STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

IN RE PROPOSED MINNESOTA CODE
OF PROFESSIONAL RESPONSIBILITY

O R D E R

WHEREAS, the House of Delegates and the General Assembly of the Minnesota State Bar Association have adopted resolutions approving a proposed Minnesota Code of Professional Responsibility and directing the officers of the Minnesota State Bar Association to petition the Minnesota Supreme Court for an order supplanting the present Minnesota Code of Professional Responsibility with the American Bar Association's Code of Professional Responsibility, as amended.

NOW, THEREFORE, IT IS HEREBY ORDERED that a hearing be had before this Court in the courtroom of the Minnesota Supreme Court, State Capitol, on Friday, January 4, 1985, at 9:30 a.m., for the purpose of hearing proponents or opponents of the proposed Code of Professional Responsibility.

IT IS FURTHER ORDERED that advance notice of the hearing be given by the publication of this Order once in the Supreme Court editions of FINANCE AND COMMERCE, ST. PAUL LEGAL LEDGER, and BENCH AND BAR.

IT IS FURTHER ORDERED that any person wishing to obtain a copy of the code as amended write to the Clerk of the Appellate Courts, 230 State Capitol, St. Paul, Minnesota, 55155.

IT IS FURTHER ORDERED that all citizens, including members of the Bench and Bar, desiring to be heard, shall file briefs or petitions setting forth their positions and shall notify the Clerk of the Appellate Courts, in writing, on or before December 21,

1984, of their desire to be heard on the proposed code. Ten copies of each brief, petition, or letter shall be supplied to the clerk.

Dated: September 25, 1984.

BY THE COURT

Douglas K. Amdahl, Chief Justice
Minnesota Supreme Court

STATE OF MINNESOTA

IN SUPREME COURT

CX-84-1651

IN RE PROPOSED AMENDMENTS TO THE CODE OF PROFESSIONAL RESPONSIBILITY TO CREATE A STATE BOARD OF LEGAL CERTIFICATION

ORDER

WHEREAS, the General Assembly of the Minnesota State Bar Association has adopted a resolution directing the Association to petition the Minnesota Supreme Court to approve a program for certification of lawyers as specialists in areas of the law by creating a Board of Legal Certification.

NOW, THEREFORE, IT IS HEREBY ORDERED that a hearing be held before this Court in the courtroom of the Minnesota Supreme Court on Friday, January 4, 1985, at 9:30 a.m., to allow the Court to hear proponents or opponents of the proposed Amendments to the Code of Professional Responsibility to create a State Board of Legal Certification, which read as follows:

RULE 7.4 Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing the lawyer's or the lawyer's firm's practice or in indicating its nature or limitations.

(b) Except as provided in this rule, a lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board or other entity which is approved by the State Board of Legal Certification. Among the criteria to be considered by the Board in determining upon application whether to approve a Board or entity as an agency which may certify lawyers practicing in this state as being specialists shall be the requirement that the Board or entity certify specialists on the basis of published standards and procedures which (1) do not discriminate against any lawyer properly qualified for such certification, (2) provide a reasonable basis for the representation that lawyers so certified possess special competency, and (3) require redetermination of the special qualifications of certified specialists after a period of not more than five years.

(c) A lawyer shall not state that the lawyer is a certified specialist if the lawyer's certification has terminated, or if the statement is otherwise contrary to the terms of such certification.

IT IS FURTHER ORDERED that advance notice of the hearing be given by the publication of the Order once, in the Supreme Court editions of FINANCE AND COMMERCE, ST. PAUL LEGAL LEDGER, AND BENCH AND BAR.

IT IS FURTHER ORDERED that all citizens, including members of the Bench and Bar, desiring to be heard, shall file briefs or petitions setting forth their positions and should notify the Clerk of the Appellate Courts, in writing, on or before December 21, 1984, of their desire to be heard on the proposed Amendments. Ten copies of each brief, petition or letter shall be supplied to the Clerk.

Dated: September 25, 1984.

BY THE COURT

Douglas K. Amdahl, Chief Justice
Minnesota Supreme Court

Case No. C8-84-1650

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Petition of the Minnesota State Bar Association, a Corporation, with Regard to the Minnesota Code of Professional Responsibility.

PETITION

Minnesota State Bar Association petitions and represents to the Court:

The House of Delegates and General Assembly of the Minnesota State Bar Association, on June 30, 1984, adopted a resolution approving proposed Minnesota Rules of Professional Conduct for Minnesota lawyers and directing that the officers of the Minnesota State Bar Association petition the Minnesota Supreme Court for its order replacing the present Minnesota Code of Professional Responsibility with these Rules.

The proposed Rules here presented are based on the American Bar Association Model Rules of Professional Conduct adopted by the American Bar Association House of Delegates in August 1983.

Certain changes were made in the American Bar Association recommended Rules -- these changes being felt to be more appropriate to Minnesota.

Attached hereto are copies of the Minnesota State Bar Association Committee Report which shows the American Bar Association draft and the changes made by the Minnesota State Bar Association.

The General Assembly and the House of Delegates of the Minnesota State Bar Association, on June 30, 1984, adopted certain amendments to the Committee Report mentioned above. These amendments are as follows:

1. Added to Rule 1.5 was subsection (f) as follows:

(f) This Rule does not prohibit payment to a former partner or associate pursuant to a separation agreement.

2. Rule 1.6 was amended to read as follows:

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;

(2) to prevent the lawyer's services from being used to assist the client to commit a criminal or fraudulent act;

(3) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;or

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

3. The "Comment" following Rule 1.6 has been changed to read as follows:

COMMENT:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. The lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1) the lawyer has professional discretion to reveal information in order to prevent such consequences. Similarly, a lawyer may reveal information necessary to prevent the lawyer's services from being used by the client to commit a criminal or fraudulent act. A lawyer also has discretion to reveal information necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. It should also be noted that a lawyer may never counsel or assist a client in criminal or fraudulent conduct.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the

client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(4) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a presentation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, and 3.3. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

4. Rule 7.4 was amended to read as follows:

RULE 7.4 Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing the lawyer's or the lawyer's firm's practice or in indicating its nature or limitations.

(b) Except as provided in this rule, a lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board or other entity which is approved by the State Board of Legal Certification. Among the criteria to be considered by the Board in determining upon application whether to approve a Board or entity as an agency which may certify lawyers practicing in this state as being specialists shall be the requirement that the Board or entity certify specialists on the basis of published standards and procedures which (1) do not discriminate against any lawyer properly qualified for such certification, (2) provide a reasonable basis for the representation that lawyers so certified possess special competency, and (3) require redetermination of the special qualifications of certified specialists after a period of not more than five years.

(c) A lawyer shall not state that the lawyer is a certified specialist if the lawyer's certification has terminated, or if the statement is otherwise contrary to the terms of such certification.

5. The "Comment" following Rule 7.4 was deleted.

Attached hereto are copies of Minnesota Rules of Professional Conduct as described above and as approved by the General Assembly and the House of Delegates of the Minnesota State Bar Association.

Attached hereto are copies of Minnesota Rules of Professional Conduct as described above and as approved by the General Assembly and the House of Delegates of the Minnesota State Bar Association.

The order of this Court in the form attached is requested, replacing the existing Minesota Code of Professional Responsibility with Minnesota Rules of Professional Conduct.

Dated: September 13, 1984

Minnesota State Bar Association
A Non-profit Corporation

By: _____
David S. Doty, Its President

By: _____
George C. King, Chairman
Ad Hoc Committee on the ABA
Model Rules

CASE NO. _____

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Petition of
the Minnesota State Bar Association

ORDER PROMULGATING
RULES OF PROFESSIONAL CONDUCT

WHEREAS, the Supreme Court has the inherent authority to establish rules governing the professional conduct of lawyers admitted to practice law in the State of Minnesota,

WHEREAS, the Minnesota State Bar Associaton has petitioned the Court for an order replacing the present Minnesota Code of Professional Responsibility with a new body of rules entitled Minnesota Rules of Professional Conduct,

WHEREAS, a public hearing on such petition was conducted before this Court on September _____, 1984,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The Minnesota Code of Professional Responsibility now in effect is revoked.

2. The Minnesota Rules of Professional Conduct as proposed by the Minnesota State Bar Association are adopted as the standard of professional conduct of lawyers of this State.

3. Any lawyer violating any of such rules shall be subject to discipline or disbarment in the manner provided by rules of this Court.

4. This Order shall take effect _____, 1984.

Dated _____.

BY THE COURT

Douglas K. Amdahl, Chief Justice

Title and Number of Case:

In Re Proposed MN Code of Professional Responsibility.

C8-84-1650

David S. Doty, George C. King, Michael Hoover and Kenneth Kirwin will be present to argue this case on January 4, 1985

Geo. C. King

Date: December 11, 1984

Informed Mr Foley that motion is not required. He will appear for 1-4-85 hearing.

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

IN RE PROPOSED MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY

MOTION FOR LEAVE TO FILE STATEMENT OF POSITION ON THE PROPOSED MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY

Patrick J. Foley moves the Court for an Order allowing the moving party to file the attached Statement of Position in regard to the Court's consideration of the proposed Minnesota Code of Professional Responsibility and respectfully shows to the Court as follows:

1. Foley is an attorney licensed to practice before the Bar of this Court and various other courts.

2. Foley has in both the State of Minnesota, the State of Montana, and various United States District Courts and United States Courts of Appeals, been engaged from time to time over the last 10 years in litigation involving constitutional rights of attorneys with respect to their professional responsibilities.

3. Foley believes that the Court's attention should be drawn specifically to some complications in regard to possible constitutional objections to certain portions of the proposed Minnesota Code of Professional Responsibility.

Foley wishes to submit the attached Statement of Position

and wishes further to appear for oral argument before the Court on January 4, 1985.

By: _____
Patrick J. Foley

608 Second Avenue South
608 Building, Suite 565
Minneapolis, MN 55402
(612) 339-4511

American College of Trial Lawyers
10889 Wilshire Boulevard
Los Angeles, California 90024
(213) 879-0143

Regent for the State of MN, WI, MI

December 20, 1984

The Honorable Douglas K. Amdahl
Chief Justice of Minnesota Supreme Court
St. Paul, Minnesota 55101

Re: Proposed Minnesota Code of Professional Responsibility

Dear Chief Justice Amdahl: C8-84-1650

The Minnesota State Bar Association has proposed changes in the text of Rules 1.6, 1.13, and 4.1 of the Model Rules of Professional Conduct adopted by the American Bar Association in 1983.

The American College of Trial Lawyers, and each of us personally, believe that the rules in question, if adopted in the form recommended by the MSBA, would seriously undermine the proper role of an attorney. On behalf of the College, we would like to bring our concerns to the attention of the Court.

We will address in detail the provisions of Rule 1.6 of the Model Rules of Professional Conduct as adopted by the American Bar Association and as amended by the Minnesota State Bar Association, and invite the Court's attention to Rule 4.1 as proposed by the American Bar Association and as amended by the Minnesota State Bar Association.

Proposed Rule 1.6 deals with privilege. The present rule dealing with this subject, in force for many years, is D.R. 4-101 which, so far as pertinent here, provides:

> (C) A lawyer may reveal: . . . .
>
> (2) Confidences or secrets permitted under disciplinary rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

The Amercian Bar Association proposed rule on this subject, Rule 1.6 provides, as far as pertinent here:

b. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . .

The ABA proposal would make the privilege requirement somewhat more stringent in that the criminal act must be one "likely to result in imminent death or substantial bodily harm." (Rule 1.6(b)(1)).

The proposal of the Minnesota State Bar, however, very substantially modifies the breadth of the rule as we have had it in Minnesota for many years in that it adds the following provisions:

b. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(2) To prevent the lawyers services from being used to assist the client to commit a criminal or fraudulent act;

(3) To rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used. . . .

The proposals of the Minnesota State Bar Association are both prospective and retrospective in that the proposed rules contain, as set out above, the word "rectify." If adopted in the form recommended by the Minnesota State Bar Association, the rule in question would greatly impair the primary duty of attorney-client confidentiality.

It is the position of the American College of Trial Lawyers, a position which we strongly endorse, that the preservation of the confidentiality of information received from a client is a central element of the adversary system. By assuring the client that information given to the attorney will not be disclosed save in the most extreme circumstances, the ABA rule maximizes the likelihood that all relevant facts, no matter how embarrassing or apparently damaging, will be made available to the attorney. Where the facts concern past conduct, complete communication between attorney and client insures that the client will receive competent legal advice. Where the facts relate to future conduct, full communication allows the attorney to counsel his

client against courses of action that could result in civil or criminal liability, but this can occur only if the client is encouraged to make full disclosure of all facts without fear of disclosure by the attorney.

ABA Model Rule 1.6 embodies these principles. It establishes a general proscription against disclosure of any information concerning a client without the client's authorization. The only exception pertinent to this rule are disclosures necessary to prevent a client from committing a crime likely to result in imminent death or serious physical injury. This exception recognizes the profound moral dilemma faced by an attorney in the rare case where the attorney could prevent death or injury by revealing the client's confidences.

ABA Model Rule 1.6 does not require an attorney to allow others to rely upon the attorney's own representations or opinion letters, if the attorney discovers that they were made on the basis of criminal or fraudulent conduct by the client. The lawyer can and should disaffirm such representations or opinions.

The MSBA proposed Rule 1.6 would allow an attorney to reveal confidential communications in far broader circumstances. Under the MSBA proposal, the lawyer could make such disclosure to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which, unknown to the attorney, the attorney's services had been used. It is apparent that such a rule would have broad and uncertain application, and thus would greatly discourage full and frank communication between attorney and client.

The MSBA proposed rule would also threaten a client's right to prevent his or her attorney from testifying against the client. Once an attorney has discretion to reveal a client's confidences, legal process may well compel the attorney to do so. In practice, this would give the attorney such power to disclose as to destroy an incentive of the client to reveal the facts. We practice in a legal system based upon the adversary principle. This means that each attorney is a client's advocate, not an ombudsman for the public. The attorney's first duty is thus to serve the client's interest, a duty limited only by the rules necessary to the functioning of the adversary system itself. No attorney has a legitimate interest in substituting his or her values for those of the client, nor can the lawyer act as policeman or judge of the client's conduct.

The rule presently in force, and which has been in force for many years, D.R. 4-101 has, so far as we are able to determine, served the interests of the public well. If it is to be amended, we submit to the Court it should be amended in accordance with

the Model Rule 1.6 as proposed by the American Bar Association and that the form of rule proposed by the Minnesota State Bar Association should be rejected.

With respect to proposed Rule 4.1, the ABA Model Rule provides:

> In the course of representing a client, a lawyer shall not knowingly:
>
> (a) Make a false statement of material fact or law to a third person; or
>
> (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The proposed MSBA rule eliminates from subparagraph (a) the word "material." More importantly, the MSBA proposal strikes subparagraph (b) in its entirety without proposing any substitute language. Instead, the MSBA proposal takes up this subject in the comments to the proposed rule. This leaves the subject covered by the ABA proposal, subparagraph (b) in a state of limbo. We submit that circumstances involving a failure to disclose a material fact should be covered by an explicit rule, as has been done by the ABA, rather than leave the subject untouched or treated only in comments to Rule 4.1. Furthermore, the ABA rule dealing with failue to disclose a material fact is linked to ABA proposed Rule 1.6. We submit that the subject of failure to disclose is of sufficient importance to be handled by a specific rule and that the rule to be adopted should be as proposed by the American Bar Association.

Respectfully submitted,

William T. Egan, Regent
American College of Trial Lawyers

Robert J. King, Sr.
State Chairman
American College of Trial Lawyers

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OF COUNSEL
STUART W. RIDER, JR.
KENNETH R. JOHNSON

December 20, 1984

WRITER'S DIRECT DIAL NUMBER

340-7903

Honorable Douglas K. Amdahl
Chief Justice of Minnesota Supreme Court
230 State Capitol Building
St. Paul, Minnesota 55155

RE: Proposed Code of Professional Responsibility
C8-84-1650

Dear Chief Justice Amdahl:

Regarding the Proposed Minnesota Code of Professional Responsibility, Robert J. King and I request the Court to be heard for 20 minutes on January 4, 1985 at the hearing we understand will commence at 9:30 a.m.

John C. Elam, Esq., of Columbus, Ohio was president of the American College of Trial Lawyers four years ago. He served as a member of the House of Delegates of the American Bar Association and was in the forefront of the extensive debates in that body and at ABA Conventions prior to the adoption of the ABA Model Code of Professional Responsibility in 1983.

Mr. King and I believe that Mr. Elam can provide the Court with helpful background information on Rules 1.6, 1.13 and 4.1 which were adopted as part of the ABA Model Code in the form urged and supported by the American College of Trial Lawyers. At our request, Mr. Elam has kindly agreed to come to St. Paul on January 4, 1985, and with the Court's permission, address the issues relating to these particular rules.

Mr. King and I will yield to Mr. Elam whatever part of the time we have requested necessary to permit him to complete his remarks. Our own comments, if any, would be very brief because we have filed a separate letter stating the position of the College, and ours.

Respectfully submitted,

William T. Egan

/jm

parties called by DKA - allowed 15 minutes

12-18-84

BASSFORD, HECKT, LOCKHART & MULLIN, P. A.

FORMERLY

RICHARDS, MONTGOMERY, COBB & BASSFORD, P. A.

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FRED B. SNYDER (1859-1951)
EDWARD C. GALE (1862-1943)
FRANK A. JANES (1908-1959)
NATHAN A. COBB, SR. (1905-1976)
BERGMANN RICHARDS (1888-1978)

December 17, 1984

The Honorable Justices of The
Minnesota Supreme Court
c/o Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

RE: Proposed Minnesota Code of Professional Responsibility/
Rules of Professional Conduct C8-84-1650

May It Please The Court:

This letter petition is respectfully submitted in support of the Petition of the Minnesota State Bar Association to replace the existing Minnesota Code of Professional Responsibility with Minnesota Rules of Professional Conduct, and specifically in support of proposed Model Rule 1.6, which deals, in part, with a lawyer's ethical duty of confidentiality when the lawyer learns that his professional services are being used or have been used by a client in furtherance of a criminal or fraudulent act.

I enclose herewith a copy of an article I wrote on this subject last year, "On Ethics and Expediency: The ABA's Dubious Vote on Disclosure of Client Fraud", March-April 1983, Hennepin Lawyer at 13. That article explains why principles of both law and ethics require an exception to the attorney's general duty of confidentiality concerning client information in the situation where the lawyer has been or is being used by the client to commit a fraud. As set forth in the article, the final draft of the Proposed Model Rules of Professional Conduct submitted by the ABA Commission on Evaluation of Professional Standards contained such a rule, which was amply supported by legal and ethical precedent. Unfortunately, the ABA rejected proposed Rule 1.6 and instead adopted a version of that Rule, proposed by the American College of Trial Lawyers, which would have the effect of requiring lawyers to maintain confidentiality of client information even when the client had used the lawyer's services in the furtherance of a crime or fraud.

copies distributed to Judges 12-20-84 GR

As the Court is aware, the proposed Minnesota Model Rules which are the subject of the pending Petition have modified the ABA Model Rules in several respects, including Rule 1.6. The Bar of Minnesota has recognized that the ABA Model Rules' prohibition of disclosure even when a lawyer learns that his client has used him to commit a fraud is ethically indefensible. I respectfully submit that the Court should follow the recommendations of the Minnesota State Bar Association in this regard.

I would expect that the Court would receive briefs or petitions in this matter from lawyers or others asserting that the more restrictive ABA Model Rule 1.6 should be adopted. I respectfully submit that the Court should reject these arguments, for several reasons.

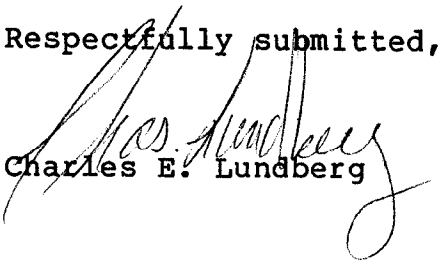
First, the Court must bear in mind the fact that the Court is adopting rules of ethical conduct. As is set forth at length in the enclosed article, the restrictive ABA Rule 1.6 is entirely unsatisfactory, as a matter of basic ethical principles.

Second, solely as a matter of lawyers' self-interests, the restrictive Rule is inappropriate. For the last four years my practice has consisted primarily of representing lawyers who have been sued for legal malpractice. In my short career, I have already had three cases which arose out of situations where a client had used the lawyer to commit a fraud. While in these three cases the lawyer in question did not learn of the fraud until after it was discovered by the injured party, the situation could well arise where a lawyer discovers his client's fraud before it has been accomplished, or after it has been accomplished but before it has been discovered by the injured party. In such a situtation, the lawyer may decide that he should reveal the fraud, if not because of basic ethical principles then because of his own interest in avoiding or mitigating liability for damages. It is absurd in such a situation to say that the lawyer should be prohibited by rules of ethical conduct from disclosing the fraud which his client has used the lawyer to commit.

Finally, I urge the Court to consider how other jurisdictions have handled proposed Rule 1.6 when they have adopted the ABA Model Rules. I believe the Court will find that virtually every state that has considered the matter has rejected the restrictive ABA Model Rule 1.6 in favor of a revised Rule, similar to Rule 1.6 as proposed by the Minnesota State Bar Association, that would allow a lawyer to reveal information in order to prevent the lawyer's services from being used by the client to commit a criminal or fraudulent act, or in order to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used.

For the foregoing reasons, I respectfully urge the Court to adopt the Minnesota Rules of Professional Conduct in the form proposed by the Minnesota State Bar Association, and to reject any suggestion that Rule 1.6 of those Rules should be made in any way more restrictive.

Respectfully submitted,



Charles E. Lundberg

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On Ethics and Expediency: The ABA's Dubious Vote on Disclosure of Client Fraud

BY CHARLES E. LUNDBERG

INTRODUCTION

The local legal community was in an uproar last fall when the Minneapolis Star & Tribune published an article by Richard Harris criticizing the legal profession generally in the harshest terms. Harris suggested that lawyers were pretty much a worthless lot, leeches on the body politic, doing much more harm than good. Several attorneys responded publicly to Harris, pointing out various fallacies and unwarranted assumptions underlying his vituperative attack on the practice of law. One commentator, however, Professor Douglas Heidenreich of the William Mitchell College of Law, acknowledged that Harris may well be justified in criticizing the "hired gun" mentality that seems to characterize the practice of law in our adversary system.

Professor Heidenreich expanded on this point in his "Inside View" column in the last issue of *The Hennepin Lawyer*, where he asked several difficult and provocative questions about the ultimate justifications for and limits of the adversary system. Does the adversary system put too much emphasis on winning, at the expense of other ideals such as justice? Do the fundamental goals of zealous advocacy — an unbounded devotion to advancing the client's cause, winning at any cost short of illegality — necessarily result in the best possible legal system? What are the costs of such a system, not only in terms of general social good, but also in terms of its effect on the mental health of lawyers themselves, who daily must adopt this win-at-all-costs mindset?

Similar questions about the limits of zealous advocacy have recently been aired on a national level. The American Bar Association, in an attempt to adopt a new code of ethics for lawyers, has become embroiled in a hotly contested argument over just how far an attorney's devotion to his client should extend.

The issue has been raised in its starkest form in connection with the debate on an attorney's continued duty of confidentiality upon discovering that a client has involved the lawyer in fraudulent activity. What should an attorney do when he or she learns that a client is using or has used the professional relationship to commit a fraud on an innocent third party? Should the attorney in such a situation have either the *right* or the *duty* to reveal the deception, if doing so would prevent or help rectify the results of a fraud that the professional relationship has been used to accomplish? Or should the attorney be required to keep information about the client's fraud secret, even if common and basic notions of right and wrong suggest that the attorney's own ethical integrity has been damaged, and can only be restored by preventing or rectifying the fraudulent activity that he or she has unwittingly helped to perpetrate?

These questions go to the very root of the adversary system, and the attorney's role in it. In a situation involving client fraud[1], there is a direct conflict between two normally unquestioned ethical duties: the duty to protect confidential client information, and the duty to guard the integrity of the legal system against those who would use an officer of the court to defraud another party.[2] It is perhaps not surprising, then, that the proposals of the ABA Model Rules of Professional Conduct ["Kutak Report"][3] dealing with this question have sparked widespread controversy in the legal community.

At its February 1983 meeting, the ABA House of Delegates voted to reject Rule 1.6 of the Kutak Report, which would have allowed but not required disclosure of information necessary to prevent a serious fraudulent act by the client or to rectify a client's fraud that the attorney's professional skills had been used to commit.[4] Instead, the ABA adopted a rule, proposed by the American College of Trial Lawyers ["ACTL"], that would discipline the attorney for disclosing the client's fraud in either of these situations.[5]

The practical ramifications of this action have been vigorously attacked in the press.[6] The public seems to have the most difficulty accepting the fact that an attorney may reveal client confidences if necessary to collect a legal fee, but not to prevent or rectify the consequences of a

fraud which the attorney has been or is being used to commit. Some commentators have questioned why the lawyer should in effect be made an unwilling accomplice in the client's continuing fraud, or the continuing cover-up of a completed fraud. More cynical writers have suggested that the ABA's decision can only be explained by reference to attorneys' own financial interest in their client's fraudulent schemes.

