

## ETHICS: HIGHLIGHTS OF PETITION TO AMEND CONDUCT RULES

by

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Minnesota lawyers have been governed by ethical canons, codes, or rules of one sort or another since the early 20th century. The Minnesota bar was one of the first to adopt the 1908 ABA Canons of Ethics, although the Minnesota Supreme Court did not formally adopt them until 1955. In 1970, the court adopted the Minnesota Code of Professional Responsibility (MCPR). The code, which was modeled on the ABA's Model Code of Professional Responsibility, reduced the former 32 canons of ethics to nine code sections. In 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct (Model Rules). Minnesota adopted the Model Rules as the Minnesota Rules of Professional Conduct (MRPC) in 1985, but with changes from the Model Rules. The Court amended the MRPC in 2005 and 2010.

The influence of the ABA's Model Rules is far-reaching. Every state (except California) patterns its lawyer ethics rules on the Model Rules and generally follows suit in adopting the ABA's changes to them. In 2009, the ABA formed an "Ethics 20/20 Commission" to review the "U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments" and to consider possible revisions to the Model Rules. The commission recommended amendments to the Model Rules that the ABA House of Delegates adopted in 2012 and 2013.

Following the adoption of the Ethics 20/20 amendments, the MSBA Rules of Professional Conduct Committee and the Rules Committee of the Lawyers Professional Responsibility Board formed a joint working group to determine whether the ABA's amendments to the Model Rules should be recommended for adoption as amendments to the MRPC. The culmination of the joint working group's efforts was a Petition to Amend the Minnesota Rules of Professional Conduct that was filed with the Minnesota Supreme Court on July 30, 2014. Some highlights:

The first recommendation is not a proposed rule or comment change at all, but rather to urge the court "acknowledge the ABA's changes to the comments so that they may be published to the bar and the public." Although comments are an important part of the MRPC, the court has on more than one occasion declined to give official recognition to them even though the court frequently cites them in support of its decisions. By contrast, when the court adopted amendments to the Minnesota Code of Judicial Conduct in 2008, it officially adopted the accompanying comments – noting that the ABA had done so in its Model Judicial Code.

The joint working group proposed only a few new or amended rules. Rule 1.6, on confidentiality, would undergo perhaps the most significant revisions. Proposed new Rule 1.6(b)(11) would allow lawyers and law firms that are investigating a potential lateral hire, merger or other change in the composition of a law firm to exchange information about affected clients in order to detect and deal with potential conflicts of interest. Proposed new Rule 1.6(c) would make explicit the lawyer's obligation to take reasonable steps to safeguard information in a lawyer's possession relating to the representation of a client. Amendments to comment [15] (renumbered as comment [17]) to the rule discuss the factors to be considered in determining the reasonableness of the lawyer's efforts to prevent the unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client.

Existing Rule 7.3, which restricts in-person and telephone solicitation of new clients by lawyers, has caused confusion by its use of "prospective clients" because the phrase is defined differently elsewhere in the MRPC. The proposed amendment would clarify that the rule applies to targeted solicitations for professional employment addressed to anyone.

The proposed amendment to Rule 8.4(g), on harassment, would add ethnicity and status with regard to public assistance as additional classes protected from harassment by lawyers in connection with their professional activities. The proposed change originated from MSBA's Human Rights Committee, not the ABA's Ethics 20/20 Commission. The joint working group said the purpose is "to achieve greater internal consistency among various sets of rules and greater correspondence with the state of society today."

The petition also proposes some two dozen new or amended comments. Among the more significant proposed new comments are [6] and [7] to Rule 1.1 (on competence) that provides before a lawyer retains or contracts with outside lawyers to provide services to a client, the lawyer "should ordinarily" obtain informed consent from the client and must have a reasonable belief that the outside lawyer "will contribute to the competent and ethical representation of the client."

Space does not permit a discussion of the approximately two dozen other proposed new or amended comments to the MRPC. They can be found in their entirety at the Minnesota Office of Lawyers Professional Responsibility website.

If the court accepts the Petition to Amend the Minnesota Rules of Professional Conduct it will mean some notable changes to the MRPC and, for the first time, official status for the comments to the rules.