NEW DIRECTIONS IN PROFESSIONAL CONDUCT:
The Devil is in the Details

Those seeking evidence of sweeping shifts in the newly amended Rules of Professional Conduct will not likely find any, but developments over 20 years have given rise to numerous changes in the details that bear careful attention.

The most extensive amendments in the 20-year history of the Minnesota Rules of Professional Conduct will become effective October 1, 2005. The amendments codify two decades of developments in case law, bar opinion, and treaties dealing with attorney ethics. This general codification has produced few marquee changes. General themes of the amendments include increased deference to the ABA Model Rules and to the 1st Amendment, and, in reaction to recent scandals in corporate America, enhanced rights and duties of lawyers to prevent and report fraud.

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The amendments were sought in three MABA petitions, filed in 2003 and 2004. The Court granted the petitions, with a few significant changes, by order dated June 17, 2005. The full text of the Court’s order and a red-lined version of the rules and amendments can be found, with other useful materials, at www.courts.state.mn.us/rules. This article will discuss the most noteworthy rule changes.

BACKGROUND TO THE PETITIONS
Since 1983 the ABA has promulgated model ethics canons, codes, and rules for lawyers. In 1983 the ABA adopted the Model Rules of Professional Conduct, which became effective in Minnesota,
with certain variations, in 1985. The ACA Ethic 2002 Commission ("2K") worked long, hard, and well, to amend the ACA Model Rules in 2002. The Commission took particular account of the Restatement of the Law Governing Lawyers and of the over 400 Formal Opinions of the ACA Standing Committee on Ethics and Professional Responsibility. The 2K Commission also conducted numerous public hearings and received comment from many interested parties, including the MSBA. The MSBA’s main petition for rule amendment, filed in September 2003, was based largely on the 2K model.

The MSBA petitions were also based on several special-purpose considerations. First, the ACA amended Model Rules 5.5 and 8.5 on the recommendation of its Multi-Jurisdictional Practice (Malpractice) Commission. The 2K Commission dealt with the problem of outdated unauthorized practice of law regulations obstructing the increasingly multistate needs of clients. Second, the ACA amended Model Rules 1.6 (Confidentiality) and 1.13 (Organization as Client) on the recommendation of its Corporate Responsibility Commission. That commission was formed to respond to the ethics issues raised by a wave of corporate scandals and by the regulations affecting lawyers in the Sarbanes-Oxley Act and related SEC rules. Third, the Lawyers Board raised its interest in a 1st Amendment concern relating to Minnesota’s prohibition, in Rule 7.4, against stating or implying that an attorney is a “specialist,” unless he or she is certified as such. Fourth, in Lemarquand v. Anoka-Hennepin Independent School District No. 11, 662 N.W.2d 119 (Minn. 2003), the Minnesota Supreme Court, having rejected the Minnesota Board of Legal Specialization’s position, required the Board to provide specific guidelines for granting board certification. Fifth, in In re Panel File No. 99-42, 621 N.W.2d 240 (Minn. 2001), and In re Wesley, 639 N.W.2d 358 (Minn. 2002), the Court held that Lawyers Board Opinions were mere guidelines, without the force of law. Because many of these opinions had been very useful in preventing friction between lawyers and clients, in the opinion that appeared to incorporate them in rule references.

DRAFTING PROPOSED RULES

In July 2002 an MSBA task force, appointed by then-Precedent Jon Duckstad, began considering rule amendments. The task force was expert, industry, and broadly representative of the bar. The task force adopted several guiding principles. Its processes were open and invited comment. The task force deferred to the ACA Model Rules — unless there was “a damn good reason” not to — because the practice of law is increasingly multistate and uniformity is therefore more important. The task force gave wide berth to the 1st Amendment in drafting rules that regulate speech, mindful of cases like Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (invalidating the “announce clause” of Minnesota Judicial Canon 3, governing judicial campaign ethics). The task force sought, unsuccessfully, to persuade the Court that the Comments to the Rules should be adopted.

For its efforts, the task force was honored with the 2003 MSBA President’s Award. The efforts of the task force in drafting the first petition for rule amendment were followed by the MSBA Rules of Professional Conduct Committee’s work in drafting the second and third petitions.

ISSUES IN CONTROVERSY

Despite numerous amendments, there were relatively few controversies. Of the few controversies that did occur, all but one involved discrete issues involving isolated areas of practice.

