnesota Rules of Professional Conduct.

- **Revealing Client Confidences (1.6).** The ABA is proposing to add several provisions relating to the permissive disclosure of client confidences or secrets. These changes include allowing a lawyer to reveal information relating to the representation of a client "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another" and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud," both "in furtherance of which the client has used" the lawyer's services.

While Minnesota has long provided for permissive disclosure in this area, Minnesota's version of 1.6 does not single-out "financial interests or property of another" as the ABA proposes. Eight jurisdictions

currently permit disclosure related to substantial injury to financial interests or property of another; 25 other jurisdictions -- including Minnesota -- permit a lawyer to reveal the intention of a client to commit any crime. The ABA has always been much more restrictive in this area, partially due to the influence of a number of commentators who feel that lawyers should not be allowed to reveal such information.<sup>Ftn 3</sup> This is one of those areas in the practice of law that results in a disconnect between a nonlawyer's view of "morality" and a lawyer's belief in the paramount importance of protected communications between a client and a lawyer. At the very least, nonlawyers would presumably argue in favor of permissive (if not mandatory) disclosure of future criminal acts, as Minnesota so provides. However, some view disclosure as a betrayal, resulting in a lawyer becoming a witness or informant against the client, the possibility of which could be destructive to the lawyer-client relationship. Perhaps so, but Minnesota has long-felt, rightfully, that lawyers must be allowed to reveal this information without fear of professional discipline.

- **Sexual Involvement With Clients (1.8).** Some readers will remember that in the early 1990s, the lawyers in Minnesota debated, and ultimately approved, an amendment to 1.8 that would prohibit sexual relations between a lawyer and client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. The ABA is now proposing similar language although the current proposal prohibits sexual relations with a "client" while Minnesota's version refers to a "current client." If the absence of the word "current" in the ABA version is intended to extend the prohibition to "former" clients, then Minnesota's version is less restrictive. Both versions prohibit the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client. This provision will undoubtedly result in debate among ABA delegates, as it did among MSBA members in Minnesota years ago.
- **Business With Clients (1.8).** In recent months, there has been considerably less media reporting on lawyers becoming wealthy as a result of taking partial ownership in businesses to which they have contributed legal services. This is presumably a result of the crashing and burning of so many "dot coms." Several years ago Minnesota amended 1.8(a) to place a greater burden on an attorney who enters into a business transaction with a client.<sup>Ftn 4</sup> The ABA is now recommending similar changes to the Model Rule. These changes include advising the client in writing "of the desirability of seeking" independent legal counsel and requiring the client to give informed consent to essential terms of the transaction and the lawyer's role in the transaction. While the ABA's proposal requires that the client must sign this informed consent in writing, Minnesota's provision provides that the client must consent to the transaction "in a document separate" from the transaction documents that serves as disclosure of the lawyer's conflicting interests and the resulting "reasonably foreseeable risks" that might result. The ABA's proposal is a step in the right direction to ensure that business clients, particularly unsophisticated clients, are not exploited by legal counsel. Minnesota's current provision is preferable in that it requires the lawyer to make clear whether the lawyer is representing the client's interests.
- **Imputed Conflicts (1.10/1.11).** In this day and age of mobility among lawyers, it is not unusual for a lawyer to leave one private firm and join another or leave a government position and join a private law firm. For many years, the vast majority of states have provided that lawyers in a law firm share conflicts of interest. The conflict is "imputed" from one lawyer to another, inhibiting lateral hires. Understandably, law firms are reluctant to hire an attorney if that attorney conflicts them out of a number of cases or prevents them from accepting representation in others. The interests involved are clear: they include a former client's interest in maintaining confidentiality;

a current client's interest in hiring counsel of his choice; and the interest of lawyers and law firms in mobility and hiring.

As a result, two years ago Minnesota amended 1.10(b) to provide for "screening" of lawyers in certain limited situations, thus avoiding imputed conflicts.<sup>Ftn 5</sup> Now, the ABA is recommending similar changes. The ABA's original recommendation was somewhat more restrictive in two areas. First, the proposed 1.10(c) would not have allowed screening if the matter involved "a proceeding before a tribunal in which the personally disqualified lawyer has a substantial role." One might well argue that allowing screening in a transactional setting but not in a proceeding before a tribunal elevates form over substance. In any case, in June of 2001, the commission dropped this recommendation because it may have resulted in "extensive litigation on whether a lawyer's involvement constituted a 'substantial' role." In addition to screening of any participation in the matter, the ABA provides that the lawyer involved not be apportioned any part of the fee resulting from the case. Recently, a son of one of the U.S. Supreme Court Justices whose firm appeared before the Court was screened in this fashion and not apportioned any part of the fee earned by the firm.

