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Jack L. Sammons

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GIVING ADVICE: ABA FORMAL ADVISORY OPINION 90-358

*Jack L. Sammons**

American Bar Association (ABA) Advisory Opinions have become more rigorous since the adoption of the ABA Model Rules of Professional Conduct. The authors of recent opinions have paid careful, detailed attention to the language of the applicable rules; they are beginning to treat the Model Rules logically and respectfully as a unified statutory scheme. My guess is, if this trend continues, and if state advisory opinion boards join in, we will eventually develop enough of a sense of precedence concerning these advisory opinions to permit a loose equivalent of a legal system to emerge to guide us in our decision-making.

But are we in danger of losing something in the process of this progress towards legal order? I think we are. Earlier advisory opinions, for all their failings,[1] often took the term "advisory" at root value and offered advice to lawyers – free wheeling advice sometimes, but advice nevertheless.[2] The direction of recent advisory opinions, I think, is away from offers of advice and towards administrative interpretative rulings – something akin to an IRS Revenue Ruling, for example, an extreme example offered to make the point in its starkest and most frightening form. If this is our direction, a trip too far in this direction puts us at risk of losing the advice component of our advisory opinions entirely.

Maybe we should accept this. Maybe we should realize that good advice is not going to come from the processes involved in formal advisory opinions. But, if so, then at least these recent and more rigorous advisory opinions should come with warning labels attached telling the unsuspecting reader – the one reading the new advisory opinions with the same eyes that read the old ones – that technical compliance with ethical rules alone may or may not be healthy for you, your client, or society for that matter. It may or may not be good advice. There is no harm in being clear about what will and will not be a violation of our ethical rules; no harm in being clear about what may and may not produce official intervention in our

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* Professor of Law, Walter F. George School of Law, Mercer University, Macon, Georgia. My thanks to Ted Blumoff, Dave Oedel, and Ivan Rutledge for comments and to Tedham Porterhouse for role playing the client.

1. There were many failings. *See* Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981).

2. *See, e.g.*, ABA Comm. on Professional Ethics and Grievances, Formal Op. 144 (1935) (propriety of bringing suit against another attorney); ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 346 (1982) (tax law opinions in tax shelter investment offerings). In their review of forty-eight holdings of the ABA Committee on Ethics and Professional Responsibility ("CEPR"), Finman and Schneyer found twenty holdings "based on value choices that are debatable, i.e., choices which some reasonable lawyers would accept and others would reject." Finman & Schneyer, *supra* note 1, at 102. I take this to mean twenty in which the CEPR exercised judgment in giving advice using something other than a rule based rationale. I am not arguing for or against Finman and Schneyer's assessment of the quality of the CEPR's work. I am only noting that earlier opinions tended towards the giving of advice. Finman and Schneyer note that some very early opinions were not treated as exercises in rule interpretation at all. *Id.* at 70, n.4.

conduct. Clarity about this, however, should never be confused with the giving of good advice.[3] As they move us further towards legal rigor, the authors of the advisory opinions should try to help us remember this critical difference. Any good lawyer would do the same for his or her client.

The only evidence I will offer in this abbreviated comment to support the claim that ABA Formal Advisory Opinions are heading in technical directions, moving away from advice, and confusing the difference for us, is an analysis of ABA Formal Advisory Opinion 90-358,[4] an opinion curiously named "Protection of Information Imparted by Prospective Client." This name is curious because the opinion is not really about protecting prospective client information at all. It is about avoiding withdrawal from representations and a concomitant loss of fees prompted by a disclosure of troublesome information in an initial interview; troublesome, that is, because the information relates to an existing representation. It is, in terms I prefer, about protecting lawyers from bad luck. If we were to follow the direction taken in this Opinion, the price we would risk paying to get this protection from the slings and arrows of misfortune is the loss of the kind of interview from which relationships of trust grow. This is brutally ironic because relationships of trust are the object of the obligation of confidentiality the Opinion says it wants to protect. But I should tell you more about the Opinion before I go on with my polemic.

