ETHICS: COURT AMENDS RULES OF PROFESSIONAL CONDUCT

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Effective April 1, 2015, certain of the Minnesota Rules of Professional Conduct (MRPC) have been amended by order of the Minnesota Supreme Court. Significant portions of the comments to the MRPC have similarly been changed, but not technically "amended" as the court has never officially adopted or approved the comments to the MRPC. Rather, in its most recent order (to which the redlined version of the rules and comments as proposed were attached), the court reiterated its long-standing position that "[t]he comments to the rules are included for convenience and do not reflect court approval or adoption."

The amendments to the MRPC and changes to the comments were proposed jointly by the Minnesota State Bar Association (MSBA) and the Lawyers Professional Responsibility Board (LPRB). The proposal was predominantly based upon recent amendments to the American Bar Association's Model Rules of Professional Conduct; the amendments to the Model Rules were, in turn, the product of an ABA commission's recommendations to bring those rules current with "recent" advances in technology.

A number of minor amendments to the MRPC and changes to the comments provide for more expansive language to capture the full scope of modern methods of communication used by attorneys, clients and members of the public. For example: Rule 1.0(o) (Terminology – defining a "Writing") was amended to replace the word "email" with the term "electronic communications"; the comment to Rule 1.1 (Competence) was changed to state that keeping abreast of "the benefits and risks of relevant technology" is an element of maintaining the requisite knowledge and skill set to remain competent; and the comment to Rule 1.4 (Communication) was changed from stating that an attorney should promptly return or acknowledge client "telephone calls" to stating an attorney should promptly return or acknowledge "client communications."

The most substantive amendments and changes were made to Rule 1.6 (Confidentiality), which addresses information relating to the representation of a client. Subsection (11) has been added to Rule 1.6(b), permitting a lawyer in many circumstances to disclose information relating to the representation of a client for the purpose of performing conflicts-checks when an attorney changes law firms or a law

firm otherwise changes composition. Rule 1.6(c) has been added and imposes upon an attorney the obligation to undertake reasonable efforts to prevent the accidental or unauthorized disclosure of information relating to the representation of a client. The unofficial comment explains that disclosures under Rule 1.6(b)(11) are limited to circumstances in which "substantive discussions regarding the new [employment or law firm] relationship have occurred" and offers guidance on determining how to gauge what are considered to be "reasonable efforts" to safeguard client information under Rule 1.6(c). Corresponding changes specifically referencing the new Rule 1.6(b)(11) were also necessarily made to the comments to Rules 1.6 and 1.17 (Sale of Law Practice).

Amendments to Rule 4.4(b) now make explicitly clear that a lawyer has an obligation to promptly notify the sender when the receiving lawyer knows or reasonably should know that a document or "electronically stored information" relating to the representation of a client was inadvertently sent. Certain changes to the comment to Rule 4.4 explicitly address the (unfortunately common-enough) accidental electronic transmission of information to an unintended recipient-lawyer. Further changes to the comment to Rule 4.4 are consistent with LPRB Opinion No. 22 relating to the transmission of, and the associated presumptions in the transmission of, metadata.

Changes to the comment to Rule 1.18 (Duties to Prospective Clients) provide somewhat of a safe harbor excepting from the protections of Rule 1.18 unsolicited communications from a prospective client in response to a lawyer's advertising which contains merely biographical information or qualifications and also provide further information as to when, precisely, an actual "consultation" occurs which triggers the protections of Rule 1.18.

Rule 8.4(g) was amended to add "status with regard to public assistance" and "ethnicity" to the list of specifically prohibited bases for harassment by an attorney (although harassment on any other basis not listed within Rule 8.4(g) may constitute a violation of one or more other rules). The amendment to Rule 8.4(g) is the only proposal by the MSBA and the LPRB not derived from the ABA's amendments to the Model Rules. This amendment flows from a report by the MSBA Human Rights Committee which proposed several rule amendments to several sets of court rules (not simply to the MRPC) for the stated purposes of achieving internal consistency across the various rule sets and, perhaps more importantly, reiterating to the public the Minnesota judicial system's commitment to equality in its administration of justice.

Several additional amendments and changes were made to the above rules and associated comments as well as to Rules 5.3 (Responsibilities Regarding Nonlawyer Assistants), 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice), 7.1

(Communications Concerning a Lawyer's Services), 7.2 (Advertising), 7.3 (Solicitation of Clients), and 8.5 (Disciplinary Authority; Choice of Law) and/or to those rules' comments. A complete, red-lined version of all amendments to the MRPC and changes to the attendant comments can be found at http://lprb.mncourts.gov.