

11-2-87



Minnesota State Bar Association

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October 29, 1987

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Dear Sir or Madame:

Enclosed is the original and ten copies of a petition for a change in the Comment to Rule 2.2 of the Minnesota Rules of Professional Conduct.

Sincerely,

Tim Groshens
Executive Director

TG/lb
encs.

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OFFICE OF
APPELLATE COURTS

NOV 2 1987

FILED

Case No. C8-84-1650

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Petition of the
Minnesota State Bar Association, a
Corporation, with Regard to Rule 2.2
of the Minnesota Rules of
Professional Conduct.

PETITION

TO THE SUPREME COURT OF MINNESOTA:

Petitioner, Minnesota State Bar Association (MSBA), states:

1. Petitioner is a nonprofit corporation of attorneys admitted to practice law before this Court.

2. This Court, under its constitutionally-vested judicial power, has inherent and exclusive power to prescribe conditions upon which persons may be admitted to practice in the courts of Minnesota, and to supervise the conduct of attorneys admitted to practice in Minnesota.

3. The Minnesota Rules of Professional Conduct (Minnesota Rules) were adopted by the Minnesota Supreme Court, effective September 1, 1985, as the standard of professional responsibility for lawyers admitted to practice in Minnesota. The Minnesota Rules are based on the American Bar Association Model Rules of Professional Responsibility (ABA Model Rules).

4. Rule 2.2 of the Minnesota Rules establishes the conditions under which a lawyer may act as intermediary between clients. Most frequently, a lawyer acts as "intermediary" when the lawyer commonly represents two or more parties with conflicting interests.

5. The Alternative Dispute Resolution Committee (ADR Committee) of the MSBA studied Rule 2.2, and determined that the Comment as currently worded causes confusion between the concept of "intermediation" and the concept of "mediation," an established alternative dispute resolution technique.

6. The ADR Committee determined that intermediation and mediation differ significantly. In intermediation, a lawyer attempts to aid two or more parties to negotiate agreements, and has an attorney-client relationship with two or more of the negotiating parties. In mediation, a mediator (who may or may not be a lawyer) attempts to facilitate negotiation between two or more parties, but has no attorney-client relationship with any of the parties. In mediation, the lawyer/mediator's sole relationship with the parties is as a third-party neutral, or mediator.

7. The ADR Committee recommended to the MSBA Board of Governors that the MSBA petition the Minnesota Supreme Court to amend the Comment to Rule 2.2 to distinguish more clearly between intermediation and mediation so as to protect the public, clarify the role of attorneys under Rule 2.2 and its Comment, and further the

development of the field of mediation. A copy of the committee report is attached.

8. The MSBA Board of Governors and House of Delegates adopted the ADR Committee report that the MSBA petition the Minnesota Supreme Court for changes in Rule 2.2 Comment paragraphs 1, 2, 3, and 5. Proposed changes are underlined, as follows:

PROPOSED CHANGES IN PARAGRAPH 1:

This Rule applies to a lawyer's actions as intermediary, not as mediator. In intermediation, a lawyer: (1) attempts to aid two or more parties to negotiate an agreement and (2) has an attorney-client relationship with two or more of the negotiating parties. In contrast, in mediation, a lawyer attempts to facilitate negotiations between two or more parties but has no attorney-client relationship with any of the parties. In mediation, the lawyer's sole relationship with the parties is as third-party neutral, or mediator. For example, a lawyer acts as intermediary under this Rule when the lawyer commonly represents two or more clients with potentially conflicting interests. A key factor in defining the relationship is whether the clients share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each

client is not separately represented, it is important that the lawyer make clear the relationship.

PROPOSED CHANGES IN PARAGRAPH 2:

A lawyer does not act as intermediary within the meaning of this Rule when the lawyer acts as arbitrator, mediator or other third-party neutral between or among parties, even where the lawyer has been appointed with the concurrence of the parties.
A lawyer is acting as arbitrator, mediator or other third-party neutral between or among parties only if none of the parties is then a client of the lawyer. In performing the role of arbitrator, mediator or other third-party neutral the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association. Payment to a lawyer for services as an arbitrator, mediator or other third-party neutral does not establish an attorney-client relationship between the lawyer and the parties.

PROPOSED CHANGES IN PARAGRAPH 3:

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working

out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or facilitating negotiations between disputing clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

PROPOSED CHANGES IN PARAGRAPH 5:

The appropriateness of intermediation can depend on its form and the circumstances of the intermediation. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

9. The MSBA Board of Governors and House of Delegates also adopted the ADR Committee report that no changes be made in Rule 2.2 Comment paragraphs 4, 6, and 7, but that two new paragraphs be added as paragraphs 8 and 9, which were inadvertently omitted through typographical error when the ABA Model Rules were adopted in Minnesota. Proposed new paragraphs 8 and 9, with the heading "Consultation," use language identical to that found in the Comment

to ABA Model Rule 2.2.

PARAGRAPH 8:

Consultation

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

PARAGRAPH 9:

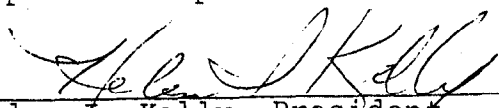
Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

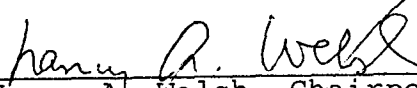
10. The MSBA Board of Governors and House of Delegates also adopted the ADR Committee report that existing paragraph 8, with the heading "Withdrawal," be moved to appear as paragraph 10.

WHEREFORE, PETITIONER RESPECTFULLY REQUESTS that the Court so amend the Comment to Rule 2.2 of the Minnesota Rules of Professional Conduct.

Dated: October 29, 1987

Minnesota State Bar Association
A Nonprofit Corporation

By: 
Helen I. Kelly, President

By: 
Nancy A. Welsh, Chairperson
Alternative Dispute Resolution
Committee

Attachments:

Report of the MSBA Alternative Dispute Resolution Committee
Letter from ABA Assistant Counsel to Adjunct Committee on
Implementation of the Model Rules of Professional Conduct
Minutes of June 11, 1987 MSBA Board of Governors meeting