

STATE OF MINNESOTA  
IN SUPREME COURT

C8-84-1650

ORDER FOR HEARING TO CONSIDER PROPOSED  
AMENDMENTS TO THE MINNESOTA RULES  
OF PROFESSIONAL CONDUCT

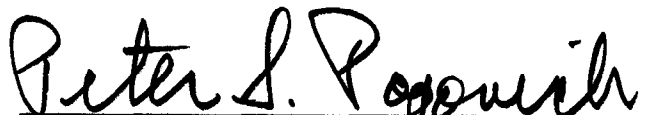
IT IS HEREBY ORDERED that a hearing be had before this Court in the courtroom of the Minnesota Supreme Court, State Capitol, on December 14, 1989, at 9:00 a.m., to consider the petition of the Lawyers Professional Responsibility Board to amend Rules 1.6 (b), Rule 7.2 (d) and (e), and Rule 8.4 (g), and the petition of the Minnesota State Bar Association to amend Rule 1.15 and Rule 8.4 of the Minnesota Rules of Professional Conduct.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 230 State Capitol, St. Paul, Minnesota 55155, on or before December 1, 1989, and
2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before December 1, 1989, and
3. All persons wishing to obtain copies of the petitions shall write to the Clerk of the Appellate Courts.

Dated: September 15, 1989

BY THE COURT

  
Peter S. Popovich, Chief Justice

OFFICE OF  
APPELLATE COURTS

SEP 15 1989

FILED

OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY

520 LAFAYETTE ROAD  
FIRST FLOOR  
ST. PAUL, MINNESOTA 55155-4196

DIRECTOR  
WILLIAM J. WERNZ  
FIRST ASSISTANT DIRECTOR  
THOMAS C. VASALY  
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October 20, 1989

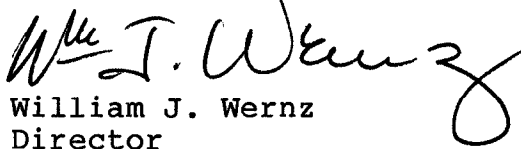
Office of Appellate Courts  
230 State Capitol  
St. Paul, MN 55155

Re: File C8-84-1650

Dear Clerk:

Enclosed for filing in the above matter is a statement of the Lawyers Professional Responsibility Board concerning petition of Minnesota State Bar Association, with 12 copies. Also enclosed are an original and 12 copies of a request to make oral presentation.

Very truly yours,

  
William J. Wernz  
Director

WJW:tt

Enclosures

cc: Honorable Glenn E. Kelley (w/encl)  
A. Patrick Leighton (w/encl)  
Tim Groshens (w/encl)  
Charles R. Kennedy  
Gregory M. Bistram

OFFICE OF  
APPELLATE COURTS  
OCT 20 1989  
FILED

OFFICE OF  
APPELLATE COURTS

FILE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

OCT 30 1989

FILED

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PROPOSALS TO AMEND  
MINNESOTA RULES OF  
PROFESSIONAL CONDUCT.  
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STATEMENT OF LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD  
CONCERNING PETITION OF MINNESOTA  
STATE BAR ASSOCIATION

The Lawyers Professional Responsibility Board files this statement pursuant to the Court's September 15 order, concerning the petition of the Minnesota State Bar Association to amend the Rules of Professional Conduct. The Board supports the MSBA's petition, with one exception.

In separate filings, the Board has filed its own petition for amendments to the Rules, and has requested leave of the Court to make oral presentation before the Court on December 14.

PROPOSED HARASSMENT RULE

The MSBA proposes to amend Rule 8.4, Rules of Professional Conduct, to provide:

It is professional misconduct for a lawyer to

\* \* \*

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status.

The Lawyers Board supports this proposal, but recommends that the Court add to the MSBA proposal the words, "in connection with a lawyer's professional activities." The language recommended by the Board is similar to that which had been approved by the MSBA Ad Hoc Committee and by the Board of Governors ("while the lawyer is acting in a professional capacity.")

Both the Board and the Committee language would provide for professional discipline of lawyers for harassment only when harassment was connected with professional activities. The MSBA proposal, in contrast, would cover harassment by a lawyer which is not connected with lawyer activities, and would cover harassment even when the victim did not know the harasser was a lawyer. Although the Board believes that the language of the harassment rule should be broad enough to cover the sorts of misconduct disciplined in recent harassment cases,<sup>1</sup> the Board believes that the language proposed by the MSBA is too broad. Under the Board's proposal, harassment connected, for example, with employment in a law office would be subject to the Rule, but harassment connected with a lawyer acting as a landlord would not.

