

BY MARTIN COLE

Lawyers Board Proposes Opinion No. 20

Lawyers Professional Responsibility Board Opinion No. 1 states “It is the policy of the State Board of Professional Responsibility to issue, from time to time, advisory opinions as to the professional conduct of lawyers ... on matters deemed important by the Board. The Board and the Supreme Court consider these opinions as rule interpretations that guide attorneys’ professional conduct even though they are not binding on the Court.”¹

The Lawyers Board last exercised this policy in 1999 when it issued Opinion No. 19. Not too long thereafter, the supreme court issued its decision in a case entitled *In re Admonition Issued in Panel File No. 99-42*.² In that matter the court held that Board opinions could not be used as a source of discipline, should be interpretations of existing rules and be strictly advisory in nature. As part of the 2005 amendments to the Minnesota Rules of Professional Conduct (MRPC), several of the Board opinions were incorporated into the Rules or the comments to the Rules.³ Many of the remaining Board opinions were repealed, particularly those not specifically based upon an existing rule.⁴

This past year, the Board determined to revive its Opinion Committee, first to consider whether the Board should again issue opinions at all, and if so by what procedure. After study, the Board has voted to resume issuing advisory opinions on appropriate topics. Now, the Opinion Committee has presented to the full Board its first proposed new opinion. Proposed Lawyers Professional Responsibility Board Opinion No. 20 states:



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 21 years.

The use of the word “Associates” or the phrase “& Associates” in a law firm name, letterhead or other professional designation is false and misleading if the use conveys the impression the law firm has more attorneys practicing law in the firm than is actually the case.

The opinion then has its own lengthy comment explaining that the opinion is an interpretation of Rules 7.1 and 7.5, MRPC, sets out the policy reasons for

Even if the Board becomes more proactive in its use of Board opinions, it seems likely that opinions will remain sporadic.

such an opinion, and provides support from the opinions of many other jurisdictions, which almost unanimously have determined that the use of “Associates” or “& Associates” is false and/or misleading for solo practitioners and some two-person firms.⁵ This remains true whether the name is a registered trade name or not.

The Board’s Opinion Committee has already solicited and received input from the MSBA Rules of Professional Conduct Committee, the Section on General Practice, Solo and Small Firms, and the Hennepin County Bar Association Section on Solo and Small Firm Practice. Before determining whether to officially issue the opinion, however, the Board seeks further input from the bar and legal community generally. So, if you have comments you wish to share with the Board and wish the Board to consider, please submit them in writing to: The Office of the Director of Lawyers Professional Responsibility, 1500 Landmark Towers, 345 St. Peter Street, St. Paul, MN 55102-1218, Attn: Siana Chaudhary; or fax a submission to us at (651) 297-5801. The Board’s stated deadline for comments is March 20,

2009, so please don’t delay. The timing has to do with the Board’s quarterly meeting dates and obviously not with *Bench & Bar’s* publication schedule.

Why This, Why Now?

Perhaps not surprisingly, some attorneys hearing about the proposed Opinion No. 20 have asked, why this topic at this time? Is it truly a “matter deemed important by the Board?” Well, the revived Opinion Committee had to start with something, and perhaps no issue would seem earth-shattering by that standard. And to be candid, this is not the most significant issue on which the Board might have or may yet issue a formal opinion. Nor, as with most issues related to lawyer advertising, is it the source of many complaints to the Director’s Office, most of which are from other lawyers.⁶

Nevertheless, the “& Associates” issue has been the source of considerable agitation among many lawyers with whom Board members or attorneys in the Director’s Office have spoken. Lawyers leaving firms, or just starting out in the profession, may be opening solo practices in increasing numbers in these tougher economic times. Maintaining a level playing field for those attorneys in their efforts to attract clients is not unimportant. I’ve heard from several lawyers who hesitated and ultimately refrained from using the phrase “& Associates” to describe their practice, based on their ethical concerns. Those same lawyers noted with some annoyance that many of their fellow solo practitioners were using the phrase with apparent impunity. So the call for this opinion, while not deafening, does exist.

