

“Legal Ethics Counsel”

Presented to the Boone County Bar Association

July 9, 2003

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EXCERPT FROM ABA EVALUATION REPORT (MAY 2001):

Recommendation 17: The OCDC Should Not Issue Written and Oral Ethics Opinions

Commentary

Supreme Court Rule 5.30 provides that the Advisory Committee may give opinions about the interpretation of the Rules of Professional Conduct and the disciplinary procedural rules contained in Supreme Court Rule 5. The OCDC, upon request, may also provide informal ethics opinions to members of the bar. These informal opinions are not binding, and summaries of these opinions may be published for informational purposes.

Understandably, the bar views the provision of informal ethics opinions by the OCDC as a valuable service, and one that enhances the relationship between the agency and Missouri lawyers. In 1999, the OCDC issued 248 written informal opinion letters and 1,519 telephone opinions. It was not clear if recipients of informal ethics opinions from the OCDC's office are issued disclaimers regarding the force and effect of reliance on those opinions.

The OCDC should cease issuing written and oral informal ethics opinions, and the Court amend Rule 5.30 to reflect this. MRLDE 4(C) and Comment. Given the responsibilities of that office to investigate and prosecute allegations of misconduct, it would be better for the Advisory Committee, with the assistance of the Missouri Bar, to undertake the entirety of this service.

Lawyers will naturally seek informal guidance from disciplinary agencies with respect to professional conduct matters. The provision of this service by the OCDC enhances the relationship between it and the bar. However, OCDC's provision of these informal ethics opinions places the OCDC in danger of being recused or called as a witness in a proceeding against a lawyer who relied, or claims to have relied, on such an informal ethics opinion. This practice also diverts resources from the investigation and prosecution of cases. MRLDE 4 and Comment.

The Advisory Committee would not subject itself to these risks by continuing to provide this service. Involving the Missouri Bar in the process will foster closer relations between the agency and Missouri lawyers. The Advisory Committee should keep complete records of requests for such informal opinions, the exact nature and content of the inquiry and the response. It should provide recipients of these responses with a disclaimer that information provided does not constitute advice as to how the requesting lawyer should act, and that reliance on such informal guidance may not preclude a disciplinary investigation or prosecution. The keeping of this information and the issuance of the disclaimer may be used to rebut an attempt by a lawyer to inappropriately use an informal opinion as a defense to disciplinary charges.

SUPREME COURT OF MISSOURI EN BANC

September 11, 2002

Effective January 1, 2003

1. It is ordered that effective January 1, 2003, subdivisions 5.07 and 5.30 of Rule 5 be and the same are hereby repealed and a new subdivision 5.07 and a new subdivision 5.30 adopted in lieu thereof to read as follows:

5.07 ASSISTANTS - LOCATION OF OFFICES - EXPENSES

(a) With the approval of this Court, the chief disciplinary counsel may appoint deputy disciplinary counsel, who shall have the same qualifications as the chief disciplinary counsel, who shall serve at the pleasure of the chief disciplinary counsel, and who shall have such powers as may be designated by the chief disciplinary counsel. The chief disciplinary counsel may appoint or employ special representatives to make investigations for the purpose of aiding in the enforcement of Rules 4, 5, 6, and 8.07; may appoint or employ special counsel to prosecute any information, complaint or proceeding instituted or pending before any committee or court; and may employ staff attorneys. The chief disciplinary counsel may also accept the assistance of volunteer attorneys. The chief disciplinary counsel may employ necessary secretarial and clerical assistants.

(b) The chief disciplinary counsel shall select an ethics counsel subject to the approval of the advisory committee. The ethics counsel shall serve as staff to the advisory committee, but shall be attached to the office of chief disciplinary counsel for administrative purposes. The advisory committee may employ necessary support staff for the ethics counsel.

(c) The advisory committee and the chief disciplinary counsel shall maintain such offices as designated by this Court.

(d) All expenses incurred pursuant to this Rule 5 shall be approved by the chief disciplinary counsel and paid out of the Advisory Committee Fund.

5.30 OPINIONS AND REGULATIONS BY ADVISORY COMMITTEE

(a) The advisory committee may give formal opinions as to the interpretations of Rules 4, 5, and 6, and the amendments or additions thereto and may make regulations consistent therewith for the administration of Rules 4, 5, and 6. Formal opinions and regulations of the advisory committee shall be published in the Journal of The Missouri Bar after adoption thereof.

