By Martin Cole

Three Rules of Professional Conduct

There are Rules of Professional Conduct with which an active attorney crosses paths almost every day. Whether the attorney stops to think about it or not, the rules on competence, diligence, communication, fees, confidentiality and others are an integral part of a lawyer's daily existence; if not, then they should be.

Then there are some other rules with which an attorney comes into contact far less frequently, if ever. One reason is that some of the Rules apply only to lawyers in certain specific situations; if the situation does not apply to a particular lawyer, that lawyer may never come into contact with that rule. That does not mean, however, that lawyers need never be aware of those rules. Knowledge of the Rules is expected, plus one never knows when the situation will arise. As a course of study, periodically select two or three rules with which you are not very familiar and just read them and their accompanying comments; who knows where it will lead you?

Three rules that might fit such a course of study are Rules 3.7 (Lawyer as Witness), 3.8 (Special Responsibilities of a Prosecutor) and 3.9 (Advocate in Nonadjudicative Proceedings), Minnesota Rules of Professional Conduct (MRPC). Although they are presented serially in the MRPC, each rule is applicable to a different set of situations.

Lawyer as Witness

Rule 3.7 states that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness, subject to exceptions. Even before the rule existed, it was considered improper for a lawyer to act as an advocate in litigation in which the lawyer's testimony was likely to be necessary, with limited exceptions allowed for situations where the testimony was uncontested, related only to the issue of the lawyer's fees, or where substantial hardship to the client would occur.[1] The rule contains the same exceptions.

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Nevertheless, some nuances of the rule occasionally are misunderstood. One is that the rule is limited in its application to "at a trial." Virtually all authorities agree that even a lawyer who knows she is likely to be a necessary witness at trial is not prohibited from handling that matter throughout investigation, discovery and settlement negotiations.[2] Since a significant number of civil matters never go to trial at all, the impact of Rule 3.7 is frequently negated.

Prior to being amended in 1987, when subsection (b) was added, what made Rule 3.7 particularly onerous was the fact that it applied vicariously to all members of the conflicted lawyer's firm. Thus, if a lawyer was a likely material witness in a case, her entire firm was prevented from handling that case. Many older lawyers remain unaware that the rule no longer contains this vicarious disqualification requirement. Now the rule permits a lawyer to "act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness" unless precluded by a separate conflict rule.

Prosecutor Responsibilities

Rule 3.8 sets out a list of special ethical responsibilities for a prosecutor in a criminal case. The list includes that a prosecutor shall: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; make reasonable efforts to ensure that an accused has been advised of his or her right to counsel and the process to obtain one; not seek to obtain a waiver of significant legal rights from an unrepresented accused; make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of an accused or mitigates an offense (Rule 3.8(d), to be discussed additionally below).

As can be discerned, many of the special obligations imposed on a prosecutor dovetail with significant constitutional protections afforded an accused in a criminal proceeding, and also with obligations contained in the Rules of Criminal Procedure. As a result of this substantial overlap, the Director's Office rarely is involved in investigating complaints based on Rule 3.8. Most such allegations are properly brought to the attention of a trial court in the first instance, or as part of a post-conviction proceeding alleging prosecutorial misconduct. Unless a court makes a finding of misconduct that matches a section of Rule 3.8, the disciplinary system is not likely to investigate such allegations or impose discipline.

One area of recent debate as to a prosecutor's ethical duties was fueled by the ABA in 2009 when it issued a formal opinion in part discussing the duty to disclose evidence or information favorable to the defense.[3] The ABA clarified that a prosecutor's ethical obligation under Rule 3.8(d) is broader than the well-known constitutional obligation to disclose material exculpatory information established by the United States Supreme Court in *Brady v. Maryland*.[4] Although ABA Opinions are not binding on Minnesota courts or the disciplinary system, it seems that the literal language of Minnesota's rule does support the ABA's view. It seems an unlikely instance in which the distinction would result in disciplinary action.

Nonadjudicative Proceedings

Rule 3.9 states that a lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and is subject to rules governing candor to a tribunal, obstructing access to evidence, and impartiality and decorum.[5] The unofficial Comment to the

rule states that it applies to appearances before legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity.

The Comments go on to indicate that such bodies are entitled to expect integrity and honesty in the same manner as a court. They also recognize and point out that lawyers appearing before such bodies, therefore, may be subject to greater restrictions than nonlawyers who may be authorized to appear. The rule does not apply to negotiations or transactions on behalf of a client with a governmental agency, to a client's license applications or compliance with reporting obligations, or in dealing with a government investigation.[6]

Never Stop Learning

After more than 25 years in the lawyer discipline field, I still can be surprised by some nuance of a Rule of Professional Conduct that I may previously have missed. Plus, amendments to the Rules occur periodically,[7] again requiring further study to keep abreast of the latest rule language. The need to reread the Rules and keep learning is ongoing. ▲

Notes

[1] *See, e.g., Wilson v. Skogerboe*, 414 N.W.2d 521 (Minn. App. 1987) (improper); *Smith v. City of Owatonna*, 439 N.W.2d 36 (Minn. App. 1989) (exceptions apply).
[2] *See, e.g.*, ABA Inf. Op. 89-1529 (1989).
[3] ABA Formal Opinion 09-454 (07/08/09).
[4] 373 U.S. 83 (1963).
[5] Rules 3.3(a) – (c), 3.4(a) – (c) and 3.5, MRPC.
[6] Such matters instead are governed by Rules 4.1 through 4.4, MRPC.
[7] As a reminder, amendments to Rule 1.5(b) and 1.15 took effect on July 1, 2011 concerning advance fees and the elimination of "nonrefundable" retainers.