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Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
Saint Paul, MN 55155-6102

Re: MSBA Petition to Amend Rules of Professional Conduct
Court File No. C8-84-1650

Dear Mr. Grittner:

I am counsel to the Minnesota State Bar Association with respect to the pending Petition and two Supplemental Petitions to amend the Minnesota Rules of Professional Conduct. The Office of Lawyers Professional Responsibility has also filed a Supplemental Petition.

I write to advise the Court that the Indiana Supreme Court has entered an order revising its Rules of Professional Conduct, including Rule 1.10. Because that development may be of interest to the Court in relation to the Petition of the MSBA now pending before it, I enclose for the Court's consideration a copy of the Indiana revisions to Rule 1.10. I enclose a copy of the first page of the Indiana Order, together with the pages containing Rule 1.10 (pages 48-51) and the closing pages of the order (pages 146 –50).

The entire order appears on the Indiana Court's website at http://www.in.gov/judiciary/orders/rule-amendments/2004/0904-prof-conduct.pdf.

Respectfully submitted,

David F. Herr

DFH:ls
Enclosures

cc: Kenneth L. Jorgenson, Director LPRB
David L. Stowman
Kenneth F. Kirwin
William Wernz

IN THE

SUPREME COURT OF INDIANA

CASE NUMBER:

ORDER AMENDING RULES OF PROFESSIONAL CONDUCT

The Indiana State Bar Association (ISBA), after lengthy study by its Ethics Committee and public input, has recommended that the Indiana Supreme Court revise the Rules of Professional Conduct for Attorneys at Law, based largely on revisions to the Model Rules of Professional Conduct adopted by the American Bar Association. This Court thanks the members of the ISBA, its Ethics Committee, chaired by Carol Adinamis, and the Supreme Court Committee on Rules of Practice and Procedure, chaired by Mary Nold Larimore, for their exceptional commitment and hard work on this important project.

Under the authority of Article 7, Section 4 of the Indiana Constitution providing for the admission and discipline of attorneys in this state, the Rules of Professional Conduct are amended to read as follows (as to the Rules, deletions shown by ~~striking~~ and new text shown by underlining; only the revised Commentary appears):

RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Rule 1.10. Imputation of Conflicts of Interest~~Imputed Disqualification~~: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client ~~if he knows or should know in the exercise of reasonable care and diligence that~~ when any one of them practicing alone would be prohibited from doing so by Rules 1.7, ~~1.8(c), 1.8(k),~~ 1.9, or 2.2 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, the firm may not represent a person in the same or a substantially related matter if it knows or reasonably should know that that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.~~

(~~e~~ b) 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(~~b~~ c) that is material to the matter.

(~~d~~ c) ~~A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.~~When a lawyer becomes associated with a

firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.

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

(~~d~~ 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(c). 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 1.10(c).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented.

[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(k) and 5.3.

[5] 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] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation. Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does 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. Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[7] 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(e).

[8] 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.

[9] 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.

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees ~~Successive Government and Private Employment~~

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a ~~private~~ client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consents, confirmed in writing to the representation ~~after consultation~~. ~~No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:~~

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in the firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this ~~R~~rule.

(~~b~~ c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(g) A ~~legal~~ non-lawyer assistant shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients.

(h) A ~~legal~~ non-lawyer assistant shall act within the bounds of the law, uncompromisingly for the benefit of the client.

(i) A ~~legal~~ non-lawyer assistant shall do all things incidental, necessary, or expedient for the attainment of the ethics and responsibilities imposed by statute or rule of court.

(j) A ~~legal~~ non-lawyer assistant shall be governed by the Indiana Rules of Professional Conduct~~American Bar Association Model Code of Professional Responsibility and the American Bar Association Model Rules of Professional Conduct~~.

(k) For purposes of this Guideline, a non-lawyer assistant includes but shall not be limited to: paralegals, legal assistants, investigators, law students and paraprofessionals.

The Clerk of this Court is directed to forward a copy of this order to the clerk of each circuit court in the state of Indiana; Attorney General of Indiana; Legislative Services Agency and its Office of Code Revision; Administrator, Indiana Supreme Court; Administrator, Indiana Court of Appeals; Administrator, Indiana Tax Court; Public Defender of Indiana; Prosecuting Attorney's Council; Indiana Supreme Court Disciplinary Commission; Indiana Supreme Court Commission for Continuing Legal Education; Indiana Board of Law Examiners; Indiana Judicial Center; Division of State Court Administration; Indiana Judges and Lawyers Assistance Program; the Executive Director of the Indiana State Bar Association; the libraries of all law schools in this state; the Michie Company; and the West Group.