While public popularity is not necessarily the *sine qua non* of a proposed code of ethics for lawyers, the fact that many intelligent and morally sensitive nonlawyer commentators find a provision of the proposed ethical code to be ethically unsatisfactory does raise questions about whether the issue has been adequately considered. We are, after all, dealing with a question of *ethics* — morally right and wrong behavior — a subject that one presumably does not need a law school education to understand. If, as seems to be the case, the ultimate moral issue underlying the client fraud question generally finds only lawyers on one side, and the non-lawyer public on the other, one might reasonably wonder whether becoming an attorney has a significant effect on a person's ability to deal with moral issues, either enhancing one's moral sensitivity, allowing the attorney to understand moral imperatives that are incomprehensible to mere mortals, or having the opposite effect.[7]

This article will suggest that the ABA House of Delegates erred in adopting the ACTL's position on the client fraud issue instead of the recommendations of the Kutak Report. The Kutak Report's resolution of the client fraud question was carefully thought out and amply supported both by sound argument and legal and ethical authority. In contrast, the position taken by the ACTL and the other groups that have attacked the Kutak Report client fraud rules simply ignores the central ethical question raised by the

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[1]For purposes of this article, "client fraud" denotes a situation in which a client uses the professional skills and advice of an attorney to assist in the perpetration of a fraudulent act resulting in substantial economic loss to a third person, without the lawyer's knowledge. The critical predicate in this definition is "use" — this analysis applies only where the lawyer has materially *aided* in the commission of the client's fraud.

[2]See Note, *Client Fraud and the Lawyer — An Ethical Analysis*, 62 Minn. L. Rev. 89 & n.2 (1977):

> Because the lawyer plays an essential role in our system of justice, he is given certain rights and privileges. With these comes an obligation to the legal system — an ethical imperative to guard the processes of justice. The Code of Professional Responsibility recognizes this concept: "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." *ABA Code of Professional Responsibility*, Preamble.

[3]The ABA Commission on Evaluation of Professional Standards was created to review and propose changes in the ABA Model Code of Professional Responsibility. In January, 1980, the Commission issued a Discussion Draft of the Model Rules of Professional Conduct. After an extensive period of review and comment, a Proposed Final Draft of the Model Rules was released in May, 1981. A Final Draft of the Model Rules was submitted to the ABA House of Delegates in the summer of 1982.

The Commission on Evaluation of Professional Standards, and its proposed Model RKULES OF Professional Conduct, have come to be known in the legal community by the name of the Commission's Chairman, the late Robert J. Kutak. For purposes of distinguishing the Model Rules proposed by the Kutak Commission from the Model Rules as adopted in February by the ABA, this article will denote the former as the "Kutak Report".

[4]RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

(4) to comply with other law.

[5]The ACTL proposal revised Rule 1.6(b), by deleting subsections (b) (2) and (b) (4) in their entirety, limiting (b) (1) to allow disclosure only to prevent imminent death or substantial bodily harm, and broadening the scope of (b) (3):

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to the client's allegations in any legal proceeding concerning the lawyer's professional conduct for the client.

[6]*See, e.g.*, Stone, *Are Lawyers So Special?*, U.S. News and World Report, February 28, 1983, at 76; O'Brien, *It's No Secret, ABA's Rule Puts Privilege Over Sense*, St. Paul Pioneer Press, February 20, 1983, at 3A; and the following editorials collected in USA Today, February 15, 1983: *ABA's Turns Lawyers Into Accomplices;* Rotunda, *Fraud May Continue, Even If Lawyer Knows; Justice Be Damned — Full Fees Ahead.*

[7]Not all lawyers, of course, accept the conclusion that an attorney's duty of confidentiality should extend to a client fraud situation. Whether the lawyer is actively engaged in practicing law appears to have some effect on how he or she analyzes the question. While academic lawyers generally recognize the limits of attorney confidentiality in a client fraud context, it appears that a near-absolute position on confidentiality is supported by many practicing attorneys, and most strongly by trial lawyers.

What is it about the practice of law that could account for this alignment of views? Might the adversary system have a dulling effect on an attorney's sensitivity to ethical concerns? Practicing lawyers, especially trial attorneys, work daily in the context of a system which requires a zealous devotion to the representation of the client. Young attorneys often need to be reminded that their only role is that of an advocate, responsible not to evaluate the rightness or wrongness of their client's ends, but merely to accomplish them. *See generally*, D. Heidenreich, *Inside View*, Hennepin Lawyer, January-February, 1983, at 3.

In light of this, it is not surprising that trial attorneys experience severe cognitive dissonance where concepts of ethics constrain their otherwise unbounded loyalty to the client's cause. Morally sensitive attorneys, recognizing this fact, will take this effect of the adversary system on trial attorneys' moral perceptions into account in analyzing arguments made by such attorneys in favor of an absolute rule of confidentiality.

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client fraud dilemma, relying instead on dire warnings that proposed Rule 1.6 would result in a radical redefinition of the attorney-client relationship, and would be inconsistent with the attorney-client privilege. From these premises, the ACTL draws the conclusion that the principle of attorney confidentiality is so important that an attorney must *never* be able to reveal a fraud in which the relationship has been used.

The premises the ACTL relies on to support its conclusions are demonstrably incorrect. Moreover, the ACTL position fails to deal with the fact that, in a particular case, an attorney confronted by the client fraud dilemma may recognize a compelling personal moral obligation to prevent or rectify the fraud that he or she has unwittingly helped commit. Since the ACTL amendment to Model Rule 1.6 will absolutely forbid in such situations precisely what morality requires, it is to that extent a bad rule — a rule that the attorney would be morally justified in disobeying.

The fact that an ethical rule adopted by the ABA could be subject to attack on classical civil disobedience grounds suggests that something is desperately wrong with the ABA's ethical analysis. To the extent that the ABA Model Rules are inconsistent with basic and common notions of ethics, the ABA simply cannot justifiably claim to be promulgating an *ethical* code, without raising a much more fundamental and troubling question — whether being an ethical attorney is inconsistent with being an ethical person.

This last issue, of course, is the ultimate question that lawyers must face in deciding what *should* be the rule governing an attorney's conduct in a client fraud situation. If, as the ACTL suggests, "the realities of legal practice" require an ethical rule that is directly contrary to the dictates of considered moral judgments, then perhaps it is time for the ABA to reconsider what are, or should be, the realities of legal practice.

THE CLIENT FRAUD PROBLEM

It must be recognized that the risk of becoming involved in client fraud may well be an inevitable part of the practice of law, just as the risk of a legal malpractice claim is. Lawyers must realize that there exists a class of people — i.e., a class of prospective clients — who are ready and willing to enrich themselves by defrauding and deceiving others; who are continually thinking up creative, innovative methods of swindling others; and who have no compunction at all about involving a lawyer in their fraudulent designs. Lawyers must also recognize that certain types of fraud either require or would be substantially assisted by the special legal skills that only an attorney can offer. While some clients intent on committing fraud may be able to find attorneys willing to risk their careers by knowingly assisting in the deception — for the right price, of course — perhaps most of those clients who want to use an attorney to commit a fraud will have to dupe the attorney, gaining his or her professional assistance without revealing their fraudulent motives.

Thus defined, client fraud appears to be a significant problem in the legal system today. Litigation alleging fraud in which attorneys have played a material role certainly seems to be occurring with increasing frequency. The *OPM Leasing Services* case, for example, which was extensively reported in the press just weeks before the ABA's February meetings, provides a textbook case study of the client fraud problem.[8]

In 1980, the New York law firm of Singer Hutner Levine & Seeman learned that its client, OPM Leasing Services, Inc., had committed a massive fraud involving various computer lease transactions in which Singer Hutner had been intimately involved as attorney. Realizing its predicament, Singer Hutner retained ethics counsel — Henry Putzel, an expert in legal ethics — to advise the firm on how to proceed. Putzel advised Singer Hutner that, under the Code of Professional Responsibility, they could in no event reveal the client's fraud; they could, however, continue to represent OPM, as long as no further fraud was committed. After receiving assurance from Myron Goodman, the principal shareholder of OPM Leasing (and the perpetrator of the fraud), that the deception had indeed ceased, Singer Hutner continued on in the representation.

The fraud, of course, had not stopped, and Singer Hutner lawyers continued unknowingly to aid the client in perpetrating even more fraud through further lease transactions. When the firm learned of this, as well as other information indicating that Goodman could not continue to operate OPM Leasing without continued fraudulent transactions, they did finally decide to withdraw from the representation. But, Putzel advised, they still could not reveal the information, even to prevent what almost certainly would be a continuation of the fraud through OPM's new attorneys, who would, of course, be entirely ignorant of any facts indicating fraud. In addition, the withdrawal had to be accomplished gradually, in such a way as not to alert anyone that anything was wrong. Finally, after the withdrawal, when Singer Hutner was contacted by a senior attorney from OPM's new law firm, who happened to be an old and close friend of Mr. Hutner, Putzel told Mr. Hutner that he could not even warn the new attorney of the imminent danger that his firm, too, was becoming involved in OPM's ongoing fraud.

The *OPM Leasing* case vividly illustrates the problems posed by the client fraud issue. It demonstrates the anomalous results of an absolute rule of attorney confidentiality in such a situation. It poses several pointed questions about the role of a code of legal ethics. Where the client has used and is continuing to use the attorney to commit fraud, how can it be said that the attorney owes any loyalty or allegiance, any further ethical duty, to the client who has so abused the professional relationship? That Mr. Hutner was even forbidden from warning his own close friend that he was becoming involved in massive ongoing fraud is truly an abhorrent result, from a moral point of

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[8]*See, e.g., O.P.M. Fraud Raises Questions About Role Of a Criminal's Lawyer,* Wall Street Journal, December 31, 1982, at 1; Taylor, *Ethics And The Law: A Case History,* New York Times Magazine, January 9, 1983, at 31.

Ethics (Continued)

view. Why should the attorney be compelled, by rules of ethical conduct, to engage in such ethically distasteful behavior?[9]

The ACTL and the other groups that support this extreme view of mandatory attorney secrecy argue that such a rule is required by both the attorney-client privilege and the related but more general principle of lawyer-client confidentiality. In fact, however, neither the privilege nor the policies underlying the principle of professional confidentiality requires the attorney to keep information secret in a client fraud situation.

The attorney-client privilege, as a rule of evidence, operates only as a shield to officially compelled disclosure. Where applicable, the privilege allows the client to prevent an attorney fron answering a question, *in a judicial context,* that the attorney would otherwise be compelled to answer.[10] As a threshold matter, therefore, the evidentiary privilege simply has no application to a private, voluntary, disclosure of the client's fraud by the attorney (such as warning successor counsel of the ongoing fraud in the *OPM Leasing* case).

More fundamentally, however, the attorney-client privilege simply *does not exist* where the client has used the professional relationship to commit a fraud. From its very beginnings at common law, the privilege has never been interpreted to protect a client who intentionally uses the professional relationship to commit a crime or fraud.[11] Thus, the ACTL is plainly wrong in suggesting that the attorney-client privilege presents a legal impediment to the attorney's disclosure of his client's fraud.[12]

The attorney's duty to preserve client confidences, however, is broader than the evidentiary privilege. The client has a right to expect that the attorney will keep information about the representation secret, even though it may be outside the scope of the attorney-client privilege. This ethical duty is presently codified in DR 4-101 of the ABA Code of Professional Responsibility, which provides for a general duty to maintain client confidences and secrets, subject to certain enumerated exceptions.

This has always been the structure of the attorney's ethical duty to preserve client confidences: a general obligation of secrecy, subject to certain limited exceptions, where the principle of confidentiality is overcome by ethical or policy considerations in favor of disclosure. The question before the ABA House of Delegates when Rule 1.6 came up for discussion and a vote, therefore, was simply whether the attorney's ethical duty to preserve client confidences should be subject to an exception when the client has involved the attorney in fraud.

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[9]While Singer Hutner's ethics counsel has been criticized for taking too extreme a view of attorney-client confidentiality under the present Code of Professional Responsibility, there is no question that the same advice would be required under the amendment to Model Rule 1.6 proposed by the ACTL and adopted by the ABA House of Delegates in February.

[10]*See,* Note, *Client Fraud and the Lawyer — An Ethical Analysis,* 62 Minn. L. Rev. 89, 111-12 & n. 101-02.

[11]*See,* Note, *supra,* n. 10, at 112 and n. 103; *See also,* 8 J. Wigmore *Evidence* §2298 at 572-77 (McNaughton Rev. 1961):

> It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise. This is for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal advisor and client . . . [The policy reasons in favor of confidentiality] all cease to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. From that point onwards, no protection is called for by any of these considerations. *Id.* at 572-73.

[12]Since the Kutak Report cited exhaustive legal precedent on this point, the ACTL's continued assertion, without authority, that the evidentiary privilege somehow precludes disclosure in a client fraud context is arguably disingenuous.

Ethics (Continued)

The ACTL attacked the Kutak Report's affirmative answer to that question as a radical redefinition of the attorney-client relationship, an abrupt transformation in the lawyer's role that "would seriously undermine the confidentiality of communications between the client and his attorney." In fact, however, the client fraud exception to the attorney's duty of confidentiality has long been a part of the ABA's model codes of ethics for lawyers. The 1969 ABA Code of Professional Responsibility, and the ABA Canons of Professional Ethics before that, both contained an exception to the attorney's duty of confidentiality when client fraud was involved.[13] Kutak Report Rule 1.6, then, was in the mainstream of legal ethics precedent, reflecting a long-honored judgment that a client who uses the attorney to commit fraud is simply not entitled to rely on the rule of confidentiality that would otherwise govern the professional relationship. If anyone can be accused of advocating a redefinition of the scope of attorney confidentiality, it is the ACTL, not the Kutak Commission.

Moreover, for all its solicitude in favor of confidentiality, the ACTL itself did not propose an absolute rule of secrecy for attorneys. Under the ACTL amendment to Rule 1.6, an attorney would be allowed to reveal a client's secrets when the attorney's own interests are at stake. Where, for example, the attorney deems it necessary to protect himself against accusations of wrongful conduct, or to collect a legal fee, the ACTL would give its blessing to disclosure of a client's secrets. In addition, where necessary to prevent the client from committing a crime likely to result in imminent death or substantial bodily harm, the ACTL would permit disclosure of client confidences, acknowledging that "such consequences are so serious and may be of such overriding concern to the attorney that he should be permitted, but not required, to disclose confidential information."[14]

But, having acknowledged that preventing serious consequences may override the duty of confidentiality, the ACTL must deal with a significant line-drawing problem: How serious must the consequences be in order to allow disclosure of client information? Why, in principle, should disclosure be allowed to prevent bodily injury — say, spousal physical abuse — but not to prevent a multi-million dollar stock fraud? More fundamentally, why should an attorney have the right to disclose information to protect his or her *own* interests, but not to protect the interests of innocent third persons who have been or will be injured by a fraud in which the lawyer has played a material role?

It should be obvious that a client who uses the attorney to commit a fraud betrays the professional relationship on which the principle of confidentiality is based. The client therefore cannot justly complain when, in order to prevent or rectify the fraud, the attorney is permitted to disregard the right to confidentiality that would otherwise govern the relationship. Just as the attorney-client privilege is abrogated when the client has a fraudulent purpose in seeking legal advice, so must the principle of professional confidentiality cease to exist in a client fraud context. When the lawyer's special office has been so abused by the client, the client forfeits any right to expect that the client's evil secrets will be protected by the attorney.

The ACTL tacitly acknowledges this fact. Their expressed concern is not so much for the fraudulent client, but rather for all other clients, who, it is assumed, will be less likely to communicate sensitive information to the lawyer if they perceive that the attorney may be able to disclose the information. The ACTL raises the spectre of a lawyer having to give the client a "Miranda warning" if Model Rule 1.6, were adopted, since the client should in fairness be warned beforehand that certain information would not be protected from disclosure by the attorney.

This reasoning is highly suspect, relying as it does on questionable empirical assumptions about clients' perceptions of the attorney's duty of confidentiality. Do clients really think that the duty of confidentiality is absolute? If so, perhaps they should be disabused of this notion, since

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[13]*See* ABA Model Code of Professional Responsibility, DR 7-102 (B) (1):

(B) A lawyer who receives information clearly establishing that:

(1) His client has, the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

Since 1974, several states, including Minnesota, have adopted an amended version of DR 7-102 (B) (1), which adds the following language at the end of the Rule:

. . . except when the information is protected as a privileged communication.

See generally, Note, *Client Fraud and the Lawyer — An Ethical Analysis,* 62 Minn. L. Rev. 89 (1977) for a discussion of how this exception clause to DR 7-102 (B) (1) in effect swallows the rule.

See also, ABA Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility, Canon 41:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured party or his counsel, so that they may take appropriate steps.

[14]Report of the Legal Ethics Committee, American College of Trial Lawyers, April 2, 1982, at 17.

Even on the level of an attorney's self interest, the ACTL rule is much too narrow. It would not allow disclosure, for example, to the lawyer's malpractice insurer before a claim had been commenced, a result that may well give the insurance carriers grounds to deny coverage for subsequent claims against the lawyer arising out of the client's fraud. Moreover, the ACTL rule would apparently not allow the lawyer to retain counsel, as was done by the Singer Hutner firm in the *OPM Leasing* case.

Ethics (Continued)

that is simply not the case. One wonders whether the members of the ACTL presently give such "Miranda warnings" to their clients, in light of the other exceptions to the duty of attorney confidentiality noted above.

Moreover, how reasonable is it to assume that clients will modify their behavior if they know that the attorney can reveal confidential information to the extent that the client uses the relationship to commit a fraud? Certainly clients who do in fact harbor fraudulent intentions may be more circumspect in what they divulge to their lawyer, but it has already been acknowledged that such clients do not deserve attorney confidentiality. If the client does not intend to engage in fraud, why would he or she be concerned about the client fraud exception to attorney confidentiality? Only where the client is engaged in activity approaching fraud will the existence of the client fraud exception be of any concern to him or her. In such cases, it seems altogether appropriate that the attorney inform the client that the professional relationship may not be used to achieve fraudulent ends.

If, as the ACTL suggests, lawyers must take into account how a proposed ethical rule will be perceived by clients in formulating such a rule, then the question becomes what kind of message attorneys want to send to clients on this issue. What is wrong, as a matter of principle, with forthrightly informing the public that they simply may not reasonably rely on an attorney's duty of confidentiality if they intend to use the attorney to commit a fraud?

Thus understood, the issue is one of policy — what limits should be placed on attorney-client confidentiality to insure the best results for the legal system? The fundamental policy considerations underlying the principle of confidentiality are the subject of *Secrets: On the Ethics of Concealment and Revelation,* a recent scholarly analysis by noted ethics commentator Sissela Bok. In a chapter entitled "The Limits of Confidentiality", Ms. Bok examines the justifications for professional confidentiality, and persuasively argues that while the premises on which this principle is based are valid in general, the social benefits of confidentiality are outweighed when serious harm to others is involved. Ms. Bok demonstrates that the utilitarian arguments in favor of professional confidentiality, while strong, are not without limits. Where the client intends injury to the interest of third parties, the social benefits of confidentiality may well be outweighed by competing concerns. Ms. Bok's analysis suggests that the absolute position on confidentiality espoused by the ACTL cannot be justified, even in terms of the utilitarian policy considerations on which it is based.

Moreover, it can be argued that the ACTL's approach to the client fraud problem runs afoul of a much more fundamental concept. A lawyer who has unwittingly been involved in his client's deception may have a personal moral *privilege* to divulge the fraud, if doing so would result in prevention or rectification of the fraud. This is *not* a question of choosing best consequences, of what kind of rule would be best for the legal system. It is rather an issue of personal moral integrity, a concept that such utilitarian considerations simply cannot adequately account for.

The moral force of the concept of integrity can best be illustrated by a hypothetical example from outside the legal system. Assume that John, a recent acquaintance, asks you to help him move a stereo from what he tells you is his house out to his car. After you do so, you learn that the house (and the stereo) is not really John's, but actually belongs to Jim. In effect, therefore, you have just helped John steal Jim's stereo. As a matter of morality, should you not tell Jim, and then do whatever you can to help him get the stereo back? Irrespective of whether you may have a moral *duty* to disclose the theft that you have helped commit, do you not have a *right* to do so, notwithstanding John's objections? Do you not have a legitimate *personal* interest in taking such steps as are necessary to purge yourself of complicity in John's deception? It is a matter of basic personal integrity: you have been used, your integrity has been soiled. To the extent that disclosure or other action will erase this stain, John certainly has no *moral* right to object to your attempt to extricate yourself from his fraud.

In this hypothetical, the intuitive appeal in favor of disclosing the fraud that one has unwittingly helped commit — as a matter of personal integrity — seems strong indeed. Why should the analysis be any different in an attorney-client context? There, just as in the stolen stereo hypothetical, one party has duped the other into assisting in a deception, causing damage to a third party. Can it really be said that the mere fact that the duped party happens to be an attorney changes the ultimate moral analysis? The personal moral integrity of the attorney is directly in issue. Surely the client, after having abused the attorney's professional skills, involving him or her in a fraud, has no more right to insist on secrecy than John does.

The question here is *not* whether giving an attorney the right to disclose client fraud would yield the best ultimate results for the legal system. Rather, it is an issue of the individual attorney's *personal* right, notwithstanding such utilitarian notions, to protect his own moral integrity.

In a particular case of client fraud, a morally sensitive attorney may reasonably conclude that his or her complicity in the client's fraud, even though un-

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intentional, requires corrective action. An attorney who recognizes such a moral imperative must be free to act accordingly. Therefore, even if the ACTL was correct in arguing that a rule allowing the attorney to disclose client fraud would result in a marginal disutility to society as a whole, the fact remains that the particular attorney must have the right to protect his or her personal integrity, to act in what he or she deems to be a moral manner. The individual lawyer's right to do the right thing is a fundamental one; it cannot be sacrificed for any supposed greater social good.[15]

In a particular case, an attorney who learns that a client has used the professional relationship to commit a fraud may conclude that he or she is morally obligated to disclose information in an attempt to prevent or rectify the consequences of the fraud. Suppose, for example, that the lawyers in the *OPM Leasing* case had learned of their client's deception the day before the closing on a large lease transaction implicated in the fraudulent scheme. Assume further that upon being confronted with the facts, the client refused to stop the deception and indicated an intention to go forward with the scheme with new counsel if necessary. The attorneys, having already participated in the client's fraud, may well decide that they have an obligation to prevent any further deception. If the attorneys do come to this conclusion, should they have to risk professional discipline in order to do the right thing?

At this point, most attorneys would give up any notions of doing the right thing, in favor of protecting their own interest in avoiding disciplinary proceedings. But what if the attorney in question was *committed* to acting consistent with his or her own moral dictates? What if the attorney accepts Thoreau's principles concerning one's duty of civil disobedience when the law is unjust? If morality tells such an attorney to reveal the fraud, then he or she will do so, notwithstanding the risk of disbarment. When the lawyer does reveal the fraud, thereby saving the client's victims from substantial losses, what should be the attitude of the relevant disciplinary body? Should the attorney be disciplined for this action?

Some lawyers, confronted with this issue, have indicated that, in a paradigm client fraud case, they would reveal the fraud notwithstanding the ethical rule prohibiting disclosure. They do not count it a serious risk that they might be disciplined for this action. Perhaps they are right. Perhaps the Disciplinary Committee, recognizing the ultimate moral issue involved here, would blink at the fact that an ethical rule had been deliberately violated by the attorney. But what does that say about the moral worth of the ethical rule in question? And why should the attorney, who is, after all, trying to do the right thing, have to be burdened by *any* risk of professional sanction?

CONCLUSION

An attorney who learns that a client has used the professional relationship to commit fraud is confronted with a personal moral decision. In a paradigm case, the lawyer may determine that a particular disclosure of confidential information about the client's fraud is morally compelled, whether because a close friend is in danger of becoming involved in the fraud, or simply to prevent or remedy the fraud that the *attorney* helped commit. In either case, the attorney must be free to protect his or her own integrity, to act in a morally responsible manner. The ACTL rule, adopted by the ABA, would forbid, in a particular case, what morality would require. The rule must therefore be changed.