■ COMMENTS. The Minnesota Supreme Court has a longstanding history of not adopting the Comments to its rules of practice and procedure. Although the Comments were included with the Court’s other adopting the Rules of Professional Conduct in 1985, an attempt to amend the Comments in 1998 was rejected when the Court indicated it had never formally adopted the Comments. Both the MSBA and the Lawyers Board urged the Court to adopt the Comments because they were not mere committee comments but integral to the ACA Model Rules. An important component of the 2K model, the Comments to the Rules of Professional Conduct differ from traditional advisory committee comments in that they contain substantive guidance on the application of the rules that is often not readily apparent in the rules themselves. One example involves the Comment to Rule 4.2 discussed below. Despite these arguments, the Court declined to adopt the Comments, stating they were included “for convenience and [shall not reflect court approval].”

■ "SPECIALIST." Competing proposals were submitted by the MSBA and the Board of Legal Certification over Rule 4.4(d), which regulates communications about lawyer specialist certification. The MSBA proposed that an uncertified lawyer be prohibited from communicating that he or she was a "specialist" unless the communication was accompanied by a disclaimer. In contrast, the Certification Board proposed that an uncertified lawyer be prohibited from stating or implying he or she was a "specialist" unless the statement was accompanied by a disclaimer. The focus of the dispute centered on whether the prohibition in the rule should be narrowly drawn due to constitutional concerns and the unavailability of certification programs in many substantive areas of the law, or whether a broader prohibition was necessary to prevent uncertified lawyers from misleading legal consumers.

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about their certified status or lack thereof. The Court resolved the dispute in favor of the broad er rule. Consequently, communications by unlicensed lawyers about their services that state or imply they are "specialists" must be accompanied by a disclaimer.

**RESPONSE TO LAWYERS.** Another controversy revolved around Rule 3.8(e), prohibiting prosecutors from subpoenaing lawyers to present evidence about a client unless a reasonable belief exists that: (1) the information is not protected by privilege; (2) the evidence is essential to the prosecution; and (3) there is no other feasible alternative to obtain the information. The ABA had adopted Rule 3.8(e) in the early 1980s due to perceived abuse of grand jury subpoenas by East Coast prosecutors. Minnesota, however, had never adopted the rule. During the 1990s Rule 3.8(e) was the subject of several lawsuits by the Justice Department against disciplinary agencies on the basis that it is not an ethics rule but instead a procedural rule that improperly infringes upon federal grand jury procedures.

The ABA and the criminal justice bar proposed adopting ABA Res. 3.8(e). The Lawyers Board and local prosecutors opposed the rule due to constitutional concerns and questioned whether the rule was necessary because of the absence of subpoena abuse in Minnesota. The Court adopted the rule but eliminated the "no other feasible alternative" requirement which had spurred much of the Justice Department litigation.

**CONFLICTS OF INTEREST.** Opinions also differed on how to attempt to curtail anticompetitive lateral movement between law firms by associates. This issue arose in response to the Court's Layman decision in which the hiring law firm, despite its prompt efforts to screen a new lateral associate, was disqualified because the associate obtained significant confidential information when she represented the opposing party during a single deposition while employed at her former law firm. Competing proposals by the ABA and the Lawyers Board that attempted to enhance the opportunity for lateral associate movement without jeopardizing client confidentiality were submitted to the Court in supplemental petitions. Ultimately the Court declined to accept either proposal and instead adopted existing Minnesota Rule 1.10(b).

**OTHER NOTABLE AMENDMENTS.**

**CONFIDENTIALITY.** Amendments to Rule 1.6(b) have increased the number of circumstances in which a lawyer may (but not must) disclose confidential client information from six to ten. Several of these apparent changes are codifications of existing practice and law, e.g., Rule 1.6(b)(1) allows disclosure "explicitly authorized in order to carry out the representation" and Rule 1.6(b)(7) allows disclosures necessary for a lawyer "to assert legal advice about the lawyer's compliance with these rules." Another reasonable exception to confidentiality in Rule 1.6(b)(2) actually retains the "confidences and secrets" category of prior law, allowing disclosures that are not detrimental and do not waive privilege. Rule 1.6 has also been amended to increase a lawyer's ability to prevent or rectify crimes and frauds. In Minnesota, this change is incremental, because for nearly 20 years Minnesota Rule 1.6(b)(4) has allowed lawyers to rectify fraud in which their services had been misused. The ABA, in contrast, consistently declined to permit such disclosures, until corporate scandals and federal legislation changed the landscape.

