Ethics 2001: More Proposed Changes

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> "We have retained the basic architecture of the Model Rules . . . we tried to keep our changes to a minimum . . . even so, the Commission ended up making a large number of changes . . . ."
>
> E. Norman Veasey, Chair
> of the Ethics 2000
> Commission

Last month, I noted some of the changes recommended by the Ethics 2000 Commission, including those provisions already included in the Minnesota Rules of Professional Conduct. There are many other areas addressed by the Report; here are some of the more important proposals.

RESPONSIBILITIES IN LAW FIRMS (5.1 AND 5.3)

Until now, 5.1 provided that a partner was charged with making reasonable efforts to ensure that a firm complied with the rules. Now the ABA is recommending that this responsibility be extended to any lawyer who individually, or together with other lawyers, possesses comparable "managerial authority" in a law firm. Further, the ABA had planned on expanding this responsibility to the "law firm," itself, which would have resulted in a law firm being subject to discipline. As an example, this might have resulted when a conflict occurred and the law firm did not have a system in place for identifying conflicts.

The theory of the Commission was that the prospect of law firm discipline (damaging the reputation of the firm in the community) would have provided an additional incentive for those in charge to comply with the rules. Currently there are only two states in the country that have adopted law firm discipline, and Minnesota is not one of them. Most states viewed this proposed change as unnecessary since the only likely form of discipline that a law firm could receive is a "public reprimand," and such discipline is rather amorphous when applied to an entity rather than an individual. In June of 2001, the Commission dropped this proposed change for fear that law firm discipline "might undermine the principle of individual responsibility."

UNAUTHORIZED PRACTICE OF LAW (5.5)

Amendments to this rule are aimed at the complex issues raised by multijurisdictional practice.Ftn 1 A separate ABA commission is currently studying this issue, but in the interim, the Commission recommended significant changes to 5.5 "in recognition of modern legal practice."

In addition to providing for the already recognized right to appear before a tribunal when admitted

pro hac vice, the rule provides for practice in another jurisdiction in three instances: first, when a lawyer who is an employee of a client acts on the client's behalf, or in connection with the client's matters, on behalf of the client's employees (the in-house counsel exception); second, when the lawyer acts with respect to a matter arising out of, or otherwise reasonably related to, the lawyer's practice on behalf of a client in a jurisdiction in which the lawyer is permitted to practice (the spillover exception); and, third, when the lawyer is associated in a particular matter with a lawyer admitted to practice in the jurisdiction (the association exception). It remains to be seen whether or not the multijurisdictional commission will recommend further changes to these provisions.

DISCIPLINARY AUTHORITY (8.5)

Recommended changes to this provision are related to the amendments made to 5.5 with regards to multijurisdictional practice and the unauthorized practice of law. This provision was amended to expand the disciplinary authority of each state. Currently a lawyer is subject to disciplinary action in the state in which he is licensed. When a complaint is made on that attorney in a state where she is not licensed, the procedure has been to refer the complaint to the state where the attorney is licensed. Now, however, the framework is being changed to allow disciplinary counsel to proceed against attorneys in the jurisdiction where they violate the rules, not where they are licensed ("a lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction."). Further, there is a choice of law provision that provides that the rules of the jurisdiction in which the lawyer's conduct occurred should generally be applied to the attorney's conduct. However, if the "predominant effect" of the conduct is in a different jurisdiction, the lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of the jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

These recommended changes are problematic in a number of ways. First, since disciplinary authorities are funded by license fees provided by those attorneys licensed within a given state, funds expended to investigate and prosecute an attorney licensed in another jurisdiction lack the "user fee" aspect of the investigation of licensed counsel. It is questionable whether it is fair to Minnesota lawyers to be paying for this service for the public as it regards out-of-state lawyers. Further, even if a jurisdiction feels that its rules are being violated (such as solicitation of victims in mass tort litigation by out-of-state attorneys) the fact remains that there is no guarantee that, as in reciprocal enforcement, the state where the attorney is licensed will encumber her ability to practice law to the extent recommended by the state where the misconduct occurred. Virtually every state in the nation has its own regulatory framework, including different procedural and substantive rules. Most states view reciprocal enforcement as a recommendation and may well disagree with recommended discipline under these new provisions, except for the most egregious cases. It is likely that, even if this rule change is made, many disciplinary authorities throughout the country will be reluctant to utilize it.

SOLICITATION (7.3)

In most states, including Minnesota, there remains a ban on in-person or telephone solicitation for professional employment by a prospective client when a significant motive for the lawyer doing so is the lawyer's pecuniary gain. The changes recommended to this rule relate to technological advances that have occurred over the years. Consequently, it is recommended that this ban be extended to "real time electronic contact" (*e.g.,* chat rooms). While some have argued in the past that chat rooms are more like mass mailings, this is not true when direct solicitation is occurring. Further, the amendments to the rules provide that any

electronic communication (*e.g.,* email) from a lawyer soliciting professional employment to a prospective client known to be in need of legal services in a particular matter include the words "Advertising Material" at the beginning and ending of the electronic communication, just as is now required with written letters under the Model Rule.

