

Potential ethics rule changes

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Reprinted from *Bench & Bar of Minnesota* – December 2021

The ethics rules generally change infrequently. Currently pending before the Minnesota Supreme Court are petitions to amend the advertising ethics rules (Rule 7, Minnesota Rules of Professional Conduct) as well as a proposal to amend the confidentiality rules applicable to information held by the Director's Office (Rule 20, Rules on Lawyers Professional Responsibility). If you are interested in either of these topics, take note of the comment period established by the Court: Any person or organization wishing to provide written comments in support of or in opposition to the amendments must file comments with the Clerk of the Appellate Court by December 20, 2021. I thought an overview of the proposed changes to Rule 7, MRPC, and Rule 20, RLPR, would be helpful in case you wish to comment.

Rule 7, MRPC

Rule 7, MRPC, governs lawyer advertising and communications. In August 2018, the American Bar Association amended Rule 7 of the Model Rules, significantly reworking the rule's subparts to eliminate what the ABA believed were unnecessary provisions. Some of the noted reasons for amending Rule 7 include the advent and increased use of social media, and to address trends in First Amendment and antitrust law that disfavor regulation of truthful communication about the availability of professional services. The Director's Office and the Lawyers Professional Responsibility Board (LPRB) jointly petitioned the Court to adopt the ABA model rule changes. The Minnesota State Bar Association also petitioned the Court to adopt the proposed ABA changes, with one notable exception. In general, the main changes are as follows:

Rule 7.1: Communications Concerning a Lawyer's Services.

The principal change to 7.1 is to the comments. The cardinal rule remains the same: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The proposed rule moves the requirements of Rule 7.5, MRPC, to the comments of Rule 7.1.

Rule 7.2: Advertising.

The amended changes would permit nominal “thank you” gifts under certain conditions as an exception to the general prohibition against paying for recommendations. The amendment would also permit the use of a “qualified referral service,” which the current rule does not provide. Notably, the proposed amendment would broaden the use of “specialist” language currently addressed in Rule 7.4(c) (which would be deleted under the amended rule) and permit lawyers who, by means of experience, specialized training, or education, have attained special competence in a field of law, to state that they are specialists or specialize in that field of law.

This is the primary area of disagreement between the OLPR/LPRB petition and the MSBA petition, and may be of particular interest to members of the bar. The MSBA’s petition wishes to maintain rule language such that only individuals who are “certified” by an accredited program may use the term “specialists.” This departs from the ABA proposed amendments, which allows attorneys to refer to themselves as “specialists” based on years of experience, education, and focus on a specialized practice, even if such attorneys were not certified, and limits the use of “certification” as a specialist to accredited programs. This also differs from the current Rule 7.4(c), MRPC, which allows the use of the term “certified as a specialist” as determined by any program as long as the certifying organization and its accreditation by the Minnesota Board of Legal Certification (or lack thereof) are noted.

Rule 7.3: Solicitation of Clients.

The most notable change in Rule 7.3 is the elimination of the requirement that all solicitations clearly and conspicuously include the words “Advertising Material.” The rule still prohibits targeted mailings that are misleading; involve coercion, duress, or harassment; or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited. Added to Rule 7.3 under the amendment is a provision specifying that the rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

Rule 7.4: Communication of Fields of Practice and Certification.

As noted above, this subdivision is eliminated with a portion of its requirements incorporated into revised Rule 7.2.

Rule 7.5: Firm Names and Letterheads.

The amendments eliminate this subdivision concerning firm names and letterheads by incorporating its guidance as part of the comments to Rule 7.1.

Rule 20, Rules of Lawyers Professional Responsibility

Many attorneys are not familiar with Rule 20, RLPR, and most attorneys will never have to know this rule. Rule 20, RLPR, governs the public and private nature of the documents and information maintained by the OLPR. Records maintained by the OLPR are specifically exempt from the Minnesota Data Practices Act (see Minn. Stat. §13.90) and from the Minnesota Rules of Public Access to Judicial Records (see Minn. Stat. Access to Rec., Rule 1, Subdiv. 2). Rule 20, RLPR, is therefore the only guidance on the confidential or public nature of the records maintained by the Director. The purpose of amending Rule 20, RLPR, is to provide clarity as to the public or private nature of information maintained by the Director. Here are the changes of note:

Changes in the organization of the rule.

A major change in the rule is in its organization. The proposed amendment would divide the rule into categories of information: (a) before probable cause or commencement of referee or court proceedings (nonpublic information); (b) after probable cause or commencement of referee or court proceedings (public information); (c) information maintained as part of the Director's more administrative rather than investigative or prosecutorial function; and (d) expungement.

Changes related to nonpublic information.

The amended changes to Rule 20 would make clear the circumstances under which the Director is allowed to reveal otherwise nonpublic information. The amended changes would clarify that the OLPR may:

- share information with other lawyer admission or disciplinary authority that have matters under investigation relating to the affected attorney;
- share information otherwise deemed confidential with the DEC and any fact witness or expert witness as necessary to investigate a complaint;
- share information with the Supreme Court-approved lawyer assistance program (in this case, Lawyers Concerned for Lawyers (LCL)) in

situations where, in the Director's discretion, such *one-way* notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being; and

- share information otherwise deemed confidential under this section with law enforcement or court personnel in situations where public safety and the safety of the Director and staff, Board, or district court is at risk.

Changes to public information.

The amended changes to Rule 20 would make clear the circumstances under which the Director is allowed to keep certain information confidential that would otherwise be public. The amended changes would clarify that the OLPR may keep confidential:

- sensitive personal information contained in the file such as Social Security numbers, birthdates, driver's license numbers, bank account numbers, and medical information;
- information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic information;
- the identity of non-complaining clients unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a sworn affidavit, or files documents in compliance with a subpoena *duces tecum*; and
- the Director's work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties. This provision was previously contained under section 20(a) of Rule 20, and with the reorganization of Rule 20, is more appropriately under Rule 20(b).

Conclusion

If you have an opinion about these proposed amendments to the rules, please provide your comments to the Minnesota Supreme Court by the deadline of December 20, 2021. The Court's order and the pending petitions can be found at the LPRB website under the "Rules" heading and "Proposed/Pending Rules/Opinions" section. If you have suggestions for additional rule changes, please let me know.