**ORGANIZATION AS CLIENT.** Disclosure of misconduct is also central to Rule 1.13,"Organization as Client." Rule 1.13(b) requires that a lawyer for an organization (whether public corporation or government agency or small association) must report up the ladder — within the organization — insider wrongdoing that is likely to substantially injure the corporation, unless the lawyer reasonably believes such reporting will not serve the organization's best interests. A related question — When may the lawyer report corporate misconduct outside the organization? — was answered more broadly by the ABA than by Minnesota. Minnesota applies the general confidentiality standard of Rule 1.6, but ABA Model Rule 1.13(c) permits disclosure "whether or not Rule 1.6 permits such disclosure, but only if an attempt to change the company reasonably believes necessary to prevent substantial injury to the organization." Another amendment relating to disclosure of misconduct, found in Rule 1.13(d), requires that a lawyer who withdraws or has been discharged from the firm must inform the organization's highest authority.

**LITIGATION.** Requirements for "curator to the tribunal" have been enhanced by amendments to Rule 3.3. Rule 3.3 generally provides that lawyers must present and disclose certain falsehoods to the tribunal. Rule 3.3(a)(1) now requires lawyers to correct their own material misstatements of law or fact. Rule 3.3(a)(3) provides that a lawyer must correct not only the client's false statements, but also those of a "witness called by the lawyer," both on direct and cross-examination. The same rule requires that defense counsel must offer evidence from a criminal defendant that the lawyer reasonably believes (but does not actually know) is false. These obligations exist until "conclusion of the proceeding." Rule 4.2. Comment (b) to Rule 4.2, governing communications with persons affiliated with represented entities, was extensively amended by the ABA. Although the Court has declined to adopt the
The amended conflict rules also employ a new, defined term for waivers, namely "informed consent." This term is defined by Rule 1.10 to require the lawyer to communicate "sufficient information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

The vastly expanded Comments to the conflict rules will be extremely important, even without Court adoption, because they will influence disciplinary and civil standards. For example, Comment 22 to Rule 1.17 suggests that prospective waivers by sophisticated clients will likely be enforceable. This Comment led the ABA to withdraw its original Opinion 93-372 and issue a new Opinion 95-416, which opposes enforceability of prospective waivers, especially where the client has independent counsel, in corporate clients often will.

Other important comments to Rule 1.17 include Comment 34 (affiliates of corporate clients are presumed not to be identified with the client for conflict purposes) and Comments 29–33, "Special Considerations in Common Representation." Comment 7 states that a lawyer who represents A may not, without informed consent, represent F in a transaction with A, even though the subject of the transaction and the representation of A are wholly unrelated.

[Multi-disciplinary Practice] Rule 5.5, governing the ethical dimension of unauthorized practice, was substantially revised based upon the ABA Multidisciplinary Practice Commission recommendations designed to facilitate temporary cross-border practice. Lawyer not licensed in Minnesota are still prohibited from establishing an office or having a systematic continuous presence in Minnesota for the practice of law. Lawyers not admitted similarly cannot advertise or otherwise hold out to the public that they are admitted to practice in Minnesota.

The most significant amendments define circumstances under which lawyers not admitted in Minnesota can temporarily practice in the state. These circumstances include associating with a Minnesota lawyer or providing services related to a pending or potential Minnesota proceeding if the non-Minnesota lawyer (or a person the lawyer is assisting) is admitted pro hac vice or reasonably expects to be admitted pro hac vice. Authorized temporary practice also includes services that arise out of or are reasonably related to the non-Minnesota lawyer's practice in his or her own state.
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Over the years, Lawyers Board opinions became reliable authority for recurring practice issues not explicitly dealt with in the Rules. For example, Opinion No. 13 relating to return of client files interpreted or clarified the files, papers and property that a client is entitled to receive upon termination of representation. Greater clarity about entitlement to file documents diminished the number of related ethics complaints and established ground rules for lawyer-client disputes over files. The value of Lawyers Board opinions caused the MSBA to propose specific Rules of Professional Conduct incorporating the standards of the several opinions.

Opinion No. 13, Return of Client Files. Opinion No. 13 provides that if a law firm ceases to practice or if a lawyer is admitted to practice in another state, the lawyer must return all documents and items for which the client paid the lawyer.

The Rules define "client files, papers and property" and are now contained in Rule 1.16(a). In all representation clients are entitled to receive all documents and property delivered to the lawyer as well as documents and items for which the client paid the lawyer.

In pending litigation representations, clients are entitled to litigation-related documents that have been served or filed as well as costs and expense items (e.g., depositions, expert opinions and statements, business records, witness statements) regardless of whether the client has paid for the lawyer's services or reimbursed the lawyer.

A different definition applies to multistate or transactional representations. A client who has not paid for the lawyer's services is not entitled to unsecured transactional documents such as estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unsecured legal document that does not otherwise have legal effect.