(b) The chief disciplinary counsel or any member of the bar who is substantially and individually aggrieved by any formal opinion of the advisory committee may petition this Court for review of the opinion. The Court in its discretion may direct that the petition be briefed and argued as though a petition for an original remedial writ has been sustained, may sustain, modify or vacate the opinion, or may dismiss the petition.

(c) The ethics counsel on behalf of the advisory committee on request may give a member of the bar an informal opinion on matters of special concern to the lawyer. Informal opinions are not binding. Written summaries of informal opinions may be published for informational purposes as determined by the advisory committee.

NEWS FOR MISSOURI LAWYERS

(from ESQ., a weekly publication of The Missouri Bar)

Supreme Court Approves Fee Increase to Support New Disciplinary Position

That portion of the annual enrollment fee paid by Missouri Bar members that supports the operations of the state's lawyer discipline system will be increased by \$7 for next year to support the creation of a new position that will offer ethics advice to attorneys while separating the advisory and prosecutorial functions of the Office of Chief Disciplinary Counsel (OCDC).

The increase, recently approved by the Supreme Court of Missouri, will cover the establishment and ongoing operations of the new post of "ethics counsel." The creation of this position will involve "a transfer of the present ethics advisory function that [the OCDC] does in terms of answering phone inquiries of attorneys, as well as providing written opinions to attorneys who have ethics questions," said Chief Disciplinary Counsel Maridee Edwards.

She added that the new ethics counsel will, in effect, provide staffing for the volunteer members of the Supreme Court Advisory Committee. This will relieve members of the committee from some of their current burdens, such as setting up disciplinary hearing panels and monitoring the progress of formal discipline proceedings, Ms. Edwards said. The assumption of these administrative duties by the ethics counsel, she said, will "make the processing of matters before disciplinary hearing panels more efficient and consistent . . . and will help to maintain consistency when there's a transition" among members of the Advisory Committee.

In addition to drafting informal opinions on behalf of the Advisory Committee, the ethics counsel will identify for the committee those issues deserving of formal opinions. Informal opinions will be provided to those individuals requesting them; however, a decision as to whether an informal opinion should be published will be determined by the Advisory Committee. Formal opinions will continue to be produced by the Advisory Committee.

That portion of the total enrollment fee established by the Board of Governors of The Missouri to support the operations of The Missouri Bar remains unchanged, as it has since 1994. The total enrollment fee paid by Missouri Bar members remains among the lowest in the nation.

HOW TO RESEARCH EXISTING INFORMAL ADVISORY OPINIONS, IN GENERAL

The formal and informal opinions through June 30, 1994, are included in a deskbook entitled Missouri Advisory Opinions published by The Missouri Bar in 1995. Opinions included in the deskbook are indexed by topic and include an annotation to the particular rule(s) involved. A supplement containing informal opinions published from July 1, 1994, through December 31, 1995, came out in 1996.

Informal advisory opinions that have been issued since June 30, 1994, have also been published in The Missouri Bar Bulletin, the Missouri Lawyers Weekly, and the KC Counselor (published by the Kansas City Metropolitan Bar Association). Additionally, these more recent informal opinions are available in searchable format through MoBarNet, an online subscription service of The Missouri Bar, and Missouri Lawyers Weekly's web site. The informal advisory opinions dating back to July 1, 1993, are online at The Missouri Bar's web site. The internet address for the opinions is: <http://www.mobar.org/opinions/>

HERE IS WHAT YOU WILL SEE ON THE MISSOURI BAR WEB SITE AT:

<http://www.mobar.org/opinions/index.htm>

Informal advisory opinions are issued by the Legal Ethics Counsel under Rule 5.30. The Legal Ethics Counsel only issues opinions to attorneys for their own guidance involving an existing set of facts. Informal advisory opinions cannot be issued on hypotheticals or regarding the conduct of an attorney other than the one asking for the opinion.

Although an effort has been made to summarize the important facts of the question, not all details are included in each summary. Therefore, these summaries should be used only for general guidance. Only summaries are available; actual copies of the opinion request and answer are not available.

You can search this database by topical index or by search engine. The search engine allows you to search the opinions themselves using keywords or phrases. Or, if you wish, you may designate a specific opinion number.