The ABA must reconsider Model Rule 1.6. If the rule is finally adopted by the ABA, attorneys who are sensitive to the ultimate moral issue involved here must oppose promulgation of Rule 1.6 at the state level. When the Model Rules are presented to the Minnesota Supreme Court for adoption, Minnesota attorneys will have the opportunity, and responsibility, to support an amendment restoring the Kutak Report proposal on client fraud. The Minnesota Bar must recognize that the question involved here goes to the very foundation of the legal profession. For if one cannot at the same time be an ethical person and an ethical attorney, then something is fundamentally wrong with the role of an attorney. If that is the case, then we all have a difficult personal ethical decision to make.

---

[15]Moral philosophers have long recognized that utilitarian moral theories cannot account for, and yield fundamentally counter-intuitive results in, situations where notions of personal integrity conflict with utilitarian value calculations. *See, e.g.*, Williams, *A Critique of Utilitarianism*, in B. Williams & J. Smart, *Utilitarianism: For and Against* 108-18 (1973).

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December 19, 1984

OFFICE OF APPELLATE COURTS
FILED
DEC 20 1984
WAYNE TSCHIMPERLE
CLERK

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

Re: Minnesota Code of Professional Responsibilities/
Proposed Model Rules of Professional Conduct
C8-84-1650

Dear Sir or Madam:

Yesterday I forwarded to your office 10 copies of a letter petition concerning the captioned subject. I neglected to add that I plan to attend the hearing before the Supreme Court on this matter, scheduled for January 4, 1985. I will be prepared to address the Court in the event that a question is raised concerning the proposed Rule 1.6 of the Rules of Professional Conduct.

Very truly yours,

Chas. Lundberg

Charles E. Lundberg

CEL:cjh

GRAY, PLANT, MOOTY, MOOTY & BENNETT

A PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS

HAROLD G. CANT (1887-1973)
HENRY W. HAVERSTOCK (1894-1977)

MINNEAPOLIS OFFICE PARTNER IS
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REPLY TO MINNEAPOLIS OFFICES

DIRECT DIAL (612) 343-2852

December 21, 1984

Mr. Wayne Tschmperle
Clerk of Appellate Courts
Minnesota Supreme Court
230 State Capitol
St. Paul, Minnesota 55155

Dear Mr. Tschmperle:

The Civil Litigation Section of the Minnesota State Bar Association supports the proposed Amendment to Rule 7.4 to the Code of Professional Responsibility to create a State Board of Legal Certification. We request an opportunity to be heard on the proposed amendment on January 4, 1985.

Yours very truly,

Jeffrey J. Keyes

Jeffrey J. Keyes
Chairman, Legal Systems Division
Civil Litigation Section

JJK:jar

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TELEPHONE (612) 338-4445

December 20, 1984

Clerk of the Minnesota Supreme Court
Room 230, State Capital
St. Paul, Minnesota 55155

CX-84-1650

Dear Sir:

I am the Chairman of the Minnesota Trial Lawyers Association Certification and Specialization Committee. It is my understanding that on January 4, 1985 at 9:30 a.m. there will be a Hearing on the new Rules of Professional Conduct for Attorneys. As a part of those new Rules, the subject of the formation of the Board to Certify Agencies that Certify Legal Specialists will be examined. I would like the opportunity to present the position of the Minnesota Trial Lawyers Association regarding the issues of certification, specialization and the formation of the Board of Legal Specialization at the January 4th meeting. This letter will serve as a request for time to speak at the Hearing regarding these issues.

If you have any questions, please do not hesitate to contact me. Thank you for your consideration with regard to this matter.

Very truly yours,

TIERNEY, NORTON, KRIESER
& HELGEN, P.A.

By Peter J. Krieser
Peter J. Krieser

PJK/jam

12/20/84

Called Mr. Krieser. Upon our request, he will file 10 copies of his position on certification question by 12/21/84.

WT

SUPREME COURT
STATE OF MINNESOTA

C1-84-1651

In Re: Changes in Code of Professional Responsibility Current Rule DR 2-105 and Proposed Minnesota Rules of Professional Conduct For Attorneys Rule 7.1 and 7.4

MTLA COMMENTS

RE: PETITION FOR SPEAKING TIME.

THE UNDERSIGNED HEREBY requests time for Peter J. Krieser, Chairman of the Minnesota Trial Lawyers Certification Committee to speak regarding adoption of Minnesota Rules of Professional Conduct For Attorneys Rule 7.1 and 7.4 at the Hearing thereon, on January 4, 1985.

Respectfully submitted,

By Peter J. Krieser
Peter J. Krieser
Chairman of Minnesota Trial Lawyers
Certification Committee
906 Midwest Plaza East
Minneapolis, Minnesota 55402
(612) 375-1707

SUPREME COURT
STATE OF MINNESOTA

In Re: Changes in Code of Professional Responsibility Current Rule DR 2-105 and Proposed Minnesota Rules of Professional Conduct For Attorneys Rule 7.1 and 7.4.

MTLA COMMENTS

RE: PROPOSED CHANGES in DR 2-105

The Minnesota Trial Lawyers Association (MTLA) joins in the proposal submitted by the Minnesota State Bar Association (MSBA) regarding adoption of Minnesota Rules of Professional Conduct For Attorneys Rule 7.1 and Rule 7.4. MTLA supports the formation of a centralized State Board of Legal Certification which will approve certification plans submitted by agencies or entities involved in the specialty at issue.

We believe that <u>any</u> bona fide certifying agency or entity should be able to certify specialists, if the State Board of Legal Certification approves a certification plan submitted, when the plan is based on criteria which genuinely reflect special competency in an area of the law. It is the MTLA's position that there may be more than one certifying agency in a field of law and that the First Amendment to the U.S. Constitution requires that any bona fide plan must be approved by the board. MTLA also opposes any amendment which would require in any legal advertisement a disclaimer that the advertisement does not imply certification as a specialist.

The Minnesota Academy of Certified Trial Lawyers ("Academy") would amend proposed Rule 7.4 to include a requirement that all communications regarding areas of practice, carry a disclaimer that indicates the ad does not imply certification as a specialist. In effect, a lawyer would be required to disclaim his own truthful protected speech. The MTLA believes that at the present time such a disclaimer would be an unlawful restraint on constitutionally protected speech.

There can be no argument that lawyer advertising is a form of commercial speech, Bates v. State Bar of Arizona, 433 U.S.350, 97 S.Ct.2691, 53 L.Ed.2d 810 (1977), In re R.M.J., 455 U.S.191, 102 S.Ct.929, 71 L.Ed.2d 64 (1982); In re Johnson, 341 N.W.2d 282 (Minn., 1983). The Supreme Court in In Re R.M.J., supra, discussed the First Amendment protections - and limitations - of commercial speech in the area of legal advertising. The Court held:

> "Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is

> not deceptive. Thus, the Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S., at 375, 97 S.Ct., at 2704. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." (Emphasis Supplied).

Id at 455 U.S.203, 102 S.Ct. 937, 71 L.Ed. 2d 72 (1982). Thus, the United States Supreme Court has set up a three step test for evaluation of Lawyer advertising under the commercial speech doctrine: 1. False, Fraudulent and Misleading advertising may always be regulated.; 2. Truthful advertising is entitled to First Amendment protection but; 3. Truthful advertising may also be regulated when experience proves it is subject to abuse, but restrictions may be no broader than necessary to prevent the abuse.

Proposed Rule 7.1 allows lawyer communication concerning his services which is not "false and misleading". Under the present Disciplinary Rule 2-105 and under the Proposed Rule 7.1, an attorney is subject to discipline for making false or misleading statements in a communication about his services. If a lawyer actually does limit his practice, communications which indicate that a lawyer practices in or limits his practice to certain areas of the law are not inherently misleading. If certain lawyers are listing areas of practice or limitations of practice in areas in which they are not practicing, this situation is already covered by DR 2-105(A) and Proposed Rule 7.1 which ethically prohibit false or misleading statements.

The Academy's proposal would require that a disclaimer accompany those communications which include a listing of the areas of practice or limitations of practice. [1] Before instituting a disclaimer, there must be a showing that truthful communications concerning limitations of areas of practice are being abused. Only time would demonstrate such abuse. A requirement of disclaimers in communications regarding areas of practice is premature at best. Without proof of abuse, the Academy's proposal requiring the disclaimer is not constitutional and must be rejected.

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1. In January, 1984, the South Carolina Supreme Court promulgated a rule requiring all legal advertisements to contain a disclaimer about the quality of legal services to be performed. The rule provided:

> "(H) No advertisement which contains any information permitted by DR 2-101(B)(2),(17),(18),(19)or (20) shall be published or broadcast unless it contains the following disclaimer:
>
> > No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services. "

South Carolina Code of Professional Responsibility DR 2-101(H). It is similar to the Academy's proposal in that both disclaimers attempt to require attorneys to include statements in legal advertising that the ad does not imply a level of expertise of the lawyer performing services. The South Carolina rule was permanently revoked eight months after it was enacted.

To allow only one agency to recognize specialists is to deny equally qualified and certified lawyers for discriminatory reasons. This in turn, prevents the attorney from exercising his or her right to communicate information to the public regarding that individuals qualifications and expertise which may be comparable to or even greater than the "approved specialists" qualifications. There should be an instinctive distaste for one entity exercising complete control over a given market or area to the detriment of equivalent entities. The Constitution and laws were carefully crafted to insure the free flow of information by any individual or entity to the public. Denying qualified attorneys who are certified by bona fide certification programs and as competent and experienced as those certified by a single "authorized" agency, would deny the public access to information necessary to their making an informed decision regarding legal counsel and is not constitutionally permissible under Central Hudson, Gas & Electric Rop. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 34 (1980); In Re R.M.J., supra; In Re Johnson, supra.

The MTLA joins with the MSBA in respectfully requesting the Court to approve the proposed Rule 7.4 as submitted by the MSBA and reject the Academy's proposal.

MINNESOTA TRIAL LAWYERS ASSOC.

By  12/21/84

Peter J. Krieser
Chairman Minnesota Trial Lawyers Assoc.
Trial Lawyer Certification Committee
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(612) 375-1707

ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA

501 Wirth Park Office Center
4000 Olson Memorial Highway
Minneapolis, Minnesota 55422
(612) 588-0721

November 15, 1984

Wayne O. Tschimperle
Clerk of Appellate Courts
230 State Capitol Building
St. Paul, Minnesota 55155

RE: Proposed Amendment To the Code of Professional Responsibility To Create A State Board of Legal Certification.

CX-84-1651

Dear Mr. Tschimperle:

Enclosed for filing the the above-captioned matter, please find ten (10) copies of the petition and brief of the Academy of Certified Trial Lawyers of Minnesota.

This letter will also serve as notice of the Academy's desire to be heard by the Court on this issue. The Academy will be represented by Mr. Thomas Wolf, Esquire.

Cordially,

ACADEMY OF CERTIFIED
TRIAL LAWYERS OF MINNESOTA

C. E. Hagglund

Clarance E. Hagglund
Dean

CEH:pmw

Enclosures

CASE NO.: CX-84-1651

STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of the Petition of the Minnesota State Bar Association, a Corporation, with Regard to the Minnesota Code of Professional Responsibility.

PETITION OF THE ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA

The Academy of Certified Trial Lawyers of Minnesota petitions and represents to the Court:

The Minnesota State Bar Association has proposed that certain changes be made in the existing Minnesota Code of Professional Responsibility. Included in these proposed changes is an amended DR 2-105 (Rule 7.4), Communication of Fields of Practice.

Attached hereto are copies of an alternative DR 2-105, together with proposed Rules of the Supreme Court on Legal Certification.

Attached hereto are copies of a memorandum in support of the adoption of said alternative DR 2-105 and proposed Rules of the Supreme Court on Legal Certification.

The Court having called for comment on the Minnesota State Bar Association proposal, this petitioner requests an order of the Court:

(1) replacing DR 2-105 of the Minnesota Code of Professional Responsibility with the attached amended version;

(2) establishing a Minnesota State Board of Legal Certification; and

(3) adopting the attached Rules of the Supreme Court in Legal Certification.

Dated: 11-16, 1984

ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA, A NON-PROFIT CORPORATION

By: C. E. Hagglund
Clarance E. Hagglund

THE MINNESOTA PLAN OF SPECIALIZATION

INTRODUCTION

In May of 1980, the Minnesota Supreme Court amended DR 2-105(B) to prohibit a lawyer from holding out himself or his firm as a specialist unless and until the Court adopted rules or regulations permitting him to do so. That same month, the Specialization Committee of the Minnesota State Bar Association ("MSBA") published a proposed Minnesota Plan of Specialization ("The 1980 Plan"). See Bench & Bar of Minnesota, May-June 1980. The 1980 Plan was discussed and ultimately rejected at the 1981 State Bar Association Convention.

In December of 1983, the Minnesota Supreme Court struck down DR 2-105(B) as unconsitutional on its face and as applied. See In Re: Richard W. Johnson, 341 NW2d 282 (Minn. 1983). Minnesota lawyers currently operate in a vacuum in regard to specialization, one in which claims of specialization may be made by anyone, subject to control only under the "false, fraudulent or misleading" standards of DR 2-101 and DR 2-105(A). This Plan is intended to remedy that situation by providing both controls on claims of specialization and guidelines for the development of reliable certification programs. It is patterned, in large part, after the model used to certify medical specialists. This proposal departs from the 1980 Plan in many ways. Its purpose, however is the same:

> To assist in the delivery of legal services to the public . . . providing greater access by the public to appropriate legal services, . . . identifying and improving the quality and competence of legal services and . . . providing appropriate legal services at reasonable cost.

Minnesota Plan of Specialization, Proposed Draft, 1980, reprinted in Bench and Bar, May-June 1980 at 75, 76.

THE GENERAL STRUCTURE AND FUNCTION OF THE PLAN

The overall composition of the plan is detailed in the attached draft Disciplinary Rules and Rules on Legal Certification. In essence, it adopts a certification program overseen by the Supreme Court. See Rule 1. A State Board shall be responsible to the Court for overall administration of the Plan, as executed by both public and private bodies. See Rule 2. Certification of individual attorneys in recognized areas will be accomplished by private groups authorized by the Board to do so. Rule 2(B). Where no qualified private group comes forward, the Board is authorized to develop certification programs under its own auspices. Rule 2(D). Registration of certified specialists will be administered by the State Board of Law Examiners. Investigation of reported violations of the rules governing specialization will be the province of the Lawyers Professional Responsibility Board, as are other allegations of attorney misconduct. Continuing Legal Education requirements are imposed and are to be administered by the State Board of Continuing Legal Education.

Funding for these operations is provided by the attorneys seeking certification. The fees collected are channelled to the State Board of Legal Certification during the first year of the plan's operation. In subsequent years, the fees are distributed among the various Boards. Mechanically, the intent is to integrate the operations of specialty certification into the existing administrative framework. This should significantly reduct costs to both the individual attorney and to the State.

The primary goal of such a structure, is to follow the lead of the Nebraska State Bar Association's recommendation that:

> Certification plans developed by national organizations . . . be allowed to preempt the field [providing] a uniform approach on a national basis [which is] more meaningful for both attorneys and consumers.

Report of the Committee on Specialization and Advertising of The Nebraska State Bar Association, April 18, 1980, cited in 67 Women Lawyers Journal 23, 29 (1981).

Any system based on "national plans" creates the problem of guaranteeing that such plans are established and administered by reputable organizations. Establishment of a State Board, with the exclusive power to recognize such bodies, guards against this threat. It also contributes to the development of uniform national standards. An incidental effect may also be to raise the standards by which specialists are recognized. In effect, the state imposing the most stringent requirements in a particular area will set the tone to the extent that any national body seriously wishes to gain recognition in that jurisdiction.

A major consideration in developing any specialization plan must be the cost to the state: how may it be minimized and who shall bear the cost? This plan responds to both issues. The State's costs are minimized in two ways: By avoiding the development of state run programs, except in the limited situations provided for under Rule 2.D, and by integrating the administrative and enforcement tasks into the current Minnesota legal structure. Costs are born by those who seek to benefit from the program, i.e. the specialist and his or her firm. Revenues are distributed among the various administrative and enforcement divisions under a formula provided for in Rule 4.

The underlying goal of the attached plan is to provide a system adaptable to the changing requirements of legal practice in Minnesota. The initiative for approval of specific certification programs is expected to come from practicing attorneys, in response to market forces. At the same time, the State Board will serve to shield the public from potential excesses.

Should the need arise for a specialty unique to Minnesota or should the need arise for a particular specialty in Minnesota before a national need is recognized, the Board is empowered to address that situation. See Rule 2.D. The brief, the Plan provides a flexible, low cost system which is responsive to the public's need for competent legal services.

ANALYSIS OF THE PROPOSED AMENDMENTS TO DR 2-102 AND DR 2-105

At the outset, it should be noted that the proposed amendments to the Disciplinary Rules are cast in the form of Minnesota's current code. Should the Court adopt the American Bar Association Model Rules in the future, these provisions are easily modified to conform to that system. DR 2-102 is amended only in that it provides a cross reference to DR 2-105(B). DR 2-105 contains the fundamental provisions in regard to specialization.

In its simplest terms, DR 2-105 provides that a lawyer may only represent himself or herself as a specialist when the lawyer is currently certified in a specialty by a body recognized by the State Board. The Rule also recognizes that the practice of any individual attorney is inseparable from the practice of the firm by which he or she is employed. Thus, description of the firm's specialty practice is limited to those situations in which either the entire firm is certified in the claimed specialty or the firm specifically designates which attorneys have been so certified. One area is left unresolved by DR 2-105(B): The number of specialties to be practiced by an attorney or a law firm.

Limitations on the number of specialties practiced are left open intentionally. Earlier plans have been unable to agree as to the appropriate number. The 1980 Plan, for instance, provided that:

> A lawyer may be recognized as a specialist in more than one field of law. The limitation on the number of specialties in which a lawyer may be recognized as a specialist shall be determined only by such practical limits as are imposed by the requirement of substantial involvement and such other standards as may be established.

1980 Plan, Rule 5.5. The Connecticut Plan, on the other hand, limits the number of self-designated limitations on practice to five and fails to specify any limitations on the number of specialties in which an attorney may be certified. Compare Connecticut DR 2-105(5) with Connecticut DR 2-105A, published in 43 Connecticut Law Journal, Supplement A, July 28, 1981. It should also be noted here that Connecticut prohibits attribution of specialty certification to a law firm. See Id, DR 2-105A(C). The MSBA Plan does not address this point.

The attached plan recognizes that certain areas of practice may overlap to such a degree that certification in a number of areas may be feasible. The tax specialist, for example, might also be certified as a civil and criminal specialist where the lawyer's practice consists of tax representation in civil and criminal forums. Other areas may be too diverse to allow a combination of specialties, e.g., Admiralty, Family and Administrative Law. The Plan therefore, imposes a standard of reasonableness based on the circumstances of the individual applicant, including the "substantial involvement" requirement imposed under the Rules. It is anticipated that certifying bodies shall inquire into the existence of other certifications and develop procedures by which application for multiple certification shall be evaluated. Practicing attorneys and private individuals would be encouraged to report apparent violations of this requirement to the appropriate Board, just as any violation is to be reported.

DR 2-105(C) prohibits any limitation on practice other than as permitted under DR 2-105(B) and is consistent with EC 2-14:

> . . . In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability . . ..

CONTINUING LEGAL EDUCATION AND POST-GRADUATE EDUCATION

Rule 5 imposes Continuing Legal Education ("CLE") requirements in addition to those already required of Minnesota attorneys. These additional hours must be taken in areas related to the specialty. Thus, a certified civil trial specialist would be expected to participate in 12 hours of course work which develops trial skills. The general requirement of 45 hours of CLE would be devoted to areas which will prevent over specialization.

A duty to develop post-graduate educational programs is imposed on the Board by Rule 6. Such education is intended to supplement, but not to replace, experience as a criterion for certification. It is intended to mitigate the handicap faced by recently admitted attorneys or those who desire certification but are in some way barred from accumulating the requisite field experience. The nature of such programs and the extent to which they shall fulfill certification requirements is left to evolve in response to the level of demand and interest expressed by the legal community.

strates its strength. A complete review would be too exhaustive for this memorandum, however. This discussion will focus on The 1980 Plan prepared by the Specialization Committee of The MSBA, the Connecticut Plan, adopted by that state in 1981, and the current MSBA Plan ("MSBA Plan"). Copies of these plans are attached.

The key elements of The 1980 Plan were its minimum requirements for certification. These requirements are retained by the current proposal. Both call for: (1) published, non-discriminatory standards. Compare Rules 3.5, 8.2 of The 1980 Plan with Draft Rules 2.C; (2) substantial involvement in the specialty during the three years immediately preceding application for certification. Compare 8.2, 1980 Plan with Draft Rule 2.C(2); (3) peer review. Compare 8.4, 1980 Plan with Draft Rule 2.C(2); (4) re-certification after a period of not more than five years. Compare Rule 9, 1980 Plan with Draft Rule 2C(3); and, (5) written or oral examinations where deemed necessary. Compare Rule 10, 1980 Plan with Draft Rule 3B.

These requirements are generally reflected in the Connecticut Plan, with the exception of the substantial involvement and peer review standards. See Connecticut DR 2-105(A). Connecticut implicitly recognized these exceptions as permissible criteria, however, when it designated the National Board of Trial Advocacy as a certifying body in 1981.

The MSBA Plan also incorporates the requirement of published, non-discriminatory standards and re-certification after a period of not more than five years. Compare Minnesota Plan, Rule 2.C with MSBA Plan 7.4(B). The MSBA Plan also requires that the standards adopted by certifying bodies provide "a reasonable basis for the representation that lawyers so certified possess special competency." MSBA Plan 7.4(B)(2). The Plan proposed here provides specific criteria for that "reasonable basis". See Minnesota Plan, Draft Rule 2.C(2), 3B. If certification is to have any value to the consumer, the standards used to designate certifying bodies and to certify individual specialists must be consistent.

One major difference between The 1980 Plan and this proposal is in terms of its structure. As described above, the proposed Plan establishes a decentralized system which is integrated into Minnesota's existing regulatory framework. The 1980 Plan, on the other hand, established a monolithic adminstrative structure which needlessly duplicated existing services.

The key structural and philosophical difference between the Plans lies in the current proposal's designation of private groups as the certifying bodies. Rule 6 of The 1980 Plan provided for certification only by Specialty Committees. The Connecticut Plan allows for certification by an entity authorized to do

so by the Connecticut Specialization Screening Committee, but makes no provision for direct certification by the State. See Connecticut DR 2-105(B)(C). The MSBA Plan does not provide for direct certification by the State.

The 1980 Plan, the Connecticut Plan, and the MSBA Plan fail to address important concerns. The 1980 Plan creates unnecessary expense and is less responsive to grass roots initiative in the development of specialty areas. The Connecticut Plan resolves these problems, but fails to provide for state action where no qualified group seeks authority to certify in a specific area. The MSBA Plan does not address many issues at all. The Plan proposed here is seen as a valid compromise; one flexible enough to respond to local needs while limiting administrative costs and allowing for development of uniform national standards.

Other differences exist. Rule 5 of the 1980 Plan details the privileges and limitations of certification. In essence, it states that practice of a specialty is purely voluntary and that non-certified attorneys are not prohibited from practicing in an area in which certification is available. Nor are certified attorneys prohibited from practicing outside the area of their specialty. These are unstated principles of the current Plan.

Rule 5.6 of The 1980 Plan, however, imposed a duty to "return" clients to a referring generalist once the specialist had performed his or her function on the client's behalf. The only conceivable basis for such a duty is to protect the economic interests of the referring attorney. This is not seen as a proper area for

state regulation and such a provision is not included in the current Plan. Rule 5.6 also directly contradicts DR 2-103A(3):

> A lawyer shall not request any person to recommend employment . . . of himself or anyone associated with him.

See generally DR 2-103. What an attorney may not ask directly should not be required by the state.

The remainder of The 1980 Plan is primarily adminstrative detail which may be determined by the Board under Draft Rule 1 or by amendment of this Plan prior to its adoption.

CONCLUSION

The proposed Plan provides a general framework for the evolution of specialty practice in Minnesota. It does so at the lowest possible costs. The Plan is consistent with and indeed fosters the participation of both the lay public and the practicing bar in the development of specialty areas. The openended, decentralized structure upon which it is based will encourage the development of uniform national standards while allowing for local variations and providing for purely local needs. In light of the above, this Plan should be adopted by the State of Minnesota.

RESPECTFULLY SUBMITTED,

ACADEMY OF CERTIFIED
TRIAL LAWYERS OF MINNESOTA

By: _____
Clarance E. Haggland

PROPOSED DRAFT OF DR 2-105: DESCRIPTION OF PRACTICE.

DR 2-105 (Rule 7.4)

(A) A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing his or his firms practice or in indicating its nature or limitations.

(B) A lawyer may communicate the fact that he or she does or does not practice in particular fields of law. If the communication indicates that the practice is limited to or uses any other language which conveys to the reader the inference that the lawyer is a specialist in any field of law authorized pursuant to these rules, then the following applies:

1. If certification is offered in a field which is the subject of the communication, and the lawyer is not certified, then such communication shall be accompanied by a statement that the lawyer is not a certified specialist.

