

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



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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 treatises 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 redress fraud.

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The amendments were sought in three MSBA 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/lprb. This article will discuss the most noteworthy rule changes.

BACKGROUND TO THE PETITIONS

Since 1903 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 ABA Ethics 2000 Commission ("E2K") worked long, hard, and well, to amend the ABA 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 ABA Standing Committee on Ethics and Professional Responsibility. The E2K Commission also conducted numerous public hearings and received comment from many interested parties, including the MSBA. The MSBA's main petition for rule amendments, filed in September 2003, was based largely on the E2K model.

The MSBA petitions were also based on several special-purpose considerations. First, the ABA amended Model Rules 5.5 and 8.5 on the recommendation of its Multi-Jurisdictional Practice (MJP) Commission. The MJP Commission dealt with the problem of outdated unauthorized practice of law regulations obstructing the increasingly multistate needs of clients. Second, the ABA 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 1st Amendment concerns 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 *Lennartson v. Anoka-Hennepin Independent School District No. 11*, 662 N.W.2d 125 (Minn. 2003), the Minnesota Supreme Court, having rejected longstanding precedent, asked the bar to consider how lateral hire conflicts of interests should be treated. Fifth, in *In re Panel File No. 99-42*, 621 N.W.2d 240 (Minn. 2001), and *In re Westby*, 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, it appeared best to incorporate them in rule amendments.

DRAFTING PROPOSED RULES

In July 2002 an MSBA task force, appointed by then-President Jon Duckstad, began considering rule amendments. The task force was expert, industrious, and broadly representative of the bar. The task force adopted several guiding principles. Its processes were open and it welcomed comment. The task force deferred to the ABA Model Rules — unless there was "a darn 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 5, 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 order adopting the Rules of Professional Conduct in 1985, an attempt to amend the Comments in 1988 was rejected when the Court indicated it had never formally adopted the Comments.¹

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 ABA Model Rules. An important component of the E2K amendments was the significant expansion of the Comments.² Comments to the Rules of Professional Conduct differ from traditional advisory committee

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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 [did] not reflect court approval."

■ **"SPECIALISTS."** Competing proposals were submitted by the MSBA and the Board of Legal Certification over Rule 7.4(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 "certified 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 broader rule. Consequently, communications by uncertified lawyers about their services that state or imply they are “specialists” must be accompanied by a disclaimer.³

■ **SUBPOENAS 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 1990s 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 infringed upon federal grand jury procedures.

The MSBA and the criminal defense bar proposed adopting ABA Rule 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 spawned much of the Justice Department litigation.

■ **CONFLICTS SCREENING.** Opinions also differed over attempts to change Rule 1.10(b) to facilitate lateral movement between law firms by associates. This issue arose in response to the Court’s *Lennartson* 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.⁴ Competing proposals by the MSBA 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)(3) allows disclosures “impliedly authorized in order to carry out the



representation” and Rule 1.6(b)(7) allows disclosures necessary for a lawyer “to secure legal advice about the lawyer’s compliance with these rules.” Another ostensible exception to confidentiality in Rule 1.6(b)(2) actually retains the “confidences and secrets” categories 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 and to the extent the lawyer 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 for reporting misconduct *must* inform the organization’s highest authority.

■ **LITIGATION.** Requirements for “candor to the tribunal” have been enhanced by amendments to Rule 3.3. Rule 3.3 generally provides that lawyers *must* prevent 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 [7] 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

Comments *en bloc*, it has nonetheless taken Rule 4.2 Comments to be decisive. See *e.g.*, *State of Minnesota v. Miller*, 600 N.W.2d 457, 467 (Minn. 1999) (“the Comments to MRPC 4.2 establish that this relationship [general manager] falls within the protection of the Rule”).

The amended Comments should eliminate confusion over the reference in the prior Comment to an employee “whose statement may constitute an admission on the part of the organization.” Local federal courts have interpreted “admission” to extend the protection of Rule 4.2 to virtually all employees.⁵ The Director’s Office and the majority of other courts have rejected this interpretation of “admission.” The ABA and the Court resolved this controversy by deleting “admission.” There is no basis remaining in Rule 4.2 or its Comments for extending their protection to a large number of employees.

