

POTPOURRI . . .

By

William J. Wernz, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (January 1992)

“Why don’t you write a *Bench & Bar* article about that?” The answer often is, “It’s a good topic, but wouldn’t fill a whole column.” Here are the odds and ends of some recent developments in legal ethics, stitched together as an article.

Board Changes. The service of Charles Kennedy as chair of the Lawyers Board *does* warrant a whole column, but this notice of his resignation from the board will have to do. After nearly 10 years on the board, including three as chair, Charlie’s regular commutes from Wadena will give way to travels for his busy litigation practice. Charlie was the first outstate chair of this board. The generosity of his service to the board, the profession, and the public should be noted and applauded. His calm and practical application of high professional standards to difficult lawyering situations will be missed, as well as his unfailing congeniality. The tradition of strong leadership for the board will be continued with new chair Greg Bistram. Greg began his lawyering with the St. Paul City Attorney, was later a partner at Moore, Costello & Hart, and last year became assistant general counsel at Mortenson & Co. Greg has served for five years on the Lawyers Board, most recently as vice chair, and was previously vice chair of the Ramsey ethics committee. The terms of St. Paul lawyer Michael Fetsch and Minneapolis lawyer Rollin Whitcomb have expired. Their replacements are Minneapolis lawyer Clinton Collins Jr. and Emilie Johnson.

Court Reporter Fees. In *Arden v. Anderson*, 473 N.W.2d 924 (Minn. App. 1991), the court held that an attorney who certifies that satisfactory financial arrangements have been made for a transcript “is obligated as an officer of the court to ensure that the reporter is paid for the transcript, independent of counsel’s right to recourse against his client.” Since the repeal in 1983 of Lawyers Board Opinion 7, the Director’s Office has not routinely investigated complaints that lawyers have refused to pay for services in legal matters of court reporters, accountants, doctors, etc. However, in cases of repeated such complaints, failure to honor judgments or other aggravating circumstances, discipline has been imposed. The appeals court’s *civil* holding, explicitly based on an attorney’s obligation as an officer of the court and on the need to avoid prejudice to the administration of justice, supports the imposition of discipline in appropriate cases.

Contacting Former Employees. Rule 4.2, R. Prof. Con., forbids communication on the merits with a represented party. When an entity is represented, and communication with certain of its employees is thereby prohibited, may these employees be contacted if and when their employment with the entity ceases? ABA Formal Opinion 91-359 answers this question affirmatively, and the Director’s Office has decided to follow this opinion. (See “*Conducting an Ethical Investigation*,” also in this issue. Ed.)

The Smell Test. Alabama attorney Robert Norris had a wreath delivered to a funeral home for the family of a recently deceased infant. Norris attached a brochure describing his firm, and a letter of condolence, which concluded with an offer to be of assistance. The Alabama Supreme Court suspended Norris for two years, stating “Norris’s actions were clearly conduct that was not specifically permitted by the rules, but were actions that a literal reading of the rule would not prohibit.” Norris’s challenge to the rule as unconstitutionally vague was rejected because his conduct showed “an indifference to the purpose

and spirit of the rule.” The U.S. Supreme Court denied a petition for certiorari. *Norris v. Alabama State Bar*, 582 So.2d 1034 (Ala. 1991), *cert. den.* 112 S.Ct. 417 (1991).

Minnesota has no catch-all rule like Alabama’s. Because no rule forbids a Minnesota attorney to exercise the freedom to be a fool, and to trash a client, no discipline resulted when a Minnesota attorney concluded a letter over a petty billing with: “I expect you to be broke in the very near future You are cursed. You will fail and continue to fail. I will look for your names in the bankruptcy listings.”

Just the Fax. What are your clients’ procedures for handling faxed communications? Questions of privilege, professional conduct, and good practice can turn on the fax arrangements of the client or other “faxee.” Consider, for example, an attorney who faxes a settlement proposal to an individual client’s workplace, where many employees have access to the fax machine, and the client, as it happens, is out of the office for several days. The client had not expected to share details of her marriage dissolution with her coworkers. Depending on the circumstances, it could be found that the lawyer with sloppy fax procedures had revealed confidential client information.

No Sex Please, We’re Californian. The California Supreme Court is considering whether to adopt a rule of professional conduct which would forbid attorney-client sexual relations in certain circumstances, including when the attorney employs “undue influence.” An accused attorney would have to overcome a presumption that a client sexual relationship found to have occurred would violate the rule.

Premium Billing. Rule 1.5(c) requires that contingent fee agreements be in writing. Is an oral agreement for a fee that is based both on hours worked and results obtained “contingent”? Not in a majority of courts, according to a recent holding. *Eckell v. Wilson*, 7 ABA/BNA Law. Man. Prof. Conduct 336 (Pa. S. Ct., October 4, 1991).

Complaints Decline. In 1991, 1,357 complaints against Minnesota attorneys were received, fewer than in 1990 (1,384) or 1989 (1,365). After an alarming surge of large misappropriation cases in 1990 and early 1991, only one significant misappropriation surfaced in the second half of 1991. Similarly, four new trusteeships for lawyers who abandoned practice were required in late 1990 and early 1991, but none in the last 10 months of 1991.

Specialist Advertising Admonitions. Rule 7.4(c), R. Prof. Con. forbids lawyer “specialist” advertising unless the lawyer is so certified by an entity approved by the State Board of Legal Certification. The board has referred a number of yellow pages specialist ads to the Lawyers Board for investigation. In 1991 11 admonitions were issued for improper “specialist” ads.

How much did Mark Sampson cost us? The Client Security Board paid \$404,681.02 to 20 client victims. The director’s office and volunteer trustees spent hundreds of hours attempting to return nearly 1,500 files to abandoned clients. Sampson would have cost all of us much more if we had not spent the time and money to pick up after him.