

Top Ten List

I miss David Letterman! Letterman retired in May of this year, and I will be joining him at the end of this year.¹ What I particularly miss is Letterman's almost nightly and usually goofy "top ten list" segment. I did not think I would miss that bit, but I find that I do.

The Office of Lawyers Professional Responsibility has published a top ten list on occasions. One such occasion came in then-Director Walt Bachman's March 1977 entry in this column, entitled "The Ten Most-Asked Legal Ethics Questions." It was essentially a summary of frequently asked questions regarding advisory opinions; whether they were truly the ten most asked questions may be debatable, but it is interesting to see what were considered issues 38 years ago.² In 1977, Minnesota operated under the Code of Professional Responsibility (MCPR), which was replaced by the Minnesota Rules of Professional Conduct (MRPC) in 1985 (and remains in effect following numerous amendments). Are these "top ten questions" still relevant questions? And are the answers still the same?

Advertising

Three of the ten questions dealt in some way with lawyer advertising matters. This is perhaps not surprising, as the issue of whether lawyers could advertise was especially ripe at that time.



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 25 years.

The United States Supreme Court decided *Bates vs. State Bar of Arizona*³ three months after Walt Bachman's column appeared, holding for the first time that the First Amendment did not allow a complete ban on lawyer advertising, forever changing the law practice landscape. Thus, the negative answer to one

of the questions, that asked whether a dignified, paid advertisement in local newspapers was allowed, is wrong under today's ethics standards.

Likewise, the answer that stated that the names of support staff, such as paralegals, cannot appear on a lawyer's letterhead is no longer accurate. Lawyers Board Opinion No. 8, which the column cited as banning such listings in 1977, was long ago amended to permit this conduct "so long as the paralegals are clearly identified as such, and so long as no false, fraudulent, misleading, or deceptive statements or claims are made concerning [the person's] legal status and authority."

As to the question that inquired whether office sharers can hold themselves out as "A, B, and C" on one combined sign or letterhead, such an action is still not permitted; in 1977 by citing to various state ethics opinions, and now, pursuant to Rule 7.5(d), MRPC, which says that lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. Office sharing by solo practitioners still does not meet this standard.

Joint Practice

A fourth question was somewhat related to the same topic. It asked whether an attorney may be jointly licensed as a stockbroker, real estate broker or insurance agent. The "yes" answer remains accurate, as was the advice to take precautions to avoid misunderstandings. The complete prohibition of practicing law and some other profession out of the same office, as the column asserted in 1977, is no longer the advice provided to an advisory opinion caller. Certain steps must be taken, such as maintaining separate accounts and records solely for the law practice, and certain other limitations might apply, such as imputing conflicts between clients from one entity to the other. But with care, a dual office may be maintained.

Trust Accounts

Issues involving the handling of client funds were just as common in 1977 as now. One question inquired whether an attorney is permitted to pay law-related business expenses (employee salaries, bar

association dues, etc.) directly from the attorney's trust account using earned fees. The "no" answer remains correct, recently codified into MRPC Appendix 1's trust account requirements.⁴ Earned fees must still be transferred to the attorney's business account and then used to pay business expenses.

The other trust account question was whether a lawyer may disburse the earned portion of settlement proceeds from his (all discussion in 1977 used only male pronouns!) trust account without prior consent of the client. The answer provided was "yes," unless the lawyer knows or has reason to know that the client disputes the attorney's fee. Disputed funds still must be kept in, or returned to, trust until the dispute is resolved, and earned fees must be withdrawn within a reasonable time, but today a lawyer must provide the client with written notice of the time, amount and purpose of the withdrawal and an accounting of the client's funds in the trust account, all of these requirements pursuant to Rule 1.15(b), MRPC.

Liens

A somewhat related question was whether a lawyer has a lien upon a client's papers, money or property in his possession to secure payment of attorneys' fees. In 1977, the column stated that the answer was unclear and that an opinion from the Minnesota Attorney General might be forthcoming. Attorney liens are governed by Minn. Stat. §481.13 as to a client's cause of action or property that is the subject matter of the representation. As to a client's papers (the file), in general, no retaining lien is permitted, although Rule 1.16(e) – (g), MRPC, sets out what papers must be provided to a client upon termination of representation and what items may be withheld if not paid for. The ABA recently issued a formal opinion on this topic,⁵ and it likely will be the subject of an upcoming column.

Conflicts.

Another question in the 1977 top ten list was whether an attorney may represent a spouse in a marital dissolution against a former client who the attorney represented in various business dealings.

The answer unequivocally said “no,” unless the former clients gave express consent, due to the risk of having/using confidential information. While that answer may still be accurate in many situations, the analysis today as to whether the two representations are “substantially related” under Rule 1.9, MRPC (Duties to Former Clients), would be more nuanced and might well lead to a different conclusion.

Ex Parte Contact

The next question was whether an attorney, if ordered to submit proposed findings following a bench trial without notice or copy to the adverse party, may comply with such an order. The column said the rules would require the attorney to send a copy to the adverse counsel despite the court’s order. The column did not address the difficult situation that this created for the attorney vis-à-vis the court and its direct order. I was

not practicing in 1977, so I do not know how common this situation actually may have been. Current rules favor compliance with a court’s order; the best practice is for the lawyer to challenge the order and make a record of her attempt.

