

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 Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on March 20, 1992 at 9:00 a.m., to consider the petition of the Minnesota State Bar Association to amend Rules 1.6, 8.3 and 8.4 of the Minnesota Rules of Professional Conduct. A copy of the petition is annexed to this order.

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, 245 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before March 16, 1992 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 March 16, 1992.

Dated: January 21, 1992

BY THE COURT:



A.M. Keith
Chief Justice

OFFICE OF
APPELLATE COURTS

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OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY

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March 4, 1992

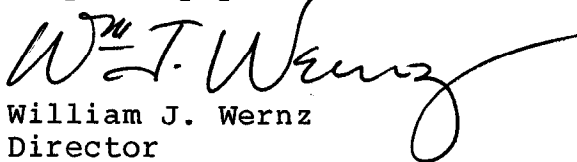
Mr. Frederick Grittner
Clerk of Appellate Courts
Office of Appellate Courts
25 Constitution Avenue
Room 245
St. Paul, MN 55155

Re: File C8-84-1650

Dear Mr. Grittner:

Enclosed are an original and 12 copies of the Comment of the Lawyers Professional Responsibility Board on the Minnesota State Bar Association's petition to amend Rules 1.6, 8.3 and 8.4 of the Minnesota Rules of Professional Conduct. Although I am not requesting leave to make an oral presentation regarding this petition, I will be present at the March 20 hearing and available if the Court wishes to inquire regarding the enclosed or the petition.

Very truly yours,


William J. Wernz
Director

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Enclosures

cc: Honorable John E. Simonett
Gregory M. Bistram
Robert J. Monson
Timothy P. Groshens

FILE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend Rules
1.6, 8.3 and 8.4 of the Minnesota
Rules of Professional Conduct.

COMMENT OF THE
LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

At its January 10, 1992, meeting the Lawyers Professional Responsibility Board approved resolutions to support the petition of the Minnesota State Bar Association to amend Rules 1.6, 8.3 and 8.4 of the Minnesota Rules of Professional Conduct. The Lawyers Board also authorized its Executive Committee to draft and submit this Comment, stating in general terms what it expected the Board's enforcement policy would be with respect to proposed Rule 8.4(h). The Board believes a comment on enforcement policy is appropriate because of concerns it has, and the Court may have, about the resources involved in enforcing the rule.

ENFORCEMENT EXPERIENCE WITH RULE 8.4(g)

The Court expressed similar concerns regarding resources before adopting Rule 8.4(g), Rules of Professional Conduct, effective January 1, 1990. Rule 8.4(g) forbids certain forms of harassment "in connection with a lawyer's professional activities." Rule 8.4(g) and proposed Rule 8.4(h) in part overlap, but the scope of Rule 8.4(h) is considerably broader, particularly because it is not restricted to the lawyer's professional activities.

Enforcement experience of the Office of Lawyers Professional Responsibility in the last two years with Rule 8.4(g) may provide

a partial guide to the enforcement burden that may be expected under Rule 8.4(h). The Rule 8.4(g) burden has been minimal.

In the last two years the only Rule 8.4(g) disciplines which have been issued have been three admonitions, two by the Director and one by a Lawyers Board Panel which determined that there was not probable cause to believe public discipline was warranted. Only the last was litigated. In addition, although dismissals are not specifically tracked by rule, it is believed that there have been only two Rule 8.4(g) complaints which have been dismissed.

BOARD ENFORCEMENT POLICY FOR RULE 8.4(h)

If Rule 8.4(h) is adopted, the Board now expects it would approve the following guidelines in rule enforcement, pursuant to its "general supervisory authority over the administration of the Office of Lawyers Professional Responsibility," under Rule 4(c), Rules on Lawyers Professional Responsibility.

1. **Deference to Other Forums.** Among the elements of a Rule 8.4(h) violation would be that the act is "prohibited by federal, state or local statute or ordinance." The Board would expect routinely to defer to the relevant governmental agencies, and to courts, which have expertise in these matters. The Board would reserve the discretion in a particular case--for example, one involving an attorney who had already been found to have harassed or illegally discriminated against someone--to proceed in advance of another agency. However, it would be expected that most such matters would first be heard elsewhere. It should be noted, however, that if the other forum does not have a standard of clear and convincing evidence, that discipline proceedings could probably not be made summary through a collateral estoppel

claim. Rule 10(d), RLPR, would allow bypass of Panel hearing in appropriate cases.

2. **Expectation Regarding Volume.** Although the Board has made no effort over the years to learn of discrimination claims involving lawyers, it seems reasonable to believe that there likely would have been publicity regarding any large scale or very serious such claims. The Board is not aware that any lawyers or law firms have been involved in such proceedings, except those who were already subject to discipline under another rule, e.g., Peters and Miera. The Board would not expect to be involved in any large volume of claims of serious illegal discrimination.

