ADVISORY OPINION SERVICE

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In November 1984 the advisory opinion service was expanded to include telephone opinions. Advisory opinions are available to all Minnesota attorneys and judges not delinquent in attorney registration fees.

Telephone requests may be made by calling the director's office--(612) 296-3952--and asking for the advisory opinion attorney. You will be asked for your name, telephone number, and address. Advisory opinions are not given to persons who will not identify themselves. The opinions and requests are, however, kept confidential.

There are certain limitations on the issuance of advisory opinions. For example, opinions are not issued on questions of advertising and solicitation or on the conduct of another lawyer. For further information concerning advisory opinion policies and procedures see the October 1984 *Bench & Bar* article concerning the telephone service.

In 1985, 822 advisory opinion inquiries were received. Over one-third of the inquiries were resolved by reference to previously written *Bench & Bar* articles, Lawyers Professional Responsibility Board opinions, or ABA ethics opinions.

In some instances, telephone requests concerning less frequently raised issues did not receive an immediate response. Some requests raised very complex issues and the caller was asked to send a written request.

The most frequent telephone inquiries in 1985 concerned conflicts of interest (96 requests). Client confidences and secrets was another common topic, often arising in connection with conflict of interest and/or withdrawal questions (52 requests). Fifty requests raised questions regarding attorney fees. Other frequently asked questions included: disposing of dormant client files, 39; withdrawal from representation, 26; and trust accounts, 21.

Following are summaries of opinions issued during 1985 regarding several recurrent or interesting matters.

Release of Client Files.

Attorney A represented client three years ago and obtained judgment for client. Attorney B recently sent letter on behalf of client asking attorney A to forward client's file. Attorney A has had no communication with client, and is concerned about turning over file without client authorization.

Upon request "of the client" a lawyer is required to promptly return client property. To protect the

confidential nature of client's file, attorney A may require a written authorization from the client prior to releasing the file to attorney B.

See Rule 1.15 and Rule 1.6.

Imputed Disqualification.

Plaintiff is represented by attorney A from law firm in a personal injury case. Defendant goes to a branch office of the same law firm to discuss the personal injury case with attorney B. During discussion, attorney B learns that plaintiff is represented by law firm and terminates the meeting with defendant. The information attorney B learned from defendant regarding the personal injury case is likely a confidence or secret.

Attorneys A and B are most likely prohibited from representing *either* party without the consent of plaintiff and defendant. Attorneys associated in a firm are prohibited from representing a client when any one of them alone would be prohibited from representing that client.

See Rule 1.10; Rule 1.7.

Tape-Recording Conversations.

An attorney has requested an opinion concerning the tape-recording of phone conversations without the knowledge of the other party. While this practice is apparently not illegal, a number of ethics opinions, including ABA Formal Opinion 337, state that generally it is improper conduct to record conversations without the consent of all parties to the conversation. ABA 337 recognizes an exception for prosecutors.

See ABA Formal Opinion 337; *In re Anonymous Member of S.C. Bar,* 322 S.E.2d 667 (S.C. 1984).

Contacting Employees of a Potential Defendant Corporation Not Represented by Counsel.

Attorney represents plaintiff in a possible action against a corporation. Attorney wants to contact former employees of the corporation. No action has been commenced.

In dealing with unrepresented individuals, an attorney must disclose whether the employees' interests are in conflict with or adverse to the interests of attorney's client. An attorney cannot state or imply that the attorney is a disinterested party. If the attorney knows or reasonably should know that the employee misunderstands the attorney's role, the attorney must make reasonable efforts to correct the misunderstanding. The attorney cannot give employees advice (other than to secure counsel) on issues as to which employee's interests have a reasonable possibility of being in conflict with the interests of attorney's client.

See Rules 4.3 and 4.4

Contacting Employees of Defendant Corporation Represented by Counsel.

Attorneys may not communicate with a represented party except with the permission of opposing counsel. When the attorney is dealing with a corporation, the prohibition on communication applies to contacting individuals with managerial responsibility and those whose acts or omissions may be imputed to the corporation for criminal or civil liability. This prohibition also applies to communication with individuals whose statements may constitute an admission of the defendant corporation or entity.