PRO BONO SERVICE (6.1)

The debate over mandatory *pro bono* service continues. Studies show that two-thirds to three-quarters of those who cannot afford to pay a lawyer go without legal services when the need arises. Most states currently do not subject a lawyer to discipline for failing to provide a minimum number of *pro bono* hours, nor, in my opinion, should they. Two states, Florida and Texas, while not mandating *pro bono* service, mandate the reporting of *pro bono* service. The proposal for a rule change to this effect was recommended by the MSBA several years ago but was turned down by the Minnesota Supreme Court. Some saw this provision as an attempt to lay the groundwork for mandatory *pro bono*. The Commission concluded that many lawyers who currently provide voluntary *pro bono* do not support a mandatory provision. The majority of the Commission refused to set a specified number of hours of mandatory *pro bono* service. Instead, a sentence was added to 6.1 stating that "Every lawyer has a professional responsibility to provide legal services to those unable to pay." The aspiration in the rule remains at 50 hours of legal services to be provided annually by each attorney.

PROSPECTIVE CLIENTS (1.18)

Most attorneys are aware that certain duties attach to an attorney-prospective client relationship when a first discussion occurs.Ftn 2 The ABA is recommending that a new rule be created to codify these obligations. First, even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client may not use or reveal information learned in the consultation. Second, a lawyer in this situation shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter if the lawyer receives information from the prospective client that could be significantly harmful to that person. Disqualification is imputed in this situation and no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter. The lawyer is conflicted and the conflict is imputed unless both the affected client and the prospective client give informed consent, confirmed in writing, or timely screening (without a fee for the disqualified lawyer) occurs and written notice is given to the client. In this and in other situations involving screening, "an adequate showing of screening ordinarily requires affidavits by the personally prohibited lawyer and by a lawyer responsible for the screening measures. A tribunal can require that other appropriate steps be taken."Ftn 3

Disqualification in these circumstances has become a particularly important issue in large firms. When a corporate client undertakes a "beauty contest" between law firms, it may poison the ability of the interviewing firm to represent an adversary if not selected by the corporate client. A law firm may condition conversations with a prospective client on the client's consent that nothing disclosed will prohibit the lawyer from representing a different client in the matter. Even without such an agreement, a lawyer or law firm is not prohibited from representing a client with interests adverse to those of a prospective client, unless the lawyer has received from the prospective client information that could be significantly harmful if used against the prospective client in the matter. It isn't hard to see how these issues could end up in litigation without a written agreement concerning the initial interview between the law firm and the potential client.

CANDOR TOWARD THE TRIBUNAL (3.3)

The intent of the recommended changes for this provision are to "clarify a lawyer's obligations with respect to testimony given and actions taken by the client and other witnesses." One area where the lawyer's obligations to the tribunal has been strengthened and clarified is that the lawyer now must not allow the introduction of false evidence and must take remedial steps when the lawyer knows that material evidence offered by the client or witness is false, regardless of the client's instructions. "Reasonable remedial measures" are defined, in part, as "disclosure to the tribunal." On the other hand, a lawyer's obligation to the client has been reaffirmed, particularly in the context of the representation of a criminal defendant. Finally, the new amendment provides that "a lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

What is the obligation of a criminal defense lawyer when offering the testimony of a defendant? A criminal defense attorney under proposed Rule 3.3 would be under the obligation to allow a defendant to testify in his own defense even if the lawyer "reasonably believes" the testimony is false. It would only be when the lawyer "knows" that it is false (*i.e.,* to be inferred from the circumstances; the attorney cannot ignore an obvious falsehood) that the attorney will be unable to allow the testimony. Further, if the court requires defense counsel to present her client as a witness or to proceed with a narrative statement if her client so desires, the attorney is relieved of any ethical duty even if she knows the evidence to be false. These changes will presumably help both civil litigators and criminal defense attorneys more clearly understand their obligations.

OTHER SUGGESTED AMENDMENTS NOT INCORPORATED

Several recommendations made by interested parties were not incorporated into the amendments. One law professor suggested a rule should be added that would prevent lawyers from cooperating in secret settlements that would result in information being hidden from the public about substantial dangers to safety or health. Another suggested a rule requiring lawyer support for client protection funds. As it regards this latter recommendation, Minnesota is already a leader in the nation in this area and, over the past 14 years, has paid out over 316 claims involving 92 attorneys, totaling $3.9 million in reimbursement.

THE TIME FRAMEWORK

After nearly four years, the work of the ABA Ethics 2000 Commission is almost over. Based on past experience, the ABA will continue to debate the amendments into the next year. Consequently, the earliest Minnesota would be preparing a comprehensive petition to the Supreme Court recommending a number of the changes approved by the ABA would be a year or two from now. The legal profession in our state should be aware of the likely changes to the practice of law that will be adopted within the next several years. Once these amendments have been adopted, the new rules will impact a generation of lawyers in the years to come.

NOTES

[1] See *Cleary, "Crossing State Lines: Multijurisdictional Practice,"* Bench & Bar, *October 2000, p. 29.*

[2] See *Cleary, "Forming The Attorney-Client Relationship,"* Bench & Bar, *December 2000, p. 23.*

[3] *Martin A. Cole, "Screening conflicted lawyers under Rule 1.10,"* Minnesota Lawyer, *5/28/01, p. 3.*