The West Group is directed to publish this Order in the advance sheets of this Court.

The Clerks of the Circuit Courts are directed to bring this Order to the attention of all judges within their respective counties and to post this Order for examination by the Bar and general public.

DONE at Indianapolis, Indiana, this _____ day of September, 2004.

For the Court

Randall T. Shepard
Chief Justice of Indiana

SULLIVAN, BOEHM, and RUCKER, JJ., concurring.

SHEPARD, Chief Justice, concurring in all but Rule 3.3, to which he dissents.

DICKSON, J., concurring, except as to new section 3.6(c), which he opposes, and except as to that portion of section 3.3(a)(3) discussed in the Chief Justice's separate opinion, which he joins.

SHEPARD, Chief Justice, dissenting.

Today's revisions to the Rules of Professional Conduct are the product of prodigious and thoughtful effort by leaders of the American Bar Association, by the Indiana State Bar Association, and by this Court, to name a few of those who have labored at the task. In the main, these new standards for lawyer conduct will well serve the courts, the profession, and the public, and I take a sense of pride in their adoption. I think the profession and this Court have taken but a single wrong turn.

Since the American Bar Association first issued canons of ethics in 1908, and for at least that long in Indiana, a lawyer representing the defendant in a criminal case has had the same obligation that all of us lawyers have to promote the truth before the judge

or jury. Lawyers have long thought that it both demeaned the profession and damaged the role of courts to present false evidence.

That now changes. Today's amendments to Rule 3.3 add a striking command to existing practice by saying: "A lawyer may refuse to offer evidence, *other than the testimony of a defendant in a criminal matter,* that the lawyer reasonably believes is false." Put another way, lawyers who try cases are generally called upon to decide what evidence to present and how to present it, except that lawyers will now be obliged to put on the stand a client the lawyer believes will commit perjury. I think this is a bad idea for the profession and for the cause of justice.

The Court has not changed this rule because it is compelled to do so. The Supreme Court of the United States has told us in unmistakable terms what the Constitution means on this very point: "Whatever the scope of a constitutional right to testify, it is elementary that such right does not extend to testifying *falsely*." Nix v. Whiteside, 475 U.S.157, 173 (1986). Thus, a majority of my colleagues have chosen this path because they believe the system of justice will be improved by it. I do not.

The bench and bar are currently much focused on building public trust and confidence in the courts and the legal profession. A decision to compel lawyers to put before juries testimony they believe is perjured can only detract from those efforts.

This change will also cause an important shift in the relationship between the criminal defendant and the defendant's lawyer. Under the present rule, the lawyer who works to dissuade a client from testifying falsely possesses some considerable clout in the discussion because it is presently the lawyer, in the end, who decides whether to call the

client to stand. Under the new rule, the client will know that this is not the lawyer's call at all. If the client insists, the lawyer will be bound by the rule to assent and assist.

Moreover, the very dilemma that now proves so difficult for defense lawyers will be made even more difficult. Under the present rule, the lawyer who must contend with whether she "knows" testimony is false (and therefore must not present it) or whether she merely "believes" it is false (and therefore may present it or not) is free to make the decision to go forward based on her assessment of quite a number of considerations. These might include her own assessment of whether the client's testimony may help his cause or actually seal his fate, for instance. The new rule requires the lawyer to make this decision based on a single consideration --- does the lawyer "know" the client's testimony will be false. It seems to me that the very dilemma that has led the defense bar to ask for this change will be rendered even more difficult by the change itself.

Furthermore, I think that this amendment places defense lawyers on a different footing than prosecutors in a way that will be unhelpful to their work.

For a period of some twenty years, prosecutors were in the habit of reading to jurors from an opinion authored by Justice Byron White, speaking for three members of the Court, as follows:

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; not should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. ... If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. ... In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

United States v. Wade, 388 U.S. 218, 256-58 (1967) (White, J., concurring in part and dissenting in part) (footnotes omitted). Public defenders and other members of the criminal defense bar properly disliked the use of this quotation and asked us to disapprove its use, which we ultimately did. Miller v. State, 623 N.E.2d 403 (Ind. 1993).

The Court's decision not only to condone the use of perjury but to require defense lawyers to use it at the client's option takes us back a step by creating a differential between prosecutors and defenders as officers of the court dedicated to pursuing the truth.

Dickson, J., joins.