

## OPINIONATED

By

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At its October meeting, the Lawyers Professional Responsibility Board adopted Opinion 21: A Lawyer's Duty to Consult with a Client about the Lawyer's Own Malpractice.<sup>Ftn 1</sup> This is the second opinion adopted by the Lawyers Board since the reconstitution of its opinion committee in 2008. The process of posting a proposed opinion for public comment, established by the board, assures that all voices are heard before an opinion is adopted. In this particular instance, several changes were incorporated based upon comments (both favorable and critical) received from interested attorneys in response to the posting. The board also adopted an amendment to its summary dismissal guidelines, directing that the Director's Office will not customarily investigate allegations that an attorney failed to disclose her own malpractice absent court findings that such malpractice occurred or in some limited, patently egregious situations.

Minnesota is not the only state or entity that issues opinions on topics of professional responsibility. Indeed, many states issue formal and informal opinions on a far more regular basis than does Minnesota. The American Bar Association also issues periodic formal opinions. A review of some of these opinions issued in the past two years, or since Minnesota's opinion committee again began considering issues, shows that the two Minnesota opinions issued fit fairly well into the range of topics addressed by others.

### Advertising Opinions

Minnesota's Opinion 20<sup>Ftn 2</sup> dealt principally with the use of the term "& Associates" in a law firm's name when there is in fact only one attorney in that firm. The opinion was an interpretation of Rules 7.1 and 7.5, Minnesota Rules of Professional Conduct (MRPC), which govern all communications about law firm names and a lawyer's services. Thus, it falls into the generic category of lawyer advertising. As has been noted previously, many states attempt to regulate advertising to a far greater degree than does Minnesota.<sup>Ftn 3</sup>

It should come as no surprise therefore, that lawyer advertising is among the most common topics upon which other states have issued opinions. For example, several states, most recently Alaska,[Ftn 4](#) have issued opinions dealing with an attorney's ability to publicize that he has been declared a "Super Lawyer" by some local publication. Most such opinions appear to be intended to reassure lawyers that publicizing one's "Super Lawyer" designation remains acceptable in their state, despite New Jersey's controversially having declared otherwise.[Ftn 5](#) Closer to home, North Dakota also issued an opinion on this issue, allowing the designation subject to certain explanatory disclaimers.[Ftn 6](#) Minnesota has elected more informal means, including press coverage of the issue and mention in articles,[Ftn 7](#) to indicate that use of the designation is acceptable. In addition to addressing the "Super Lawyer" debate, states recently have issued opinions related to advertising and law-firm designations involving the use of testimonials, celebrity endorsements, or the term "Of Counsel" on the firm's letterhead.

### **MetaData, Credit Cards, & Facebook**

Perhaps the next most-addressed topic for opinions over the past two years has been "metadata mining": whether it is appropriate for a lawyer to access hidden electronic information contained in a document that has been sent to the lawyer via email. States are closely divided on this issue, which perhaps explains the volume of opinions issued, as lawyers genuinely may be unsure of how their state's disciplinary agency views the ethical obligation. Is this an issue of the sender's handling of confidential information or of the recipient's action in bringing to light information that was sent inadvertently? States have reached differing answers, although the trend clearly seems to be swinging towards allowing recipient attorneys to look for metadata without presuming that it was inadvertently included.[Ftn 8](#) The Pennsylvania Bar Association reached that conclusion by an interesting process. After initially opining that it was up to each lawyer's individual judgment whether to "mine" for metadata, the Pennsylvania Bar reconsidered. Perhaps realizing that such a decision implicitly allowed the activity, the bar's ethics committee revised its opinion expressly to allow Pennsylvania attorneys to search for metadata.[Ftn 9](#) Minnesota's Lawyers Board opinion committee has expressed some interest in investigating this issue in the future.

