

PARTIAL RESUMPTION OF ADVISORY OPINION SERVICE ON AN EXPERIMENTAL BASIS

By
Mike Hoover, Administrative Director
Minnesota Office of Lawyers Professional Responsibility

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The bar has traditionally promoted efforts to give ethics advice to individual lawyers. The ABA has, for example, long had a standing committee on professional ethics which issues advisory ethics opinions.

In Minnesota the Lawyers Professional Responsibility Board is empowered under Rule 4, Rules on Lawyers Professional Responsibility, to issue opinions on questions of professional conduct. As a practical matter, the issuance of a board opinion in response to each attorney inquiry is impossible. Those few board opinions which have been issued followed a lengthy and thorough study of issues important to the entire bar. The responsibility for a day-to-day response to many individual inquires rested with the Director's office.

In 1981, the Minnesota disciplinary system suffered from a growing caseload and limited resources. A backlog of disciplinary investigations developed. At the same time more lawyers sought ethics opinions from the Director. In September, 1981 the board made a difficult, but necessary, decision to temporarily suspend the issuance by the Director of advisory ethics opinions.

The supreme court and the bar have since provided additional resources which have helped reduce the backlog of pending cases and speed dispositions. It is now possible to partially resume the advisory opinion service on an experimental basis. This article will outline the ground rules for obtaining ethical guidance from my office.

Availability

The service will be available to any Minnesota judge or lawyer. This limitation recognizes both that our funding comes from Minnesota judges and lawyers, and that our limited resources simply do not permit us to expand this service to the non-Minnesota attorneys and to non-lawyers. Before making a request for an ethics opinion, attorneys should first consult the Minnesota Code of Professional Responsibility, as experience has shown that many ethics questions are clearly answered by the code itself.

Written Requests Required

The request for an advisory opinion must generally be made in writing. The written request should contain a statement of the facts, a list of authorities consulted, and the specific questions or problems about which advice is sought. As a courtesy to the bench, the requirement of written submission will not be imposed.

Written Answers

Opinions will generally be in writing. The written opinion will usually recite the facts, the authorities upon which we rely, and contain several disclaimers. The first disclaimer is that the opinion is confined to the facts provided to us by the requester. The second is that the written opinion does not bind the Director, the board or the supreme court in any subsequent disciplinary proceeding. These disclaimers are consistent with past policy and have been expressly approved by the board at its September 10, 1982 meeting where it approved this plan for the partial resumption of the advisory opinion service.

The general policy of requiring both written submissions and written opinions recognizes the practical impossibility of maintaining with our current resources a telephone hotline service for 13,000 Minnesota lawyers. The policy also emphasizes that the questions asked and the answers given are important enough to be made a matter of record between our office and the requester.

Limitations on Advisory Opinions

We must reserve the right to decline to issue an opinion whenever the facts or legal issues are so complex as to require an unreasonable commitment of our own resources. Obviously, we cannot permit several complex problems to monopolize our limited resources.

We will also decline to issue opinions where we are required to resolve questions of law outside the areas of lawyer ethics and discipline.

We may decline to issue opinions where we are asked about past conduct. Issuing opinions on past conduct may conflict with our duty to investigate and prosecute such conduct if we determine it to be unethical. The focus of this service is intended to be preventative so that the subject matter of inquiry should generally be prospective conduct rather than past conduct.

Inquiries about third-party conduct will generally not be answered. Again, we may have a conflict with our duties to investigate and prosecute. Also, opinions about third-party conduct are subject to misuse by the persons receiving them. Obviously, if an attorney has been retained by another lawyer to obtain an advisory opinion, or if there is an associate relationship between the requester and the person about whose conduct the inquiry is made, we may issue the opinion where that relationship is disclosed to us.

Similarly, we will usually decline to issue an opinion where we are asked about non-lawyer conduct except where the non-lawyer is under the direct control or supervision of the inquiring attorney.

We may decline to answer questions about the content of advertising and solicitation materials.

Publication

We will attempt to publish in BENCH & BAR, in digest form, leading opinions and those about recurring issues. Other opinions may be discussed in this column. Whenever publication occurs, identities will be protected.

Costs

There will be no charge to those obtaining advisory opinions. There is, however, an indirect cost to all members of the bar in that staff resources will now be committed to this service. Initially, a half-time law clerk will also be hired to research and draft opinions under the supervision of staff lawyer. These resources may need to be expanded in the future. Records will be kept in the office to insure that the

monetary cost of this service to the bar as a whole is calculated whenever a request for additional funding for the discipline system becomes necessary.

Conclusion

The existence of an advisory ethics opinion service can be a source of education for both individual lawyers and the bar as a whole. Such a service can be another means of raising ethical standards in the state, and serves as a needed alternative to disciplinary action. In addition, such a service can prevent unethical conduct before it occurs, and diminish the need for disciplinary proceedings.

We are pleased that the additional resources given to us by the supreme court and the bar now enable us to re-establish partially, on an experimental basis, an advisory opinion service in Minnesota. We recognize that inherent limitations of this partial resumption. For example, those who require immediate advice, or those whose inquiries require exhaustive research, may be required to turn to other sources, including their own lawyer, for an advisory opinion. We are not, however, able to go further at this time. We have, however, made the calculated decision that rather than continuing the complete suspension of this service, we should now restore it partially on an experimental basis.

I am pleased to invite attorneys to use the service as outlined above. I also welcome feedback from lawyers about the service generally, or about their own experiences with it.