

By MARTIN COLE

## The Ethics Rules: Lost and Found

Much has already been written introducing lawyers to the amendments to the Minnesota Rules of Professional Conduct (MRPC) that took effect last October 1, 2005. Attorneys in the Director's Office have been writing articles and making Continuing Legal Education seminar presentations regularly since even before the new rules were adopted. Now, after ten months, the new rules can hardly be called "new" for much longer. Most of the emphasis has been on new rules and additions to existing rules. Far less has been written, however, on rules that were eliminated or on those provisions of remaining rules that have been lost.

### RULES GONE MISSING

A child who manages to lose a scarf or glove for the nth time is typically told to look in the school's lost and found. When rules of professional conduct are discarded, perhaps they too should go to an ethics rules lost and found. What would we find in such a lost and found following October 2005?

If history is a guide, some practitioners may take several years to realize that certain rules no longer exist. For example, some attorneys who were licensed before 1985 still inquire about the status of the former disciplinary rule prohibiting an attorney from threatening criminal prosecution solely to gain an advantage in a civil matter.

Often these attorneys are absolutely certain the prohibition exists yet they can't seem to locate it within the Rules of Professional Conduct. That is so, of course, because the specific prohibition that existed in the former Code of Professional Responsibility was not continued with the adoption of the current Rules.<sup>1</sup>



**MARTIN COLE**  
is director of the Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 21 years.

Now, following the October amendments to the Rules of Professional Conduct, which recently deleted or altered rules will some attorneys stubbornly continue to believe remain as they existed before the recent changes? And what of the former Opinions of the Lawyers Professional Responsibility Board: where have they gone?

### RELATIVE OPPOSITION

One recently eliminated rule that may be a candidate for calls wondering where it went could be former Rule 1.8(i), MRPC, which dealt with close family members appearing for clients on opposing sides of a matter. One of the classic lawyer movies dealt with this unique issue. "Adam's Rib" is the 1949 movie comedy starring Katherine Hepburn and Spencer Tracy as married attorneys who end up on opposite sides of the criminal trial of a woman accused of shooting her husband and his lover; Tracy is the prosecutor and Hepburn the defense counsel. This plot twist made for great fun, and the movie certainly was ahead of its time in dealing with women as attorneys, but could such a situation in fact have occurred? Although New York operated under the then Canons of Ethics, which contained no specific prohibition on such representations, if the movie-makers had thought about it, it would have been highly unlikely that consent ever could have been obtained to such representation in such a criminal prosecution.

On the question of whether in Minnesota spouses or other close relatives could appear on both sides of a matter, such as occurred in "Adam's Rib," for approximately 20 years the answer clearly had been "No." That's because Rule 1.8(i) prohibited attorneys who were related as parent, child, sibling or spouse from representing clients whose interests were directly adverse, unless both clients consented after consultation regarding the relationship. Such disqualification was considered a personal conflict and not imputed to other lawyers in a firm. As of October 1, 2005, however, Rule 1.8(i) no longer exists.

Has the elimination of Rule 1.8(i) now created the possibility for spouses or other close relatives to represent adverse clients in the same matter? Perhaps, but probably not. The express prohibition against spouses appearing on opposite sides of a matter has been replaced by Comment [11] to Rule 1.7, which states that when lawyers representing different clients in the same matter are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with loyalty and professional judgment. The Comment then recommends that each client should be advised of the relationship and the possible implications before the lawyer undertakes the representation. Only if both clients consent should the two related lawyers appear in the same matter. The disqualification remains personal and is not imputed

### Notes

<sup>1</sup> For information about what did happen to this rule and its current viability, see Jorgensen, "When lawyers threaten criminal prosecution in a civil case," *Minnesota Lawyer*, 04/24/98. Copies of all articles written by attorneys in the Director's Office are available on the Office's website: [www.courts.state.mn.us/lprb](http://www.courts.state.mn.us/lprb).

<sup>2</sup> In its June 17, 2005, order promulgating the new amendments, the Court stated "[t]hat the inclusion of comments is made for convenience and does not reflect court approval of the comments made therein."

<sup>3</sup> In 2001, the Minnesota Supreme Court ruled that Lawyers Board Opinions could not be an independent basis for discipline. *In re Admonition Issued in Panel File No. 99-42*, 621 N.W.2d 240 (Minn. 2001).

