What’s the process for developing a legal ethics opinion?

Does an opinion drafted by the ABA override one drafted by the state bar?

Since an opinion is not legally binding, how does it affect our practices?

William Balin of Balin & Kotler, who currently teaches “Legal Ethics and the Practice of Law” as an adjunct professor at UC Hastings College of the Law, the University of San Francisco Law School, and Golden Gate University School of Law gave our writer a tutorial. Here are answers to some pressing questions.
Issues may be suggested by the members of the Legal Ethics Committee, general members of The Bar Association of San Francisco (BASF), or even from outside attorneys. The committee will then consider the merits of the topic, research whether anyone else has opined on it, and determine if it is of significant value to BASF members.

Once an issue is chosen, the committee then follows these steps:

1. The committee assigns a few people to research and draft the opinion.
2. A draft is submitted to the full committee for vetting, discussion, comments, and suggestions.
3. The draft is revised until one of two things happens:
   a. The group as a whole can't come to a decision or the issue is deemed too complicated to opine, or
   b. The committee adopts the opinion.
4. A final draft is presented to BASF’s board of directors for its approval.
5. The opinion is posted on BASF’s website (www.sfbar.org/ethics) and is also distributed to members through print publications and social media.
6. A copy is sent to the state bar and it goes into the California Compendium of Professional Responsibility (see more about this below), which makes the opinion available to the public.

Ethics opinion documents are not necessarily lengthy tomes; they typically run just a few pages and sections are brief and concise. A standard format includes the following components:

- Issue or Title: A question is posed.
- Digest: Why this is a problem.
- Authorities Interpreted: Rules of Professional Conduct, ABA Model Rules, and other sources may be listed as references.
- Statement of Facts
- Discussion: Summary of the committee’s discussion, including citations from authorities.
- Conclusion: The committee’s recommendation.
- Disclaimer

Visit www.sfbar.org/ethics/ to read opinions released by BASF’s Legal Ethics Committees dating back to 1970.

While the State Bar of California’s opinions are generally deemed to carry more weight than opinions from county bar associations, there’s no overriding committee that decides which opinion takes precedence. An ABA opinion doesn’t trump a state opinion, and a state opinion doesn’t trump a county opinion. There are simply conflicting opinions. And once an opinion has been released, other parties have the opportunity to question, criticize, or comment. It’s interesting to note that multiple
comments—explanations of how the rule may apply in certain situations—can all but rule out the original rule.

In the case of a court of appeals decision that cites an opinion, if a separate court of appeals comes out with a conflicting decision, then that latter decision may criticize the old decision, but only a higher court can overrule it.

**Legal ethics options are not legally binding, they’re advisory only. So how are they used?**

It comes down to “first impressions.” If an issue comes before a court (and generally this occurs in the court of appeals, although this occasionally occurs in the superior court), and there is no court decision that addresses that issue, then an ethics opinion can have persuasive value. An attorney may cite an opinion—any opinion, whether it comes from the ABA, any state bar, or any county bar—that supports his or her position. If the court likes the opinion, it may cite it to back up its decision.

**How do ethics opinions influence the Rules of Professional Conduct?**

If an issue is cited in a decision by the California Supreme Court, then it may become a legal precedent.

(If you’re curious about any opinions that have become law, look at the *California Compendium of Professional Responsibility*. It includes the Rules of Professional Conduct, all Committee on Professional Responsibility and Conduct [COPRAC] opinions, as well as all opinions from Orange, San Diego, and Los Angeles counties’ bar associations, and BASF.)

Almost every state bases its own rules in some part on the ABA Model Rules of Professional Conduct, and some states base their rules on the ABA Model Code of Professional Conduct, which predates the Rules. The key word is *based*; the ABA has no authority to dictate the rules, and each state is free to adopt or modify them to meet their own needs. California, in keeping with its Wild West reputation, has always had its own set of rules that did not follow the format or organization of the ABA Model Rules.

In the early 2000s, the California Supreme Court directed the State Bar of California to appoint a commission to redraft our rules using the ABA’s as a guide. The tedious work included shifting from the state’s hyphen-based format (1-1, 1-2) to the ABA’s decimal-based format (1.1, 1.2) and addressing the bigger issue of which of the ABA’s rules were appropriate for the state to adopt. Issues such as future conflict waivers and whether or not we should allow multidisciplinary practices (okay per the ABA, but not in California) were discussed.

After two years of diligent work, the Rules Revision Commission submitted its proposed draft to the California Supreme Court. It has yet to be adopted as a whole; however, revised rules have been adopted, out of necessity, in the old format in the interim. This includes, for example, the duty to inform clients if you do not have malpractice insurance, which is now a disciplinary rule.

**So, what’s the bottom line?**

Well, there isn’t one. While there is some interest in having an authoritative ABA set of “bright line rules”—rules that have no gray areas, such as those about sexual contact—each state has the right to say its own rules take precedence. Each state also has the right to look to other jurisdictions for guidance on what could be the rule for each issue, as it applies to the times, such as we’re seeing with the advent of rules for social media.

This is a fluid science. Attorneys and their clients will always be pushing the envelope, there will always be tension, and there will always be new issues to opine. And that’s part of what makes this work so vital and exciting.