The reasons which led the MSBA General Assembly to delete from the committee recommendation the language, "while the lawyer is acting in a professional capacity," are not clear. One source suggests that the reasons may have been semantic.<sup>2</sup>

The Lawyers Board wishes to make clear its strong support for the adoption of a Rule against harassment. The MSBA Committee Report, filed with the MSBA Petition, summarizes the

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In re Williams, 414 N.W.2d 397 (Minn. 1987);  
In re Miera, 426 N.W.2d 850 (Minn. 1988); In re Peters,  
428 N.W.2d 375 (Minn. 1988); In re Plunkett, 432 N.W.2d 454  
(Minn. 1988).

2/

The person who suggested deletion of the words, "While acting in a professional capacity" stated, "It's almost an oxymoron to suggest that a lawyer who is harassing someone would be acting in a professional capacity." 5 MSBA, "In Brief," No. 7, July 1989, pp. 4-5.

relevant history. The recent report on gender fairness suggests further reasons for adoption of a rule. The MSBA now has a standing committee on the Rules of Professional Conduct. That committee apparently will be considering whether a rule generally prohibiting certain sorts of discrimination would be advisable. The Board takes no position at this time.

The Board also wishes to advise the court that, if the Court adopts a rule against harassment, the Board will consider issuing an opinion regarding the rule. Under Rule 4(c), Rules on Lawyers Professional Responsibility, the Board ". . . may, from time to time, issue opinions on questions of professional conduct."

#### OVERDRAFT NOTIFICATION RULE

The Lawyers Board recommends that the Court adopt the MSBA's recommendation to amend Rule 1.15, Rules of Professional Conduct, to incorporate provisions for a trust account overdraft notification program. While such a program may be expected to have only limited utility in detecting trust account shortages, the rule will have educational benefits as well as disciplinary effect.

The MSBA Committee report, attached to its petition, states well the reasons for adopting the overdraft notification rule. The Board has adopted a policy, by which the Director would be instructed not to open discipline investigation files automatically upon receipt overdraft notifications. Instead, it would be expected that screening of such notices would reveal that a significant number of overdrafts were caused by bank error, mistaken bookkeeping entry and other problems that do not warrant disciplinary investigation. When review of the overdraft notices indicated a basis for "a reasonable belief that

misconduct may have occurred," the Director would open a discipline investigation file.

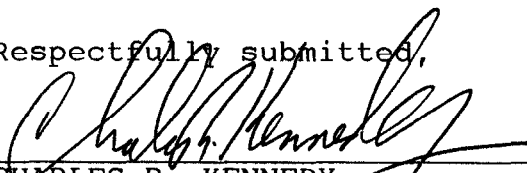
The Board has also considered that adoption of the notification rule would entail some additional burdens on staff. No staff additions would be required for the overdraft notice program itself, but in combination with other recent additional duties for the Director's Office (such as the Client Security Board and trusteeships), staff addition may be necessary at some point.

#### CONCLUSION

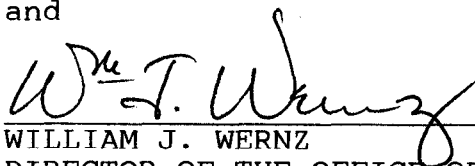
For the reasons stated above, the Lawyers Board recommends that the Court amend the Rules of Professional Conduct in accord with the Petition of the Minnesota State Bar Association except that addition be made to the proposed new Rule 8.4(g), of the following language: ". . . in connection with a lawyer's professional activities."

Dated: October 18, 1989.