Disciplinary Investigations

The final top ten question was whether, in responding to an ethics complaint, an attorney may disclose client confidential information to the extent necessary. The column answered “yes,” and this is still true pursuant to Rule 1.6(b)(8), MRPC.

Conclusion

As noted in the Lawyers Board’s annual report that was recently filed with the Supreme Court, confidentiality was the most common source of advisory opinion inquiries in 2014, not advertising. In many years, conflicts of interest top the list. Advisory opinions about an

attorney’s own prospective conduct may be obtained by calling the Director’s Office (651-296-3952) and requesting the advisory opinion attorney, or in writing through the Office’s website at <http://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx>.

Notes

- ¹ I have recently announced my retirement from the director position effective 12/31/2015.
- ² I did a not-dissimilar retrospective column in October 2013, entitled “Mythbusters,” updating an old director’s column from 1984.
- ³ 433 U.S. 350 (1977).
- ⁴ Appendix 1, as authorized by Rule 1.15(h), MRPC, was amended on 6/26/2015.
- ⁵ ABA Formal Opinion 471 (ethical obligations of lawyer to surrender papers and property to which former client is entitled), 7/1/2015.

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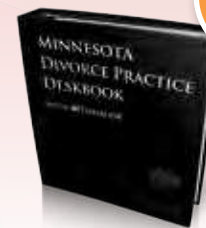
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Meet Blair Nelson

'Small firm practice chose me'

How would you describe your practice?

I practice in the areas of criminal defense and gun law throughout northern Minnesota and eastern North Dakota. My caseload primarily consists of major felonies, but I handle everything from traffic violations through homicides. I have a substantial "pre-charging" practice where I represent people under investigation for allegations of physical and sexual abuse or other misconduct with the goal of preventing charges from ever being filed. My gun law practice deals with permit to carry and firearm right restoration cases as well as consultations and outreach on the legal environment surrounding gun ownership. I have recently begun drafting gun trusts in response to the legalization of suppressors in Minnesota.

What led you to choose a small firm practice?

Small firm practice chose me by virtue of geography, as small towns typically feature either solo/small firm or public practice. In the course of my career I have realized that, while it is nearly impossible to turn off the lawyer when you go home to your personal life, effective lawyering is magnified once a person figures out who they are and builds a practice around their personal strengths and interests. The flexibility of small firm practice is an ideal environment for that model to thrive.

What do you value in your practice?

I am constantly humbled by the faith demonstrated by clients who put their freedom and reputation in my firm's hands. I am heartened and encouraged by the members of the bench and bar that take the time and demonstrate a commitment to problem-solving in each case to find a just result. As criminal allegations arise from every corner of the human condition, I am constantly challenged with interesting cases.

What aspects of your practice are particularly challenging?

Criminal laws seem to be the afterthought of a legislative process that is increasingly focused on collecting and spending money. When criminal justice receives attention, the result is laws enacted to punish and/or prevent recent tragedies or deal with monolithic bogeymen like "drunk drivers," "drug dealers," "gang members," and "predatory sexual offenders." These increasingly broad definitions homogenize treatment of those within the class without regard for their particular conduct or circumstances. Getting courts, juries, and prosecutors to understand clients as unique people, acting within the world as they know it, is the eternal challenge of a criminal defense practice.

When you face a challenge, what resources are helpful to you?

I rely heavily on my network of colleagues all over the state (and nation) to find new angles in both legal theory and practical presentation. My wife, Jennifer, is the managing public defender in the Bemidji office and her practical brilliance



BLAIR NELSON is an MSBA Certified Criminal Law Specialist who has been based in Bemidji since 1996. He is licensed in Minnesota and North Dakota's State and Federal courts. He is a graduate of the University of North Dakota, and the University of North Dakota School of Law.

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is the perfect sounding board when I am stuck on an issue. One of the biggest challenges of criminal defense practice is incomplete investigations of the underlying facts by law enforcement. Resources are scarce, and the authorities often compile enough facts to arrest and charge without getting the complete picture. I have employed a full-time investigator for over a decade and cannot imagine practicing criminal law without one on staff.

How is being a bar association member worthwhile?

The MSBA Specialist Certification program has given me another tool for my practice to stand out to potential clients. I have also gained immeasurable benefits from the Solo/Small and CrimLaw listserv groups.

What activities do you enjoy away from work?

Work and life merge at times, as criminal and gun law dovetail with shooting sports and the study of ballistic science. I love to take advantage of the hunting and fishing the Northwoods has to offer and happily tell clients that I have never billed a minute with a firearm or fishing rod in hand. I express myself through cooking (especially social barbeque) and may make the best gumbo "north of the Mississippi."

Where do you see the practice of law heading in the future, particularly for the small firm practitioner?

Technological advances have radically advanced the practice of law in small communities and will continue to do so in the future. Marketing a niche practice is much more viable in the internet age, where clients have endless information about lawyers and the services offered as opposed to when clients found lawyers through the local phone directory and word-of-mouth. While I maintain a "brick and mortar" storefront, the majority of my cases are venued outside my home county. I see many lawyers are successfully going "nomad" and operating out of virtual offices. ▲