2. A lawyer who is a certified specialist may communicate that his or her practice is limited to one or more fields of law included within the area of specialization for which he or she is certified.

(C) A lawyer shall not advertise or otherwise hold out himself or his firm as a specialist, or as specializing in a field of law, except as follows:

APPENDIX A

(2) A law firm may publicize the fact that it specializes in a field of law if all of its attorneys are certified in that field, or if each statement of that fact clearly indicates which of its attorneys are so certified. A law firm shall not state that it specializes in a field of law or that its attorneys are certified as specialists if the attorneys' certification has terminated or if the statement is otherwise contrary to the terms of such certification.

(3) An attorney shall not obtain certification in more than a reasonable number of fields of law, nor shall a law firm state that more than a reasonable number of certified specialties are practiced under its auspices. In determining whether the number of certified specialties sought or practiced is reasonable, a lawyer or law firm should consider:

(a) the interrelationship of the specialties;

(b) the number of lawyers active in the firm's practice and the ratio of lawyers certified in each specialty; and,

(c) any other circumstances relevant to a determination that the lawyer or law firm is capable of providing representation at a level consistent with certification in each specialty.

APPENDIX A

(D) A lawyer shall not advertise or otherwise hold out himself or his firm as practicing in only certain areas of law or as limiting his practice, other than as permitted under DR 2-105(B).

DRAFT OF DR 2-102.

(A) A lawyer of a law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings or similar professional notices or devices that contain statements:

(1) which are false, fraudulent, misleading or deceptive as those terms are defined and limited in DR 2-101; or,

(2) which describe the lawyer's or law firm's practice other than as provided in DR 2-105.

ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA

501 Wirth Park Office Center
4000 Olson Memorial Highway
Minneapolis, Minnesota 55422
(612) 588-0721

December 21, 1984

Olga Buccek
The Honorable Lawrence R. Yetka
230 State Capitol Building
St. Paul, Minnesota 55155

Re: Proposed Amendment To The Code Of Professional Responsibility To Create A State Board Of Legal Certification
C8-84-1651

Dear Ms. Buccek:

As per our telephone conversation of December 20, 1984, enclosed please find ten (10) amended and complete copies of the Academy Of Certified Trial Lawyers Of Minnesota Petition and Brief in the above-captioned matter.

Cordially,

ACADEMY OF CERTIFIED
TRIAL LAWYERS OF MINNESOTA

Janet L. Johnson

jj
Enclosures

ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA

501 Wirth Park Office Center
4000 Olson Memorial Highway
Minneapolis, Minnesota 55422
(612) 588-0721

December 17, 1984

Wayne O. Tschimperle
Clerk of Appellate Courts
230 State Capitol Building
St. Paul, Minnesota 55155

Re: Proposed Amendment To The Code Of Professional Responsibility To Create A State Board Of Legal Certification C8-84-1651

Dear Mr. Tschimperle:

Enclosed please find 10 copies of an amended Page 1, Appendix A of the Academy Of Certified Trial Lawyers Of Minnesota Petition and Brief in the above-captioned matter.

The original Page 1, Appendix A should be replaced with the enclosed materials.

The following changes have been made; Paragraph three:

1. If certification is offered in a field which is the subject of the communication, and the lawyer is not certified, then such communication shall be accompanied by a statement that the lawyer is not a certified specialist.

Cordially,

ACADEMY OF CERTIFIED
TRIAL LAWYERS OF MINNESOTA

Clarance E. Hagglund

CEH/jj
Enclosures
cc: Thomas E. Wolf

CASE NO.: CX-84-1651

STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of the Petition of the Minnesota State Bar Association, a Corporation, with Regard to the Minnesota Code of Professional Responsibility.

PETITION OF THE ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA

The Academy of Certified Trial Lawyers of Minnesota petitions and represents to the Court:

The Minnesota State Bar Association has proposed that certain changes be made in the existing Minnesota Code of Professional Responsibility. Included in these proposed changes is an amended DR 2-105 (Rule 7.4), Communication of Fields of Practice.

Attached hereto are copies of an alternative DR 2-105, together with proposed Rules of the Supreme Court on Legal Certification.

Attached hereto are copies of a memorandum in support of the adoption of said alternative DR 2-105 and proposed Rules of the Supreme Court on Legal Certification.

The Court having called for comment on the Minnesota State Bar Association proposal, this petitioner requests an order of the Court:

(1) replacing DR 2-105 of the Minnesota Code of Professional Responsibility with the attached amended version:

(2) establishing a Minnesota State Board of Legal Certification; and

(3) adopting the attached Rules of the Supreme Court in Legal Certification.

Dated: _____, 1984

ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA, A NON-PROFIT CORPORATION

By: _____
Clarance E. Hagglund

THE MINNESOTA PLAN OF SPECIALIZATION

INTRODUCTION

In May of 1980, the Minnesota Supreme Court amended DR 2-105(B) to prohibit a lawyer from holding out himself or his firm as a specialist unless and until the Court adopted rules or regulations permitting him to do so. That same month, the Specialization Committee of the Minnesota State Bar Association ("MSBA") published a proposed Minnesota Plan of Specialization ("The 1980 Plan"). See Bench & Bar of Minnesota, May-June 1980. The 1980 Plan was discussed and ultimately rejected at the 1981 State Bar Association Convention.

In December of 1983, the Minnesota Supreme Court struck down DR 2-105(B) as unconsitutional on its face and as applied. See In Re: Richard W. Johnson, 341 NW2d 282 (Minn. 1983). Minnesota lawyers currently operate in a vacuum in regard to specialization, one in which claims of specialization may be made by anyone, subject to control only under the "false, fraudulent or misleading" standards of DR 2-101 and DR 2-105(A). This Plan is intended to remedy that situation by providing both controls on claims of specialization and guidelines for the development of reliable certification programs. It is patterned, in large part, after the model used to certify medical specialists. This proposal departs from the 1980 Plan in many ways. Its purpose, however is the same:

> To assist in the delivery of legal services to the public . . . providing greater access by the public to appropriate legal services, . . . identifying and improving the quality and competence of legal services and . . . providing appropriate legal services at reasonable cost.

Minnesota Plan of Specialization, Proposed Draft, 1980, reprinted in Bench and Bar. May-June 1980 at 75, 76.

THE GENERAL STRUCTURE AND FUNCTION OF THE PLAN

The overall composition of the plan is detailed in the attached draft Disciplinary Rules and Rules on Legal Certification. In essence, it adopts a certification program overseen by the Supreme Court. See Rule 1. A State Board shall be responsible to the Court for overall administration of the Plan, as executed by both public and private bodies. See Rule 2. Certification of individual attorneys in recognized areas will be accomplished by private groups authorized by the Board to do so. Rule 2(B). Where no qualified private group comes forward, the Board is authorized to develop certification programs under its own auspices. Rule 2(D). Registration of certified specialists will be administered by the State Board of Law Examiners. Investigation of reported violations of the rules governing specialization will be the province of the Lawyers Professional Responsibility Board, as are other allegations of attorney misconduct. Continuing Legal Education requirements are imposed and are to be administered by the State Board of Continuing Legal Education.

Funding for these operations is provided by the attorneys seeking certification. The fees collected are channelled to the State Board of Legal Certification during the first year of the plan's operation. In subsequent years, the fees are distributed among the various Boards. Mechanically, the intent is to integrate the operations of specialty certification into the existing administrative framework. This should significantly reduct costs to both the individual attorney and to the State.

The primary goal of such a structure, is to follow the lead of the Nebraska State Bar Association's recommendation that:

> Certification plans developed by national organizations . . . be allowed to preempt the field [providing] a uniform approach on a national basis [which is] more meaningful for both attorneys and consumers.

Report of the Committee on Specialization and Advertising of The Nebraska State Bar Association, April 18, 1980, cited in 67 Women Lawyers Journal 23, 29 (1981).

Any system based on "national plans" creates the problem of guaranteeing that such plans are established and administered by reputable organizations. Establishment of a State Board, with the exclusive power to recognize such bodies, guards against this threat. It also contributes to the development of uniform national standards. An incidental effect may also be to raise the standards by which specialists are recognized. In effect, the state imposing the most stringent requirements in a particular area will set the tone to the extent that any national body seriously wishes to gain recognition in that jurisdiction.

A major consideration in developing any specialization plan must be the cost to the state: how may it be minimized and who shall bear the cost? This plan responds to both issues. The State's costs are minimized in two ways: By avoiding the development of state run programs, except in the limited situations provided for under Rule 2.D, and by integrating the administrative and enforcement tasks into the current Minnesota legal structure. Costs are born by those who seek to benefit from the program, i.e. the specialist and his or her firm. Revenues are distributed among the various administrative and enforcement divisions under a formula provided for in Rule 4.

The underlying goal of the attached plan is to provide a system adaptable to the changing requirements of legal practice in Minnesota. The initiative for approval of specific certification programs is expected to come from practicing attorneys, in response to market forces. At the same time, the State Board will serve to shield the public from potential excesses.

Should the need arise for a specialty unique to Minnesota or should the need arise for a particular specialty in Minnesota before a national need is recognized, the Board is empowered to address that situation. See Rule 2.D. The brief, the Plan provides a flexible, low cost system which is responsive to the public's need for competent legal services.

ANALYSIS OF THE PROPOSED AMENDMENTS TO DR 2-102 AND DR 2-105

At the outset, it should be noted that the proposed amendments to the Disciplinary Rules are cast in the form of Minnesota's current code. Should the Court adopt the American Bar Association Model Rules in the future, these provisions are easily modified to conform to that system. DR 2-102 is amended only in that it provides a cross reference to DR 2-105(B). DR 2-105 contains the fundamental provisions in regard to specialization.

In its simplest terms, DR 2-105 provides that a lawyer may only represent himself or herself as a specialist when the lawyer is currently certified in a specialty by a body recognized by the State Board. The Rule also recognizes that the practice of any individual attorney is inseparable from the practice of the firm by which he or she is employed. Thus, description of the firm's specialty practice is limited to those situations in which either the entire firm is certified in the claimed specialty or the firm specifically designates which attorneys have been so certified. One area is left unresolved by DR 2-105(B): The number of specialties to be practiced by an attorney or a law firm.

Limitations on the number of specialties practiced are left open intentionally. Earlier plans have been unable to agree as to the appropriate number. The 1980 Plan, for instance, provided that:

> A lawyer may be recognized as a specialist in more than one field of law. The limitation on the number of specialties in which a lawyer may be recognized as a specialist shall be determined only by such practical limits as are imposed by the requirement of substantial involvement and such other standards as may be established.

1980 Plan, Rule 5.5. The Connecticut Plan, on the other hand, limits the number of self-designated limitations on practice to five and fails to specify any limitations on the number of specialties in which an attorney may be certified. Compare Connecticut DR 2-105(5) with Connecticut DR 2-105A, published in 43 Connecticut Law Journal, Supplement A, July 28, 1981. It should also be noted here that Connecticut prohibits attribution of specialty certification to a law firm. See Id, DR 2-105A(C). The MSBA Plan does not address this point.

The attached plan recognizes that certain areas of practice may overlap to such a degree that certification in a number of areas may be feasible. The tax specialist, for example, might also be certified as a civil and criminal specialist where the lawyer's practice consists of tax representation in civil and criminal forums. Other areas may be too diverse to allow a combination of specialties, e.g., Admiralty, Family and Administrative Law. The Plan therefore, imposes a standard of reasonableness based on the circumstances of the individual applicant, including the "substantial involvement" requirement imposed under the Rules. It is anticipated that certifying bodies shall inquire into the existence of other certifications and develop procedures by which application for multiple certification shall be evaluated. Practicing attorneys and private individuals would be encouraged to report apparent violations of this requirement to the appropriate Board, just as any violation is to be reported.

DR 2-105(C) prohibits any limitation on practice other than as permitted under DR 2-105(B) and is consistent with EC 2-14:

> . . . In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability . . ..

CONTINUING LEGAL EDUCATION AND POST-GRADUATE EDUCATION

Rule 5 imposes Continuing Legal Education ("CLE") requirements in addition to those already required of Minnesota attorneys. These additional hours must be taken in areas related to the specialty. Thus, a certified civil trial specialist would be expected to participate in 12 hours of course work which develops trial skills. The general requirement of 45 hours of CLE would be devoted to areas which will prevent over specialization.

A duty to develop post-graduate educational programs is imposed on the Board by Rule 6. Such education is intended to supplement, but not to replace, experience as a criterion for certification. It is intended to mitigate the handicap faced by recently admitted attorneys or those who desire certification but are in some way barred from accumulating the requisite field experience. The nature of such programs and the extent to which they shall fulfill certification requirements is left to evolve in response to the level of demand and interest expressed by the legal community.

COMPARISON WITH OTHER PLANS

A decision as to the validity of the attached Plan cannot be made in a vacuum. A review of earlier proposals and plans adopted in other states provides ground for comparison and demonstrates its strength. A complete review would be too exhaustive for this memorandum, however. This discussion will focus on The 1980 Plan prepared by the Specialization Committee of The MSBA, the Connecticut Plan, adopted by that state in 1981, and the current MSBA Plan ("MSBA Plan"). Copies of these plans are attached.

The key elements of The 1980 Plan were its minimum requirements for certification. These requirements are retained by the current proposal. Both call for: (1) published, non-discriminatory standards. Compare Rules 3.5, 8.2 of The 1980 Plan with Draft Rules 2.C; (2) substantial involvement in the specialty during the three years immediately preceding application for certification. Compare 8.2, 1980 Plan with Draft Rule 2.C(2); (3) peer review. Compare 8.4, 1980 Plan with Draft Rule 2.C(2); (4) re-certification after a period of not more than five years. Compare Rule 9, 1980 Plan with Draft Rule 2C(3); and, (5) written or oral examinations where deemed necessary. Compare Rule 10, 1980 Plan with Draft Rule 3B.

These requirements are generally reflected in the Connecticut Plan, with the exception of the substantial involvement and peer review standards. See Connecticut DR 2-105(A). Connecticut implicitly recognized these exceptions as permissible criteria, however, when it designated the National Board of Trial Advocacy as a certifying body in 1981.

The MSBA Plan also incorporates the requirement of published, non-discriminatory standards and re-certification after a period of not more than five years. Compare Minnesota Plan, Rule 2.C with MSBA Plan 7.4(B). The MSBA Plan also requires that the standards adopted by certifying bodies provide "a reasonable basis for the representation that lawyers so certified possess special competency." MSBA Plan 7.4(B)(2). The Plan proposed here provides specific criteria for that "reasonable basis". See Minnesota Plan, Draft Rule 2.C(2), 3B. If certification is to have any value to the consumer, the standards used to designate certifying bodies and to certify individual specialists must be consistent.

One major difference between The 1980 Plan and this proposal is in terms of its structure. As described above, the proposed Plan establishes a decentralized system which is integrated into Minnesota's existing regulatory framework. The 1980 Plan, on the other hand, established a monolithic adminstrative structure which needlessly duplicated existing services.

The key structural and philosophical difference between the Plans lies in the current proposal's designation of private groups as the certifying bodies. Rule 6 of The 1980 Plan provided for certification only by Specialty Committees. The Connecticut Plan allows for certification by an entity authorized to do so by the Connecticut Specialization Screening Committee, but makes no provision for direct certification by the State. See Connecticut DR 2-105(B)(C). The MSBA Plan does not provide for direct certification by the State.

The 1980 Plan, the Connecticut Plan, and the MSBA Plan fail to address important concerns. The 1980 Plan creates unnecessary expense and is less responsive to grass roots initiative in the development of specialty areas. The Connecticut Plan resolves these problems, but fails to provide for state action where no qualified group seeks authority to certify in a specific area. The MSBA Plan does not address many issues at all. The Plan proposed here is seen as a valid compromise; one flexible enough to respond to local needs while limiting administrative costs and allowing for development of uniform national standards.

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See generally DR 2-103. What an attorney may not ask directly should not be required by the state.

The remainder of The 1980 Plan is primarily adminstrative detail which may be determined by the Board under Draft Rule 1 or by amendment of this Plan prior to its adoption.

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The proposed Plan provides a general framework for the evolution of specialty practice in Minnesota. It does so at the lowest possible costs. The Plan is consistent with and indeed fosters the participation of both the lay public and the practicing bar in the development of specialty areas. The openended, decentralized structure upon which it is based will encourage the development of uniform national standards while allowing for local variations and providing for purely local needs. In light of the above, this Plan should be adopted by the State of Minnesota.

RESPECTFULLY SUBMITTED,

ACADEMY OF CERTIFIED
TRIAL LAWYERS OF MINNESOTA

By: _____
Clarance E. Hagglund

PROPOSED DRAFT OF DR 2-105: DESCRIPTION OF PRACTICE.

DR 2-105 (Rule 7.4)

(A) A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing his or his firms practice or in indicating its nature or limitations.

(B) A lawyer may communicate the fact that he or she does or does not practice in particular fields of law. If the communication indicates that the practice is limited to or uses any other language which conveys to the reader the inference that the lawyer is a specialist in any field of law authorized pursuant to these rules, then the following applies:

1. If certification is offered in a field which is the subject of the communication, and the lawyer is not certified, then such communication shall be accompanied by a statement that the lawyer is not a certified specialist.

2. A lawyer who is a certified specialist may communicate that his or her practice is limited to one or more fields of law included within the area of specialization for which he or she is certified.

(C) A lawyer shall not advertise or otherwise hold out himself or his firm as a specialist, or as specializing in a field of law, except as follows:

APPENDIX A

(1) A lawyer may publicize the fact that he or she is currently certified as a specialist in a field of law by a bona fide board or other entity recognized by the State Board of Legal Certification. A lawyer shall not state that he or she is certified as a specialist if the lawyers' certification has terminated or if the statement is otherwise contrary to the terms of such certification.

(2) A law firm may publicize the fact that it specializes in a field of law if all of its owners, partners or shareholders are certified in that field. A law firm shall not state that it specializes in a field of law or that its attorneys are certified as specialists if the attorneys' certification has terminated or if the statement is otherwise contrary to the terms of such certification.

(3) An attorney shall not obtain certification in more than a reasonable number of fields of law, nor shall a law firm state that more than a reasonable number of certified specialties are practiced under its auspices. In determining whether the number of certified specialties sought or practiced is reasonable, a lawyer or law firm should consider:

(a) the interrelationship of the specialties;

(b) the number of lawyers active in the firm's practice and the ratio of lawyers certified in each specialty; and,

APPENDIX A

(c) any other circumstances relevant to a determination that the lawyer or law firm is capable of providing representation at a level consistent with certification in each specialty.

(D) A lawyer shall not advertise or otherwise hold out himself or his firm as practicing in only certain areas of law or as limiting his practice, other than as permitted under DR 2-105(B).

DRAFT OF DR 2-102.

(A) A lawyer of a law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings or similar professional notices or devices that contain statements:

(1) which are false, fraudulent, misleading or deceptive as those terms are defined and limited in DR 2-101; or,

(2) which describe the lawyer's or law firm's practice other than as provided in DR 2-105.

APPENDIX A

PROPOSED DRAFT: RULES OF THE SUPREME COURT
ON LEGAL CERFTIFICATION

RULE 1: State Board of Legal Certification:

The State Board of Legal Certification shall consist of ten (10) members, each to serve for a period of three (3) years or until his or her successor is appointed and qualifies. Two (2) members of the Board shall be appointed by each of the following: The Minnesota Supreme Court; The Minnesota State Bar Association; The Minnesota Trial Lawyers Association; The Minnesota Defense Lawyers Association; and The Academy of Certified Trial Lawyers of Minnesota. From among its members, the Board shall elect a president and the Court shall appoint a secretary. The Board shall be charged with the duty of administering these Rules and shall have authority to make its own rules not inconsistent herewith.

RULE 2: Duties of the Board

A. The Board shall determine, on its own motion or the motion of any interested party, the need for specialty certification in a particular area of law. Such a determination shall be based on the expressed public interest in and the perceived public need for certification in the area of law.

B. Once a need for a particular specialty has been identified, the Board shall accept applications from all interested parties for designation as a certifying body in a particular specialty.

APPENDIX B

The Board may authorize more than one certifying body in a particular field of law, at its discretion. Authority shall be granted for a period of five years, at which time the Board shall again accept applications from all interested parties.

C. No entity shall be authorized to certify specialists in any area of law unless such certification is based on published standards and procedures that:

(1) do not discriminate against any lawyer otherwise qualified for such certification;

(2) provide a reasonable basis for the representation that lawyers certified possess special competence in the area for which certification is to be granted. Proof of special competence may be demonstrated in the following fashion, together with any additional standards the Board or certifying bodies may impose:

(a) a demonstration of substantial involvement in the specialty during the three year period immediately preceding application. Substantial involvement shall be defined in regard to each specialty by reference to its nature, complexity and differences from other fields and from a consideration of the nature and extent of effort and experience necessary to demonstrate competence in that area. Such requirements shall be measured objectively where possible. What constitutes substantial involvement may vary between specialties, but in no case shall the time spent in practice

of the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice, as measured during each of the three years immediately preceding application.

(b) a system of peer review based on references obtained from attorneys and judges familiar with the competence and qualifications of the applicant, none of whom are related to the applicant or are associated with the applicant in the practice of law at the time of application; and,

(3) require re-certification after a period of not more than five years. In selecting an entity to act as a certifying body the Board may consider the effect of its selection on national uniformity.

D. Should the Board recognize a need or demand for certification in a particular area of law and receive no suitable applications from potential certifying bodies, it may develop a certification program under its own auspices, to be administered by the State Board of Law Examiners. Such bodies shall be granted authority to certify in a particular area for no more than five years, at which time the Board shall accept applications from all interested parties.

E. The State Board of Legal Certification shall report to the Supreme Court on an annual basis. It shall include in that report: (1) a statement of specialties currently recognized;

APPENDIX B

(2) the organizations authorized to certify in those specialties;
(3) the total number of attorneys currently certified; and
(4) the number certified in each specialty since the Board's last report. If the Board has declined recognition of a specialty in the preceding year, it shall include a statement of its reasons for doing so. The Board shall also include in its report any other material it deems proper or which is requested by the Court.

RULE 3: Duties of Certifying Entities:

A. An entity authorized to certify Minnesota attorneys as specialists in a particular area of law or legal practice shall publish the standards and procedures required for certification.

The standards and procedures used:

(1) shall not discriminate against any lawyer properly qualified for such recognition;

(2) shall provide a reasonable basis for the representation that lawyers so certified possess special competence in the area for which certified, as required by Rule 2.C(2);

(3) require re-certification after a period of not more than five years; and,

(4) shall be subject to approval by the Board.

B. Any examinations required in order to obtain certification shall be offered at least twice a year, at dates and places determined by the certifying entity.

APPENDIX B

C. Certifying entities shall maintain the confidentiality of information pertaining to individual applicants, as required by law.

D. Certifying entities shall, on an annual basis, submit to the Board all information required for its report to the Court under Rule 2(A), together with any information the certifying entity may deem relevant or which the Board may request.

RULE 4: Registration of Certified Specialties

A. Each attorney certified as a specialist by a recognized certifying entity shall, commencing with his or her initial registration, pay an annual registration fee equal to that required by Rule 2 of the Rules of the Supreme Court for Registration of Attorneys.

The fees so received shall be allocated as follows:

100% to the State Board of Legal Certification during the first year of its existence and, in subsequent years;

60% to the State Board of Legal Certification;

20% to the State Board of Law Examiners/Continuing Legal Education; and,

20% to the Lawyers Professional Responsibility Board.

B. Each law firm organized as a professional corporation and which practices a certified specialty as permitted under DR

2-105(B), shall include a statement of the specialties practiced, and the attorneys certified in that specialty, in annual reports filed pursuant to Minn. Stat. §319A.21.

C. Each law firm practicing a certified specialty, including professional corporations, shall file an annual statement of the specialties practiced and the attorneys in its employ who are so certified with the State Board of Legal Certification. Statements shall be filed no later than July 1 of each year. For filing the first of such statements, the law firm shall pay a fee of $100.00. For each successive statement the fee shall be $25.00, which fees will be for the use of the Board.

D. Upon payment of the registration fee, the Clerk of the Appellate Court shall issue and deliver to the attorney or law firm paying the same a certificate in such form as may be provided by the Supreme Court, showing that such individual is authorized to practice as a certified specialist in a recognized area.

RULE 5: Continuing Legal Education.

Attorneys certified as specialists in recognized areas shall complete a minimum of twelve hours of course work, either as a student or as a lecturer, in Continuing Legal Education courses related to the individuals specialty and approved by the State Board of Law Examiners/Continuing Legal Education.

APPENDIX B

These hours shall be accumulated in the same three-year cycle required under the rules of the Supreme Court for Continuing Legal Education of members of the Bar and shall be in addition to the forty-five hours required under those rules. Proof of completion of the required number of hours shall be submitted together with the attorneys' Continuing Legal Education report made at the end of each three-year cycle.