Respectfully submitted,

  
\_\_\_\_\_  
CHARLES R. KENNEDY  
CHAIRMAN OF THE LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD

and

  
\_\_\_\_\_  
WILLIAM J. WERNZ  
DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY  
Attorney No. 11599X  
520 Lafayette Road, 1st Floor  
St. Paul, MN 55155-4196  
(612) 296-3952

FILE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

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PROPOSALS TO AMEND MINNESOTA  
RULES OF PROFESSIONAL CONDUCT.  
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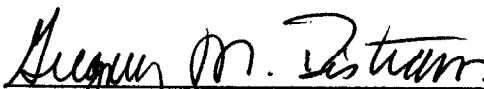
REQUEST TO MAKE  
ORAL PRESENTATIONS

The Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility request leave of the Court to make oral presentations before the Court on December 14, 1989, concerning proposed amendments to the Minnesota Rules of Professional Conduct. The Board requests that Gregory N. Bistram, the Board's Vice-Chair, have leave to address the Court concerning the Minnesota State Bar Association proposal to amend Rule 8.4(g), by adding a harassment rule, and to further address the Court concerning the Board's recommendation for an addition to this Rule.

William J. Wernz, the Director of the Office of Lawyers Professional Responsibility, requests leave to address the Court concerning the MSBA proposal to amend Rule 1.15, and the Lawyers Board proposals to amend Rules 1.6(b), 7.2(d) and (e), and 8.4.

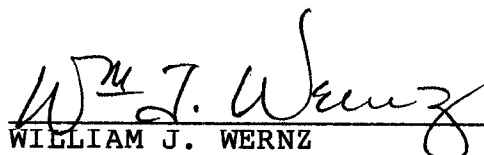
Dated: October 18, 1989.

Respectfully submitted,



\_\_\_\_\_  
GREGORY M. BISTRAM  
VICE-CHAIRMAN OF THE LAWYERS  
PROFESSIONAL RESPONSIBILITY BOARD

and



\_\_\_\_\_  
WILLIAM J. WERNZ  
DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY  
Attorney No. 11599X  
520 Lafayette Road, 1st Floor  
St. Paul, MN 55155-4196  
(612) 296-3952

FILE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

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PROPOSALS TO AMEND  
MINNESOTA RULES OF  
PROFESSIONAL CONDUCT.  
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STATEMENT OF LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD  
CONCERNING PETITION OF MINNESOTA  
STATE BAR ASSOCIATION

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The Lawyers Board supports this proposal, but recommends that the Court add to the MSBA proposal the words, "in connection with a lawyer's professional activities." The language recommended by the Board is similar to that which had been approved by the MSBA Ad Hoc Committee and by the Board of Governors ("while the lawyer is acting in a professional capacity.")





# MINNESOTA STATE BAR ASSOCIATION

MINNESOTA BAR CENTER • SUITE 403, 430 MARQUETTE AVE. • MINNEAPOLIS, MN 55401

President  
**Ralph H. Peterson**  
P.O. Box 169  
Albert Lea, MN 56007  
(507) 373-3946

OFFICE OF  
APPELLATE COURTS  
October 27, 1989

President - Elect  
**Tom Tinkham**  
2200 First Bank Place East  
Minneapolis, MN 55402  
(612) 340-2829

**Frederick Grittner**  
Clerk of the Appellate Courts  
230 State Capitol  
St. Paul, MN 55155

Secretary  
**Roger V. Stageberg**  
1100 TCF Tower  
Minneapolis, MN 55402-2852  
(612) 339-8131

Re: December 14 Hearing C 8-84-1650  
Minnesota Rules of Professional Conduct

Treasurer  
**Robert J. Monson**  
555 Degree of Honor Bldg.  
St. Paul, MN 55101  
(612) 227-6301

Dear Mr. Grittner:

Vice President - Outstate  
**Robert A. Guzy**  
3989 Central Ave. NE  
Columbia Heights, MN 55421  
(612) 788-1644

The Minnesota State Bar Association requests permission to appear at the December 14, 1989, hearing before the Minnesota Supreme Court to amend Rule 1.15 and Rule 8.4 of the Minnesota Rules of Professional Conduct. We would like to appear through our president, Ralph H. Peterson, and through the two individuals who chaired committees recommending rules changes. Those individuals are Philip K. Arzt and R. Walter Bachman. We anticipate Mr. Peterson providing a brief introduction, followed by substantive comments regarding the rule changes by Mr. Arzt and Mr. Bachman.

