

COPY

Case No. CR 84-1650

STATE OF MINNESOTA  
IN SUPREME COURT

In the Matter of the Petition of the  
Minnesota State Bar Association, a  
Corporation, with Regard to the  
Minnesota Code of Professional  
Responsibility.

PETITION

Minnesota State Bar Association petitions and represents to the Court:

The House of Delegates and General Assembly of the Minnesota State Bar Association, on June 30, 1984, adopted a resolution approving proposed Minnesota Rules of Professional Conduct for Minnesota lawyers and directing that the officers of the Minnesota State Bar Association petition the Minnesota Supreme Court for its order replacing the present Minnesota Code of Professional Responsibility with these Rules.

The proposed Rules here presented are based on the American Bar Association Model Rules of Professional Conduct adopted by the American Bar Association House of Delegates in August 1983.

Certain changes were made in the American Bar Association recommended Rules -- these changes being felt to be more appropriate to Minnesota.

Attached hereto are copies of the Minnesota State Bar Association Committee Report which shows the American Bar Association draft and the changes made by the Minnesota State Bar Association.

The General Assembly and the House of Delegates of the Minnesota State Bar Association, on June 30, 1984, adopted certain amendments to the Committee Report mentioned above. These amendments are as follows:

1. Added to Rule 1.5 was subsection (f) as follows:

(f) This Rule does not prohibit payment to a former partner or associate pursuant to a separation agreement.

2. Rule 1.6 was amended to read as follows:

**RULE 1.6 Confidentiality of Information**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;

(2) to prevent the lawyer's services from being used to assist the client to commit a criminal or fraudulent act;

(3) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used; or

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

3. The "Comment" following Rule 1.6 has been changed to read as follows:

**COMMENT:**

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

#### **Authorized Disclosure**

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

## **Disclosure Adverse to Client**

The confidentiality rule is subject to limited exceptions. The lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1) the lawyer has professional discretion to reveal information in order to prevent such consequences. Similarly, a lawyer may reveal information necessary to prevent the lawyer's services from being used by the client to commit a criminal or fraudulent act. A lawyer also has discretion to reveal information necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. It should also be noted that a lawyer may never counsel or assist a client in criminal or fraudulent conduct.

## **Withdrawal**

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

## **Dispute Concerning Lawyer's Conduct**

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the

client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(4) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a presentation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

#### **Disclosures Otherwise Required or Authorized**

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, and 3.3. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

#### Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

#### 4. Rule 7.4 was amended to read as follows:

##### RULE 7.4 Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing the lawyer's or the lawyer's firm's practice or in indicating its nature or limitations.

(b) Except as provided in this rule, a lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board or other entity which is approved by the State Board of Legal Certification. Among the criteria to be considered by the Board in determining upon application whether to approve a Board or entity as an agency which may certify lawyers practicing in this state as being specialists shall be the requirement that the Board or entity certify specialists on the basis of published standards and procedures which (1) do not discriminate against any lawyer properly qualified for such certification, (2) provide a reasonable basis for the representation that lawyers so certified possess special competency, and (3) require redetermination of the special qualifications of certified specialists after a period of not more than five years.

(c) A lawyer shall not state that the lawyer is a certified specialist if the lawyer's certification has terminated, or if the statement is otherwise contrary to the terms of such certification.

#### 5. The "Comment" following Rule 7.4 was deleted.

Attached hereto are copies of Minnesota Rules of Professional Conduct as described above and as approved by the General Assembly and the House of Delegates of the Minnesota State Bar Association.

Attached hereto are copies of Minnesota Rules of Professional Conduct as described above and as approved by the General Assembly and the House of Delegates of the Minnesota State Bar Association.

The order of this Court in the form attached is requested, replacing the existing Minnesota Code of Professional Responsibility with Minnesota Rules of Professional Conduct.

Dated: September 15, 1964

Minnesota State Bar Association  
A Non-profit Corporation

By: 

David S. Doty, Its President

By: 

George C. King, Chairman  
Ad Hoc Committee on the ABA  
Model Rules

CASE NO. \_\_\_\_\_

STATE OF MINNESOTA  
IN SUPREME COURT

In the Matter of the Petition of  
the Minnesota State Bar Association

ORDER PROMULGATING  
RULES OF PROFESSIONAL CONDUCT

WHEREAS, the Supreme Court has the inherent authority to establish rules governing the professional conduct of lawyers admitted to practice law in the State of Minnesota,

WHEREAS, the Minnesota State Bar Association has petitioned the Court for an order replacing the present Minnesota Code of Professional Responsibility with a new body of rules entitled Minnesota Rules of Professional Conduct,

WHEREAS, a public hearing on such petition was conducted before this Court on September \_\_\_\_\_, 1984,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The Minnesota Code of Professional Responsibility now in effect is revoked.

2. The Minnesota Rules of Professional Conduct as proposed by the Minnesota State Bar Association are adopted as the standard of professional conduct of lawyers of this State.

3. Any lawyer violating any of such rules shall be subject to discipline or disbarment in the manner provided by rules of this Court.

4. This Order shall take effect \_\_\_\_\_, 1984.

Dated \_\_\_\_\_.

BY THE COURT .

Douglas K. Amdahl, Chief Justice