See Rule 4.3 and comment. *See also* ABA Informal Opinion No. 1410 (February 14, 1978).

Advancing Costs.

An attorney proposes that responsibility for costs and expenses of litigation would be negotiable between attorney and client, and would depend in part on the likelihood of recovery. Attorneys are permitted to advance costs and expenses of litigation. However, "advancing" is distinguishable from "paying" the costs and expenses of litigation. Attorneys are permitted to "pay" costs and expenses of litigation *only* in representing indigent clients. Attorneys may not generally agree to "pay" costs and expenses if the litigation is successful and/or there is a recovery. Attorneys may, however, agree to absorb costs and expenses *if* the litigation is unsuccessful.

See Rule 1.8(e).

Conflict of Interest.

Firm 2 recently merged into firm 1. Prior to the merger, firm 1 had represented client A and firm 2 had represented an insurer. Client A has filed a claim with the insurer and is represented by the newly merged firm (firms 1 and 2). The insurer objects to the merged firm's representation of client A.

The objection to representation presents a "former client" conflict problem. Rule 1.9 prohibits a law firm from representing a client in a matter that is substantially related to a matter in which the firm represented a prior client unless the prior client consents after consultation. The comment to Rule 1.9 indicates that a lawyer who recurrently handled this type of problem for a prior client may represent another client in a distinct problem of that type even if representation involves adverse representation to the prior client.

However, Rule 1.9(b) must also be considered in determining whether to accept a representation. Rule 1.9(b) prohibits attorneys from using information obtained from the prior client to that client's disadvantage. *See* Rule 1.6. Where the types of representation are similar, the information at issue may be susceptible to use in the subsequent representation. In this case the newly merged firm should consider Rule 1.9(a) and (b) to determine whether continued representation is proper.

See Rules 1.9 and 1.10.

Fiduciary Obligations.

An attorney is asked by medical provider in personal injury cases to provide a letter of protection for medical provider's services. The attorney contacts client and provides the letter with client's authorization. The attorney is concerned with the situation in which the client later attempts to rescind the authorization and the attorney is holding funds in trust to be distributed to the medical provider.

The attorney must discuss with the client the implications of providing the protection letter. The attorney should advise the client that the protection letter may require the attorney to withhold a portion of the settlement funds despite the client's directions to the contrary. The letter of protection should be drafted so as to avoid depriving the client of a right to object to the reasonableness of the fees and costs claimed by the medical provider.

Contingent Fees.

Attorney accepted a representation based on a contingent fee arrangement in a matter arising out of a dissolution judgment procured by fraud (*i.e.*, concealing assets). The representation is of a domestic relations nature because the court has reopened the dissolution judgment. Under the Code (effective through September 1, 1985) representation of clients in domestic relations matters on a contingent fee basis was rarely justified. Under the new Rules of Professional Conduct (effective September 1, 1985) attorneys are expressly prohibited from collecting a fee that is contingent upon the amount of property settlement in a domestic relations matter. The attorney should not therefore represent the client on a contingent fee basis in the matter.

See Rule 1.5(d)(1).

Our advisory opinions are only opinions, frequently given under time constraints precluding extensive research. Attorneys needing guidance should start with their own analysis and research, and may wish to consult with other experts in the substantive law or in matters of attorney ethics. The ABA Formal and Informal Opinions can be located in most law libraries. Other useful research sources include: *ABA/BNA Lawyer's Manual of Professional Conduct*; Hazard, *The Law of Lawyering; Annotated Model Rules of Professional Conduct* by the American Bar Foundation; and *Shepard's Professional and Judicial Conduct Citations*. *See also* the April 1984 *Bench & Bar* for a cross-reference index between the prior Code and the new Rules of Professional Conduct. The ABA also offers written opinions. Information on how to request a written opinion may be obtained by calling the ABA Ethics Hotline (312) 988-5000, ext. 3023.