Past President  
**A. Patrick Leighton**  
1400 Norwest Center  
St. Paul, MN 55101  
(612) 227-7683

Sincerely,

Mary Jo Ruff  
Associate Executive Director

Executive Director  
**Tim Groshens**

MJR:jg

c: Philip K. Arzt  
R. Walter Bachman  
Ralph H. Peterson

M E M O R A N D U M

OFFICE OF  
APPELLATE COURTS

NOV 29 1989

FILED

DATE: November 28, 1989  
TO: The Minnesota Supreme Court  
FROM: Rosemary Strunk, Esq. *RS*  
RE: PROPOSED HARASSMENT RULE

After reading through the proposed Harassment Rule, I was shocked and angered to read the recommendation of the Lawyers Board to add the words, "in connection with a lawyer's professional activities."

By limiting the scope of this rule to our professional activities, the MSBA is sending the message that harassment is permissible, just do it in private. Harassment is unacceptable in any capacity. When an attorney is found to have harassed another in whatever capacity he was acting in, his conduct is a reflection of our profession. The public doesn't seem to differentiate between when the lawyer is harassing in connection with his professional activities and when he is not. Would the Lawyers Board recommend a rule that states:

It is professional misconduct for a lawyer to:

- a) Physically beat up his wife if done in his professional capacity. However, if the attorney is acting privately, there is no misconduct.

Perhaps because harassment and discrimination is so wide spread in our profession (Supreme Court findings), the Lawyers Board motivation stems from the desire to limit their colleagues exposure and liability to misconduct.

The public continues to question lawyers integrity and professionalism. There is no magical line for them that separates our conduct into professional and private. When someone is harassed, their injury is not different or lessened because the harasser was acting in his professional capacity or personal capacity.

Harassment is not acceptable. The Lawyers Board needs to think about the limitation they are proposing and look to its message and eventual consequences. The proposed rule should be passed in its original recommended form.

RS/ml

DEC 1 1989

STATEMENT  
TO THE  
SUPREME COURT  
STATE OF MINNESOTA

FILED

In Re Petition to Amend the  
Minnesota Rules of Professional  
Conduct.

STATEMENT IN RESPONSE TO THE  
AMENDMENTS TO THE MINNESOTA  
RULES OF PROFESSIONAL CONDUCT  
PROPOSED BY THE LAWYERS PRO-  
FESSIONAL RESPONSIBILITY BOARD

INTRODUCTION

I submit this statement as a private citizen, and a licensee under Minnesota Statute, who is concerned about the disciplinary actions available against attorneys in tax matters as they relate to other business and professional persons granted licenses by the State of Minnesota.

AMENDMENT TO RULE 8.4(g)

It is my belief that attorneys, in order to enjoy the confidence of the public and because of their unique position in the justice system, should be held to a standard of professional conduct and obedience to the law that is at least as high, if not higher, than that of any other citizen or licensee of the State. However, I recognize that attorneys are also human beings subject to the same, or sometimes greater, pressures and errors as are other citizens. Therefore, there should always be opportunity for hearing and explanation before sanctions are imposed or a livelihood withdrawn by disbarment.

In considering this matter it must also be recognized that there are available criminal penalties in certain instances of failure to file required tax returns.

Against this background I state my support for the proposed Amendment of Rule 8.4(g) so long as there is opportunity available to an attorney charged with misconduct under this rule to have a hearing on the charges.

A GREATER ISSUE

While I concur that the matter of attorneys satisfying the requirement to file appropriate tax returns is of significant importance and should be a cause of sanctions, I believe there is a greater related issue that should be addressed by the Court. This is the matter of non-payment of taxes by attorneys.

In recent years the Legislature enacted a Statute which empowers all licensing agencies in the State of Minnesota to withhold the issuance or renewal of licenses to any licensee who is delinquent in the payment of taxes to the

State of Minnesota. It is provided that the Department of Revenue notify all licensing agencies of the names of licensees who are delinquent in tax payments and the respective agencies are empowered, and required, to withhold the issuance or renewal of a licenses to the named persons. There is no opportunity for hearing or appeal to my knowledge. Action is automatic.

The one exception to to the law is for attorneys inasmuch as under the doctrine of separation of powers the Legislature cannot discipline attorneys. This function is given to the Supreme Court.

It is interesting and disturbing to note that State officials who should be knowledgeable in this matter appear to be uniformly misinformed. On February 5, 1988 I wrote to several State officials inquiring as to why this law was not being applied to attorneys as it was to other groups of licensees. Following are quotations from those who responded to my letter.