Advisory Opinion 90-358 is concerned with a situation that can arise every time a new client walks through the door. During the initial interview of a putative client seeking assistance in good faith,[5] the lawyer learns information "material to the representation of [an] existing client and its use would be detrimental to the would-be client."[6] The lawyer performs no legal services and declines representation of the putative client, but wonders if the acquired information is confidential and, if it is, must the lawyer withdraw from the existing representation? The answers given to these two questions are yes and maybe. The information is confidential and the obligation the lawyer has to the putative client regarding the information may be enough to require withdrawal. This issue had been the subject

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3. If you will permit me one tangent, we are in danger of making this kind of mistake in other settings as well. A recent California case found that the disqualification of a defense attorney for immoral conduct was not a sufficient basis for ineffective assistance of counsel. People v. Johnson, 224 Cal. App.. 3d 52, 273 Cal. Rptr. 446 (1990), *review granted,* 801 P.2d 1070, 276 Cal. Rptr. 319 (1990). Is the court really saying that the morals of the lawyer do not play a part in effective representation? Is ours purely a technical exercise? If we reflected more upon the nature of lawyerly advice, perhaps we would not make this kind of mistake. The most meticulous cynic could not have painted a more convincing picture of a corrupted profession than the one painted by this California court.

4. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990) [hereinafter Formal Op. 90-358].

5. *Id.* This "good faith" requirement is there to eliminate the situation in which the putative client knows of the existing representation and talks to the attorney for the purpose of creating a problem. The Opinion notes that in these circumstances the information acquired in the initial interview is not confidential. *Id.*

6. *Id.*

of numerous state advisory opinions[7] and, although there was disagreement in those opinions,[8] and although the ABA Model Rules of Professional Conduct provisions on confidentiality are not clear on the issue,[9] these "yes and maybe" answers are not very surprising. The analysis leading to them is straightforward, resourceful, and sleek. The analysis rests upon Model Rule 1.7(b).[10]

Model Rule 1.7(b)[11] permitted the authors of the Opinion to use the obligation of confidentiality to one seeking legal assistance—a generally accepted obligation—as a basis for required withdrawal due to conflicting interest and to do so without going through a tortured analysis of whether or not there was a client-lawyer relationship formed in the initial interview with the putative client adequate to support a conflict of interest claim. (This tortured analysis had been central to most state advisory opinions on the issue.) This use of Rule 1.7(b) also neatly avoided questions about the application of the "substantial relationship" test, and its demanding presumptions, to putative client conflict of interest problems.[12] The way Model Rule 1.7(b) does all of this is by prohibiting the lawyer from representing a client "*if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person*, . . . unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."[13] The putative client, then, is now a *third person* to whom we owe an obligation outside the client-lawyer relationship.

By describing the obligation of confidentiality to the putative client as a responsibility to a third person, the authors of the Opinion avoided many of the problems

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7. *See, e.g.*, ABA Adv. Op. 1055 (BNA 901:8738)(1988), ABA Adv. Op. 1036 (BNA 901:8736)(1988), ABA Adv. Op. 316 (BNA 901:3902)(1987), ABA Adv. Op. CI-1153 (BNA 901:4756)(1986), ABA Adv. Op. 61 (BNA 801:4211)(1985), ABA Adv. Op. 84-132 (BNA 801:1086)(1984), ABA Adv. Op. 84-3 (BNA 801:4608)(1984), ABA Adv. Op. 83-94 (BNA 801:1057)(1983), ABA Adv. Op. 14 (BNA 801:5051)(1983), ABA Adv. Op. 82-39 (BNA 801:6339)(1982).

8. *Compare* ABA Adv. Op. 1055 (BNA 901:8738)(1988) *with* ABA Adv. Op. CI-1153 (BNA 901:4756)(1986).

9. Formal Op. 90-358, *supra* note 4, at 134.

10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(1983).

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

11. *Id.*

12. The substantial relationship test is a legal test to determine when a former representation will disqualify an attorney from a current representation adverse to the former client. Very basically, the attorney will be disqualified if the former and current representations are substantially related. If there is a substantial relationship, there is usually an irrebuttable presumption that confidential information was disclosed in the former representation that would be useful in the current one. The attorney usually does not have the option of showing that nothing useful or nothing confidential was disclosed in the former representation. Courts have taken many differing approaches to determining whether or not representations are substantially related. One prevalent approach is to look at the scope of the representations, that is, what topics would be discussed (hypothetically) in these kinds of representations to see if the scopes overlap to any significant degree. If they do, the representations are substantially related and the presumptions apply. Applied to an initial interview, the question regarding the substantial relationship test was whether the relationship with the putative client was sufficient to support its use.

