

## Professional Responsibility

By MARTIN COLE

# Advisory Opinion Sampler

Last year, the Director's Office received 2,135 requests for an advisory opinion. Most such requests are by telephone, although a growing number of attorneys, approximately 10 percent, are taking advantage of the ability to submit questions through the internet from the office's website. So far this year, over 1,500 requests have been received through the end of July, a pace that if maintained will result in a substantial increase in opinions this year. The advisory opinion service is manned only by the most experienced attorneys in the Director's Office (presently me, Pat Burns, Tim Burke, Craig Klausing, Cassie Hanson, and Julie Bennett), as providing immediate answers to ethical dilemmas requires extensive familiarity with the Rules of Professional Conduct and experience as a lawyer.

A sampling of advisory opinion calls is set out below—sort of a Frequently Asked Questions (FAQ) list. Perhaps someone else's question and the response will help another lawyer similarly situated to better analyze the rules and their ethical obligations. All of these examples are based upon real inquiries from the past three months, but are in no way intended to exhaust the list of topics upon which inquiry is made. For example, some conflict-of-interest issues are addressed in this article as conflicts are a common source of inquiry; usually, however, these situations are very fact-specific, and rarely make useful examples for educating others. An area not addressed in this article is the many questions we are receiving of late concerning lawyers being laid off, leaving their firm, or starting a solo practice. The advisory opinion service will address general questions about the rights and



**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.

obligations of departing attorneys and about starting up a law office, but these may be better suited to a future article devoted only to that topic, rather than being included here.

### Sample Opinions

■ **Fee Agreements.** The requirements for reasonable fees and written agreements have been a common source of advisory opinion inquiry recently, particularly since this topic has been receiving some reconsideration of late.<sup>1</sup> Although written fee agreements are not mandatory in all instances, several types of representation do require a written agreement (contingent fees, for example). While explaining what the rules require, our attorneys may well advise that a written agreement be prepared in all situations to avoid misunderstandings. This highlights one of the purposes of the advisory opinion service: to *advise* the caller how to clearly avoid an ethical problem, not to ascertain just how "close to the line" the caller can get without crossing it.

■ **Business Transactions and Adverse Pecuniary Interests.** A caller inquired whether a client could be asked to sign a confession of judgment for fees already incurred in connection with an agreement to continue representation. Signing a confession of judgment involves the waiver of significant legal rights. Under Rule 1.8(a), MRPC, such an agreement would be considered potentially adverse to the pecuniary interest of a client, triggering attorney obligations of fairness, written notice to the client to consider obtaining separate counsel, and written consent from the client. Note that the protection of the rule does not extend to former clients, although other rules—1.8(h) or 4.3, depending upon the facts and claims<sup>2</sup>—may still require certain notices to the former client, especially if unrepresented.

■ **Former Clients.** As noted, many conflict-of-interest questions are very fact-specific. Pursuant to Rule 1.9, MRPC, lawyers are allowed to represent a client whose interests are adverse to a former client, unless it is in the same or a substantially related matter. Whether matters are substantially related in particular involves an analysis of the particular facts and issues involved

in the proposed new representation. Our advisory opinion attorneys will attempt to help callers sort through such analyses, as they will with issues of concurrent representation of conflicting interests under Rule 1.7, MRPC. They also can help determine whether, if there is a conflict of interest, the conflict can be waived with informed consent confirmed in writing.

One cautionary aspect of analyzing conflicts is to inform the caller that despite our considered opinion, a former client or opposing counsel may disagree and still seek to have the caller disqualified or may file a disciplinary complaint. Whenever the potential for a conflict claim exists it is good practice to alert your new client and discuss how a disqualification motion could occur and distract attention away from the merits of the client's matter. Counsel without such a potential conflict might be beneficial to the client. If the client nevertheless wants you to represent them, you should discuss with them in advance who will be expected to pay the costs associated with defending against a disqualification motion if brought against you in this matter.