Senator Doug Johnson, Chairman, Taxes and Tax Laws - "Let me assure you that contrary to your understanding, attorneys are, in fact, being disciplined and having their licenses revoked or suspended if they are delinquent on their state taxes."

John P. James, Commissioner, Department of Revenue - "The license clearance program is enforced uniformly by all state agencies." "The same procedure (non-renewal of license) is followed in the case of attorney licenses. The Board of Professional Responsibility has been very cooperative in enforcing the license clearance program."

Michael A. Hatch, Commissioner, Department of Commerce (responding for the Governor) - Contrary to what was indicated in the newspaper, (regarding tax delinquencies of attorneys) however, attorneys were the first profession that came under the 'holding system' used by the Department of Revenue."

When I raised this question with Mr. William J. Wernz, Director of the Office of Lawyers Professional Responsibility, he responded "Only the Minnesota Supreme Court is empowered to institute a program of automatic non-renewal of attorney licenses. In the Court's current case-by-case decision-making, it has suspended a significant number of attorneys, principally for non-filing of returns, rather than delinquent payments."

In mid-summer 1987 I believe, the Department of Revenue issued a statement saying that the largest single occupational group of delinquent taxpayers was attorneys.

It is readily apparent that attorneys are being given more favorable treatment than other licensee/taxpayers; they represent a major tax collection problem; and appropriate officials are either uninformed or unconcerned.

SUMMARY

As a person holding a license granted by the State of Minnesota, and admittedly unschooled in law, I have question as to the fairness and perhaps the constitutionality of the current "license clearance" law. However, so long as it is the law of the State of Minnesota and is being aggressively enforced, it should then be applied to all licensees, not to the exclusion of attorneys. If attorneys, whose very profession is to uphold the laws and seek justice, are exempt from the law and apparently are the greatest transgressors in this instance, why then should any citizen be subject to that law or have belief in equal justice under our laws.

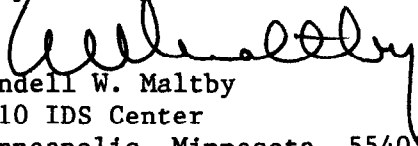
I urge the Court to continue this hearing in order to consider the matter of the automatic non-issuance or non-renewal of attorneys' licenses in those cases where the licensee is delinquent in the payment of taxes to the State of Minnesota in order to bring the disciplining of attorneys in this matter into conformity with the discipline applied to other licensees in the State.

As an alternative to the continuance of this hearing, I would urge the Court to request or instruct the Office of Lawyers Professional Responsibility to present a recommendation to the Court to accomplish the same objective.

I reiterate my belief that attorneys should be held to a standard of professional conduct and obedience to the law that is at least as high, if not higher, than that of any other citizen.

Dated: November 30, 1989.

Respectfully submitted,

  
Wendell W. Maltby  
4510 IDS Center  
Minneapolis, Minnesota 55402  
612/337-5300

**MICHAEL J. HOOVER**

ATTORNEY AT LAW  
201 RIDGEWOOD AVENUE  
MINNEAPOLIS, MINNESOTA 55403

OF COUNSEL TO  
WILLEKE & DANIELS

FAX (612) 870-0689  
TELEPHONE (612) 870-4000

November 29, 1989

OFFICE OF  
APPELLATE COURTS

NOV 30 1989

**FILED**

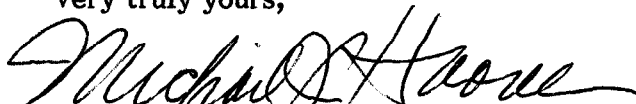
Mr. Frederick K. Grittner  
Clerk of Appellate Courts  
230 State Capitol Building  
St. Paul, MN 55155

Re: Hearing to Consider Proposed Amendments to the  
Minnesota Rules of Professional Conduct  
Court File C8-84-1650

Dear Mr. Grittner:

Enclosed please find 12 copies of my statement in the above matter. I do not request the opportunity to make an oral presentation.

Very truly yours,

  
Michael J. Hoover

MJH:cvs

Enc.

NOV 20 1989

**FILED**

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

**Re: Hearing to Consider Proposed  
Amendments to the Minnesota Rules  
of Professional Conduct**

**STATEMENT OF  
MICHAEL J. HOOVER**

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**INTRODUCTION**

This Statement is submitted pursuant to the Court's September 15, 1989 Order. The undersigned does not request the opportunity to make an oral presentation.