RULE 6: Post-Graduate Education.

The Board, in conjunction with accredited law schools in this jurisdiction and other interested parties, shall develop post-graduate programs intended to facilitate certification in recognized specialties. Such programs shall satisfy the requirements of obtaining certification in a recognized specialty to the extent that the Board shall deem proper.

APPENDIX B

ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA

501 Wirth Park Office Center
4000 Olson Memorial Highway
Minneapolis, Minnesota 55422
(612) 588-0721

June 6, 1985

Wayne Tschimperle
Clerk of the Appellate Courts
230 State Capitol
Saint Paul, Minnesota 55155

RE: Proposed Amendments to DR 2-015 and
Rules of the Board of Legal Certification
Court File No: C1-84-2140

Dear Mr. Tschimperle:

Enclosed for filing in the above-described matter, please find the brief of the Academy of Certified Trial Lawyers of Minnesota.

Cordially,

C. E. Hagglund

Clarance E. Hagglund

Enclosures

jas

CX-84-1651
~~C1-84-2140~~

STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of the Report
of the Ad Hoc Committee on
the Board of Legal Certification

BRIEF IN SUPPORT OF MINORITY
REPORTS OF THE AD HOC COMMITTEE

INTRODUCTION

This brief is submitted by the Academy of Certified Trial Lawyers of Minnesota in support of two minority reports submitted by members of the Ad Hoc Committee on the State Board of Legal Certification. These minority reports concern (a) the requirement of a disclaimer under proposed disciplinary rule 2-105 and (b) the requirement of an objective evaluation system under rule 5A(2) of the rules governing the operation of the Board of Legal Certification.

1. A DISCLAIMER REQUIREMENT MUST BE INCLUDED IN DR2-105

The Academy of Certified Trial Lawyers of Minnesota (the Academy) gives its complete support to the minority report submitted by Clarance E. Hagglund on the issue of a disclaimer requirement under DR2-105. See Exhibit A. As stated in that report, such a disclaimer complies with the decisions of both the United States Supreme Court and this Court. It also provides consumers of legal services with the information necessary to make an informed selection of counsel.

Failure to require such a disclaimer, on the other hand, will render both the amended DR2-105 and the certification program meaningless.

2. AN OBJECTIVE EVALUATION REQUIREMENT MUST BE INCLUDED IN THE RULES GOVERNING CERTIFICATION.

The Academy also lends its full support to the minority reports submitted by committee member Peter Kreiser. See Exhibit B.

Rule 5A(2) is the heart of the proposed certification program. As recommended by the committee majority, Rule 5A(2) would impose only two conditions on certification: substantial involvement in the area of law for which certification is sought and a system of peer review. No objective evaluation is required.

The committee's failure to require objective evaluation by a potential certifying agency seriously impairs the proposed certification program: it undermines the program's credibility; it does nothing to promote higher levels of competence; and, it creates the risk of unfair administration of the program.

The lack of an objective evaluation requirement undermines the program's credibility because it leaves the program open to charges of "cronyism". In order to obtain the required recommendations of attorneys or judges, an applicant need only be experienced in the area and exercise some degree of judgment as to the individuals used as references. In effect, it creates

an "old boys network" based solely upon time in practice. Peer review and experience are important elements in certification. If certification is to be more than an advertising ploy, however, it must be more than a mere recognition of experience. Thirty years practice in an area may indicate some level of competence, but it does not guarantee that the practitioner is any more competent in that field than a recently admitted attorney.

Increased levels of competence among practicing attorneys should be an important goal of any certification program. The requirement of objective evaluations will promote greater competence. Few attorneys are likely to sit for an examination without some preparation.

Any certification program must be perceived as fair by both potential applicants for certification and by the public. Certification requirements based solely on experience and the availability of references is unlikely to be so perceived. Young attorneys, and especially minority group members, may not have positions within their respective firms which provide them with opportunities to obtain outside references. Moreover, some fields of law may not lend themselves to peer review at all (e.g., estate planning). It is conceivable that highly competent individuals would be denied certification simply for lack of a means of demonstrating their competence.

The lack of objective criteria also creates practical problems for the board. As written, Rule 5 gives the board no objective

criteria for the selection of certifying agencies. One can only assume that the reputation of the agency or of its members will become a predominant criterion. By evaluating an objective test to be used by the certifying agency, the board will have at least some guaranty that the agency takes its task seriously and that the certification granted by that agency has some value. It also provides for some degree of consistency among certifying agencies and prevents the proliferation of groups organized solely for the purpose of certifying their members.

The Academy respectfully submits that the lack of an objective evaluation will render certification meaningless. It, therefore, recommends that the Court adopt the minority report of committee member of Peter Kreiser on Rule 5A.

Respectfully submitted.

Dated: 6-5, 1985

Clarance E. Hagglund
Attorney No: 22208
Dean
Academy of Certified Trial
Lawyers of Minnesota
501 Wirth Park Office Center
4000 Olson Memorial Highway
Minneapolis, Minnesota 55422
(612) 588-0721

MINORITY REPORT ON DR2-105

RECOMMENDATION

The undersigned recommends to the Supreme Court that the following language be included in the amended version of DR2-105, pertaining to advertising of legal services:

(B) A lawyer may communicate the fact that he or she does or not practice in particular fields of law. If the communication indicates that the practice is limited to or uses any other language which conveys to the reader the inference that the lawyer is a specialist in any field of law authorized pursuant to these rules, then the following applies:

1. If certification is offered in a field which is the subject of the communication, and the lawyer is not certified, then such communication shal be accompanied by a statement that the lawyer is not a certified specialist.

2. A lawyer who is a certified specialist may communicate that his or her practice is a limited to one or more fields of law included within the area of specialization for which he or she is certified.

EXHIBIT A

RATIONALE

The current effort to develop standards for specialty certification, and regulations controlling the advertising of such specialties, is a direct result of the Court's decision in Johnson v. Director of Professional Responsibility, 341 N.W.2d 282 (Minn. 1983). In Johnson, the Court held a blanket prohibition of specialty advertising unconstitutional, both on its face and as applied. The Johnson case arose in the context of a tremendous increase in the amount of attorney advertising and a substantial change in the methods used to advertise legal services. These changes, in turn, were the result of the United States Supreme Court's decisions in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) and In Re: RMJ, 455 U.S. 191 (1982).

As currently drafted, DR2-105 simply codifies the Johnson decision. It provides no additional controls over attorney advertising, despite the fact that reasonable forms of control are constitutional and have been a goal of the Court for a number of years. As indicated in Appert, 315 N.W.2d 204, 215 (Minn. 1981), the Court is

> determined to comply with both the spirit and the letter of the United States Constitution. . . . We are equally determined to do what we can to prevent and discourage abuses. . . . We view the right of the general public to know of the availability of professional services as the principal interest involved in advertising such services. Advertisements desgined to achieve less important objectives will be subject to a more critical scrutiny.

The disclaimer recommended here fulfills the Court's goals. First, it adheres to the constitutional requirements. As the United States Supreme Court stated, "the preferred remedy is more disclosure rather than less." RMJ, 455 U.S. at 201. The disclaimer provision provides more information to the consumer than a simple statement of areas of practice. As the same Court suggested in Bates, "the remedy in the first instance is . . . preferably a requirement of disclaimers or explanation." 433 U.S. at 375. Second, the disclaimer requirement serves the general public's right to know of the availability of professional services, but avoids the "special risks of deception" present in such advertising. See RMJ, 455 U.S. at 200.

The disclaimer requirement also eases the "critical scrutiny" demanded by Appert. With such a requirement, the Board of Professional Responsibility may readily determine whether an advertisement touches on an area in which certification is available and whether the advertising attorney is a registered specialist.

In light of the failure of DR2-105 to provide any significant improvement over current advertising controls, its failure to provide guidelines for enforcement and the expressed desires of the Court in regard to controls over attorney advertising, the undersigned recommend adoption of the disclaimer language proposed above.

Respectfully submitted,

Dated: 5-21, 1985

Clarance E. Haggluud
Attorney No: 22208
501 Wirth Park Office Center
4000 Olson Memorial Highway
Minneapolis, Minnesota 55422
(612) 588-0721

MINORITY REPORT - Regarding Rule 5

The undersigned would include the following language in Rule 5A(2) as part (c):

> (c) a system of objective evaluation of the lawyer's knowledge of the substantive law and procedure of the specialty field in which certification is sought. Such objective evaluation to be by written and/or oral examination.

and strike the following language from part B, "...including but not limited to, oral or written examination or a combination of such examination."

The minority feels that for certification to have meaning it must be based on objective testing of an applicant's knowledge of the substantive law and procedure in a specialty field. Certification should be more than a recognition of experience. Objective testing should allow competent lawyers, who might not yet be well know by other lawyers in a specialty field, have a method of recognition in the field as a specialist. Further, if everyone, who obtains certification from an agency, has taken and passed a test, it removes claims of favoritism or discrimination. For these reasons we believe that the above provision and changes should be adopted.

EXHIBIT B

BOARD OF LEGAL CERTIFICATION

RULE 1. PURPOSE

The purpose of the State Board of Legal Certification (Board) is to assist in the delivery of legal services to the public by providing greater access by the public to appropriate legal services; identifying and improving the quality of legal services; and, providing for and regulating certification of specialist in a field of law.

RULE 2. COMPOSITION OF THE BOARD OF LEGAL SPECIALIZATION

The Board shall be composed of twelve members appointed by the Supreme Court. Three of the members of the Board shall be non-lawyers and all other members of the Board shall be lawyers licensed and currently in good standing to practice law in this state. One of the lawyer members shall be designated annually by the Supreme Court as chairperson of the Board. The members shall be appointed by the Supreme Court to staggered three-year terms of office, except that the initial appointees shall serve as follows: one non-lawyer and three lawyers shall serve for one year after appointment; one non-lawyer and three lawyers shall serve for two years after appointment; and one non-lawyer and three lawyers shall serve for three years after appointment. Appointment to a vacancy among the members shall be made by the Supreme Court for the remaining term of that member leaving the Board. No member may serve more than two three-year terms in addition to any additional shorter term for which the member was originally appointed.

Meetings of the Board shall be held at regular intervals, at such times and places and upon such notice as the Board may from time to time prescribe.

The Chairperson and other members shall serve without compensation but shall be paid their reasonable and necessary expenses incurred in the performance of their duties.

RULE 3. DIRECTOR

The Court may appoint a director who will serve at the pleasure of the Court. The Director, if any, shall be responsible and accountable to the Court and, unless the Court otherwise directs, to the Board, for the proper administration of this Plan; and the Director when authorized by the Court and on the Court's behalf may employ persons at such compensations as the Court may approve.

RULE 4. DUTIES OF THE BOARD

A. The Board shall determine, on its own motion or the petition of any interested party, the need (as derived from the purpose statement) for the certification of specialty designation in a particular area.

B. Once the need for a particular specialty has been identified, the Board shall accept applications from all interested parties for designation as a certifying agency.

C. The Board shall review all applications and shall from time to time designate those agencies which are authorized to certify specialists in a

EXHIBIT C

particular area. The authority may be granted for not longer than five years, and may be withdrawn at any time after notice and opportunity to be heard.

D. The Board shall report to the Supreme Court on an annual basis. It shall include in its report: (1) a statement of specialties currently recognized; (2) the organizations authorized to certify in those specialties; (3) the total number of attorneys currently certified; and, (4) the number certified in each specialty since the Board's last report. If the Board has declined recognition of a specialty in the preceding year, it shall include a statement of its reasons for doing so. The Board shall also include in its report any other material it deems proper or which is requested by the Court.

RULE 5. MINIMUM REQUIREMENTS OF CERTIFYING AGENCIES

A. An agency authorized to certify Minnesota attorneys in a particular area of law or legal practice shall publish the standards and procedures required for certification.

The standards and procedures used:

(1) shall not unlawfully discriminate against any lawyer properly qualified for such recognition.

(2) shall provide a reasonable basis for the representation that lawyers so certified possess special competence in the area for which certification is to be granted. Proof of special competence may be demonstrated in the following fashion, together with any additional standards the Board may impose:

(a) a demonstration of substantial involvement in the specialty during the three-year period immediately preceding application. Substantial involvement shall be defined in regard to each specialty by reference to its nature, complexity and differences from other fields and from a consideration of the nature and extent of effort and experience necesssary to demonstrate competence in that area. Such requirements shall be measured objectively where possible. What constitutes substantial involvement may vary between specialties, but in no case shall the time spent in practice of the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice, as measured during each of the three years immediately preceding application; and,

(b) a system of peer recommendations based on references obtained from attorneys or judges familiar with the competence and qualifications of the applicant, none of whom are related to the applicant or are associated with the applicant in the practice of law at the time of application.

(3) shall require re-certification after a period of not more than five years.

(4) shall require the agency to submit to the Board, on an annual basis, all information which the Board may request.

(5) shall maintain the confidentiality of information pertaining to individual applicants, as required by law.

(6) shall be subject to approval by the Board.

B. An agency authorized to certify Minnesota attorneys in a particular area of law may establish additional or more stringent standards, including but not limited to, oral or written examinations or a combination of such examinations.

RULE 6. REGISTRATION OF CERTIFIED SPECIALTIES

A. The Board may recommend to the Court a fee for each attorney requesting certification, the aggregate of which is adequate to cover the costs of the program.

B. Upon payment of the registration fee, the Clerk of the Supreme Court shall register such individual as authorized to practice as a certified specialist in a recognized area.

RULE 7. CONTINUING LEGAL EDUCATION

Attorneys certified as specialists in recognized areas shall complete a minimum of twelve hours of course work, either as a student or as a lecturer, in continuing legal education courses related to the individual's specialty and approved by the State Board of Law Examiners/Continuing Legal Education. These hours shall be accumulated in the same three-year cycle required under the rules of the Supreme Court for Continuing Legal Education of Members of the Bar and shall be included in the forty-five hours required under those rules. Proof of completion of the required number of hours shall be submitted together with the attorneys' Continuing Legal Education report made at the end of each three-year cycle.

HAROLD J. KINNEY
FREDERICK E. LANGE
WILLIAM A. BRADDOCK
NICKOLAS E. WESTMAN
DAVID R. FAIRBAIRN
CHARLES E. STEFFEY
WAYNE A. SIVERTSON
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JO M. FAIRBAIRN
ZBIGNIEW PETER SAWICKI
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KINNEY & LANGE

A PROFESSIONAL ASSOCIATION

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January 3, 1985

Clerk
MINNESOTA SUPREME COURT
Capitol Building
Saint Paul, Minnesota 55155-0000

Re: Proposed Rules of Professional Conduct
C8-84-1650

Dear Sir:

I wish to call the Court's attention to an aspect of Rule 7.2 proposed Rules of Professional Conduct, which may not have been adequately considered by the Ad Hoc Committee, or by the Minnesota State Bar Association Convention in June of 1984 when the proposed rules were approved.

Rule 7.2, which deals with adveritsing, includes subparagraph (d) which requires:

> "Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content."

For those firms having a firm name which includes the name of at least one attorney who is actively practicing in the firm, this requirement probably is met simply by the use of the firm name.

There is, however, a growing trend among law firms to "institutionalize" their firm name to provide continuity and avoid having the good will which the firm has built up over the years lost by a succession of name changes as partners die or retire. There are a number of prominent east coast law firms which come to mind: Hale & Dorr, Sullivan & Cromwell, and

Shearman & Sterling to name a few. There are also a growing number of Minnesota law firms who have apparently adopted this same approach. Thus the use of a trade name is not confined to legal clinics, but in fact includes some of the most prominent law firms in the country and in Minnesota.

The problem with Rule 7.2(d) is that it requires the name of an actively practicing member of the firm to appear in all advertising. This can be a significant and unnecessary burden. For example, a law firm who has institutionalized its firm name so that the names it contains are only the names of deceased or inactive members could not place a yellow pages listing which contained only the firm name. Instead, that firm would have to add lines to include the name of at least one actively practicing attorney. Similarly, signage on doors and the like could not use just the firm name if that firm name included only deceased or retired attorneys' names.

The results of the requirement of Rule 7.2(d) are unnecessarily expensive, in many cases aesthetically undesirable, and really not necessary to protect any reasonable interests of the public or the bar. Rule 7.1 and subparagraphs (a) through (c) of Rule 7.2 provide adequate protection and accountability without the need for Rule 7.2(d).

At the Minnesota State Bar Association Convention, which I attended as a delegate, debate was limited when this particular rule and others were being discussed. As a result, only one speaker was allowed to address this particular rule, and he did not raise the points which I have mentioned. After the adoption of the rules by the delegates, I spoke with both Professor Kirwin and Mr. Hoover, who were members of the Ad Hoc Committee which presented the rules to the convention. Both Professor Kirwin and Mr. Hoover indicated that the issue which I have raised was not considered by the Committee, and suggested that I write to the Court, so that the issue could be considered prior to action by the Court on these rules.

I have no quarrel with the concept of accountability by advertisers (whether they be lawyers or anyone else) for the contents of whatever form of advertising they produce. I suggest, however, that the accountability of a law firm and the members of that firm toward the advertising by the firm exists regardless of whether one active firm member's name appears in conjunction with the advertising.

Yours very truly,

David R. Fairbairn

DRF:kr
c: Prof. Kenneth Kirwin
William Mitchell College of Law
Michael Hoover, Lawyers
Professional Responsibility Board

Copies distributed 1-7-85 RP

C8-84-1650

IN RE: PROPOSED MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY

TO: CLERK OF THE APPELLATE COURTS
230 State Capitol
St. Paul, Minnesota 55155

PLEASE TAKE NOTICE that the undersigned, Robert M. A. Johnson, Anoka County Attorney, on behalf of the Minnesota County Attorneys' Association, hereby requests an opportunity to be heard on proposed Rule 3.8(e) of the Code of Professional Responsibility.

ROBERT M. A. JOHNSON
Anoka County Attorney
Attorney License No. 51834
Courthouse
325 East Main
Anoka, Minnesota 55303
Telephone: (612) 421-4760

C8-84-1650

PETITION IN OPPOSITION TO RULE 3.8(e) OF THE A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT

SUBMITTED BY:

THE MINNESOTA COUNTY ATTORNEYS ASSOCIATION
40 North Milton
St. Paul, MN 55104

ROBERT M. A. JOHNSON
Anoka County Attorney
Courthouse
325 East Main Street
Anoka, MN 55303

MARCY S. CRAIN
Assistant Anoka County Attorney
Attorney License No. 134326

12-21-84: Copies distributed to Justices BR

TABLE OF CONTENTS

I. INTRODUCTION

Your petitioner, the Minnesota County Attorneys Association, is opposed to the adoption of Rule 3.8(e) of the A.B.A. Model Rules of Professional Conduct (hereinafter referred to as "Rule 3.8(e)"). Rule 3.8(e) provides that "The prosecutor in a criminal case shall: . . . (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extra-judicial statement that the prosecutor would be prohibited from making under Rule 3.6"[1] Rule 3.8(e) is vague, over-inclusive, and seeks to impose responsibilities on prosecutors for the actions of individuals over whom he has little or no control.

II. THE ROLE OF THE PROSECUTOR

The prosecutor holds a unique position in our legal system. According to the Comment to Rule 3.8, a prosecutor is both an advocate and an administrator of justice. It is the duty of the prosecutor to seek justice, not merely to convict. A.B.A. Standards for Criminal Justice: The Prosecution Function, Std. 3-1.1(c) (1980). In accordance with these principles, the prosecutor is obligated to see that the defendant is afforded procedural justice and that guilt is determined on the basis of sufficient evidence. The Comment acknowledges that there is debate and variation from one jurisdiction

---

[1] Rule 3.6 provides that,

> "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing a pending criminal jury trial."

to the next in precisely how far the prosecutor is required to carry that responsibility. Rule 3.08(e) requires the prosecutor to carry that responsibility farther than is humanly possible.

III. CURRENT DISCIPLINARY RULES AND ETHICAL CONSIDERATIONS RELATING TO PROSECUTORS.

A. DISCIPLINARY RULES

Many provisions of the Minnesota Code of Professional Responsibility and the A.B.A. Code govern the conduct of a prosecutor as they would any other lawyer. See, e.g., D.R. 7-106(B) and (C) (trial conduct); D.R. 9-101 (C)(avoiding even the appearance of impropriety).

In addition, the prosecutor, by virtue of his unique position in our legal system, is governed by additional Displinary Rules designed specifically for prosecutors. For example, Displinary Rule 7-103 of the Minnesota Code of Professional Responsibility states:

> (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
>
> (B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

B. ETHICAL CONSIDERATIONS

Similarly, there are several Ethical Considerations which apply to prosecutors and other lawyers alike. See, e.g., E.C. 7-26 (prohibition on the use of perjured testimony); E.C. 7-27 (suppression of evidence). There is only one Ethical Consideration, however, that specifically addresses prosecutors. E.C. 7-13 provides that:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because:
>
> (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute;
> (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and
> (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.
>
> With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

IV. OTHER STANDARDS FOR PROSECUTORS' CONDUCT

In addition to the Professional Responsibility Code, a prosecutor's conduct can be measured against two other sets of standards; specifically, A.B.A. Criminal Justice Standards and the National District Attorneys Association Standards. The A.B.A. Standards for Criminal Justice: The Prosecution Function is a set of standards which are intended to be used as guides for conduct, and not as criteria for judicial review of prosecutorial misconduct as a ground for setting aside a criminal conviction or sentence. A.B.A. Standards for Criminal Justice: The Prosecution Function, §3-1.1(e)(1982). Also, the National District Attorneys Assocation published an exhaustive set of national prosecution standards which are far more detailed than the ethical codes and the A.B.A. standards. The National District Attorneys Association

Prosecution Standards mandates that prosecutors adhere to the A.B.A. Code of Professional Responsibility and various state ethical codes. N.D.A.A. Prosecution Standards, Std. 25 (1977).

Thus, prosecutors' conduct is already highly regulated and can be measured against several widely accepted standards. Mechanisms already exist to hold them accountable for misconduct. The Minnesota Code of Professional Responsibility, in its current form, specifically assigns responsibilities to prosecutors for their conduct. Any violation of these rules could lead to disciplinary action.

V. PROBLEMS WITH RULE 308(e)

Rule 3.8(a) appears to be designed to protect the rights of criminal defendants from the prejudicial effects of extra-judicial comments which may be disseminated by the mass media while the trial is pending. While the Rule's goal is admirable, the means by which it attempts to accomplish this goal are unworkable and fraught with difficulties. Rule 3.8 is vague, over-inclusive, and seeks to impose responsibilities on prosecutors for the actions of individuals over whom he may have little or no control.

A. VAGUENESS

First, Rule 3.8 is vague. It mandates that the prosecutor use "reasonable care" to prevent certain individuals from making extra-judicial comments which could potentially prejudice a pending criminal case. There is massive uncertainty as to what constitutes "reasonable care." "Reasonable care" may require telephone contact with every individual connected with the prosecutor's case, or it may require a letter to each individual involved in the case. It

may require the prosecutor to seek a gag order or some other type of court order which would restrain individuals from making extra-judicial comments about a case during the pendency of a jury trial. Because Rule 3.8(e) is proposed as a disciplinary rule, it would subject the prosecutor to potentially serious disciplinary sanctions, including disbarment.

In order for a prosecutor to protect himself from such sanctions, he would seek to document his efforts in using "reasonable care" and this would require mailing a minimum of one letter to every person involved in any aspect of the prosecution of the case. These mailings would be a drain on his already limited resources, including budget and staff time. In addition, the mailings may not reach the recipients in time to prevent the making of offending extra-judicial comments. Requiring such expenditures and the diversion of these limited resources to that end does not serve to benefit the criminal justice system in any meaningful way.

B. OVER-INCLUSIVITY

Even if the prosecutor were able to notify to individuals involved in his case, he is faced with the second problem created by this rule. That is, that the rule as written is over-inclusive and extends to individuals over whom he has no control and even to people whose identities may be unknown to him. It seeks to hold prosecutors responsible for the actions of "investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case." (emphasis supplied). This is vicarious liability in its most extreme form. No lawyer, prosecutor or otherwise, should be subject to disciplinary action, precipitated by the actions of a person over whom he

has no control. Nowhere in Minnesota's Code of Professional Responsibility is a lawyer subject to discipline for the actions of anyone other than himself, his associates, and his staff. The rationale of this is simple: these are the only individuals over whom he has, or should have, control.

The Minnesota Code of Professional Responsibility in its present form appropriately provides that a lawyer may be disciplined for not exercising reasonable care to prevent his employees and associates from engaging in certain conduct. For example, Disciplinary Rule 4-101(D) provides that "a lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him, from disclosing or using confidences or secrets of a client, except that a lawyer may reveal information allowed by DR4-101(C) through an employee." More directly on point, disciplinary rule 7-107(J) states that "A lawyer shall exercise reasonable care to prevent his employees and associates from making an extra-judicial statement that he would be prohibited from making under D.R.7-107." These rules appropriately hold a lawyer responsibile for the conduct of individuals over whom he has supervisory or financial control.