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(1983)(emphasis added).

that have plagued other analyses of the issue. But they also created one of their own. Due to the interaction of the obligation of confidentiality with the need for consent by the existing client for continued representation, the test for required withdrawal is quickly reduced to the lawyer's determination whether the existing representation will be "materially limited" by her responsibilities to the putative client. If the lawyer determines that the existing representation will be "materially limited," the only option is withdrawal. Here is how the authors of the Opinion described this reduction:

> The principal inquiry under Rule 1.7(b) is whether, as a result of the lawyer's duty to protect the information relating to the representation of the would-be client, the lawyer's representation of the existing client would be materially limited. Even if the lawyer reasonably believes that the representation of the existing client would not be adversely affected by a material limitation (such that the existing client's consent to the representation after consultation would permit the lawyer to represent the client), revelation of sufficient information for the existing client to appreciate the significance of the limitation on the representation ordinarily would require the lawyer to divulge information relating to the would-be client's representation. Since such a revelation can be made under Rule 1.6 only after consulting with the would-be client (which ordinarily also would be foreclosed), the lawyer in the typical case cannot practicably obtain the requisite consents to continue representing the existing client.[14]

We find out in the last section of the Opinion, in which the authors apply their rule analysis to three hypothetical situations, that this "materially limited" test is not going to require withdrawal very often if lawyers and law firms are careful about the way in which they conduct their initial interviews.[15] The Opinion tells us to apply a "functional analysis,"[16] one heavily weighted for continuing the existing representation, when a question arises about the meaning of "materially limited." Avoiding required withdrawal is the unmistakable objective here. In fact, in the beginning of this section of the Opinion this "functional analysis" approach is described, in a slip of the pen, as "[w]ays to avoid this consequence [of withdrawal] from representation of an existing client."[17]

Now there are many grounds for quarreling with this Opinion. Something important is lost, for example, in discussing this issue purely as a matter of confidentiality. For all its cumbersomeness, an analysis that focuses upon the nature of the relationship formed in an initial interview and upon questions about the application of the substantial relationship test manages to hold on to little bits and pieces of a concern with the fidelity owed to those who have confided in their lawyers in

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14. Formal Op. 90-358, *supra* note 4, at 135.

15. "Accordingly, if the law firm exercises care to learn no more from the would-be client than is required to initiate a conflicts of interest check within the firm, it would be the unusual case where the law firm could not continue to represent [the existing client.]" *Id.* at 138-39.

16. *Id.* at 138.

17. *Id.* at 137.

addition to recognizing the confidentiality we owe to them.[18] But there is a much more troublesome reason for writing about this Opinion than quarreling with its results. The centerpiece of the Opinion is not its rule analysis because we are told that this analysis will seldom require us to withdraw *if* we have done our initial interview correctly. Rather, it is the adaptation of initial interviews to the rule analysis. The centerpiece is a description of a "correct" initial interview. We are told, quite specifically, how to conduct an initial inquiry to avoid the risk of required withdrawal from representation. The Opinion describes what we should do, and it is this description that is troublesome, and it is this description that makes my point about technical directions and the giving of advice.

The first protective measure the Opinion tells us to take in an initial interview is to "limit those situations in which, as a result of information revealed by a would-be client, a lawyer or firm must withdraw from or decline representation of another client"[19] is to "[*i*]*dentify conflicts of interest before undertaking representation in any matter.*"[20] This is commonplace prudence, but what is a little different in this recommended version of it is that the procedures for identifying conflicts are going on *during* the discussions with the putative client. This is done to identify a conflict at the "earliest practicable point in the discussions . . . ."[21] This first measure, designed to stop the flow of information quickly before any harm to the lawyer or her existing representations is done, is not enough of a limitation; we are also told to "[*l*]*imit information from a would-be client to that which is necessary to check for conflicts.*"[22] This is done by cautioning the client "at the outset of the initial conversation not to volunteer information pertaining to the matter until after the lawyer has had an opportunity to determine whether a conflict of interest exists . . . ."[23] This, the Opinion states, is especially important when the putative client is a former client of the lawyer or the law firm because such people are very likely to believe "that the communication is with his or her lawyer."[24] Next, the authors of the Opinion believe it would be "proper. . .to advise"[25] the putative cli-