This Statement addresses three of the proposals before the Court:

- (1) The Minnesota State Bar Association (MSBA) petition to amend Rule 8.4, Minnesota Rules of Professional Conduct (MRPC).
- (2) The Lawyers Professional Responsibility Board (LPRB) petition to amend Rule 1.6(b), MRPC.
- (3) The LPRB petition to amend Rule 8.4(g), MRPC.

**I. THE MSBA PETITION TO AMEND RULE 8.4(g), MRPC, SHOULD BE REJECTED**

I abhor all forms of harrassment and discrimination covered within the intended Rule. Such conduct, whether it occurs in a professional setting or otherwise, is both unprofessional (within the broad meaning of that term) and despicable. Nevertheless, I cannot support the MSBA proposal to amend Rule 8.4, MRPC.

In my opinion, the MSBA proposal is well-intentioned but misguided. It would unnecessarily expand LPRB jurisdiction and would result in a misallocation of scarce LPRB resources.

The LPRB's principal concern should be the attorney-client relationship and the attorney's conduct within the judicial system. In many cases of client complaints, lawyer discipline is the only effective remedy for an attorney's unethical conduct. Frequently, monetary damage caused by such misconduct will not justify the expense of

a legal malpractice or other action against the lawyer. Further, the LPRB has special expertise in evaluating complaints of lawyer unethical conduct which arise out of an attorney-client relationship or from the lawyer's contact with the judicial system.

Minnesota lawyers are proud of our lawyer discipline system. Nevertheless, there is still more to be done to improve attorney-client relations and lawyer performance in judicial matters. Continued improvement in these areas would be undermined by adoption of the MSBA proposal.

There are already state and federal administrative remedies available to those who suffer the forms of harrassment and discrimination mentioned in the MSBA proposal. Civil actions for harrassment and discrimination are also expanding. The petitioners have not demonstrated that the existing administrative and civil remedies are inadequate. They should meet this burden before lawyer discipline is added to the arsenal of remedies available for harrassment and discrimination.

State and federal administrative agencies have developed special expertise in evaluating complaints of harrassment and discrimination. Case law, as developed by the courts, also demonstrates the capability of the judicial system to deal with such matters. As compared to the administrative agencies and the courts, the LPRB is inexperienced and unprepared in these areas.

Even if a provision subjecting lawyers to discipline for harrassment or discrimination is desirable, the MSBA proposal is poorly drafted.

The MSBA proposal has hopelessly scrambled the terms "discriminate" and "harrass." Under the MSBA proposal, there would be considerable doubt about the forms of discrimination which constitute harrassment.

Sexual harrassment is defined in Minn. Stat. § 363.01, Subd. 10a. (1988), as follows:

"Sexual harrassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:



- (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing;
- (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education or housing; or
- (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating or intimidating, hostile or offensive employment, public accommodations, public services, educational or housing environment; and in the case of employment, the employer knows or should know of the existence of the harrassment and fails to take timely and appropriate action.

Sexual harrassment is only one form of gender discrimination. "The term 'discriminate' includes segregate or separate and, for purposes of discrimination based on sex, it includes sexual harrassment." Minn. Stat. § 363.01, Subd. 10 (1988).

As a result of the statutory framework, it is clear that not all sex discrimination is also sexual harrassment. The specific kinds of sex discrimination which constitute sexual harrassment are specifically outlined in the statutory framework.

The concept of harrassment based on "race, age, creed, religion, color, national origin, disability or marital status" is foreign to the statutory framework and case law. Assuming that there are such forms of "harrassment," they would logically be less extensive than discrimination based upon these factors. If lawyers are to be disciplined for "harrassment" but not for "discrimination," they are entitled to know with some specificity the kinds of conduct which will be considered as harrassment, rather than as discrimination. The distinction contained in the proposed comment that "harrassment forbidden by this rule involves active burdening of another, rather than mere passive failure to act properly" is completely devoid of any specific guidance to Minnesota lawyers.

The MSBA Committee Report indicates that it did not adopt a proposed amendment to Rule 8.4, MRPC, which would have precluded unlawful discrimination in hiring, promoting and determining conditions of employment. Although the Committee decided it did not have jurisdiction to consider discrimination, it did so anyway by including all the forbidden categories within the concept of harrassment. In so doing, it has hopelessly confused the issues of harrassment and discrimination, left the disciplinary agency without any real guidance concerning enforcement, and left the Minnesota Bar without any specificity regarding the forms of discrimination which will be disciplined as unlawful harrassment.