It is certainly appropriate that a prosecutor be subject to discipline for making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knew or reasonably should have known that it would have a substantial likelihood of materially prejudicing a pending criminal jury trial. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966)(reversing a state murder conviction which may have

resulted from massive and unrestrained publicity generated by the prosecutor, which the Supreme Court held to be worthy of disciplinary measures); United States v. Milanovich, 303 F.2d 626 (4th Cir., 1962)(prosecutor who, on the eve of trial, supplied radio station with adverse information about a criminal defendant held to have committed a gross violation of professional propriety). But see, In re Conduct of Lasswell, 673 P.2d 855 (Or. 1983)(a prosecutor who makes "extra-judicial statements" to the press concerning a pending criminal trial does not violate a disciplinary rule prohibiting such statements unless he does so "with the intent to affect the fact finding process" or he "knows or is bound to know that the statements pose a serious and imminent threat to the process and acts with indifference to that effect.").

While it is appropriate to hold a prosecutor responsible for his own offending extra-judicial comments, and to require him to use reasonable care to prevent his staff from making such comments, it is unreasonable to extend this responsibility to include other individuals beyond the prosecutor's control. Rule 3.8(e) mandates that the prosecutor exercise reasonable care to prevent "investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case" from making a prejudicial extra-judicial statement. (emphasis added).

In the prosecution of a single criminal case, a prosecutor may be required to exercise "reasonable care" over the local police department, the county sheriff's office, agents from the Bureau of Criminal Apprehension, police departments in other jurisdictions and other states, other prosecutors' offices, staff from all of these agencies, victims and their families, witnesses and their friends, experts and the like.

Moreover, the Rule is written so broadly that "other persons . . . associated with the prosecutor in a criminal case" may include individuals not readily identifiable by the prosecutor. According to the mandates of Rule 3.8(e), the prosecutor would be required to use "reasonable care" to prevent these identifiable and unidentifiable individuals from making offending extra-judicial statements. This requirement is humanly impossible to meet. Simply attempting to restrain a chief of police from making potentially prejudicial comments to the press during the pendency of a newsworthy criminal case can present the prosecutor with a formidable task. It can lead to disastrous political consequences and cause a deterioration in the relationship between the prosecutor and the police agency, which does nothing to promote effective law enforcement.

A prosecutor should not be held responsible for the actions of individuals over whom he has little or no control. A prosecutor does not have control over the actions of police agencies, witnesses, victims, victims' families and friends and the like. There is no financial, political, supervisory or disciplinary control which the prosecutor can exercise over these individuals.

This problem of lack of control is compounded by the fact that criminal cases which generate trial publicity are often those which place individuals in highly emotional states and lead to actions and reactions from them which are difficult if not impossible to control. Thus, there is a very real danger that individuals connected with the prosecution of a criminal case may indeed make prejudicial extra-judicial comments over which the prosecutor has little if any control.

VI. REMEDIES

There is indeed the potential for problems to be created when extra-judicial comments are made which materially prejudice a pending criminal trial.

The burden is on the proponent of the Rule to show that the problem is so troublesome, that such extreme measures as the adoption of Rule 3.8(e) must be taken to combat it. That burden has not been met. Creating a Disciplinary Rule which imposes reponsibility on prosecutors over a myriad of individuals who may make offending extra-judicial remarks, is not the solution to this problem.

The courts have several remedies available which they may invoke to remedy the problem and protect the right of the accused to a fair trial. These remedies include the suppression of evidence, a change of venue, the dismissal of the case with or without prejudice and the declaration of a mistrial.

VII. CONCLUSION

In conclusion, Rule 3.8(e) is vague, over-inclusive, and it imposes responsibilities on prosecutors for the actions of individuals over whom he has little, if any, control.

Based on the foregoing, your petitioner urges this court to reject Rule 3.8(e).

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

STATEMENT OF POSITION REGARDING PROPOSED MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY

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I. AN ATTORNEY HAS A RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW DURING AN INVESTIGATION.

Proceedings involved in investigating and processing charges against an attorney are of such fundamental importance to the attorney that due process of law must be accorded. In Juster Bros., Inc. v. Christgau, 214 Minn. 108, 7 N.W.2d 501 (1943), the due process rights of an employer before an administrative agency provoked the following comment by this Court:

> The due process of law clauses of our state and federal constitutions are: standing guarantee[s] of substantial justice, and prevent such a caprice or arbitrary action as would prevent a litigant from having a substantially fair trial. The requirement of due process means opportunity for a hearing, i.e., opportunity to be present during the taking of testimony or evidence, to know the nature and content of all evidence adduced in the matter, and to present any relevant contentions and evidence the party may have. * * * While the statute may confer upon an administrative board exemption from rules of evidence or procedure, it cannot authorize exemption from the due process clause, which is a permanent safeguard against the recurrence of abuses such as characterized by the Court of 'star chamber.' * * *
>
> The observance of constitutional 'due process' requirement is as important in administrative law as elsewhere * * *. 7 N.W.2d at 507.

The delegation of administrative duties involves the Court acting in a legislative function. Rapp v. Committee on Professional Ethics and Conduct, 504 F.Supp. 1092, 1097 (D.C. Iowa 1980). In that legislative role, it would appear that the Court has the same responsibility as a legislature in delegating administrative power. Such delegation requires that:

> * * * the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental

> process. Such a hearing has been described as an 'inexorable safeguard.' Morgan v. United States, 304 U.S. 1, 14-15, 58 S.Ct. 773, 775 (1938).

Procedural due process was considered in detail by the United States Supreme Court in Willnar v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175 (1963). Willnar passed the bar examination in 1936 but was not admitted to practice because of a judgment on his character and general fitness. He many years later sought a judicial ruling that he had been deprived of his rights to due process of law when he had been in 1937 promised a personal confrontation with the source of the slanderous criticisms of him but never obtained a hearing. The Court held that:

> Moreover, the requirements of procedural due process must be met before a State can exclude a person from practicing law. 'The state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.' 373 U.S. at 102, 83 S.Ct. at 1180.

The Court explained further that:

> We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. [Citation]. That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. 373 U.S. at 103, 83 S.Ct. at 1180.

The Court quoted from an earlier case with respect to the due process requirements of a full hearing.

It was held in Nell v. United States, 450 F.2d 1090, 1093 (4th Cir. 1971) that:

> Due process, however, requires that disbarment or suspension proceedings be preceded by adequate notice and an opportunity to prepare a defense.

This, of course, is a logical development from the fundamental principle that attorneys do have rights. It may be called a privilege, but the concept of privilege is so restricted by constitutional due process of law that one has a right to be considered objectively for admission and must be given due process before being disciplined. As to attorneys, "They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the Court after opportunity to be heard has been afforded [citations]. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power * * *. Ex parte Garland, 4 Wall. 333, 18 S.Ct. 366, 320 (1867). The Court stated further:

> The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the Court, for moral or professional delinquency. Ibid.

See also Schware v. Board of Law Examiners, 353 U.S. 232, 238, 77 S.Ct. 752, 756 (1957) where the Court pointed out that an attorney may not be precluded from the practice of law in any manner that contravenes due process or equal protection.

Selling v. Radford, 243 U.S. 446, 37 S.Ct. 377 (1917) reaffirmed the right of an attorney to due process of law.

In Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625 (1967), the discipline of the attorney was predicated upon his refusal to produce documents under a subpoena ducus tecum. The Court first of all held that the privilege against self incrimination

had been absorbed into the Fourteenth Amendment and gives protection to lawyers as well as other individuals. It held that the imposition of any sanction which makes the assertion of the Fifth Amendment privilege costly is a penalty. Attorneys are protected under due process of law under the same Fifth Amendment and Fourteenth Amendment and the Minnesota Constitution. It would appear that the Court should be consistent with Garrity v. State of New Jersey, 385 U.S. 493, 500, 87 S.Ct. 616, 620 (1967), where it was held that "we conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

This brief will demonstrate that some of the proposed Rules as written may deprive attorneys of procedural and substantive due process of law.

II. THE VAGUENESS IN THE DISCIPLINE REGULATIONS MAKES SOME OF THEM UNCONSTITUTIONAL

Vague laws in any area suffer a constitutional infirmity. Ashton v. Kentucky, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410 (1966).

The conviction there on a charge of criminal libel for writing calculated to create disturbances was reversed because of vagueness. Precision in expression would appear to be the necessary corollary to due process of law. In Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211 (1965), the Court reversed a conviction based on a violation of a city ordinance requiring one to terminate loitering on a street after lawful order of the police officer. This if enforced would have meant that a person was on the sidewalk "only at the whim of any police officer." That failed to provide for government "by clearly defined laws." The Court held that:

> Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state. 382 U.S. at 90-91, 86 S.Ct. at 213.

Vagueness in a regulation or statute is a due process violation. In Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242 (1974), the conviction was based upon a statute foreclosing ones treating "contemptuously" the flag of the United States. Regarding "the due process doctrine of vagueness," the Court held:

> The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' 415 U.S. at 572-573, 94 S.Ct. at 1247.

The Court pointed out that the 70 year history of the statute did not give any narrow judicial interpretation before

the conviction in that case. It was held that:

> We are without authority to cure that defect. Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predelictions. Legislators may not so abdicate their responsibilities for setting the standards of the criminal law. 415 U.S. at 575, 94 S.Ct. at 1248.

The vice in the vagueness is that it "* * * permits such selective law enforcement, there is a denial of due process." 415 U.S. at 578, 94 S.Ct. at 1249.

As a companion to the problem of vagueness offending due process of law, I contend that some proposed rules are overbroad and thereby deprive Petitioner of constitutional rights. In Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316 (1964), there was a Washington State oath whereby one swore that the affiant was not a subversive person. The Court struck it as vague because it did not define what the person must know before being considered subversive. 377 U.S. at 369, 84 S.Ct. at 1321. The Court held that:

> The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed. 377 U.S. at 371, 84 S.Ct. at 1322.

This approaches the complicating factor of International Society for Krischna Consciousness, Inc. v. Evans, 440 F.Supp. 414 (D.C. Ohio, 1977), where it was held that:

> On the other hand, a statute may regulate too much and in its zeal to protect certain legitimate interests infringe on protected conduct. Under such circumstances, the statute is considered overbroad. Ibid, at 423.

The Court pointed out that a person of reasonable intelligence is not required to guess at a controlling regulation to steer between lawful and unlawful conduct. Ibid. In the decision striking down proscriptions against certain advertising by

attorneys, the Supreme Court pointed out that the individual need not have personal standing to contest. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977). It held that an overbroad statute might serve to chill protected speech under the First Amendment. 433 U.S. at 380, 97 S.Ct. at 2707. Judge Murphy in United States JayCees v. McClure, 534 F.Supp. 766, 772 (D.C. Minn. 1982) stated that:

> An enactment is void for vagueness if its prohibitions are not clearly defined, or if it does not give a person of ordinary intelligence reason to know what is prohibited. * * * The exact application of this due process principle may vary depending upon whether the enactment is criminal, penal regulations of business, or civil.

The regulations discussed in this brief are vague and thereby deprive attorneys of their right to due process of law and are also overbroad and thereby fail to give attorneys precise details as to what one may and may not do as required under the First and Fifth Amendments and the Fourteenth Amendment of the United States Constitution.

Exemplary of the distinction that must be made between punishment and standards is A.B. Small Co. v. American Sugar Company, 267 U.S. 233, 239, 45 S.Ct. 295, 297 (1925) where it was held that: "It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." See also Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974), where the police officers objected to regulations proscribing conduct unbecoming a member and detrimental to the service. Those regulations were held unconstitutionally vague. The Court said:

> It is a central tenant of constitutional law that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and difference as to its application violates a first essential of due process of law.' 501 F.2d at 1188.

The Court pointed out that the prohibitions against vagueness do extent to administrative regulations. Ibid. Relevant to the Respondent, it was held that "* * * a vague regulation cannot be saved by prospective 'proper application' simply because a rule contains no objective criteria for determining precisely what constitutes a 'proper application.' 501 F.2d at 1189. There must be a standard of conduct "capable of objective interpretation" by those subordinate to it; and whatever has "no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned" is invalid.

The issuance of discipline rules ought not to be compared to preliminary investigations, as in In Re Agerter, 353 N.W.2d 908 (Minn. 1984), but rather consider these as preliminaries to an adversary proceeding designed to prove allegations. See Kohn v. State, 336 N.W.2d 292 (Minn. 1983).

Precision in expression is needed, as demonstrated by this Court's opinion in State v. Becker, 351 N.W.2d 923 (Minn. 1984), where the statute imposing punishment for intra-familial sexual abuse was attacked as being unconstitutionally vague. This Court's opinion, per Justice Todd, pointed out that the terms otherwise vague had specific definition by reason of a companion statute. This Court reiterated the vagueness doctrine which

requires that penal statutes specify with definiteness so that ordinary people may understand what conduct is prohibited. Ibid at 925. The Court added "the twin evils of vague laws are that they trap the innocent by not providing adequate warning of unlawful conduct and unleash the potential for unfair and uneven law enforcement by not establishing minimal guidelines." 351 N.W.2d at 925.

While I can see that the discipline rules are not penal statutes, they should as a matter of fairness to attorneys be capable of a specific definition in order that attorneys may comply without doubts inherently created by the generality of the terms of the rules.

III. VARIOUS COURTS HAVE INVALIDATED VARIOUS DISCIPLINE RULES

It would appear from this Court's earlier decision that there is no provision for resolving constitutional issues before the matter reaches the Supreme Court on filing of charges for discipline. Johnson v. Director of Professional Responsibility, 341 N.W.2d 282 (Minn. 1983). This Court has held unconstitutional certain rules that proscribed written dissemination of advertising material by attorneys. In Re Appert, 315 N.W.2d 204, 212 (Minn. 1981).

It would appear that because the committees processing complaints against attorneys have laymen as members, the committees would not be designed to deal with constitutional rulings often requiring substantial legal background and subtle legal differentiations. Garden State Bar Assn. v. Middlesex Cty. Ethics Comm., 643 F.2d 119, 126 (3rd Cir. 1981), reversed sub nom. Middlesex County Ethics Comm. v. Garden State Bar Assn., _____ U.S._____, 102 S.Ct. 2515 (1982).

Validity and vitality are in some cases granted to vague regulations solely because judicial interpretions give a constitutionally permissible prospective effect. That is done because fairness, that is due process, requires a fair warning of the conduct proscribed. Woll v. Kelley, 409 Mich. 500, 297 N.W.2d 578, 585 (1980). In Hirschkop v. Snead, 594 F.2d 356, (4th Cir. 1979), the Court reviewed a variety of discipline rules not directly applicable to the case at bar. The Court held that vague rules offended the due process clause. Ibid. at 370. Regarding DR 7-107(D), prohibiting an attorney from making

statements about "other matters that are reasonably likely to interfere with a fair trial," the Court said:

> This proscription is so imprecise that it can be a trap for the unwary. It fosters discipline of a subjective basis depending entirely on what statements the disciplinary authority believes reasonably endangers a fair trial. Thus, neither the speaker nor the disciplinarian is instructed where to draw the line between what is permissible and what is forbidden. Ibid. at 371.

The Court invalidated Rule 7-107(D), prohibiting statements reasonably likely to affect the imposition of sentence, because there was "no compelling reason." Ibid. at 372. Rule 7-107(G), prohibiting an attorney from making certain comments during the investigation or litigation of the case, was unconstitutional as overbroad. Also unconstitutionally vague was Rule 7-107(G)(5) prohibiting statements about "any other matter reasonably likely to interfere with the fair trial of the action." Ibid. at 373. Rule 7-107 relating to restrictions on comments regarding administrative proceedings, was held unconstitutionally overbroad. Ibid. at 374.

In Chicago Counsel of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), the Court held overbroad and therefore outside of constitutional standards the rule barring attorneys comments "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." The Court pointed out that the standard must be such as to eliminate overbreadth but also be specific enough to avoid vagueness. Ibid. at 250. The Court held ambiguous as applied to attorneys the proscription against making statements when "participating in or associated with the

investigation." Ibid. at 252. The proscription against expressing opinion as to guilt or innocence of the accused, the evidence, or the merits of the case arouse the Court's concern with respect to the "merits" but it thought that it might properly be used in a rule constituting a presumption of a serious and imminent threat. Another rule proscribing comments relating to a trial, parties, issues, "or other matters that are reasonably likely to interfere with the fair trial" was held to be unconstitutionally vague. Ibid. at 255-256. The rule proscribing comments that may affect a sentence was held unconstitutional. Ibid. at 257. The rule proscribing comments during the period of the investigation or litigation had no time limitations and was therefore unconstitutional. Ibid. at 258. The rule proscribing comment on "any other matter reasonably likely to interfere with a fair trial of the action" was also voided. Ibid. at 259.

These cases demonstrate that subjective, undefined elements in discipline rules invalidate the rules.

IV. RULE 1.8(g) IS UNCONSTITUTIONALLY VAGUE

Rule 1.8(g) provides:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client consents after consultation, including disclosure of the existence and nature of all the claims and of the participation of each person in the settlement.

This rule is derived from the present DR 5-106, which up to now includes in describing the consent "* * * after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement * * *" and the participation of each. It is significant that the new rule does not refer to disclosing the total amount of the settlement but does of course require disclosure of the existence and nature of all the claims. More fundamentally, this is a hybrid rule because it has coined a phrase, aggregate settlement, which has not been given any uniform definition in the law.

This proposed rule is unconstitutionally vague because it does not describe or define the phrase aggregate settlement. It is difficult to infer from the Code of Professional Responsibility or the proposed rule just what the Court has in mind in issuing this rule.

Under the present discipline rules, the ethical considerations that relate to Canon 5, a lawyer should exercise independent professional judgment on behalf of a client, do not resolve the problem of defining aggregate settlement. EC 5-14 refers to the independence of professional judgment and precludes an attorney's employment if it dilute his loyality to a client. It reads further that "this problem arises whenever a lawyer

is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant." EC 5-15 refers to an attorney representing "multiple clients having potentially different interests." This ethical consideration implies an attorney's representation of several clients in single litigation. In EC 5-16, an attorney is justified in representing two or more clients with differing interests if the individual client is "* * * given the opportunity to evaluate his need for representation free of any potential conflict * * *."

The Ad Hoc Committee on ABA Model Rules of Professional Conduct reported to this Court the proposed rules and made among other things the following comment:

> Multiple representation will be permitted when the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. See Rule 1.7.

The Preamble to the Minnesota Rules of Professional Conduct includes this statement:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, the lawyer can be a zealous advocate on behalf of the client and at the same time assume that justice is being done.

The Preamble clearly demonstrates the presumption that lawyers will represent more than one client, may be a "zealous advocate," and "at the same time assume that justice was being done." None of these statements makes any attempt at defining the critical phrase, aggregate settlement. The Preamble states that the comment accompanying each rule explains and illustrates that rule. The comment following Rule 1.8 makes the statement

on most of the subsections but pointedly omits any reference to Rule 1.8(g), the one that is in especial need of interpretive assistance.

The present Code of Professional Responsibility in EC 5-15 gave an example of an attorney's representing multiple clients as "co-defendants in a criminal case, co-plaintiffs in a personal injury case * * *." Thus, the one existing indication of the multiple representation problem is not defendants in a civil case but the representation of several plaintiffs in a, that is one, personal injury case. The problem then arises as to whether an attorney representing multiple plaintiffs in multiple claims in dissociated events in separate litigation could be considered under the proposed rule, or under the existing rule, in the absence of a consolidation. The term aggregate settlement has no known, common definition in the field of law. That is in addition to the problem that the new proposed rule does not even require the attorney to explain the total amount of the settlement, as in the existing DR 5-106(A), which is the only section in 5-106 and by the subsection indication suggests that there perhaps at one time was a definition paragraph (B), which has been lost to history.

The few cases involving DR 5-106 demonstrate that there is no common definition. A review of these cases illustrates the necessity for the Court's issuing an additional regulation specifically defining the phrase in terms understandable by attorneys regulated by the rules.

In Supermarkets General Corp. v. United States, 537 F.Supp. 759 (D.C. New Jersey 1982), there was a lawsuit for tax refunds on

behalf of the supermarket chain of 100 retail stores. The essence of the problem was the taxpayer's accrual of personal injury and property damage claims. The taxpayer sued for "judgment that it may properly determine its accrued liability on the basis of the aggregate of the personal injury and property damage claims rather than on a claim by claim basis." Ibid at 760. The taxpayer contended that it could make a reasonably accurate estimate of the "aggregated reasonable estimate." Ibid at 762. To show that it could use the same term to refer to the liability side, the court referred to the "aggregated liability." Ibid at 763. There are other uses of the term aggregate throughout the opinion. There just is no common legal definition of the term aggregate or the phrase aggregate settlement.

In Attorney Grievance Commission of Maryland v. Engerman, 289 Md. 330, 424 A.2d 362 (1981), the attorney was charged with a violation of DR 5-106 as well as other rules. Apropos of that charge Harris and Hughes had been passengers in a vehicle driven by High. They sustained injury and by some manner were referred to Engerman. He notified the insurance company, but thereafter the two clients notified State Farm that they wished to drop the case. However, Kearny at State Farm continued to deal with Engerman as if he in fact represented Harris and Hughes and sent to Engerman the forms for filing a claim. The forms were filled out but not signed by the two clients. Two checks were mailed to Engerman, one for Harris and one for Hughes; and they were deposited to the attorney's escrow account. As to the aggregate settlement charge, the court made this statement:

> Accordingly, this Court can find no evidence that Respondent violated DR 5-106 in the contention that he made an aggregate settlement of the Hughes and Harris claims. In fact, the evidence is clear, that separate PIP payments were received by Defendant's office, although neither Harris nor Hughes received such payments. 424 A.2d at 368.

The clear indication here is that because separate checks were made to each individual client, there was no aggregate settlement.

In Weems v. Supreme Court Committee, 523 S.W.2d 900 (Ark. 1975), Catherine and Vivian VanHouten were injured while in an automobile insured by Thurston National Insurance Company. Weems filed a lawsuit for the two VanHoutens and for the subrogated claim of Thurston and negotiated a settlement. One check was made payable to Catherine and her husband, one to Vivian, and one to Thurston Insurance. The problem arose when the attorney endorsed the checks and deposited them to his account. This was described as an "aggregate settlement" but it is not clear whether it is an aggregate because of the separate claims of Catherine and Vivian or because of the subrogated claim of Thurston. An analogous case is Dodd v. Board of Commissioners, 350 S.2d 700 (Ala. 1977). Doris Myers retained Dodd to represent her and her minor daughter, Kathy, in a claim for injuries to Kathy. The attorney later on was charged with violating DR 5-106. The evidence was that there was first a contingent fee agreement between Dodd, the mother, and Kathy the daughter. Kathy and her mother did not get along at all, and after awhile, Kathy asked to be declared 21, in other words to have her disability of non-age removed. Dodd and the newly adult Kathy then negotiated the settlement, which excluded

the mother, who thereupon filed a complaint with the discipline board. The only way that DR 5-106 could be involved would be if the claim of the mother and the claim of the daughter were the "aggregate," but the mother's claim of course would be only as a representative of the daughter. Thus, there is no clear delineation of the terms and borders of "aggregate settlement." There was no separate and individual claim of the mother, and there was no judicial interpretation of what under the law would be an aggregate settlement.

In Continental Coiffures Ltd. v. Kimble, 411 A.2d 834 (PA 1979), Continental sued McGrogan for breach of employment agreement and Kimble for inducing Continental employees to leave to work for Kimble. McGrogan and Kimble were represented by the same attorney. Although evidence on the two cases was heard together, the cases were never formally consolidated. There was a settlement arrived at in the courtroom in the presence of the clients, but Kimble later opposed the filing of the formal order. The court found that the only basis for voiding the agreement reached in open court would be the finding of a conflict of interest. That is where 5-106 was considered. It was pointed out that Kimble's attorney's professional judgment did not adversely affect Kimble's interests because the settlement agreement "successfully attained the goals which both she and McGrogan sought." EC 5-14 was then cited as discussing the problem of an attorney representing two or more clients with differing interests, whether conflicting, inconsistent, diverse, or otherwise discordant. Because the two clients had consented to the agreement the aggregate settlement proscription was not

violated. Each client evaluated her need free of any potential conflict, and there was no violation of DR 5-106 in this single piece of litigation. No definition was suggested.