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18. The substantial relationship test is based primarily on protection of confidentiality and is basically a prophylactic measure to avoid disclosure of confidences, but in application another base in fidelity appears. This usually happens in judicial attempts to apply the test when a lawyer has turned on an obviously sympathetic client. In these situations, the application of the test shows more concern with fidelity than it does with confidentiality. I have discussed the legal analysis of subsequent representation conflicts of interest, the substantial relationship test, and the role of fidelity in it, in JACK L. SAMMONS, INST. OF CONTINUING LEGAL EDUC. IN GEORGIA, RECENT DEVELOPMENTS IN ETHICS AND PROFESSIONALISM (1990); JACK L. SAMMONS, INST. OF CONTINUING LEGAL EDUC. IN GEORGIA, RECENT DEVELOPMENTS IN ETHICS (1989); JACK L. SAMMONS, INST. OF CONTINUING LEGAL EDUC. IN GEORGIA, RECENT DEVELOPMENTS IN ETHICS (1988); Jack L. Sammons, *Legal Ethics*, 41 MERCER L. REV. 237, 261-62 (1989). The specific issue of defining the existence of a client-lawyer relationship in initial contact situations is discussed in JACK L. SAMMONS, INST. OF CONTINUING LEGAL EDUC., RECENT DEVELOPMENTS IN ETHICS 20-70 (1989).

19. Formal Op. 90-358, *supra* note 4, at 135.

20. *Id.* at 136 (emphasis in original).

21. *Id.*

22. *Id.* (emphasis in original).

23. *Id.*

24. *Id.*

25. *Id.*

ent that the information given to the attorney, before a determination that no conflict exists, is not confidential, that the information will not bar the attorney from any representation adverse to the putative client, and, impliedly, that the attorney is free to use the information to the disadvantage of the putative client. The authors could not have meant to say that this is "advice" to the client. I reach this conclusion because the information *is* confidential and the attorney may or may not be barred from an adverse representation. Instead, they meant to say that the attorney should request a waiver of confidentiality from the client and an accompanying understanding that the information given cannot be the basis for withdrawal and may be used against the putative client. This becomes clearer, although still not completely clear, when they tell us, "[t]he waiver of confidentiality should be in writing and signed by the client; it should reflect clearly that all relevant consequences of providing the waiver were fully explained to and understood by the would-be client."[26] As a final protective measure against required withdrawal, the lawyer conducting the initial interview should be screened from disclosing the information obtained to all other lawyers in the firm if the lawyer does not undertake the representation.[27]

At this point, I want to remind you that this Opinion is about a procedure to follow before *every* initial interview (except, perhaps, for the inaugural interview of a sole practitioner). This Opinion is about the way in which the profession should receive its clients. It is about the ethics and the courtesies of reception.[28] It is about how we first present ourselves to those we are to serve as professionals.

Does the rest of my argument need to be made? I hope not. But in case it does, here is the part of the attorney in a hypothetical initial inquiry conducted in accordance with the guidance of ABA Ethics Opinion 90-358. (I have often used the wording of the Opinion.)

"Good morning, Mr. Porterhouse. It's a pleasure to see you again. Let's see. It's been two years now since we concluded that unfortunate breach of contract matter for you."

"You will notice, I am sure, Mr. Porterhouse, that I did not ask you what brought you to my office today nor did I ask you how your business was going now. Before we begin either of those topics, I want you to know that I am not now acting as your lawyer even though I was your lawyer on the previous matter. Before I can determine whether or not I can be your lawyer, if you elect to use my services, I must first determine whether or not the matter that you bring to me today, whatever it may be, will create any conflicts for me with existing representations.

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26. *Id.*

27. *Id.*

28. The phrase is from George Steiner, Real Presences 145-78 (1989). Steiner discusses reception in the context of receiving works of art and works of meaning. He uses the courtesies of reception, the "modulation . . . of stranger into guest" as an instructional analogy for our reception of works of art and works of meaning. *Id.* at 176. He wonders in what sense these "moral motions of sensibility are essential to the communitive act." *Id.* at 145. These rites of reception he calls "philology," following Vico, I assume. *Id.* at 155. The connections I am suggesting between his discussion and ours are tenuous and strained, but very interesting. Steiner reminds us of the subtle importance, the buried centrality, of our subject to all ethics.