Rule 1.11 governs the situation where a lawyer has joined a private firm after having represented the government and the situation where the lawyer represents the government after having served private clients. The amended rule now incorporates the concern of protection of former client confidences as well as the possible abuse of a public position. Both Minnesota's current provision and the ABA's proposed provision provide for screening in these instances. When a former government lawyer represents a private client on a matter in which the lawyer participated "personally and substantially," Minnesota requires that a written notice be given promptly to the appropriate government agency. The ABA recommended changes would require informed consent "confirmed in writing" to the representation by the government agency while Minnesota's provision does not currently require this. Both Minnesota's provision and ABA's provision generally prohibit a government lawyer from participating in matters in which she participated in personally and substantially in private practice. The ABA again recommends that the appropriate government agency be allowed to give its informed consent. Minnesota does not currently provide this remedy for this type of conflict.

#### OTHER IMPORTANT PROPOSED CHANGES.

The same lawyers who tell their clients they should get everything in writing are often the worse offenders when it comes to doing so themselves. The ABA Ethics 2000 Commission is recommending changes to the Model Rules of Professional Conduct that, if adopted by the states, would provide an incentive for lawyers to heed their own advice.<sup>Ftn 6</sup>

- **Conflicts (1.7, 1.9, 1.18).** Conflict of interest doctrine relates not only to discipline, but to the issues of disqualification and civil damages. One of the more significant changes included in a number of the proposed rule provisions is a requirement of "written informed consent." In addition, client signatures are now required under amendments to several rule provisions.

"Written informed consent" is now required to waive a conflict. The writing can be a document executed by the client or the record of an oral consent that the lawyer promptly transmits to the client. This transmission can take a number of forms, including email. The commission recommends that in most cases the lawyer should still speak with the client to explain the risks and advantages of representation in the conflicted situation, and discuss reasonably available alternatives while affording the client a reasonable

opportunity to consider the risks and alternatives involved. The commission emphasizes that written informed consent is an addition to the discussion and is meant to impress upon clients "the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing." Consequently, the writing should include "disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as the client's agreement to the representation despite such risks."

- **\*Fees (1.5).** The ABA is recommending that Rule 1.5 be amended to require that the scope of the representation, the fee, and expenses be communicated in writing. Prior to this change, the rule provided that it was "preferable" that the matter be in writing. Now it will be required. Further, any changes in the basis or rate of the fee or expenses shall also be communicated in writing. The addition of the requirement that the scope of representation be in writing may well serve to protect the attorney as well as inform the client.

The rule also provides that fee-splitting between lawyers who are not in the same firm may be made only if the client is advised of and agrees in writing to the share each lawyer will receive. The balance of this provision will remain similar to the Minnesota provision that provides for fee-splitting only when the fee is reasonable and the fee 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. Under the current ABA version, it has been enough to advise the client of the participation of all the lawyers involved and ensure that the client did not object to their participation. Minnesota has also required that clients be advised of the share each lawyer was to receive but has not required that the client agree to the splitting of the fee. Until June of 2001, the ABA was proposing a more radical change to this provision allowing fee-splitting without any division of work or joint responsibility if the client agreed in writing. Apparently the commission thought better of it and returned, for the most part, to the current arrangement, adding only the new requirement that the client agree in writing to the fee share each lawyer receives.

## CONCLUSION

The proposals of the Ethics 2000 Commission on revealing client confidences, sexual involvement with clients, business with clients, and imputed conflicts resulting from lateral hires are, for the most part, already codified in the Minnesota version of the Rules of Professional Conduct. The proposed changes to the rules governing conflicts and fees are a slight departure from current Minnesota requirements. Next month, I will examine many other proposed changes ranging from a new rule for prospective clients to changes in a lawyer's obligations to the tribunal.

## NOTES

<sup>1</sup> Cleary, "Ethics 2000: A Preview," *Bench & Bar*, February 2000, p. 15.

<sup>2</sup> See "Proposed Changes to the Model Rules of Professional Conduct," *Bench & Bar*, December 2000, p. 16.

<sup>3</sup> See Mark Hansen, "The New Rule Models," *ABA Journal*, January 2001, p. 50, stating "opponents of the proposed rule fear that it will place lawyers in the position of being whistle-blowers against their clients."

<sup>4</sup> See Cleary, "When the Lawyer Takes a Stake," *Bench & Bar*, May/June 2000, p. 26.

<sup>5</sup> See *Martin A. Cole, "Screening conflicted lawyers under Rule 1.10," Minnesota Lawyer, 5/28/01, p. 3.*

<sup>6</sup> *Arthur Garwin, "Put It in Writing," ABA Journal, February 2001, p. 64.*