Comment [7] was also amended to provide that, instead of protecting every employee with “managerial responsibility,” only one “who supervises, directs or regularly consults with the organization’s lawyer concerning the matter” and one who “has the authority to obligate the organization with respect to the matter” are protected. For large organizations, these amendments will allow many more employees to be contacted by adverse counsel. (Insofar as fewer employees are covered by Rule 4.2, more are covered by Rule 4.3, “Dealing With Unrepresented Person.”) Comment [7] also restates the position taken in Minnesota and most other states that former employees are not covered by Rule 4.2.

Rule 4.4. Following the ABA Model Rule, Rule 4.4 now provides, “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” Comment [2] clarifies that whether an inadvertently received document can be used or must be returned is a matter of law beyond the scope of the ethics rules. Previously, the ABA Commission on Ethics and Professional Responsibility, in Formal Op. 94-382 (1994), had taken the position that the receiving lawyer should both notify and obey the sender’s instructions as to return or destruction of the inadvertently sent document.⁶

■ **CONFLICTS.** The most important amendment to the conflicts rules (Rules 1.7 — 1.12) requires that conflicts waivers be “confirmed in writing.” Although the rules (except 1.8(a)) do not require that conflict disclosures be in writing or that the client(s) sign conflict waivers, obviously the best practice will be not merely to confirm consents in writing, but to make disclosures in writing and obtain a client’s signature or email assent.

Rule 1.18, “Duties to Prospective Client,” is a new rule. It provides that a lawyer who has met with a prospective client is disqualified from adverse representation on a substantially related matter if the lawyer received significant confidential information. Rule 1.18 also disqualifies the lawyer’s firm, unless there is informed consent or the lawyer takes three steps: avoiding learning unnecessary confidential information; being screened from the adverse matter and fee; and giving prompt written notice to the prospective client.

The amended conflict rules also employ a new, defined term for waivers, namely “informed consent.” This term is defined by Rule 1.0(f) to require the lawyer to communicate “adequate 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 1.7 suggests that prospective waivers by sophisticated clients will likely be enforceable. This Comment led the ABA to withdraw Formal Opinion 93-372 and issue Formal Opinion 05-436, which espouses enforceability of prospective waivers especially where the client has independent counsel, as corporate clients often will.

Other important comments to Rule 1.7 include Comment 34 (affiliates of corporate clients are presumed *not* to be identified with the client for conflicts purposes) and Comments 29—33, “Special Considerations in Common Representation.” Comment 7 states that a lawyer who represents A may not, without informed consents, represent B in a transaction with A, even though the subjects of the transaction and the representation of A are wholly unrelated.

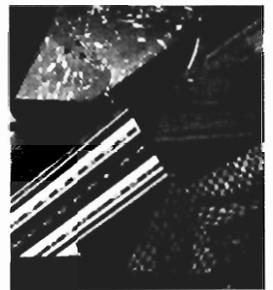
■ **MULTIJURISDICTIONAL PRACTICE.** Rule 5.5, governing the ethics dimension of unauthorized practice, was substantially revised based upon the ABA MJP Commission recommendations designed to facilitate temporary cross-border practice. Lawyer not licensed in Minnesota are still prohibited from estab-

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lishing 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.⁷ 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



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state, provided the services do not require *pro hac vice* admission in Minnesota. Examples include when officers of a multinational corporation survey business sites and seek the services of their lawyer to assess the merits of each. Another example is where the services draw upon the lawyer's expertise developed by representing clients in matters involving a particular body of federal, uniform, foreign or international law.

Two differences exist between Minnesota Rule 5.5 and the ABA Model Rule. First, a reciprocity exemption in 5.5(a) exempts Minnesota lawyers from being disciplined in Minnesota for their unauthorized practice in another jurisdiction if the same conduct is permitted in Minnesota under Rule 5.5 for lawyers not admitted in this state.⁸

A second difference is that unlike the Model Rule, Minnesota Rule 5.5(d) does not authorize house counsel employed by a corporation or organization to practice law on behalf of the organization without first being admitted to practice in Minnesota. The basis for this distinction was that lawyers who establish a continuous presence in Minnesota should not be exempted from bar admission requirements. In conjunction with this proposal, the Minnesota Rules for Admission to the Bar were amended to facilitate the admission of house counsel employed in Minnesota but admitted elsewhere. Rule 10, Rules for Admission to the Bar, now provides for relaxed eligibility requirements for lawyers admitted elsewhere to be admitted to the Minnesota bar as House Counsel. The House Counsel license authorizes the lawyer to practice law in Minnesota solely on behalf of an organization as long as the lawyer continues to be employed by the organization.

