

OCT 28 2004

FILE NO. C8-84-1650

STATE OF MINNESOTA

**FILED**

IN SUPREME COURT

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In Re Petition to Amend the Minnesota  
Rules of Professional Conduct.  
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**SUPPLEMENTAL PETITION OF  
THE LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD TO  
AMEND THE MINNESOTA RULES  
OF PROFESSIONAL CONDUCT**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE  
STATE OF MINNESOTA:

Petitioner Lawyers Professional Responsibility Board (LPRB) respectfully  
supplements its May 3, 2004, petition this Court to amend the Minnesota Rules of  
Professional Conduct (MRPC) as set forth below.

In support of this petition, the LPRB would show the following:

1. Petitioner LPRB is a Board established by this Court to oversee the lawyer  
discipline system.
2. By petition dated September 19, 2003, and by supplemental and amended  
petition dated January 26, 2004, the Minnesota State Bar Association (MSBA) requested  
this Court to amend the Minnesota Rules of Professional Conduct (MRPC).
3. By petition dated May 3, 2004, petitioner LPRB requested this Court to  
amend the MRPC.
4. These petitions were heard on May 18, 2004, and are pending before this  
Court.
5. The original MSBA petition reported that the MSBA was further studying  
proposed amendments to Rule 1.10, MRPC.
6. The MSBA proposed an amendment to Rule 1.10(b) to be presented to the  
MSBA convention in June 2004. Because the LPRB did not support the proposed

change, the MSBA withdrew its proposal from the convention and attempted to work out a new proposal that would be acceptable to the LPRB. After several meetings this summer, the LPRB and MSBA committees did not reach consensus but came much closer in their respective proposals for amendment of Rule 1.10. By second supplemental and amended petition dated September 24, 2004, the MSBA proposed amendments to Rule 1.10.

7. At its September 24, 2004, meeting, the LPRB voted to petition this Court to amend Rule 1.10, as outlined below. (Underlining and strike-through are changes from the existing rule. Bold represents LPRB changes in wording that differs from the MSBA proposal.)

#### PROPOSED RULE 1.10

##### **RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE**

(a) Except as provided by this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from representing a client pursuant to Rule 1.9(a) or (b), other lawyers in the firm may represent that client if ~~there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because:~~

(1) ~~any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter~~ the associating lawyer submits an affidavit to the firm stating that the associating lawyer (i) possesses no confidential information that is likely to be material to the subsequent matter and has transmitted no

confidential information about the matter to the firm, (ii) did not manage or direct the former client's matter at the policy-making level, (iii) did not exercise day-to-day responsibility for decisions in the former client's matter, and (iv) was not primarily responsible for the previous firm's communications and;

(2) the firm does not know that any of the affidavit's statements are incorrect; and

~~(3) the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation~~ the firm timely screens the associating lawyer from any participation in the matter and apports the associating lawyer no part of the fee therefrom;  
and

~~(4) timely and adequate~~ the associating lawyer provides prompt written notice of the screening has been provided to all any affected clients former client to enable the client to ascertain compliance with the provisions of this rule.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

## **Comment**

### **Definition of "Firm"**

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

### **Principles of Imputed Disqualification**

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b) and(c).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

[5] When the conditions of paragraphs (b) are satisfied, the imputed conflict of interest is removed, and consent to the new representation is not required. Paragraph (b)'s procedures should facilitate judicial review of the screening procedures or court supervision of their implementation and compliance.

[6] Paragraph (b)(1) refers to communications with a client. As stated in Comment [7] to Rule 4.2, communication with an organizational client is communication with an officer, director, employee, or shareholder of the organization "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

[7] Notice under paragraph (b)(2) should be given as soon as practicable after the need for screening becomes apparent and should include a description of the screened lawyer's prior representation and the screening procedures employed. In most cases notice should include provision of the moving lawyer's affidavit or at least those portions of the affidavit relevant to the particular former client. Pursuant to Rule 4.2, the notice should be directed to the former client's lawyer if the former client is represented by counsel.

[8] The requirements for screening are specified in Rule 1.0(l) and Comments [9] and [10] to Rule 1.0. Paragraphs (b)(2) and (c)(3) do not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

{5} [9] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

{6} [10] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

{7} [11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d) where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

{8} [12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

## DIFFERENCES BETWEEN THE LPRB AND MSBA PROPOSED REVISIONS

(1) The LPRB Rules Committee revised and reformatted paragraph (b) to make it clearer and to give greater emphasis to the fact that the moving lawyer attests to having no confidential information likely to be material in the subsequent matter.

(2) The LPRB Rules Committee omits proposed new paragraph (c) except for subparagraph (2) which it moves and includes as subparagraph (b)(2)

(c) A firm shall not be disqualified because it has associated a lawyer who is prohibited from representing a client pursuant to Rule 1.9(a) or (b) if:

(1) the associating lawyer submits the affidavit and provides the notice required by paragraph (b);

(2) the firm does not know that any of the affidavit's statements are incorrect; and

(3) the firm timely screens the associating lawyer from any participation in the matter and

## ANALYSIS

The LPRB recommends that Rule 1.10 be amended as specified above to improve the clarity of the rule thereby facilitating a lawyer's legitimate interest in being able to move to a new firm without compromising any former client's interests in loyalty or confidentiality.

Rule 1.10(b)(1) safeguards the former client's interest in loyalty because the former client is less likely to identify as "my lawyer" a lawyer who did not manage or direct the client's matter at the policy-making level, exercise day-to-day responsibility for decisions in the matter, or was not primarily responsible for the previous firm's communications with the client.

Rule 1.10(b) safeguards the former client's interest in confidentiality by requiring (1) the associating lawyer to state under oath that the lawyer possesses no confidential information that is likely to be material to the subsequent matter and has transmitted no confidential information about the matter to the firm, (2) the firm not to know that any of the affidavit's statements are incorrect, (3) the firm to timely screen the lawyer from any participation in the matter, and (4) the associating lawyer to provide the former client prompt written notice to enable the client to ascertain compliance with Rule 1.10's provisions. Rule 1.0(l) specifies:

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Rule 1.0's Comments specify:

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.




[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.


Based on the foregoing, petitioner Lawyers Professional Responsibility Board respectfully requests and recommends this Honorable Court to amend the Minnesota Rules of Professional Conduct as outlined in paragraph 7, above.

Dated: October 25, 2004.

Respectfully submitted,

  
KENT A. GERNANDER, CHAIR  
LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD  
Attorney No. 34290  
1500 Landmark Towers  
345 St. Peter Street  
St. Paul, MN 55102-1218  
(651) 296-3952

and

  
KENNETH L. JØRGENSEN  
DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY  
Attorney No. 159463