Another topic that has generated multiple ethics opinions in the past two years is the use of credit cards as a means of paying advance fees. Here too, states have reached differing conclusions on whether attorneys may accept credit cards in payment of fees that will be placed into a lawyer's trust account, and also on the safeguards necessary to ensure that merchant fees and charge-backs do not reduce a client's trust balance.[Ftn 10](#) This is an issue that the Director's Office addressed in an article, stating that, "while the

use of credit cards for payment of funds that are to be held in trust is discouraged, it can be done.”Ftn 11

A topic related to the ever-expanding universe of modern technologies is whether attorneys may use misleading means to gain access to someone’s social networking website, such as Facebook. Most authorities (but again not all) have found no investigative exception exists to the prohibitions on deception, false statements, or responsibility for the acts of agents or staff when gathering information on adverse parties or witnesses from internet sources.Ftn 12 Thus, it would be improper to have a staff person in the lawyer’s office falsely claim to be a “friend” and ask permission to access an adverse party’s Facebook page, solely in the hope of finding information that may be used for impeachment. Indeed, a Minnesota attorney received an admonition this past year for just such conduct.

### **Weighing Opinions**

What weight should be given to these opinions? Well, in all instances, opinions are intended as guidance on how to prospectively shape conduct. Advisory opinions offered by the Director’s Office play a similar role. Opinions are interpretations of rules, much like the comments to the ethics rules in Minnesota. Although neither American Bar Association formal opinions nor other states’ ethics opinions are binding in Minnesota, they are entitled to considerable weight and, in the absence of clear authority in Minnesota, may be useful in resolving an ethical issue. As noted, however, conflicting opinions often exist.

Opinions issued by Minnesota’s Lawyers Board represent a position that the Director’s Office and the board itself will be expected to follow in interpreting and enforcing a particular rule. They are not independently enforceable, however. The Minnesota Supreme Court retains exclusive rule-making and rule-interpreting authority.Ftn 13 Nevertheless, the level of interest and debate that the two recent Lawyers Board opinions generated has brought renewed vigor and attention to the professional responsibility field, and reflects favorably on how seriously most Minnesota attorneys take their ethical obligations.

### **Notes**

1 A complete copy of the opinion and accompanying comment can be found on the website of the Lawyers Board and the Office of Lawyers Professional Responsibility at <http://www.mncourts.gov/lprb/Opinion21.pdf>. The final opinion as adopted is slightly different from the version that earlier had been posted for comment.

2 <http://www.mncourts.gov/lprb/Opinion20.pdf>.

- 3 See Cole, "Advertising: The Song That Never Ends," 65 *Bench & Bar of Minnesota* 5 (May/June 2008), p. 16.
- 4 Alaska Bar Association Ethics Committee, Opinion 2009-2, May 5, 2009.
- 5 The opinion was vacated by the New Jersey Supreme Court. *In re Opinion 39 of Comm. on Attorney Advertising*, 961 A.2d 722 (N.J. 2006).
- 6 North Dakota Ethics Op. 08-02 (2008).
- 7 See Cole, "What We Don't Do," 63 *Bench & Bar of Minnesota* 10 (November 2006), p. 11.
- 8 If the attorney somehow knows the metadata was inadvertently included, then notification to the sender would be required by Rule 4.4(b), MRPC.
- 9 Pennsylvania Bar Assn. Committee on Legal Ethics and Professional Responsibility, Formal Op. 2009-100 and Formal Op. 2007-500.
- 10 See, e.g., Michigan State Bar Committee on Professional and Judicial Ethics, Inf. Op. RI-344, April 25, 2008.
- 11 Burns, "Clients & Credit Cards," *Minnesota Lawyer* (Dec. 3, 2007). All articles written by attorneys in the Director's Office are available through the office's website. *Bench & Bar* columns are also archived on the MSBA's website.
- 12 See Philadelphia Bar Assn. Professional Guidance Committee Op. 2009-02, March 2009.
- 13 *In re Admonition Issued in Panel File 99-42*, 621 N.W.2d 240 (Minn. 2001).