[Search Engine](#)

[Topical Index](#)

[How to Request an Opinion](#)

HOW TO REQUEST AN OPINION

Clicking on "How to Request an Opinion" brings up the following information on the MoBar web site:

REQUESTING INFORMAL ADVISORY OPINIONS FROM THE LEGAL ETHICS COUNSEL

Supreme Court Rule 5.30(b) gives the Legal Ethics Counsel the authority to issue non-binding informal opinions on "matters of special concern to the lawyer" requesting the opinion. The Legal Ethics Counsel issues written and oral informal advisory opinions. The Legal Ethics Counsel can not provide opinions or advice regarding legal, rather than ethical, questions.

Most questions can be answered over the telephone. Questions should be in writing under three circumstances:

1. when the question is complex or the quantity of information is large,
2. when the ethical question is new or presents an entirely new twist, or
3. when the requesting attorney needs a response in writing.

When requesting an oral or written informal advisory opinion, the attorney should review the Rules of Professional Conduct first. The Rules of Professional Conduct are found collectively in Supreme Court Rule 4, which is included in Missouri Rules of Court. Reviewing the rules will assist the attorney with phrasing the specific question(s) that relate to the particular situation. General questions cannot be answered in an informal advisory opinion. It may also be possible to find the answer or further define the question by researching existing opinions.

An attorney requesting an oral informal advisory opinion should call personally or have another attorney within the firm call. The Legal Ethics Counsel does not issue advisory opinions to nonattorneys. To request an oral informal opinion, call the Legal Ethics Counsel at 573-638-2263 and inform the person who answers that you are a Missouri attorney and you are calling for an informal opinion. Please have your bar number available.

An attorney requesting a written informal advisory opinion should allow one month to receive an answer. If the request is truly urgent, the attorney should explain that fact in the opening paragraph of the letter.

- The letter should contain specific facts but initials or other designations should be used instead of specific names.

- The letter should be concise but must contain all facts upon which the opinion will be based. Additional or different facts could change the conclusion reached in any opinion.
- The letter must indicate that the person requesting the opinion is the attorney, or a member of the firm, whose conduct is in question. Informal opinions will not be given regarding the conduct of an attorney or firm other than the one requesting the opinion.
- The request must relate to future conduct rather than conduct which has already occurred.

An informal advisory opinion does not affect the authority of a judge to rule on an issue pending before the judge. It also does not affect the authority of other officials, such as the Attorney General or a prosecuting attorney. If a complaint or report is filed with the Chief Disciplinary Counsel regarding the matter, it may be necessary for the Chief Disciplinary Counsel to investigate the complaint or report and determine the facts, independently.

A summary of the written request and answer may be published. Although the actual request letter must be specific, the summary will be generalized. Only summaries are available. To request a written informal opinion, write: Legal Ethics Counsel, 217 E. McCarty, Jefferson City, MO 65101. Facsimile: 573-635-8806.

A request for a formal opinion is the appropriate way to address a matter of general importance, not necessarily related to a specific fact situation. The Advisory Committee may issue formal opinions under Supreme Court Rules 5.30(a). Requests for formal opinions should be addressed to the Chair of the Missouri Supreme Court Advisory Committee, 217 E. McCarty, Jefferson City, MO 65101.

Questions regarding malpractice or risk management, as opposed to ethical obligations under the Rules of Professional Conduct, should be directed the attorney's malpractice carrier or The Missouri Bar's Risk Management Program at 1-800-555-9721.

[quotation of Rule 5.30 – see page 1 above]

SEARCH ENGINE

Clicking the "Search Engine" option on the MoBar web site brings up a search form that allows you to search by either keyword/phrase or opinion number.

Example: A keyword/phrase search for "office sharing" brings up 10 possible matches, of which the first seven are quoted here:

Informal Advisory Opinion Number: 990120

QUESTION: Attorney is renting office space from a law firm and there is a landlord tenant relationship. They share a common reception area. The firm's receptionist answers Attorney's telephone calls only when Attorney's number is forwarded to do so. One of the members of the law firm is a municipal judge and another is a city prosecutor. May Attorney represent individuals charged with violations in the areas where the firm members act as the prosecutor and municipal judge?