If the jurisdiction of the LPRB must be expanded to include the areas covered by the MSBA proposal, consideration should be given to amending the proposal as follows:

- (1) The original qualifier, "while the lawyer is acting in a professional capacity," should be restored.
- (2) Professional discipline should first require final adjudication in a civil, criminal, or administrative proceeding that the lawyer has engaged in the forbidden conduct. This requirement would rightfully leave to other agencies with the requisite expertise the primary jurisdiction to consider such allegations. It would also conserve LPRB resources, requiring involvement only where there is strong reason, based upon another adjudication, to believe that the lawyer may have engaged in the forbidden unprofessional conduct.
- (3) If the Court is unwilling to restore the qualification contained in paragraph (1) and if the Court is unwilling to require prior adjudication in all cases, there should still be a distinction between conduct alleged to have been committed in a professional capacity and otherwise. There is arguably a stronger interest in giving the LPRB concurrent jurisdiction with other agencies when the conduct is alleged to have occurred in a professional

capacity. The case for concurrent jurisdiction when the misconduct is alleged to have arisen outside the professional capacity is less compelling. Thus, it may be appropriate to require adjudication in a criminal, civil or administrative proceeding as a prerequisite to an LPRB investigation when the conduct is alleged to have occurred outside the professional capacity.

## **II. THE LPRB PROPOSAL TO AMEND RULE 1.6, MRPC, SHOULD BE ADOPTED**

Increasingly, attorneys question the dichotomy between professional ethics and personal morality. The LPRB proposal presents an opportunity to reconcile an unfortunate and necessary difference between professional ethics and personal morality.

A credible case could be made for requiring attorneys to reveal confidential information under the circumstances contained in the LPRB proposal. At a minimum, attorneys should be free to do so.

There are sound policy and constitutional reasons for providing that an attorney is not required to reveal confidential information about crimes or frauds committed prior to the attorney's retention. The same policy and constitutional considerations do not justify prohibiting a lawyer, whose services have been used to further a crime or a fraud, from revealing information necessary to rectify that crime or fraud.

The public simply does not understand how a lawyer can be permitted to reveal confidences and secrets in order to collect a fee but can be prohibited from revealing the same information if it is necessary to correct a crime or fraud in the furtherance of which the lawyer's services were used. Clients have no right to expect such protection when they use a lawyer's services to commit a crime or a fraud. A lawyer should not be an unwilling accomplice simply because the Rules of Professional Conduct prohibit the lawyer from effectively acting to undo the client's mischief.

## **III. THE LPRB PROPOSAL TO AMEND RULE 8.4, MRPC, SHOULD NOT BE ADOPTED**

Since In Re Bunker, 199 N.W.2d 628 (Minn. 1972), there have been numerous cases disciplining Minnesota lawyers for breaches of state and federal tax laws. Bunker also holds that the appropriate sanction, in the absence of extreme mitigating circumstances, is suspension or disbarment. Given the many cases which have arisen since Bunker, it may seem radical to advocate that the LPRB proposal should be rejected. Yet, it is respectfully submitted that this proposal should be rejected and In Re Bunker should be repealed.

In Re Bunker has extended LPRB jurisdiction and activity into areas which are outside the attorney-client relationship and the lawyer's participation in the judicial system. Substantial resources which could be devoted to these areas are instead committed to investigating and prosecuting lawyer disciplinary actions concerning alleged tax law violations. These tax cases have involved a substantial misallocation of LPRB resources.

The lawyer discipline system is financed by a special tax on attorneys. It is inappropriate for the Minnesota Department of Revenue (MDR) and the Internal Revenue Service (IRS), each of which possesses substantial resources of its own, to use the lawyer discipline system, financed by the special tax on attorneys, as a collection agency for state and federal taxes.

Attorneys are not exempt from any of the many remedies already available to the IRS for tax enforcement. There is no reason why lawyer discipline needs to be added as a remedy in all nonfiling cases.