Please do not volunteer any information to me pertaining to the matter about which you have come to see me until I have had the opportunity to make my determination. This is why I did not ask you why you are here and it is why I cannot ask you about your business. Do you understand?"

"Mr. Porterhouse, you will notice that I will be entering the information you provide into my computer terminal as we speak. Please don't let this distract you. This is necessary for the computer to attempt to match the information you are providing with information related to existing representations. If at any time during the interview the computer determines that a conflict exists, I will terminate our conversation."

"Despite my precautions, Mr. Porterhouse, I may obtain information from you that could require my withdrawal from existing representations. In order to avoid this risk to me and to my existing clients, I must ask you to sign a waiver of confidentiality regarding all information you divulge in this preliminary inquiry. You must also indicate by your signature that you understand all relevant consequences of providing this waiver and that I fully explained those consequences to you. The consequences for you are that the information you give me in this preliminary inquiry cannot be the basis for my withdrawal from any existing representation, even if that representation is adverse to you and even if I would have to use the information you provide against you. In other words, what you tell me now may be used against you. I cannot tell you what the specific consequences may be beyond this because I cannot permit you to tell me about your situation until you have signed this waiver."

"Thank you for signing the waiver, Mr. Porterhouse. Now, in order for me to avoid obtaining any information outside the scope of this preliminary inquiry, I want to remind you not to volunteer any information. I will ask narrow specific questions to assist you in limiting your conversation."

"Shall we start . . . . excuse me, I mean, we will start now."

When this hypothetical inquiry is completed, the lawyer will have complied with the Model Rules, avoided the risk of withdrawal and the attendant risk of any loss of fees. This is what the authors of the Opinion wanted to accomplish. This is all they wanted to accomplish. And this is the problem. They have given us fine directions for rule compliance with risk reduction. But no one would be well advised to start an initial interview with such an inquiry. There is so much more to an initial encounter with a prospective or returning client than the protection of the lawyer, the protection of existing clients from the loss of their lawyer, and the avoidance of troublesome information that might prompt these lamentable results. As I mentioned before, it is brutally ironic that a rigorous concern with confidentiality has produced such a result. How can we foster the trust and the confidence that the obligation of confidentiality was designed to promote if we start initial interviews like this?

Would the authors of this Opinion have rendered such an opinion if they thought of their task a little more in terms of giving good advice to lawyers and a little less in terms of compliance with the Model Rules? I hope so. Perhaps this little shift

would have broadened their horizons enough to see the limits of the perspective from which they were thinking and writing. It is this hope that moves me to bemoan the tendency to neglect the "advice" part of advisory opinions or, at least, to rue the neglect of a warning about the difference between technical directions and advice.

I should conclude here because I have filed the complaint I wanted to file, but there is one more possible explanation of what possessed the authors of this Opinion to recommend such a dreadful start to client-lawyer relations, and it is a far more disturbing explanation.

Perhaps I am wrong in my critique of this Opinion. Perhaps it has nothing to do with a movement towards rule based analytical rigor. Perhaps, instead, the reason for this Opinion is found in the ABA's perceptions of the attitude of the members of our profession toward their back pockets and purses. This Opinion sets up a demanding obligation of confidentiality towards putative clients. In doing so it stakes out, implicitly, one part of the ethical claim that our business is a profession. But it then recommends a disastrous way of starting an initial interview along with a weighted functional analysis balancing test that together are designed to assure us that this part of our ethical claim for being a profession is cost free. Yes, there are goods to be served in not withdrawing from a well formed client-lawyer relationship, and there is money of others to be protected here, but these are not the only goods at stake. Could it be that the authors were driven towards their perspective not by the horse and buggy of increased rule based analytical rigor, but by the BMW of protecting our income? If so, I want to complain. I want to complain that the profession may be more willing to pay the price of good ethics than the ABA gives us credit for in this Opinion. We *may* be willing to suffer a few more slings and arrows of misfortune coming to us in the form of a sudden and unexpected requirement to withdraw from an existing (and profitable) representation than to lose the excellences of initial interviews, the unique relationships of trust that can be created in them, and the courtesies of reception that should shape our relationships with those we serve.

My guess is that most lawyers already know all of this and that when they finished reading ABA Formal Advisory Opinion 90-358 they knew they had been left on their own to find a solution to the putative client issue within the experiences of their own practice. This one will not do.