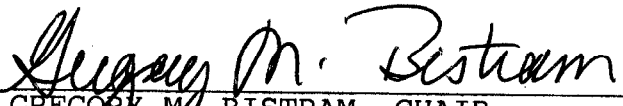
3. **Complex Cases.** The Board is aware of litigation in other jurisdictions involving allegations of illegal discrimination by lawyers or law firms; and is aware that some such litigation has been protracted and complex. If such claims were brought in Minnesota and were found first in other forums to have merit, it might be necessary for the Office of Lawyers Professional Responsibility, after investigation, to be involved in complex related disciplinary litigation. It might then be necessary, depending on the resources and disposition of the parties involved, and such factors as the then-current budget, staffing and expertise levels within the Office of Lawyers Professional Responsibility, to seek outside counsel and special funding. Other than such extraordinary situations, the Board would expect complaints to be handled within the normal procedures of the Office of Lawyers Professional Responsibility.

In re Peters, 428 N.W.2d 375 (Minn. 1988) provides a basis for believing that the professional responsibility system as now constituted is able to deal with at least moderately complicated allegations of harassment, illegal discrimination and the like.

4. Discretion. The Board would regard the four enumerated factors under Rule 8.4(h) as providing a considerable basis for exercise of discretion by the Office of Lawyers Professional Responsibility in determining whether to pursue a particular matter. Thus, not every claim of discrimination, or finding in another forum of discrimination would trigger a disciplinary investigation or proceeding.

The Board and the Director stand ready to be of service in enforcing whatever rules of professional conduct may be adopted by the Minnesota Supreme Court. The Board supports the efforts of the Minnesota State Bar Association in its petition to amend Rules 1.6, 8.3 and 8.4, Rules of Professional Conduct.

Dated: February 26, 1992.


GREGORY M. BISTRAM, CHAIR
LAWYERS PROFESSIONAL RESPONSIBILITY
BOARD
520 Lafayette Road, Suite 100
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A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of the Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

While a lawyer is forbidden to report, without client consent, the serious misconduct of another lawyer when he or she learns of that misconduct through a privileged attorney-client communication, the lawyer may, in his or her discretion, disclose client secrets in order to report. See Rule 1.6(b)(6) and the accompanying Comment.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the act of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities; or

(h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.

Comment-198991

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving moral turpitude. That concept can be construed to include criminal and civil offenses concerning some matters of personal morality, such as adultery and discrimination or harassment on the basis of sex, race, creed, religion, color, national origin, disability, sexual preference or marital status that have no specific connection to fitness for the practice of law. Although a Each lawyer, of course, the same as any other citizen, is personally answerable to the entire criminal law and, as well, the civil law relating to discrimination and harassment, but, a lawyer should be professionally answerable in addition only for offenses that indicate lack of those characteristics relevant to the practice of law. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is

MSBA



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OFFICE OF
APPELLATE COURTS

March 8, 1992

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Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
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St. Paul, MN 55155

RE: March 20 Hearings

C8-84-1650

Dear Mr. Grittner:

The Minnesota State Bar Association requests the opportunity to make oral presentations on the following petitions:

1. **MSBA PETITION TO ESTABLISH A LAWYER ASSISTANCE PROGRAM**

The Minnesota State Bar Association requests the opportunity to make an oral presentation through Robert J. Monson, its President, and Thomas Gmeinder, the Chairperson of its Lawyer Assistance Committee. The MSBA requests fifteen minutes for this presentation.

2. **LPRB PETITION FOR AN INCREASE IN THE ATTORNEY REGISTRATION FEE**

The MSBA requests the opportunity to make an oral presentation through its President, Robert J. Monson. The presentation will be in support of the LPRB's petition to increase the attorney registration fee. The MSBA requests two minutes for this presentation.

3. **MSBA PETITION TO AMEND RULES 1.6 AND 8.3 OF THE MINNESOTA RULES OF PROFESSIONAL CONDUCT**

The MSBA requests the opportunity to make an oral presentation through its President, Robert J. Monson and Walter Bachman, former Chairperson of its Rules of Professional Conduct Committee. The MSBA requests ten minutes for this presentation.

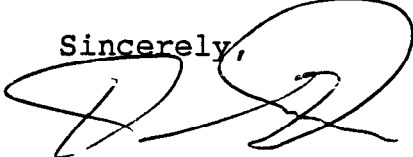
Mr. Frederick Grittner
March 8, 1992
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4. MSBA PETITION TO AMEND RULE 8.4 OF THE MINNESOTA
RULES OF PROFESSIONAL CONDUCT

The MSBA requests the opportunity to make an oral presentation through its President, Robert J. Monson and Phyllis Karasov, former Chairperson of the Discrimination Subcommittee of its Rules of Professional Conduct Committee. The MSBA requests twenty minutes for this presentation.

As requested, twelve copies of this request are enclosed.

Sincerely,



Tim Groshens
Executive Director

TG:ak

Enclosures

cc: Robert J. Monson
Thomas Gmeinder
Walter Bachman
Phyllis Karasov

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