Copy charges are also covered. Although reasonable charges for reproducing files can be assessed, the client has agreed to writing such a charge, a lawyer may not condition the return of client files, papers and property upon payment of the copy costs or the lawyer's outstanding fees.

Opinion No. 15, Advance Fee Payments and Availability or Nonrefundable Retainers. Advance fees and "availability" or nonrefundable retainers are now covered by Rules 1.5(b) and Rule 1.15(c). All advance payment of nonrefundable or availability retainers must be reasonable in amount and communicated in writing signed by the client. In the case of advanced fee payments, clients must be debited into a trust account and withdrawn as earned unless the lawyer and the client have entered into a written agreement to the contrary.

Copy-related charges require contingent fee agreements to disclose whether the client will be responsible for litigation costs and expenses when the client is not the prevailing party and all agreements to divide fees between lawyers from separate law firms must be confirmed in writing with the client.

Opinion No. 9, Trust Account Books and Records. Lawyers must certify annually on their attorney registration renewal that they maintain trust account books and records in compliance with Rule 1.15. Historically, the books and records have been identified and described in Opinion No. 9. Rule 1.15(a) now authorizes the Lawyers Board to annually publish the required trust account books and records. It is anticipated the Lawyers Board will publish Opinion No. 9.

Opinion No. 12, Trust Account Signatories. The requirement that all trust account checks or other disbursements be signed or authorized by at least one lawyer associated with the law firm is now incorporated in Rule 1.15(b).
agreeing to arbitrate the dispute. This standard of conduct now appears as Rule 8.4(f).

**MINNESOTA VARIATIONS FROM THE MODEL RULES.**

In addition to the variations discussed above, there are a number — much smaller than in the past — of Minnesota variations from the ABA Model Rules. Some of the variations are retention of Minnesota rules. These include: 1.8(e)(3) (guaranteeing loan reasonably needed to enable client to withold litigation delay that would put substantial pressure on client to settle because of financial hardship rather than merits); 5.8(c)(2) (paying estate for deceased lawyer’s services); 5.8(d)(2) (nonlawyer with governance authority under Minnesota Professional Firms Act); 5.8A provisionally numbered as 5.7, and covering employment of disbarred, suspended, or involuntarily inactive lawyers; and 9.4(d) and (h) (prohibiting harassment and discrimination).

In some cases, Minnesota drafting appeared superior to the ABA’s. For example, Model Rule 1.8(c) provides an exception to the general prohibition on drafting an estate plan for the benefit of the drafting lawyer or his or her family, namely allowing drafting for the benefit of both family members and others “with whom the lawyer or the client maintains a close, familial relationship.” The problem with this exception is that the drafting lawyer/beneficiary will claim such a nebulous relationship even with those who are being exploited, and proof of the absence of such a relationship will be very difficult. Other rules that use Minnesota drafting include: 1.8(e)(3) (see with client); 1.17 (role of a law practice); 3.5 (exparte communications with judge or jurors); and 8.5(c) (exemption from retracted disclosure of attorney misconduct learned during participation in lawyer assistance program).

**CONCLUSION.**

Periodic revision of professional standards is important for self-regulating professions. The integrity of any ethics standard demands consideration of societal changes. The comprehensive changes to the Rules are intended to fulfill these purposes by promoting greater uniformity in legal ethics rules among jurisdictions and responding to problems relating to recent corporate scandals, while at the same time preserving Minnesota’s variations from the Model Rules that over time have proven beneficial to the bar and the public.

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**Notes**

1 In re Petition with Regard to Minnesota Code of Professional Responsibility, C8-84-1620, unpublished order (Minn., 12/19/88), denying an attempt by the bar to amend the reference to Rule 1.7.

2 For example, new Rule 1.7 relating to conflicts of interest has 15 paragraphs in comparison to 14 paragraphs in the previous version.

3 The disclaimer notes that the lawyer is not certified by an organization approved by the Minnesota Board of Legal Certification and must affirm in the same manner that certifies the certification.


6 The local rule at 8.6(b)(2) of the U.S. District Court in Minnesota authorizes the Minnesota Rules of Professional Conduct, “except as otherwise provided by specific rules of this Court.”


8 See Rule 5.6(c).

9 Although the provision would exempt a lawyer who engages in unauthorized practice from Minnesota discipline, it does not afford such protection.

10 See Rule 1.16(d) which prohibits lawyers to surrender papers or property to which the client is entitled is vacated upon termination of representation.

11 See Rules 1.16(b) and (g).

12 Rule 1.5(c).

13 Rule 1.5(c).

14 See also in Rea et al., 572 N.W.2d 415 (Minn. 1998).