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other members of a lawyer's firm. Thus an express prohibition has been replaced by a recommendation, contained in a Comment that the Supreme Court has not formally adopted.

This change does not prevent the Director's Office from interpreting Rule 1.7 as preventing spouses from appearing on both sides in many circumstances, especially in a criminal prosecution. Thus, even with the elimination of Rule 1.8(i), the Comment to Rule 1.7 clearly indicates that opposing spouses in a criminal matter, such as in the Tracy-Hepburn movie, still would be improper. Consent should not even be sought in such an unlikely situation. In contrast, however, under the new Comment, sibling lawyers handling opposite sides in a civil matter is far more plausible than before.

**OTHERS ELIMINATED**

Other Rules eliminated in the October amendments include specific portions of Rules 1.5(e) — fee splitting, 1.10 — imputed conflicts of interest, 2.2 — lawyer as intermediary (eliminated altogether), 4.2 — communications with represented party, and 7.1 and 7.2 — lawyer advertising requirements (some of these changes also involved moving portions to a Comment).

One lost and found example from this group is the former requirement previously contained in Rule 7.2(f) that the word "Advertisement" appear at the top of all written communications offering representation to individuals known to be in need of specific legal services. This provision won't be found there any more. Instead, as part of Rule 7.3, the words "Advertising Material" now must appear on any envelope and within any written, recorded or electronic communications to such individuals.

Along with the additions to and subtractions from the Rules, the Opinions of the Lawyers Professional Responsibility Board may be considered to be part of the lost and found as well.

Several former Board Opinions have been incorporated into portions of the Rules or as part of a Comment to a Rule. Other Opinions have been repealed while a few remain in effect. A complete listing of the status of all Lawyers Board Opinions is set out in the attached sidebar.

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some true ethical norms do not, and should not, ever change: it is wrong to lie, steal or commit acts of fraud under any comprehensive set of normative standards. Other types of rules of conduct, however, have changed over time, reflecting changes in societal values, changes in the way law is practiced, or occasionally in response to constitutional challenges. Some rules have been "lost" in this process while others merely have "found" a new home. ▲

**STATUS OF LAWYERS BOARD OPINIONS:**

- Opinion No. 1:** Legal Force and Effect: amended and still in effect.
- Opinion No. 2:** Defense of Criminal Cases by a County Attorney: repealed. Incorporated into Comment 1 of Rule 1.11, MRPC.
- Opinion No. 3:** Practice of Law by Part-time Judges: repealed.
- Opinion No. 4:** Withdrawal for Nonpayment of Fees: repealed.
- Opinion No. 5:** Failure to Comply with Fee Arbitration: repealed. Incorporated into Rule 8.4(i), MRPC.
- Opinion No. 6:** Defense of Criminal Cases by Municipal Attorneys, repealed. Incorporated into Comment 1 of Rule 1.11, MRPC.
- Opinion No. 7:** Professionally Incurred Indebtedness: repealed.
- Opinion No. 8:** Guidelines for Services by Nonlawyers: still in effect.
- Opinion No. 9:** Maintenance of Books and Records: repealed. Incorporated through Rule 1.15(i), as Appendix 1 to the MRPC.
- Opinion No. 10:** Debt Collection Procedures: repealed.
- Opinion No. 11:** Attorneys' Liens: repealed. Incorporated into Rule 1.16(g), MRPC.
- Opinion No. 12:** Trust Account Signatories: repealed. Incorporated into Rule 1.15(j), MRPC.
- Opinion No. 13:** Copying Costs of Client Files, Papers and Property: still in effect. Also incorporated into Rules 1.16(e) and (f), MRPC.
- Opinion No. 14:** Attorney Liens on Homesteads: repealed.
- Opinion No. 15:** Advance Fee Payments and Nonrefundable Retainers: repealed. Incorporated into Rules 1.5(b) and (c), MRPC.
- Opinion No. 16:** Interest on Attorneys Fees: repealed.
- Opinion No. 17:** Accepting Gratuities from Court Reporting and Other Services: still in effect.
- Opinion No. 18:** Secret Recording of Conversations: repealed.
- Opinion No. 19:** Using Technology to Communicate Confidential Information: still in effect.