ANSWER: The arrangement Attorney has described does not, on its face, prohibit Attorney from representing individuals charged with ordinance violations in either of those municipalities. In an office sharing arrangement, it is important to be certain that people who come into contact with the offices understand that they are separate offices. This should be addressed in signs and possibly in the set up of the reception area. It should also be addressed in the manner in which the telephone is answered, even when Attorney has forwarded Attorney's calls to the firm's telephone number. Attorney also has an obligation to maintain confidentiality as to Attorney's files and other information. In order to accomplish such confidentiality

Attorney's files must be secure. If Attorney has taken these steps, the firms will be treated as separate. Therefore, Attorney will not have a conflict.

Informal Advisory Opinion Number: 980220

QUESTION: Attorney is involved in an office sharing agreement with three other attorneys. Each person pays all expenses relating to their practice and each contracts separately with clients. They do share common overhead expenses. They are also networked together on the same computer system and everyone on the network can access all of the client files for all of the attorneys. The attorneys are the sole occupants of a stand alone building and the sign in front of the building lists the names of all attorneys and the words "Law Office." There is one receptionist answering the telephone for all four attorneys. Currently, each attorney has their own stationery with their name at the top. Should Attorney list the names of the other attorneys on Attorney's stationery? If so, what is the proper way to list these names?

ANSWER: Under Rules 4-7.1 and 4-7.5(f), if Attorney is in an office sharing arrangement, all stationery, signage, etc., should indicate that Attorney is completely separate. If Attorney includes the other attorneys on Attorney's letterhead, it would give a contrary impression. If Attorney has a separate practice, it is not appropriate for the other attorneys to have access to confidential information regarding Attorney's clients. This applies to electronic information in the computer system, paper files, incoming and outgoing fax materials, etc. Attorney should take immediate steps to make any necessary changes to comply with the requirements of Rule 4-1.6 regarding confidentiality.

Informal Advisory Opinion Number: 970192

QUESTION: Attorney enters into an office sharing arrangement. Attorney would have a separate telephone number, but the fax number would be the same. It would appear on business cards, letterhead and the bar directory. Would this be a problem? Should Attorney get a separate fax line as well?

ANSWER: It is not required that Attorney have a separate fax line in an office sharing arrangement. However, Attorney must be able to assure confidentiality of materials received or sent on a shared fax machine. Similar concerns apply to other shared machines, such as a copy machine, and shared areas, such as a conference room.

Informal Advisory Opinion Number: 970119

QUESTION: Attorney is currently in an office sharing agreement with another attorney and they are considering entering into a formal partnership agreement at a later time. Attorney would like to obtain a full page advertisement to be split with the other attorney under one account with each attorney paying half. A border will divide the page into two parts. Would such advertising imply a partnership? Would such advertising need to contain a disclaimer stating the offices are not in partnership?

ANSWER: It is permissible for Attorney and another attorney to share the costs of a full page in the yellow pages without violating Rule 4-7.5(f) as long as the advertisements appear to be two separate advertisements. Depending on the degree to which the advertisements would appear to an objective person to be two separate advertisements, a disclaimer might be helpful.

Informal Advisory Opinion Number: 970035

QUESTION: Attorney owns office space and is considering entering into a landlord/tenant office sharing relationship with a non-attorney. The offices are all separated and have closing doors. There would be a common reception area. The non-attorney would have a separate secretary and phone system. There would be separate signage outside and inside the office space. All legal files would be maintained in separate storage and secured. No sharing of information would occur. There would be no sharing of advertising.

ANSWER: Based on the information provided, the office sharing arrangement Attorney has proposed will not violate the Rules of Professional Conduct.

Informal Advisory Opinion Number: 970007

QUESTION: Attorney seeks to represent H in a domestic case. W has previously consulted another attorney with whom Attorney has an office sharing arrangement. Does this create a conflict for Attorney?

ANSWER: Based upon the information Attorney has provided, which establishes that this is a true office sharing arrangement, Attorney does not have a conflict of interest which prevents Attorney from representing H.

Informal Advisory Opinion Number: 960219

QUESTION: Attorney would like to office share with a CPA firm. May Attorney do so if Attorney's files will be segregated within Attorney's own space in the suite? May Attorney use or share the secretarial staff?