An aggregate settlement was involved in National Union Fire Insurance Co. v. Greenberg, 386 N.E.2d 765 (Mass. 1979). There, the attorney was charged with having engaged in an aggregate settlement when he settled for his client and the subrogated interest of the insurance company. That is another hybrid example of aggregate settlement. This subrogated interest, of course, is identical to the insured's claim rather than involved in the same litigation, rather than a totally discrete claim on a separate lawsuit for separate damages on evidence and liability which have not been consolidated for a unitary claim.

In Quintero v. Jim Walter Homes, Inc., 654 S.W.2d 442 (Texas 1983), the attorney entered into an aggregate settlement of several hundred claims for a lump sum "to be divided among his clients in accordance with a formula he devised." Ibid at 443. The litigation hung on the issue of whether Quintero had withdrawn from the litigation with the attorney negotiating the settlement before the settlement was effected. There was no particular quarrel with the attorneys having devised a formula for dividing the lump sum settlement. DR 5-106 was quoted in the case.

The genesis of this whole problem, and its solution, should be traced to In Re Sizer, 134 S.W.2d 1085 (MO. 1939). The attorney there, Sizer, was charged with professional misconduct for a variety of reasons and on a large amount of evidence. With respect to the aggregate settlement situation, the court

affirmed the Commissioner's findings and conclusions, which are quite illuminating. Count XIII alleges that Sizer and his associate had various suits and claims against various and sundry railroad companies and proposed a lump sum settlement which reserved to themselves, the attorneys, the right of distribution among the clients. They did so. The evidence showed that Sizer grouped five of the cases together and offered to settle them for a lump sum paid by the Missouri Pacific. He submitted the proposal in writing and completed the settlement. None of the clients was dissatisfied. Testimony is critical, and we quote it as follows:

> Q. You knew what each client would take is that right?
> A. I think so.
>
> Q. What did you mean by this language, 'if you will take the total sum of $28,000.00 and let me make the distribution as best I can, I will undertake to put the deal over by that time. What did you mean by that language?
> A. I just mean to scoop them up and get as much money as I could. I knew as a matter of fact, from what my clients wanted, I could really put the deal over, if I had to go for less money, but I was just jockeying to get the best settlement that I could for my clients.
>
> Q. In other words, in putting the deal over, you didn't have to put anything over with your clients, is that true?
> A. I knew what they wanted and what they would be tickled to death to have at that time of the year rather than to go into trial that would come up in the next two weeks.
>
> Q. (By Comm. Page) Were you concealing anything from your clients?
> A. No, sir, I was not. They knew it all.

The Court commissioner, whose findings and conclusions were confirmed by the Missouri Court of Appeals, stated as follows:

> If it is true that respondent Sizer knew in advance what his clients would settle for, and saw fit to add up the sum it would take to make the settlements, I can see no reason why he should not propose to the defendant the

> lump sum settlement. No fraud could possibly be perpetrated before settlement could be made, checks or drafts would have to be issued payable to the various clients so the clients would know then if not before, what they were getting and would have an opportunity to make any complaint which they might have concerning the amount.
>
> No complaints were made, at least there is no evidence that there was any complaints made, and Mr. Sizer's uncontradicted testimony is that he was concealing nothing from his clients, and that they knew what was going on. Under such conditions I can see no merit in Count XIII. 134 S.W.2d at 1112.

This case puts into perspective the realistic practice of litigation. The critical factor is the client's individual consent to a settlement. The fact that the claims are separate and apart, not a subrogated interest in a single claim and not a joint claim in a single traumatic event, warrants the conclusion that for lack of specificity, the Rule referring to aggregate settlements cannot apply to discrete claims where the individuals have separate claims and they execute separate releases for amounts which satisfy the individual client. However, the phrase may be defined along these lines.

If those who write the original version of DR 5-106 had any understanding of administrative law, they would have recommended to the courts a definition of aggregate settlement. The fact that DR 5-106 has an (A) subsection but no (B) indicates that perhaps at some time a paragraph defining aggregate settlement was included. Specificity can be lent to make Rule 1.8(g) constitutional. Because that has not been done, and because there is no historically accepted common definition of the phrase aggregate settlement, Rule 1.8(g) is unconstitutionally vague.

V. RULES 8.4(b) and (f) ARE UNCONSTITUTIONALLY VAGUE

Rule 8.4(b) makes the professional misconduct for a lawyer to:

> (b) Commit a criminal act that reflects adversely on the lawyers' honesty, trustworthiness or fitness as a lawyer in other respects; * * *

and Rule 8.4 provides further that it is professional misconduct for an attorney to

> (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

These terms are manifestly vague. In Rule 8.4(b), it is misconduct for an attorney to commit a criminal act that reflects adversely on the attorney's honesty or fitness as a lawyer in other respects. There is no practicable limitation under this proposed rule for defining the term adversely or the phrase in other respects.

Rule 8.4(f) provides that it is misconduct for an attorney to assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

This proposed rule requires further definition.

Determining what other law is indicated by Rule 8.4(f) is difficult. The Preamble to the proposed rules indicates that the comments are intended as guides to interpretation. However, in determining what other law is involved, in this context, proposed Rule 1.2(e) refers to the rules of professional conduct "or other law." The comment under that proposed rule refers again to the rules of professional conduct and other law. It can hardly be suggested that the rules of professional conduct are laws. They may have the force and effect of laws, but laws they are not. As to proposed Rule 8.4(f), it is difficult to

understand just what other laws are involved and whether that reference to other laws includes the proposed rules of professional conduct.

Proposed rule 8.4(b) refers to something that reflects "adversely" on the attorney's fitness as a lawyer "in other respects." Adversely and in other respects are subjective terms and have no objective limitations required for Rules controlling professional conduct.

Some lawyers may read these laws as poetry, and some may read them as conservative draconian regulations. Various subjective interpretations must be predicated upon terms that are specific and understandable.

It is noteworthy that the committee has not proposed a continuation of the presently existing, conscionally subjective, DR 1-102(A)(5), which bars an attorney's actions "prejudicial to the administration of justice." That is a subjective term which is as vague as what the court now is faced with implementing, that which adversely reflects in other respects.

There are no guidelines for these discipline rules. Discipline rules, along with Canon 9 "A lawyer should avoid even the appearance of professional impropriety," give no guidance to the attorneys and therefore should give no sanctions against them. In Kramer, The appearance of impropriety under Canon 9: The study of the federal judicial process applied to lawyers, Minn. Law Review, Vol. 65, No. 2, January, 1981 the following is said:

> Canon 9 of the ABA Code has developed into a source of unpredictable, post-hoc rulemaking regarding the standards of professional conduct. As the foregoing discussion

> demonstrates, many courts are willing to disqualify counsel on the basis of appearances alone, absent evidence of actual impropriety and sometimes despite proof that no actual impropriety occurred. Disqualification of a lawyer imposes a serious taint. In Canon 9 cases, the decision often turns on how different judges suppose that the public might view a given ethical issue. Too much can be made of such public perceptions, even when correctly intuited by the Courts. What laypersons sometimes perceive as impropriety is frequently in the highest tradition of the bar: For example, representing unpopular clients, defending the guilty, and being courteous to opposing counsel during the course of a trial.
>
> The future of Canon 9 is uncertain. An ABA commission has released a working draft of a new set of "Rules of Professional Conduct" which jettisons the whole concept of 'appearance of impropriety,' terming it 'question-begging' and a concept resting on 'subjective judgment.' P. 264-265.

It was pointed out in JOHNSTON, ABA Code of Professional Responsibility: Void for Vagueness, North Carolina Law Review, Volume 57, 1979, p. 671, that "* * * vaguely worded rules may invite state bar associations, or factions thereof, to weed out attorneys who are unorthodox or politically unpopular by current standards." P. 684. She added: "The presence of standardless rules such as DR 1-102 leaves open the possibility that it could occur again." P. 685. The Court pointed out that Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974), cert. den. 419 U.S. 1121 involved 40 specific grounds for reprimand by regulations of police, and this "* * * indicates that the regulation of the legal profession could be effected through more precise language than that employed in DR 1-102." P. 687. She added, "Thus one may conclude that the disciplinary rules, in view of the purpose they are intended to serve, could fairly be held to the exacting standard of specificity required or criminal statutes, and that applying such standards should not, on the whole, be contrary to the

public interest." P. 687. The author concluded that the Code of Professional Responsibility was designed to regulate the legal profession but did so "in inappropriately broad terms." P. 693.

In WECKSTEIN, Maintaining the Integrity and Competence of the Legal Profession, Texas Law Review, Vol. 48: 267 1970, the author writes:

> The relevancy of prohibiting a lawyer from engaging in conduct that 'is prejudicial to the administration of justice' or 'adversely reflects on his fitness to practice law' is also apparent, but the scope of the proscription is not. * * * I have less confidence in an enlightened application of the latter clause because I am uncertain what conduct will be held to reflect adversely on fitness to practice law. Reasonable minds could well differ over whether this includes all criminal conduct, rudeness to clients, other lawyers, or judges, or minimal ability and diligence, and unreasonable minds might extend this to social drinking, growing a beard, or owning a nightclub jointly with a football player. Because it obviously makes sense to subject lawyers to discipline for conduct that I think adversely reflects on their fitness to practice, I hesitate to recommend the deletion of the provision unless it proves to be unnecessary or unless a more acceptable substitute can be found. P. 276.

The author's sarcasm points up the vagueness in subjectivity of the rules here involved.

Specificity in these rules is constitutionally necessary. There are two solutions. In Office of Disciplinary Counsel v. Campbell, 345 A.2d 616 (Pa. 1975), the attorney was disciplined for violations of DR 1-102A(5)(6) for conduct that is "prejudicial to the administration of justice" and conduct that "adversely reflects on his fitness to practice law." The court held there that

> Although these two rules are arguably vague, it does not necessarily follow that appellant's disbarment under these sections is constitutionally impermissible. A regulation or statute can be validly applied to some activity even though its application to other situations might be of uncertain constitutionality. [Citation.]

> Where one is on fair notice that his own conduct is within that prohibited by a regulation, he cannot attack the regulation simply 'because the language would not give similar fair warning with respect to other conduct which might be within its broad and liberal ambit.' 345 A.2d at 621.

The critical factor in Campbell is that the attorney there had previously been placed on notice about the proscription because of earlier court decisions. That is totally unlike issuing new rules where there are no definitive decisions explaining the meaning of the various DR's.

In Bence v. Breier, supra, the court invalidated departmental rules proscribing police conduct "unbecoming a member and detrimental to the service." There were many examples of such conduct, and those were equally vague. The court held that prohibition against vagueness extends to administrative regulation, 501 F.2d at 1188, and pointed out that a vague regulation cannot be saved through prospective application when the rule contains no objective criteria for determining the proper conduct. P. 1189. Lacking the objective, ascertainable standards were the words "unbecoming" and "detrimental to the service."

Woll v. Kelley, 409 Mich. 500, 297 N.W.2d 578 (1980) considered a statute barring solicitation by attorneys. The court held that a statute must provide fair warning for the conduct, p. 585, and held that vagueness involved required limiting construction and therefore prospective application. P. 597.

The Second Circuit held in Bd. of Ed. v. Nyquist, 590 F.2d 1241, 1247 (2nd Cir. 1979) that "* * * appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases."

A reference to "good moral character" has been termed "unusually ambiguous." Konigsberg v. State Bar of Cal., 353 U.S. 252, 263, 77 S.Ct. 722, 728 (1957). The Supreme Court there per Justice Black said:

> A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated--free to think, speak and act as members of an Independent Bar. 353 U.S. at 273, 77 S.Ct. at 733.

The rules involved in this section create an elastic guideline that has no objective standard. The privation of attorneys charged with having violated them is a loss of due process; the Court should require that the enforcing official be given objective standards so that there is no likelihood of subjective enforcement. Inherent in due process is that the reviewing court, in this case this Court, would be able to evaluate the facts and relate them to the discipline rules in order that there can be reasonable assurance that the evidence, if any, supports the conclusion that a discipline rule had been violated. Indeed, specificity is required not only to inform the person accused but also, as held in a criminal case in United States v. Radetsky, 535 F.2d 556 (10th Cir. 1976), to "* * * inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." 535 F.2d at 562. In other words, the specificity not only enables the accused to be aware of the charges but also it enables the reviewing court to test whether the evidence adduced in support of that charge actually supports that clear, specific allegation and

demonstrates a violation of a specific rule or statute. Vagueness forecloses any intelligible, adequate review by the appellate court.

The subjective elements here involve determination of what "adversely" reflects on one's "fitness as a lawyer in other respects." Rule 8.4(b).

There are many standards controlling the practice of law. There is no need to depend on the vagueness which inheres in these various rules. The proposed Rule 8.4(b) refers to misconduct by a criminal act that reflects adversely on the "lawyer's honesty, trustworthiness or fitness as a lawyer in other respects * * *." It specifically limits it to a criminal act and relates to honesty, trustworthiness or fitness. The comment stated that "* * * a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category." Those limitations should be written into the rules because, of course, comments are merely guidelines. The inclusions and the exclusions should be specific and within the terms of the rules. When the comment refers to offenses relevant to the practice of law, Rule 8.4(b) also refers to fitness as a lawyer in other respects. This rule should be revised to specify what is included and what are the factors that are to be excluded from discipline potential.

There are no comprehensive standards that relate the Canons, the ethical considerations, and the discipline rules for an objective control over enforcing agencies; and

there is no measure by which this Court can determine whether evidence demonstrates a violation of the objectively defined discipline rules. Thus, these rules are invalid.

VI. PROPOSED RULE 1.5(a) SHOULD NOT BE ADOPTED

Proposed rule 1.5(a) is as follows:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

My father told me more than 40 years ago that minimum fee schedules of the bar associations were merely a price fixing arrangement. It took the court some time to datch up to that idea, but it is established now that minimum fee schedules are illegal. The proposed rule 1.5 requires too many subjective but positive considerations; and these are far beyond the capacity of a rule properly reviewable by the court.

Attached to this submission is a copy of a letter sent from the Anti-Trust Division of the United States Department of Justice on September 21, 1984 to various state supreme courts and addressed to the chief justice of the Supreme Court of Alabama. The record indicates that no copy was sent to the Chief Justice of this Court. In that letter, the Department of Justice makes the following comment:

> Rule 1.5(a) would require that '[a] lawyer's fees shall be reasonable.' This language, which replaces the former Model Code provision that prohibited 'a clearly excessive fee,' may lead lawyers to infer that the new Rule prohibits 'unreasonably' low fees. Such an interpretation would adversely affect price competition and discourage attorneys from offering their services for fees that are lower than those prevailing in their locality.

It is significant that proposed Rule 1.5(a)(3) makes the determination of the reasonableness of a fee that which is charged in the locality. This is an overcomplication that merely sounds good and has no effect.

The committee could re-write this and provide for a proscription against excessive fees made without regard to the nature of the representation, the value of the attorney's services, the value received by the client, and the financial stability of the client. The proposed rule is unnecessarily subjective and encourages reasonably high fees.

VII. PROPOSED RULE 7 SHOULD BE ENTIRELY REVISED

The proposed Rule 7 relates primarily to communications with the client, advertising, and solicitation.

The Department of Justice in the letter attached to this submission states that " * * * the Model Rules, in our view, would, if adopted, unnecessarily restrict the content of and the methods by which lawyers may convey such information. The rules are worded and interpreted so as to go beyond proscribing false or misleading communication and misleading or overreaching practices, to prohibit truthful, non-deceptive, non-overreaching communication and practices that can contribute to better informed selections of counsel by those in need of legal services."

The Supreme Court has repeatedly held that speech surrounding a lawyer's procurement of employment is contained within the First Amendment's sphere of protection: See In Re Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

In a series of recent cases, the Supreme Court has held that the speech and associational activities of attorneys in communicating the availability of legal services cannot be proscribed on a wholesale and indiscriminate basis. In In Re Primus, supra, United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); in National Association for the Advancement of Colored People v. Button, 37 U.S. 415 (1963), the Court struck down statutes which prohibited all communication of legal advice or "solicitation" by attorneys or members of organized groups as overbroad, and, consequently, as violative of First Amendment

rights of speech and association. In Bates v. State Bar of Arizona, supra, the Court struck down a blanket prohibition on advertising by attorneys, as a violation of First Amendment rights. Similarly, in Ohralik v. Ohio State Bar Association, supra, the Court upheld the proscription of solicitation by attorneys, in the narrow circumstances where that solicitation was made in person, for pecuniary gain, and where the circumstances were conducive to "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" Id, at 462. See also, In Re Primus, supra at 434. Where the circumstances under which the solicitation is undertaken do not contain these dangers, such solicitation cannot be prohibited in keeping with the First Amendment. See In Re Primus, supra at 434. See also In Re Appert & Pyle, 315 N.W.2d 204 (1981).

Where a statute makes no attempt to distinguish between protected and non-protected speech and conduct, it is overbroad and cannot stand. Dombrowski v. Pfister, 380 U.S. 479 (1965).

A statute is violative of the First Amendment if, in the application to particular speech or conduct, it is overbroad, does not provide fair notice of the conduct proscribed, or is so indefinite that it confers unstructured and unlimited discretion on the trier of facts to determine whether an offense has been committed. See Grayned v. Rockford, 408 U.S. 104, 108-109 (1972). Because the proposed rules fail to delineate in the type of speech or conduct which is proscribed, it is impossible to determine whether they relate to protected or nonprotected conduct.

The Court may legitimately proscribe in-person solicitation which contains dangers of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" Ohralik v. Ohio State Bar Association, 436 U.S. 447, 462 (1978); Bates v. State Bar of Arizona, 433 U.S. 350, 366 (1977). The state may not, however, prohibit all solicitation by attorneys, by any means and in any circumstances whatsoever. Id.; See also, In Re Primus, 436 U.S. 412 (1978).

A statute which grants unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed, or which allows for the criminal indictment of constitutionally protected speech or conduct, is void as contrary to federal constitutional guarantees, and any indictment which is rendered on the basis of that statute is likewise void. See Grayned v. Rockford, 408 U.S. 104, 108-109 (1972); Woll v. Kelley, 409 Mich. 500, 297 N.W.2d 578 (1980). In Woll v. Kelley, supra, the Court quashed an indictment which was based on an anti-solicitation statute which was overbroad, and which was susceptible to conduct protected by the First Amendment. The Court stated:

> [A] limiting construction, making the statute expressly inapplicable to activities protected by Bates and Ohralik, is necessary to prevent violation of a due process right akin to that which protects one from application of a law so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.
>
> If prosecution were to proceed without benefit of a limiting construction, a person might be convicted for acts within the literal terms of the solicitation statute which cannot, by reason of Bates and Ohralik, be proscribed. Unless the trier of fact has been apprised of the limiting construction, it cannot properly be said that either its assessment of the evidence or its finding was guided by such construction.

> In addition to the risk that a defendant might be convicted without a finding that he engaged in prohibited conduct there is the risk that a belated construction may deprive a defendant of an opportunity to make out a valid defense.
>
> The indictment charging Posner and Keane with violation of the solicitation statute merely states the grand jury's conclusion, and gives no indication of the nature of the activities the grand jury found the probable cause to believe had occurred. For all that appears, the grand jury may have only found that they engaged in conduct, albeit within the literal scope of the statute, too innocuous to prohibit consistent with Ohralik. We believe that the concerns voiced in Shuttlesworth [v. Birmingham], 382 U.S. 87 (1965) and Ashton [v. Kentucky], 384 U.S. 195 (1966) prevent Posner and Keane from being forced to stand trial without a grand jury having found probable cause to believe a violation of the statute, as construed, occurred. For this reason, the indictment must be quashed. * * * Id., 297 N.W.2d at 598-599.

See also Koffler v. Joint Bar Association, 51 N.Y. 2d 140, 412 N.E.2d 927, 432 N.W.S.2d 872 (1980). (conviction of attorney on the basis of solicitation under an overbroad statute overturned, on the grounds that the particular solicitation engaged in by the attorney (letters to clients) cannot be constitutionally prohibited); Matter of Jaques, 407 Mich. 26, 281 N.W.2d 469 (1979) (conviction of attorney for solicitation under overbroad statute overturned, where the circumstances did not involve the potential for overreaching and undue influence present in Ohralik; See Matter of Discipline of Appert, 315 N.W.2d 204 (Minn. 1981), this Court held that certain disciplinary rules are unconstitutional restrictions of the First Amendment rights for disciplining an attorney for distribution of written materials.

Mere interest in efficient application of disciplinary rules and regulations does not justify vague or overbroad statutes which provide a dragnet for both protected and unprotected conduct. As stated in Polk v. State Bar of Texas, 374 F.Supp. 784,

788 (D.C. N.D. Tex. 1974), "where the protections of the Constitution conflict with the efficiency of a system to insure professional conduct, it is the Constitution which must prevail and the system that must be modified to conform."

Proposed Rule 7.3 purports to bar solicitation from a prospective client with whom the attorneys had no previous relationship. Eliminated from the proposed rule was the recommended definition of the term solicit. The gratuitous philosophy expressed in the comment contributes very little to the proposed rule in the absence of a specific definition. While the comments are designed to be guides to interpretation, what they are in this proposed rule is an addition to the rule itself.

Solicitation has been a constant problem for the legal profession, but in Minnesota, see In Re Greathouse, 189 Minn. 54, 248 N.W. 735 (1933), there was at a time a concern about the big city law firms diverting law business from the country lawyers. Solicitation is a speech protected by the First Amendment to the United States Constitution. In Re Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Speech and associational activities of attorneys in communicating the availability of legal services cannot be proscribed on a wholesale and indiscriminate basis. In Re Primus, supra; United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); and National Association for Advancement of Colored People v. Button, 371 U.S. 415 (1963). The latter statute struck down statutes which prohibited all communication of legal advice or "solicitation" by attorneys or members of organized groups on the grounds that

the prohibitions were overbroad and therefore violative of the First Amendment rights of speech and association.

To salvage the solicitation statute, it should be made specific so as to bar unlimited discretion on the trier of fact to determine whether an offense has been committee, see Grayned v. Rockford, 408 U.S. 104, 108-109 (1972); and it is likely that a judicial construction of the proposed rule for the purpose of lending the specific definition would be necessary. Woll v. Kelley, 409 Mich. 500, 197 N.W.2d 578 (1980).

Proposed Rule 7.4 seems to have an inherent contradiction. Rule 7.4(a) authorizes an attorney to communicate the attorney's practicing in particular fields and may not use any false claims in describing that practice or its limitations. Rule 7.4(b) provides, however, that an attorney shall not state or imply that the attorney is a specialist unless currently certified. It is difficult to understand how one could "communicate" about their restricted practice of law and avoid implying that the attorney is a specialist in that field. The original recommendation to the State Bar Association eliminated the conflict. However, the state convention reinstated the contradiction.

The state convention also deleted any comment so it is difficult to understand just what was the net result because the comment authorized an attorney's advertising in directories about the restricted nature of the attorney's practice.

VIII. ADDITIONAL EDITING THROUGHOUT THE REPORT ON THE MODEL RULES IS RECOMMENDED

The statement of the Ad Hoc Committee on ABA Model Rules of Professional Conduct writes in part that

> The nine canons state axiomatic norms, but are not themselves enforceable rules.

The canons have not been attached to or made a part of the printed rules distributed for consideration at this time. Either they should be included or the statement should be eliminated from the committee statement.

The Court should reconcile a variety of comments regarding attorneys' responsibilities.

The proposed Preamble states in part:

> While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Proposed Rule 1.2(e) provides:

> When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

The comment relevant to this reads in part:

> The last clause of paragraph (b) recognizes that determining the validity or interpretation of a statute of regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Part of the comments following proposed Rule 1.6 reads that:

> The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

Proposed Rule 3.1 reads:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. * * *

The comment following proposed Rule 3.1 includes this:

> The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

The problems are compounded by proposed Rule 3.4(c) which provides that a lawyer shall not

> Knowingly disobey an obligation under the rules of the tribunal except for an open refusal based on an assertion that no valid obligation exists.

There are some inherent contradictions; and in addition thereto there are problems with respect to the attorney's responsibilities to a client. When compliance may cause irreparable injury, the attorney may be exonerated from a refusal to comply with the court order. Maness v. Meyers, 419 US. 449, 460 (1975). Furthermore, contempt of the court will not lie when compliance with the court would involve an irrevocable surrender of a constitutional right. In Re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979).

It is suggested that these various excerpts be harmonized to comport with the prevailing concepts of constitutional rights, which are not entirely restricted to criminal law.

The Ad Hoc Committee approves of multiple representation "* * * when the lawyer reasonably believes the representation

will not be adversely affected and the client consents after consultation. See Rule 1.7." That, of course, posits the individual lawyer's subjective belief with no objective review. Rule 1.7 reiterates the individual attorney's subjective belief. Settlements, however, are not controlled by the same subjective character. See Rule 1.8(g).

It is significant that proposed Rule 1.7, placing upon the attorney a personal subjective judgment, is probably derived from the present D.R. 5-105, which was described in the Ad Hoc Committee's letter as "often difficult to understand and apply."