The use of the phrase “& Associates” has been prevalent in Minnesota for several years. To date, the Board and Director’s Office have not taken an aggressive enforcement posture as to this issue. For some, therefore, significant change may be required if this opinion is issued. That is why the Board is publishing the proposed opinion in draft and seeking input before finalizing and issuing the opinion. Also, the proposed comment to the opinion specifically calls for no discipline to be issued for violations of Rules 7.1 and 7.5 (for using this particu-

lar term or phrase) until at least September 1, 2009, to give practitioners a reasonable amount of time to alter their signage, letterhead and the like.

Future Opinions

In the 26 years through 1999 in which the Board periodically issued opinions, only 19 formal opinions were issued. Even if the Board becomes more proactive in its use of Board opinions, it seems likely that opinions will remain sporadic. The study, draft, and publish-for-comment approach adopted by the Board almost assures that, at best, new opinions will be issued less than once a year. No specific topics for future opinions are under consideration at this time. Along with comments on proposed Opinion No. 20, suggestions for future Board opinions are welcome. ▲

Notes

¹ LPRB Opinion No. 1, as amended January 26, 2006.

² 621 N.W.2d 240 (Minn. 2001).

³ See, e.g., Rule 8.4(i), MRPC, making it misconduct to refuse to honor a binding fee arbitration award after agreeing to arbitrate the fee dispute. This new section was added to the MRPC in 2005, but previously was Lawyers Board Opinion No. 5. See, *In re Pearson*, 352 N.W.2d 415, 418 (Minn. 1984).

⁴ See, Bateman, "Opinions of the Lawyers Board," *Bench & Bar of Minnesota*, November 2002.

⁵ The full text of proposed LPRB Opinion No. 20, including the comment, can be found on the Board's website at <http://www.mncourts.gov/lprb/index.asp>. It is too lengthy to reproduce here.

⁶ See, Cole, "Advertising: The Song that Never Ends," *Bench & Bar of Minnesota*, May/June 2008. That article also presented the fact that the Board's Opinion Committee was considering the topic of the use of the phrase "& Associates."

Medtronic Business and Law Roundtable

Our National Challenge: A Blueprint for Restoring the Public Trust

Sponsored by the Holloran Center for Ethical Leadership in the Professions and the Center for Ethical Business Cultures.

Thursday, March 19, 2009 – 4 p.m.

Schulze Grand Atrium, University of St. Thomas School of Law

Panelists include:

- | | |
|-----------------------------|---|
| John Coffee, Jr. | Columbia Law professor, author of <i>Gatekeepers: The Professions and Corporate Governance</i> |
| William Chandler III | Chief Judge, Delaware Court of Chancery |
| Rakesh Khurana | Professor, Harvard Business School, author of <i>From Higher Aims to Hired Hands; The Social Transformation of American Business School</i> |
| Lyman Johnson | University of St. Thomas Law professor |
| Lizanne Thomas | Partner-in-charge, Jones Day, Atlanta office |

CLE credits applied for. For reservations or further information, contact Mary Edel-Joyce, 651-962-4920 or holloranctr@stthomas.edu.



METRO LEGAL WORKS WITH THE BEST



- Courthouse
- Filings
- Searches
- Retrievals
- Service of Process
- Courier Service
- Skip Tracing
- Service Arranged Nationwide

BEST & FLANAGAN customers of **METRO LEGAL SERVICES**: Rebecca Chaffee, Family Law; Cathy Gorlin, Family Law; Jeff Davidman, Government Relations; Jim Harvey, Real Estate; Reno Van Putten, Real Estate; Emily Husmann, Real Estate.

*"I have used Metro Legal Services for 40 years
– and they're the best." —RENO VAN PUTTEN*

Minneapolis
612-332-0202

www.metrolegal.com

St. Paul
651-291-0008