ANSWER: Attorney may have an office sharing arrangement with the CPA firm as long as all signs, and other ways in which Attorney's practice is held out to the public, clearly indicate that Attorney is separate. Attorney must not only make certain that Attorney's files are segregated but that they are secure from unauthorized people. Attorney may use or share the secretarial staff as long as Attorney can implement adequate measures to ensure confidentiality.

TOPICAL INDEX

Clicking on "Topical Index" on the MoBar web site allows you to search for opinions indexed by sections of the Rules of Professional Conduct. The index, with each entry being an active link, looks like this:

CLIENT-LAWYER RELATIONSHIP	RULE
Competence	4-1.1
Scope of Representation	4-1.2
Diligence	4-1.3
Communication	4-1.4
Fees	4-1.5
Confidentiality of Information	4-1.6
Conflict of Interest: General Rule	4-1.7
Conflict of Interest: Prohibited Transactions	4-1.8
Conflict of Interest: Former Client	4-1.9
Imputed Disqualification: General Rule	4-1.10
Successive Government and Private Employment	4-1.11
Former Judge or Arbitrator	4-1.12
Organization as Client	4-1.13
Client Under a Disability	4-1.14
Safekeeping Property	4-1.15
Declining or Terminating Representation	4-1.16
Sale of Law Practice	4-1.17
COUNSELOR	RULE
Advisor	4-2.1
Intermediary	4-2.2
Evaluation for Use by Third Persons	4-2.3
ADVOCATE	RULE
Meritorious Claims and Contentions	4-3.1
Expediting Litigation	4-3.2
Candor Toward the Tribunal	4-3.3
Fairness to Opposing Party and Counsel	4-3.4
Impartiality and Decorum of the Tribunal	4-3.5
Trial Publicity	4-3.6
Lawyer as Witness	4-3.7
Special Responsibilities of a Prosecutor	4-3.8
Advocate in Nonadjudicative Proceedings	4-3.9
TRANSACTIONS WITH PERSONS	
OTHER THAN CLIENTS	RULE
Truthfulness in Statements to Others	4-4.1
Communication With Person Represented by Counsel	4-4.2

Dealing With Unrepresented Persons	4-4.3
Respect for Rights of Third Persons	4-4.4
LAW FIRMS AND ASSOCIATIONS	RULE
Responsibilities of a Partner or Supervisory Lawyer	4-5.1
Responsibilities of a Subordinate Lawyer	4-5.2
Responsibilities Regarding Nonlawyer Assistants	4-5.3
Professional Independence of a Lawyer	4-5.4
Unauthorized Practice of Law	4-5.5
Restrictions on Right to Practice	4-5.6
PUBLIC SERVICE	RULE
Pro Bono Publico Service	4-6.1
Accepting Appointments	4-6.2
Membership in Legal Services Organization	4-6.3
Law Reform Activities Affecting Client Interests	4-6.4
INFORMATION ABOUT LEGAL SERVICES	RULE
Communication Concerning a Lawyer's Services	4-7.1
Advertising	4-7.2
Direct Contact with Prospective Clients	4-7.3
Communication of Fields of Practice	4-7.4
Firm Names and Letterheads	4-7.5
MAINTAINING THE INTEGRITY	
OF THE PROFESSION	RULE
Bar Admission and Disciplinary Matters	4-8.1
Judicial and Legal Officials	4-8.2
Reporting Professional Misconduct	4-8.3
Misconduct	4-8.4
Jurisdiction	4-8.5
TERMINOLOGY	RULE
Definition of Terms	4-9.1
LAWYER REFERRAL AND	
INFORMATION SERVICES	RULE
Lawyer Referral and Information Services	4-10.1
COMMON QUESTIONS	
1. I previously represented this person in an unrelated matter. Do I have a conflict of interest that prevents me from representing a current or potential client against the former client?	
Rule 4-1.9(b)	
2. My client has discharged me, but has not paid me, do I have to turn the file over to the client or the client's new attorney?	
<i>In the matter of Cupples</i> , 952 S.W.2d 226, 234 (Mo banc 1997) and Formal Opinion 115, as amended.	
3. I have files that I have accumulated over a number of years. What can I do with them?	
Rules 4-.1.15 and 4-1.16(d), and Formal Opinion 115, as amended.	
4. Does the advertising material I plan to mail out need the ADVERTISING disclaimer?	
Rules 4-7.2 and 4-7.3	