Most of the remedies available to the MDR also apply to attorneys. One exception may be the provision which results in revocation of a license if the licensed individual or business fails to file tax returns and pay taxes related to the licensed endeavors. There is no reason why the Court could not enter into an agreement with the MDR that upon a showing that a lawyer has failed to file the appropriate returns and pay the taxes due thereon, the lawyer's license would be administratively suspended

under the same circumstances which are applicable to other licensed individuals and entities.

Refusal to adopt the LPRB proposal would not completely divest the LPRB of jurisdiction in tax matters. As the LPRB statement notes, lawyers who are convicted of criminal violations of the tax laws could still be disciplined under Rule 8.4(b), MRPC. Further, lawyers who commit fraud or other dishonesty in connection with their tax obligations could still be prosecuted under Rule 8.4(c), MRPC.

Criminal prosecution is an option available to state and federal tax authorities in nonfiling cases. If such convictions are not sought or obtained, there is no reason to use lawyer discipline to compel compliance with filing requirements.

Lawyer discipline cases in tax areas often involve lawyers who have otherwise unblemished records. Although failure to comply with tax obligations is not to be condoned, the failure by some attorneys to timely file income tax returns is not at all related to their actual performance within the judicial system or within the context of an attorney-client relationship. To give the LPRB jurisdiction to discipline these lawyers, irrespective of any showing that such failure to file tax returns has any relationship to the lawyer's fitness within the judicial system and the attorney-client relationship, goes too far. This is especially true when state and federal tax authorities, for reasons best known to them, have not pursued criminal prosecution and, in many cases, have not even vigorously pursued the available civil remedies.

The LPRB proposal is also poorly drafted. Will "the time required by law" encompass permissible extensions available to all taxpayers under state and federal law? Also, there are many reasons for failure to file tax returns, ranging from inadvertence and simple neglect to willful and intentional disregard of tax obligations. The LPRB proposal would seem to impose a "strict liability" standard, encompassing inadvertence and simple negligence. Also, the LPRB proposal would discipline a lawyer

who in good faith fails to file returns as an act of civil disobedience in protest of state or federal government policy.

State and federal governments are facing the need to set priorities in enforcement and regulation. The lawyer discipline system should not be immune from this process solely because it is funded by the special tax on attorneys. The LPRB seeks to strengthen its hand in tax matters by having the Court adopt a specific rule covering tax cases. It is respectfully submitted that the Court should instead tell the LPRB that noncriminal tax cases should not be given high priority. The LPRB should be told that in the absence of a criminal conviction or an adjudication of fraud or dishonesty, tax matters should be left to tax authorities.

#### CONCLUSION

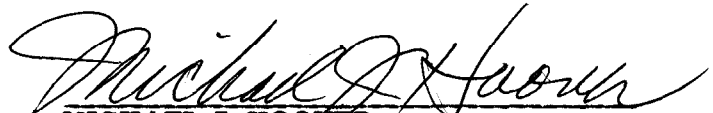
The undersigned respectfully urges the Court to reject the MSBA proposal to amend Rule 8.4, MRPC, or alternatively to limit LPRB jurisdiction in such matters to cases arising in a professional capacity and involving a prior civil, criminal or administrative adjudication that the lawyer has engaged in the forbidden conduct.

The undersigned urges the Court to adopt the LPRB proposal to amend Rule 1.6, MRPC.

Finally, the undersigned urges the Court to reject the LPRB proposal to amend Rule 8.4, MRPC.

RESPECTFULLY SUBMITTED,

11/29/89  
Date



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September 27, 1989

OFFICE OF  
APPELLATE COURTS

SEP 29 1989

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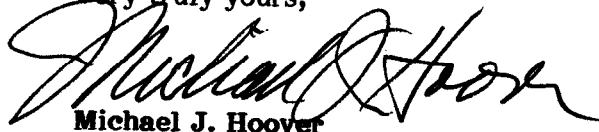
Mr. Frederick Grittner  
Clerk of Appellate Courts  
230 State Capitol  
St. Paul, MN 55155

Re: Proposed Amendments to the  
Minnesota Rules of Professional Conduct  
Court File C8-84-1650

Dear Mr. Grittner:

Pursuant to the Court's September 15, 1989 letter, I hereby request copies of the Petitions of the Lawyers Professional Responsibility Board and the Minnesota State Bar Association to amend various portions of the Minnesota Rules of Professional Conduct. Thank you.

Very truly yours,



Michael J. Hoover

MJH:cvs

Sent 9-29