■ **LAW PRACTICE ISSUES.** Until 2001, the formal opinions of the Lawyers Board were considered to have authority nearly equivalent to that of the Rules of Professional Conduct they interpreted. Violations of Lawyers Board opinions were treated like rule violations and were frequently cited in private discipline cases as well as the Court's public discipline opinions. The Court's decision in *Panel File No. 99-42* not only changed but clarified the authority of Lawyers Board opinions:

Because [the lawyer] was admonished solely for violating a Board opinion and Board opinions do not have the force and effect of [rules of professional conduct] we reverse the Board Panel's affirmance of the admonition.⁹

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.¹⁰ 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's definitions of client files, papers and property are now contained in Rule 1.16(e). In all representations clients are entitled to receive all documents and property delivered to the lawyer as well as documents and items for which the client has paid the lawyer.

In *pending* litigation representations, clients are also 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 nonlitigation or transactional representations. A client who has not paid for the lawyer's services is not entitled to unexecuted transactional documents such as estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted legal document that does not otherwise have legal effect.

Copy charges are also covered. Although reasonable charges for reproducing files can be assessed if the client has agreed in writing to 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.¹¹

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 agreements for advance payment of nonrefundable or availability retainers must be reasonable in amount and communicated in a writing signed by the client. In addition, advance fee payments from clients must be deposited into a trust account and withdrawn as earned unless the lawyer and the client have entered into a written agreement to the contrary.

Other fee-related changes require contingent fee agreements to disclose whether the client will be responsible for litigation costs and expenses when the client is not the prevailing party¹² and all agreements to divide fees between lawyers from separate law firms must be confirmed in writing with the client.¹³

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(i) 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(j).

Opinion No. 5, Fee Arbitration Awards. Although participation in the fee arbitration programs sponsored by the local bar associations is voluntary, it has long been professional misconduct for a lawyer to refuse to honor a fee arbitration award after

agreeing to arbitrate the dispute. This standard of conduct now appears in Rule 8.4(i).¹⁴

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 retentions of Minnesota rules. These include: 1.8(e)(3) (guaranteeing loan reasonably needed to enable client to withstand litigation delay that would put substantial pressure on client to settle case because of financial hardship rather than merits); 5.4(a)(2) (paying estate for deceased lawyer's services); 5.4(d)(2) (nonlawyer with governance authority under Minnesota Professional Firms Act); 5.8, previously numbered as 5.7, and covering employment of disbarred, suspended, or involuntarily inactive lawyers; and 8.4(g) 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 MRPC 1.8(k) (sex with client), 1.17 (sale of a law practice), 3.5 (*ex parte* communications with judge or juror), and 8.3(c) (exemption from required disclosure of attorney misconduct learned during participation in lawyer assistance program).

CONCLUSION

Periodic reevaluation 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 of 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, C8-84-1650, unpublished order (Minn. 01/29/88), denying an attempt by the MSBA to amend the comment to Rule 2.2.

2 For example, new Rule 1.7 relating to conflict of interest has 35 paragraphs as compared to 14 paragraphs in the previous version.

3 The disclaimer must state that the lawyer is not certified by an organization approved by the Minnesota Board of Legal Certification and must appear in the same sentence that communicates the certification.

4 *Lennartson v. Anoka-Hennepin Independent School Dist.*, 662 N.W.2d 125 (Minn. 2003).

5 *Paulson v. Plainfield Trucking, Inc.*, 210 F.R.D. 654 (D. Minn. 2002); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 2003 U.S. App. LEXIS 21188 (8th Cir. 10/20/03). By Local Rule 83.6(d)(2), the U.S. District Court in Minnesota adopts the Minnesota Rules of Professional Conduct, "except as otherwise provided by specific rules of this Court."

6 For a fuller treatment of this issue, see Kenneth L. Jorgensen, "Ethics Advisory Opinions," *Bench & Bar of Minnesota* 60:7 (August 2003) p. 12 ff.

7 See Rule 5.5(c).

8 Although this provision would exempt a lawyer who engages in unauthorized practice elsewhere from Minnesota discipline, he or she might still be subject to discipline or other sanctions in the other jurisdiction for unauthorized practice.

9 In re Panel File No. 99-42, 621 N.W.2d 240, 242 (Minn. 2001).

10 See Rule 1.16(d) which obligates lawyers to surrender papers and property to which the client is entitled to receive upon termination of representation.

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

12 Rule 1.5(c).

13 Rule 1.5(e).

14 See also *In re Pearson*, 352 N.W.2d 415 (Minn. 1984).



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