

AMENDING THE RULES

By

William J. Wernz, Director

Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (November 1989)

On December 14, the Minnesota Supreme Court will hear presentations and consider whether to amend the Minnesota Rules of Professional Conduct. The Lawyers Board and the Minnesota State Bar Association have both filed petitions for amendment.

The subjects of the proposed amendments are diverse: harassment, client confidentiality, tax returns, advertising, and the trust account overdraft notice program. While the subjects are various, the proposed changes are not extensive. Indeed, in the four years in which the "new" rules have been in effect, they have served their purpose well without any other changes.

Harassment Rule

The MSBA proposes to add a new section to Rule 8.4, providing:

It is professional misconduct for a lawyer to:

(g) Harass a person on the basis of sex, race, age, creed, color, national origin, disability, sexual preference, or marital status.

This proposal arises from two sex harassment discipline cases decided by the Court in 1988. The provision of the old code which was used to impose discipline did not specifically refer to harassment and has not been carried forward into the rules.

The Lawyers Board recommends adding to the proposed rule the words, "in connection with a lawyer's professional activities." Similar language had been recommended by an MSBA committee which studied the matter, but the language was deleted in the House of Delegates. The current MSBA proposal would proscribe harassment even when it occurred outside the lawyering setting and even when the victim did not know the harasser was a lawyer. The Lawyers Board strongly supports the harassment rule, but believes its scope should be confined to lawyering activities.

Trust Account Overdraft Notice

The other proposal by the MSBA is to amend Rule 1.15 to provide for adoption of what is essentially an ABA model program for automatic notice of overdrafts on trust accounts. (See "Overdraft Notice Rule," *Bench & Bar* 45:9 (Nov. 1988), p. 14.) Like the Interest on Lawyer Trust Account program, the overdraft notice program would involve financial institutions in which lawyers have trust accounts automatically notifying the Director's Office of overdrafts. The Director's Office would screen the notices to determine which were merely clerical in nature, and would not open formal investigation files unless it appeared that misconduct may have occurred. Based on experience in other jurisdictions, it is expected that most overdrafts will be products of error; but that some trust account shortages will be revealed through the program. The Lawyers Board supports this MSBA proposal.

Confidentiality

The Lawyers Board proposes to amend Rule 1.6 so that a lawyer *may* disclose confidential information "necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used." The proposal, which roughly tracks the longstanding crime-fraud exception to the attorney-client privilege, means to allow lawyers more discretion to reveal when the lawyer has been misused to perpetrate harm. (See Charles E. Lundberg, "On Ethics and Expediency," *Hennepin Lawyer* 52:4 (March/April 1983), p. 13.) A perfect balance will never be struck between the

competing claims of confidentiality and social fairness. Professional rules have generally restricted attorney disclosures more broadly than have the statutory or common law attorney client privilege.

Tax Returns

For over 15 years, the Court has disciplined attorneys for failure to file tax returns on a timely basis. The Lawyers Board proposes an addition to Rule 8.4 that would reflect these holdings. There is no intent to expand the Court's holdings to new areas. The intent is merely to provide additional notice of what is by now longstanding law. The text of the addition is:

It is professional misconduct for a lawyer to fail to file federal or state individual income tax returns, corporate income tax returns, partnership income tax returns, or employer's withholding tax returns within the time required by law.

In a related development in case law, the Minnesota Supreme Court on September 22 filed an order stating:

Ever since our decision in *In Re Bunker*, 294 Minn. 47, 199 N.W.2d (1972), in a number of cases this court has reiterated its dictum that the appropriate sanction to be imposed in an attorney disciplinary case for failure to file income tax returns is suspension or disbarment. In this case, the recommendations of the referee, as well as the stipulation entered into between the Director and the Respondent, call for a substantially less onerous sanction. We decline at this time to accept the recommendation of the referee or the stipulation between the parties. Instead, we order the parties to brief and argue the issue of whether or not the dictum in *In Re Bunker* should be reconsidered, continued, modified or revised. File No. C8-88-782.

As it happens, this case is the only tax matter now pending in the director's office or before the Court. The Court will have the opportunity to consider disciplinary policy in tax matters in both the rulemaking and case law contests.

Advertising Rule

Rule 7.2, advertising, currently requires that advertisements or legal services, "shall include the name of at least one lawyer" responsible for the content of the ad. The Lawyers Board proposes an amendment to make clear that a *Minnesota* lawyer must be responsible for ads for services to be performed by Minnesota lawyers.

By December 1, anyone desiring to be heard on the proposed Rule amendments must file a written statement and any request to make an oral presentation before the Court. Twelve copies of such filings must be made with the clerk of appellate courts.

For the future, the MSBA has appointed a committee, chaired by Minneapolis lawyer Walt Bachman, to consider whether any further amendments should be proposed. Great interest in the rules seems indicated from the initial committee membership of nearly 40 persons, including several nonlawyers. For its part, the Lawyers Board will both work with this committee and voice its own proposals where appropriate.