

By MARTIN COLE

New and Noteworthy

Several developments in the area of professional responsibility have occurred in a fairly short period of time since the start of this year. Each warrants comment but perhaps not an entire column, so this month I'll address a few marginally related matters under the heading "new and noteworthy."¹

Amendments to the MRPC

On February 27, the Court approved a joint petition from the Lawyers Professional Responsibility Board and the MSBA to amend certain provisions of the Minnesota Rules of Professional Conduct (MRPC). Few of the proposed changes to the actual rules were substantively significant. Rather, the majority of the proposed amendments were to the unofficial comments to the rules, mostly to take better note of technology and its impact on the practice of law. As it has done previously, although the Court amended the language of several comments, the Court nevertheless stated that "[t]he comments to the rules are included for convenience and do not reflect court approval or adoption."²

Perhaps the most substantive changes to a rule were to Rule 1.6, MRPC (Confidentiality), to which two additions were approved. New Rule 1.6(b)(11) allows a lawyer to disclose confidential information as part of the hiring process

or as part of a law firm merger. Now, a lawyer may disclose information relating to a representation if "the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm" but cautions that revelation is appropriate "only if the revealed

information would not compromise the attorney-client privilege or otherwise prejudice the client." Prior to this change, such information in all likelihood was disclosed (since a hiring firm, for example, would have an obligation to determine if conflicts of interest existed) but now can be done so with a greater degree of protection.

The other amendment to Rule 1.6 adds a new section 1.6(c) that requires a lawyer to make reasonable efforts to prevent inadvertent or unauthorized disclosure or access to client confidential information. Previously the rule only explicitly prohibited knowing disclosures.

Amendment Rejected

In a separate petition to amend the MRPC, the Court denied a local law firm's request to amend the comment to Rule 1.2, MRPC. The petition grew out of Minnesota's recent change to the law authorizing the use and production of marijuana for prescribed medical purposes. In particular, Rule 1.2(d), MRPC, states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Well, the use and production of medical marijuana is now legal (and thus not criminal) under state law – but it remains criminal under applicable federal law, which of course could preempt the state law. So what can a Minnesota lawyer do in advising a Minnesota client who desires to enter into the business of medical marijuana? Will such advising be considered to be counseling or assisting the client in what is known to be (federally) criminal conduct, even though it is (state) non-criminal? An irreconcilable dilemma? Aye, there's the rub.

The petition's proposal was to amend the comment to Rule 1.2 to clearly permit advising a client in such a situation. The approach was similar to that taken in some other states that have legalized medical and/or recreational use, production and distribution of marijuana. The rub in doing so was, as noted above, the

Court has not ever formally adopted the comments to the rules. Can an amendment to such an unofficial comment provide the type of protection from discipline that was being sought? In the end, the Court said no, by declining to approve the amendment.

The Lawyers Board and Office of Lawyers Professional Responsibility (OLPR) presented its position on the petition to amend the comment to Rule 1.2 at the Court's hearing. As an enforcement position, the OLPR will not investigate or prosecute a complaint alleging that a Minnesota-licensed attorney is or has counseled or assisted a Minnesota entity concerning legal activity related to medical marijuana in Minnesota, notwithstanding the language of Rule 1.2(d), which is, in essence, the protection sought by the law firm that filed the rule amendment petition. This position is currently reinforced by the fact that the federal justice department has also indicated it will not presently seek any criminal prosecutions of state entities (or their lawyers) for engaging in marijuana-related production that is legal in the entity's jurisdiction. For now, a Minnesota attorney is safe from both state discipline and from federal prosecution. The only "catch" is that such a stated federal policy determination is subject to change by a new U.S. Attorney General or new administration.

Why does that last bit matter? An interesting aside occurred while writing this month's column: Alabama's Supreme Court took a stance against federal law preemption far more forcefully than the civil debate that the proposed amendment to Rule 1.2 took in Minnesota. Alabama's highest court has directed local probate judges not to accept marriage applications from same-sex couples, despite Alabama's law to that effect having been declared unconstitutional by a federal district court, claiming that state judges would follow a U.S. Supreme Court determination but are not bound to follow a federal district court's decision. If such a stance is deemed a criminal contempt, where does that leave an Alabama lawyer or judge wishing to comply with that state's Rule 1.2(d), which mirrors ours? Might the justice department view



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a civil rights issue differently than a drug enforcement issue, or might it eliminate all “hands off” policy positions? In the meantime, the Lawyers Board Opinion Committee may consider whether a formal LPRB opinion is appropriate.

Other Odds and Ends

There are a few other Minnesota Supreme Court actions that may have bypassed your attention lately. As of this writing, the Court has already issued 10 public discipline decisions, a pace that could produce over 60 public decisions this calendar year, which would be a record number. With 40 more petitions for public discipline already filed, it seems that such a total is quite plausible. I have never believed that the number of public cases necessarily reflects that there are more miscreants or that there is more misconduct. I hope it reflects that detection and reporting have improved and are being taken seriously by the bench and bar.

The recent merger of William Mitchell College of Law and Hamline University School of Law took many by surprise. It no doubt presages a reduction in the number of new law grads and admittees each year. With the legal job market as depressed as it has been, it may make little dent on the number of practicing

attorneys, and on this office’s budget, at least for a while. Thus, little immediate impact on lawyer discipline is foreseen.

A statistically minor number of dissents in lawyer discipline cases has been noted. How common dissenting and concurring opinions are in all Supreme Court decisions has varied over the years, obviously depending on the particular makeup of the Court at the time and the particular issue. Anything other than unanimity in lawyer discipline decisions, however, has been rare. So, even four dissents in the past nine months (three since November 2014 and two since February 2015) are noticeable. Lawyers in all areas of law try to read the “tea leaves” of the Court for developing trends, especially if new justices are the dissenters. In three of the lawyer discipline cases, the minority argued for greater discipline than the majority imposed; one for less, so it is hard to discern a clear developing pattern as of yet.

Finally, a new word has been added to the Supreme Court’s lexicon. I did a quick word search and did not find the word “hornswoggle” or any variation thereof in any Minnesota previously published decision, be it lawyer discipline or any other type of case. But in a recent lawyer discipline case,⁴ the respondent attorney claimed he somehow had been

“hornswoggled” by our office into not calling a particular witness at his disciplinary hearing, claiming he had been told that a particular allegation was no longer being pursued against him. Quite correctly, the Court determined this claim to be “baseless.” But a new term had been added for Supreme Court wordsmiths! ▲

Notes

¹ Other possible titles for the column presented themselves but were rejected: “No Comment” or “Pot Luck” seemed a bit too cheeky; “Crime and Punishment” is not entirely accurate in light of the Court’s long-held position that professional discipline is not punishment. Thus, a more neutral title was selected.

² Amended Order Regarding Proposed Amendments to the Minnesota Rules of Professional Conduct, ADM10-8005 (Minn. Sup. Ct., Feb. 27, 2015, effective April 1, 2015). A copy of the full order is available at: <http://lprb.mncourts.gov/Pages/Amendment%20to%20MRPC%202015.pdf>.

³ *Dictionary.com* defines it as a slang verb meaning “to swindle, cheat, hoodwink, or hoax.” But you knew that.

⁴ *In re Greenman*, A13-1963, slip. op. at 11 (Minn. March 4, 2015).

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