■ **Trust Accounts.** A caller inquired whether he was required to maintain a trust account. Trust accounts (primarily in the form of an IOLTA account) are required for attorneys who handle client or third-party funds, pursuant to Rule 1.15(a), MRPC. If the attorney does not handle such funds, a trust account is not mandatory. Few lawyers are likely to fit this exception for their entire careers. Many questions about trust accounts may be answered by visiting the FAQ section on the OLPR website devoted solely to questions about lawyer trust accounts.<sup>3</sup>

■ **Withdrawal.** Issues connected with withdrawing from representation are very common sources of advisory opinion inquiries. A typical recent call asked whether the caller could withdraw approximately two weeks before a trial in a contested marital dissolution proceeding if the client was not current in paying fees. Rule 1.16, MRPC, governs withdrawal from representation and allows an attorney to withdraw for

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nonpayment of fees by a client in some situations, if sufficient notice has been given. The rule also requires that upon termination, a lawyer must take steps to the extent reasonably practicable to protect a client's interests, which includes allowing enough time for the client to obtain substitute counsel. Two weeks before a contested trial, even if the client is behind on fees, almost never is enough time.

There are also calls about the return of a client's file upon termination of representation, including withdrawal. Rule 1.16(e)-(g), MRPC, incorporated substantially all of former Lawyers Board Opinion No. 13 into the MRPC, identifying what are client papers and property, saying when clients may be charged for copying costs, and prohibiting conditioning return of a file upon payment of fees or copying costs.

■ **MJP (Multijurisdictional Practice).** We often receive calls inquiring about an attorney's ability to handle a matter in another jurisdiction. A recent caller asked about setting up a corporation for a friend in Wisconsin: the prospective client lives in Wisconsin, the business would be in Wisconsin, and there is no connection to the caller's Minnesota practice. MJP rules have been greatly relaxed and now allow a Minnesota attorney to provide services in other states on a temporary basis in many instances if in association with a local attorney or arising out of a proceeding in Minnesota. Otherwise, Rule 5.5, MRPC, still requires that the services be reasonably related to the lawyer's Minnesota practice, and don't stretch so far as to allow a Minnesota lawyer to simply handle any Wisconsin (or any other state) matter. That would still be considered the unauthorized practice of law and be subject to possible criminal prosecution.

■ **Duty to Report.** A frequent inquiry concerns whether the caller has a duty to report the alleged misconduct of some other attorney, usually opposing counsel in some contested matter. The advisory opinion service does not provide opinions on third-party conduct, *i.e.*, the conduct of the "other lawyer." Certainly Rule 8.3(a), MRPC, imposes a duty on lawyers to report the misconduct of other lawyers of which they have knowledge and that raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness. But the recent call about an opposing attorney who might have a conflict of interest did not raise such an issue; posing it as an advisory opinion question about the caller's duty to report doesn't change that. We'll describe the limited scope of the rule and usually be able to advise a caller that she has no duty to report; but we'll not say whether the other lawyer's conduct violates the rules.

### Conclusion

Advisory opinions are available by calling the Director's Office at (651) 296-3952 (or toll free at (800) 657-3601) and asking for the advisory opinion attorney of the day. If the attorney is not immediately available, the call will be returned, almost always the same day (this applies to advisory opinion requests received by email from the website as well).<sup>4</sup> There are some limitations as noted above: no opinions about third-party conduct, or about the caller's past conduct, or to answer questions of law. Still, we are here to help as many lawyers as possible to avoid ethical problems before they occur. Your lawyer registration fees are already paying for this wonderful service, so take advantage of it. ▲

### Notes

<sup>1</sup> See Gernander, "Nonrefundable Retainers & Other Oxymorons," 66 *Bench & Bar of Minnesota* 2 (February 2009), p. 16.

<sup>2</sup> Rule 1.8(h)(2), MRPC, deals with settling certain liability claims with unrepresented clients and former clients. Rule 4.3, MRPC, covers dealing with unrepresented persons in general.

<sup>3</sup> <http://www.mncourts.gov/lprb/trustfaq.html>.

<sup>4</sup> <http://www.mncourts.gov/lprb/mailform/ContactUs.aspx>.

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