The Court should change the comments and the rules which indicate or refer to the Rules of Professional Conduct as law. For example, proposed Rule 1.2(e) refers to the "rules of professional conduct or other law." The comments include the reference to the "rules of professional conduct and other law." Proposed Rule 1.5(c) refers to a determination of contingent fees as "prohibited by paragraph (d) or other law." It is stretching the lexicon to suggest that the rules of professional conduct are laws. What is really meant is that these may have the force and effect of law because the court will enforce them; but laws they are not.

Proposed Rule 1.12(b) refers to attorneys serving as law clerks to judges, but while there is a difficulty in extending jurisdiction over non-lawyers, I suggest that this be reconsidered to relate also to law students serving as law clerks.

Proposed Rule 1.2(b) states that the attorney's representation of a client does not constitute "* * * an endorsement of the client's political, economic, social or moral views or activities."

It seems that the Court could legimately add there that the attorney does not endorse the legal views either. Trial attorneys hardly have to agree with all of the legal issues involved in a particular case but rather must have a good faith justification for asserting them, whether the attorney's personal view is consistent, oblique, or opposed.

Editorial consistency would be improved if proposed Rule 1.16(a)(4) referring to actions "criminal or fraudulent," were made compatible with the comment, which refers to conduct that is "illegal or violates the rules of professional conduct."

Proposed Rule 2.1 informs an attorney that he may refer not only to the law but also to moral, economic, social, and political factors that are relevant. This is a gratuity since all of these factors have been ingrained in the law since Justice Brandeis.

Proposed Rule 3.3, regarding candor toward the tribunal, has in some of its comments the following:

> In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

The following proposed rule, 3.4, relating to fairness to opposing parties and counsel, provides in the comments that:

> The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

We are dealing only with the jurisdiction of this Court. It seems that rather than referring in the comments to other jurisdictions, in some jurisdictions, or in most jurisdictions, this Court should make a determination of what the law is

and then state it. Otherwise, the rule should be eliminated for failure to resolve what the comments acknowledge as an issue varying from state to state.

A similar resolution of the matter should be made in proposed Rule 1.16, relating to discharge of attorneys, where one of the comments is that "whether a client can discharge appointed counsel may depend on applicable law." If these proposed rules purport to resolve the problem, they should do so. Otherwise, this section has no relevance to what the proposed rules supposedly mean.

The first paragraph of the comments to proposed Rule 6.1 refers to the ABA House of Delegates having formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee. There are many of us who for what we consider profound reasons fail to belong to the ABA or have any confidence in the objectivity of its House of Delegates. It seems to me that we need not refer to that organization to recognize that the profession of law involves a responsibility to the public. If the comments to these proposed rules were to be considered, as a guideline to interpretation, then they are in effect a statement of this Court. I think there is no need to refer to an organization which has no jurisdiction in this State.

DR 1-102(5) is not renewed in haec verba. It bars the lawyers engaging in conduct prejudicial to the administration of justice. The index to the proposed model rules refers to

several new proposed rules. Proposed Rule 3.1 provides that a lawyer shall not bring or defend a proceeding "* * * unless there is a basis for doing so that is not frivolous, which includes the good faith argument for an extension, modification or reversal of existing law." As written, this does not distinguish between whether there is a basis that is not frivolous and which includes a good faith argument or on the other hand whether those are separate elements on a either/or basis. The syntax should be clarified to reflect the Court's intent. Also apparently supplanting the present DR 1-102(A)(5) is proposed Rule 3.3, requiring candor toward the tribunal. Proposed Rule 3.3(a) bars a lawyer from knowingly making (1) a false statement of fact to a tribunal; (2) failing to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; and (4) offering evidence known to be false. "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." One and two refer to facts, and (4) seems to limit the discipline potential to an offer of "material evidence." (d) also refers to "material facts." It may be that some of these paragraphs should be limited to material facts and others just to facts generally, but there does not appear to be any explanation for the difference. Also listed as supplanting DR 1-102(A)(5) is proposed Rule 8.4(b), which makes professional misconduct an attorney's committing a criminal act that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." And (f), knowingly assisting a judge or judicial officer in conduct in violation of applicable rules "of judicial

conduct or other law." These paragraphs seem to be a reasonable updating of the old expressions, except "or other law."

In the absence of definitions, I assume that these roles are not readily admitted against administrative law judges or state officials who have quasi-judicial capacity.

DR 1-102(A)(5) is supplanted by proposed Rule 8.4(d) and (f), and these may be applicable indirectly to administrative law judges through proposed Rule 8.4(e), which makes misconduct an implication of one's ability to influence a government agency or official. However, this should be more precise. This is true particularly in light of proposed Rule 8.4(d), which refers to conduct "prejudicial to the administration of justice." This is arguably unconstitutionally vague.

DR 2-103(A) prohibits among other things the personal and telephonic communications with respect to recommending employment of a private practitioner, bars a lawyer's compensating anyone for recommending the attorney other than public relations or advertising services, and other things. The index refers to the new proposed rule 7.3, which merely bars solicitation by personal or telephonic communication. However, this area should be read in light of DR 3-102(A), which bars sharing legal fees with a non-lawyer except to one's estate or to others after an attorney's death. This is modified in proposed Rule 5.4(a)(3), which provides that a lawyer or a law firm shall not share legal fees with a non-lawyer except that they "* * * may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." The question then is again of syntax, that is whether the

statement that payments may be permitted to non-lawyer employees in a compensation plan as well as a retirement plan; and if that be true, what is meant by compensation other than annual or periodic salary or bonus system. I would read this as allowing, by inadvertent expression, the payment to a non-lawyer employee when it is based on a profit sharing arrangement. The comment purports to have this rule "* * * express traditional limitations on sharing fees." The question is whether it does in fact express the traditional limitation or makes a substantial change. The Preamble indicates that the comment accompanying each rule "* * * explains and illustrates the meaning and purpose of the Rule." While these may be guides to interpretation, the comment in this particular rule does not assist in clarifying just what is meant by the term "compensation."

DR 7-102(A)(5) provides that "in his representation of his client, a lawyer shall not: (5) knowingly make a false statement of law or fact." Ignoring, of course, the sexist reference, which flows all the way through the old rules and comments, it is apparent that this rule is very broad in respect to the representation of a client. The index refers to two proposed model rules. Proposed Rule 3.3(a)(1) bars a lawyer from knowingly making a false statement of fact to a tribunal. It is apparent that this proposed update is very restrictive in making the misstatement of fact only "to a tribunal." The present rule makes it far more expansive in barring one's making a false statement of law or fact "in his representation of his client." Thus, the new rule apparently restricts this applicability only

to the statements made to a tribunal. That proposed rule limits the proscription to false statements of fact. In representing clients, proposed Rule 4.1, a lawyer is barred from making a false statement of fact or law. There is no comment attached to proposed Rule 4.1 to explain either the difference or to its restrictive or expansive potential or to the distinction between the two restrictions, a proscription of false statements of fact to tribunals or a proscription of false statements of fact or law in representing a client.

DR 7-102(A)(6) bars a lawyer in representing a client from creating or preserving evidence known to be or obviously false. The newer version is proposed Rule 1.2(d) which refers to a barring of an attorney's counseling or assisting a client in conduct known to be criminal or fraudulent. The two do not seem to relate to each other. The second reference is proposed Rule 3.4(b), which bars a lawyer from falsifying evidence, counseling or assisting a witness to testify falsely, or offering a prohibited inducement to witnesses. That rule may relate to the current DR.

A uniform system of expressing comments on each proposed rule would be helpful. Many of the proposed rules do not have specific comments tied in to each section or sub-section. Such a comment specifically identifying the purpose of the rule would be helpful. Proposed Rule 1.8 has some sections identified. The aggregate settlement paragraph, 1.8(g), which certainly needs definition, has no comment. Proposed Rule 1.11 has a limited comment referable to various sections. Also with somewhat descriptive comments is proposed Rule 5.1. It would seem that a clarification by the publishing of the views of the committees which worked on these model rules would be particularly illustrative of the

supposedly legislative intent of those bodies. The comments are frequently merely extensions of the generalized principles contained in the proposed rules. Furthermore, while the committee explained the reason for the renumbering, it merely makes research of the history of these rules inordinately complex and time consuming.

The proposed rule suggests to some degree that there is a bureaucracy searching for a mission. The Preamble establishes a statement of philosophy, limits the comments to interpretation guides, eliminates the rule violations as a cause of action, and holds that the "text of each Rule is authoritative." Several of these proposed rules are more indications of philosophy rather than enactments of legal authority with discipline potential. For example, proposed rule 6.1 for pro bono publico service is a pure gratuity which is obviously unenforceable. It purports to allow attorneys to render public interest legal service. It even allows an attorney to provide this service "at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service and activities for improving the law, the legal system or the legal profession, by financial support for organizations that provide legal services to persons of limited means." Lawyers can do that anyway. This whole proposed section should be transferred to the Preamble or some other rule for comment rather than for an enforceable rule.

Proposed Rule 5.1 imposes on "a partner in a law firm" the duty to make reasonable efforts to insure that the firm has "in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." The

second sub-paragraph imposes on lawyers having direct supervisory authority over other lawyers the duty to make reasonable efforts to insure that the other lawyer conforms to the Rules. This is a subtle change from DR 4-101(D), which requires an attorney to exercise reasonable care to prevent the attorney's employees, associates, and others from disclosing secrets of a client; and DR 7-107(J), which requires that an attorney shall exercise reasonable care to prevent the employees and associates from making extra judicial statements that the attorney would be prohibited from making. The proposed rule suggests that one of the partners in a law firm shall take the efforts to give reasonable assurance of compliance with the proposed Rules. The Comment, however, indicates that this probably can be done by reliance on continuing legal education in professional ethics. It would seem obvious that this should be specific as to whether the law firm with each partner involved, or shareholders in a professional corporation, must take personal responsibility; or may all of this be delegated to one person who can rely upon the continuing legal education? The purported importance of proposed Rule 5.1(b), imposing the duty on attorneys having direct supervisory authority, is watered down by the subsection (c), which makes one lawyer responsible for violations by another if the lawyer sought to be held responsible orders or allows or ratifies the conduct or is a partner in a law firm, or has direct supervisory authority, and knows of the conduct but fails to take reasonable remedial action.

CONCLUSION

The regulation of the Bar is a necessary result not only of the history of our profession but of the complexities of modern society. We still seek for judges those whom Moses described as "* * * such as fear God, in whom there is truth, and that hate avarice * * *." EXODUS, 18.21.

The Biblical literature B.C.E. dealt little with lawyers, although the Christian era includes in the Gospel according to St. Luke, 11.46:

> Woe to you lawyers also! because you load men with oppressive burdens and you yourselves with one of your fingers do not touch the burdens.

The Anglo-American tradition of controlling lawyers is traceable to the Middle Ages in England. In those days, the barristers were not officers of the court but were disciplined by the judges who were members of the Inns of Court. Those barristers were regulated with respect to their beards and their style of clothing; they were required to have known chambers of residence and were barred from practicing under someone else's name. At Easter Term, 1567 C.E., there was an inquiry into lawyers and falsities, erasures, contempts, and misprisions. The falsities were defined as:

> Where a man outwardly will set a shew, a face in countenance that he doth well, and truly knowing inwardly and to himself that it is not so, but more subtlety and falsehood, as, for example, if he will sue forth of purpose false process, or wittingly of himself will minister a false and foreign plea, not taking it of his client.

In the 16th Century, Thomas More wrote Utopia, and in Book Two, he spoke as a knowledgeable attorney about the ideal society as follows:

> Furthermore they utterly exclude and banish all proctors and sergeants at the law, which craftily handle matters and subtly dispute of the laws, for they think it most meet that every man should plead his own matter and tell the same tale before the judge that he would tell to his man of law. So there shall be less circumstance of words and the truth shall sooner come to light; whiles the judge with a discreet judgment doth weigh the words of him whom no lawyer hath instruct with deceit, and whiles he helpeth and heareth out simple wits against the false and malicious circumversions of crafty children.

The Bar in the United States imposed on lawyers a variety of duties and obligations, including Canon No. 27 of the New York Bar, 1848, which requires an attorney:

> To counsel or maintain such actions, proceedings, or defences, only, as appear to him legal and just, except the defence of a person charged with a public offense.

In opposing the proposed rules as written either in whole or in some limited respects, I am not attempting to be one of those described in Turner v. State, 8 Okla. Cr. 11, 12, 126 P. 452, 455-6 (1912):

> Judges and lawyers have been educated in and are accustomed to an antiquated system of procedure, and have been taught to look with reverence upon old legal theories, and are thereby unduly biased against any change in legal procedures.

Concern for precision in expressing the rules regulating attorneys is in keeping with the limitations upon judicial interpretations. "A judge must not rewrite a statute, neither to enlarge nor to contract it." FRANKFURTHER, Some Reflections on the Reading of Statutes, 47 Colum. L.R. 527, 533 (1947).

Attorneys subject to discipline are entitled to procedural and substantive due process. In Re Ruffalo, 390 U.S. 591, 551, 88 S.Ct. 1222, 1226 (1968).

The due process necessities devolve upon the Supreme Court because violations of regulations may violate one's right to due process of law. Behagen v. Intercollegiate Conference, 346 F.Supp. 602, 606 (D.C. Minn. 1972). Because the Lawyers Professional Responsibility Board has a non-lawyer on each panel, Rule 4, Rules on Lawyers Professional Responsibility, consideration has to be given as to whether the panels are qualified to rule on the constitutional issues of due process. It would appear that they are not. See In Re Johnson, 341 N.W.2d 282 (Minn. 1983), which indicated, without a specific holding, that constitutionality would not be within the authority of the panel. Garden State Bar Assn. v. Middlesex, 643 F.2d 119, 126 (3rd Cir. 1981), reversed on other grounds, sub nom. Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423, 102 S.Ct. 2515 (1982).

Specificity as a constitutional mandate has several advantages. In Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971), the Court pointed out that

> Courts should require administrative officers to articulate the standards and principles that govern their discretionary decision in as much detail as possible. * * * When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.

Adequate judicial review, therefore, is critical to the specificity of rules and regulations. This adequacy of a judicial review should be as important in administrative law as it is in criminal law. This enables the reviewing court to determine whether the facts support a conviction of the violation of law or regulation. See United States v. Radetsky, 535 F.2d 556, 562 (10th Cir. 1976). This adequacy of review should be

emphasized in the discipline proceeding because "the purpose of disciplining an attorney is not to punish him (sic), but to guard the administration of justice and to protect the courts, the legal profession, and the public." In Re Hanson, 258 Minn. 231, 233, 103 N.W.2d 863, 864 (1960). This is further developed in the sequel to the Middlesex case, where after the Supreme Court of the United States had asserted jurisdiction and defered to the state court, the Supreme Court of New Jersey, In Re Hinds, 90 N.J. 604, 449 A.2d 483, 497 (1982) ruled that the elementary fairness invalidated certain discipline rules except insofar as they would be given prospective effect and added the following:

> In terms of the propriety of sanctions, we are not engaged in the enforcement of the State's criminal laws. Rather, we are addressing disciplinary rules governing the professional conduct of attorneys. Our major concern is the ethics lesson to be extracted from this case and the prophylactic effect of our decision in explaining the appropriate ethics principles. Our purpose is not to punish but to enlighten and improve the profession for the benefit of the public.

The less specific a rule is, the more likely it is that constitutionally it can be given only prospective effect. In the case last cited, the attorney, Hinds, was charged with having violated DR 1-102(A)(5) and 7-107(D), which respectively prohibits lawyers from engaging in conduct prejudicial to justice and making comments reasonably likely to interfere with a fair trial. The Court interpreted DR 7-107(D) to include attorneys who cooperate with the trial and are therefore associated with counsel for the purpose of that rule. The Court held that the reasonable likelihood test was constitutionally adequate to withstand a challenge on overbreadth. 449 A.2d at 494. That reasonable likelihood, however, required a showing by clear

and convincing evidence. Ibid at 495. The Court then went on to consider whether to apply the standard to Hinds, who was not an attorney of record. The Ethics Committee had held that while he was not an attorney of record, he was subject to violation. The Court agreed with that interpretation by its opinion. "The term is, therefore, adequate to inform and forewarn attorneys who potentially may be subject to the strictures of the rules. Consequently, the rule is not impermissibly vague * * *." Ibid at 496. The Court, however, held that the Ethics Committee had conducted no hearing on the issue of the attorney's connection with the defense. Furthermore, and the primary reason for refusing to apply DR 7-107(D) "

> * * * is based on elementary fairness. This is the first time we have addressed the question of whether an attorney in Hinds' position would be considered 'associated with' a case for purposes of falling within the rules coverage. Furthermore, as already pointed out, this decision also constitutes the first time we have explained the balancing test to be applied for determining whether the extrajudicial speech of an attorney associated with an on going criminal trial is reasonably likely to interfere with a fair trial. * * * We therefore deem it appropriate that DR 7-107(D) be applied prospectively only and that Hinds be given the benefit of this ruling. Ibid at 497.

The Court referred to DR 1-102(A)(5) as giving "* * * the appearance of an aspirational standard, rather than a disciplinary rule." The Court added,

> Courts have held that a broad disciplinary rule may acquire constitutional certitude when examined in light of traditions in the profession and established patterns of application. Ibid at 497-498.

The Court held that that particular rule had been applied generally in situations involving "conduct flagrantly violative of accepted professional norms. [Citation]. Thus, the rules broad language proscribing acts 'prejudicial to the administration

of justice' takes on sufficient definition to pass constitutional muster, given those prior judicial determinations narrowing its scope to particularly egregious conduct." Ibid at 498. The court exonerated Hinds and made the rules prospective and pointed out that with respect to its own decision, "we view the decision itself as a sufficient explanation of the ethical responsibility of attorneys and find no need for punishment." Ibid at 500. Thus, the less specific a rule, the more judicial interpretation is necessary.

For vague statutes or regulations controlling lawyers, a limiting construction must be applied before prosecution is begun. Woll v. Kelley, 409 Mich. 500, 297 N.W.2d 578, 597 (1980). The reason for the prospective application, or for an interpretation before prosecution, is that "unless the trier of fact has been apprised of the limiting construction, it cannot properly be said that either its assessment of the evidence or its finding was guided by such construction." Ibid at 598.

Lawyers ought not to be disciplined for rules that are "so highly debatable." Arden v. State Bar of Cal., 341 P.2d 6, 11 (Cal. 1959). This Court has interpreted statutes controlling lawyers and made interpretation only prospective. In Re Greathouse, 189 Minn. 51, 248 N.W. 735 (1933); In Re Tracy, 197 Minn. 35, 266 N.W. 88, 91 (1936).

Vagueness in administrative regulations is as prohibitive as vagueness in penal statutes. Bence v. Breier, 501 F.2d 1185, 1188 (7th Cir. 1974).

The Court has a constant conflict in balancing the need for control of lawyers and the need for informing attorneys what is required. Although the Canons have not been added in the published proposed Model Rules, one law professor some years ago stated that "Canons are as much use to a practicing attorney in the courtroom as a Valentine card would be to a heart surgeon in the operating room." DORSEN AND FRIEDMAN, Disorder in the Court, Pantheon Books, 1973, p. 140. In conflict with the vagueness problem is the tendency to rigidify attorneys tactics. As pointed out in People v. Kurz, 35 Mich. App. 643, 192 N.W.2d 594, 599 (1971):

> There is no room in our system of justice for inflexible rules of conduct. In applying the generally observed norms of conduct, a judge must make a balanced value judgment case-by-case. This cannot be avoided by a mechanical approach, with rigid commandments, inflexible administration and automatic contempt citations for those who stray across the line.

An earthier description of the problem found in Kentucky State Bar Association v. Taylor, 482 S.W.2d 574, 582-83 (1972):

> If the canons of ethics adopted for the legal profession were tested under the 'void for vagueness' doctrine which has spelled the doom of various breach of peace and disorderly conduct laws throughout the country it is doubtful that they would survive this case. What is 'fair and honorable,' 'a respectful attitude,' 'candor and fairness,' or 'chicane' must depend very largely on the subjective point of view of the person or persons making a judgment after the fact. Obviously we do not all have the same sense of propriety. It is interesting to note, for example, the chairman of the tribal committees comment that 'you all live in a legal jungle down here.' * * *
>
> It may well be that the standard of decorum usually prevailing in the sedate precincts of chancery should also be observed by the jungle-fighters in the pit of police and criminal courts, but it would be somewhat less than realistic to assume that the advocate who practices exclusively in one of these two worlds will have the same conception of what is expected of him as the lawyer who confines his

> practice to the other. We do not mean to suggest that there should be two different sets of rules. On the contrary, there can be only one. But when the rules are loosely couched in terms of high principle, as are the canons, there is room for differences of opinion, hence the distinct possibility that they do not provide sufficiently explicit 'no trespassing' signs for those who may approach the invisible line of proscription.

The Court, in promulgating and enforcing rules on conduct of attorneys,is faced with the difficulty of conflicting needs and attitudes. The public must be assured that the courts have some powers to protect clients. The court, of course, is interested in preserving the procedures that are essential for a fair administration of justice. Lawyers have rights; and the constitutional principles require that rules and regulations attain a fixed and certain content to enable a constitutional enforcement. See Vorbeck v. Schnicker, 660 F.2d 1260, 1263 (8th Cir. 1981), cert. den. 455 U.S. 921. The Court ought not to assume the responsibilities that are more efficiently and more fairly assumed by clients in civil litigation against their attorneys or in prosecutors in enforcing penal statutes against attorneys. The public's confidence will always be affected by the appearance which attorneys make and the impressions which the public perceives. Perhaps we are still considered along the lines discovered by former Chief Justice Sheran and Timothy J. Baland, in their article, The Law, Courts, and Lawyers in the Frontier Days of Minnesota: An Informal Legal History of the Years 1835 to 1865, 2 William Mitchell Law Review 1, 20 (1976), where the authors report the description in 1849 of the attorneys at the Stillwater: "The role of attorneys is large for a new country. About 20 of the lankest and hungriest description

were in attendance."

Whatever their perception, by the public or by the courts, regulation of attorneys involves subtle symbolism and constitutional rights. In legislating for future conduct, the Court is dealing in an area different from the usual, where the courts resolve conflicts which have already occurred. The use of terms and the prescription for procedures were a constant concern of former Chief Justice Cardozo, who wrote in Mr. Justice Holmes, 44 Harvard Law Review 682 (1931), in discussing Justice Holmes:

> No one has been able to combat more effectively than he the repression of a formula, the tyranny of tags and tickets. Is it a question of the competence of the legislature to respond by novel legislation to the call of an emergent need? Fettered by the word, we are too often satisfied to say that competence exists if it can be brought within a cliche, 'the police power,' of the state; and at home in the protective phrase, we settle back at peace. Is it a question of the quality of the need, the pressure of the emergency, that will bring the power into play? We say the need must have relation to an activity 'affected with the public interest'; and again at home in the protective phrase, we are happy in the thought that while we keep within the shelter there can come no damage to the state. The familiar form beguiles into an assurance of security. Danger as well as deception may indeed be lurking ill conceived, danger as well as deception and a false appearance of exactitude. The threat is too remote to jolt us out of the deeply-cloven ruts. In the end we may find we have been sinking a little deeper than we willed. For a cliche is not a barrier to power intent upon its aims, though sluggishness of thought may lead us for a season to act as if it were. A label is not a dyke or dam that will repel the onset of the flood--the rush of an emergent need--though it may breed a sense of safety until the flood has swept beyond. All this the great master has been quick to see. He has seen it when, paternally indulgent, he has been willing for the hour to let the cramping phrases pass, to let them pass with a word of warning that the need may yet arrive to throw them over or to expand them, to pull out of the rut at whatever cost of pain and effort. The repetition of a catch word can hold analysis in fetters for 50 years or more.

Justice Cardozo succinctly states the potential for deception by broad statements that appear to resolve today's problems but may not be so effective for a long period. The Court should keep in mind that there are other remedies in the criminal law and damage litigation fields. The Court should not overly regulate in a field where the vast majority of the members act professionally with honor and integrity, a vast majority who ought not to be entangled with generalized terms which give to the enforcing agency subjective discretion rather than objective criteria.

Respectfully submitted,

By: 

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U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

21 SEP 1984

Honorable Clement C. Torbert, Jr.
Chief Justice, Supreme Court
of Alabama
Post Office Box 218
Montgomery, Alabama 36101

Re: American Bar Association Model Rules of Professional Conduct Concerning Fees, Solicitation, and Advertising

Dear Chief Justice Torbert:

I am writing in anticipation of the possibility that the Court may soon be considering adoption of the Model Rules of Professional Conduct recently promulgated by the American Bar Association (hereafter "the Model Rules"). In any such rulemaking process, the Court will be balancing a number of important factors in fashioning rules that govern the provision of legal services to the state's citizens. With the hope of assisting the Court in this process, the Antitrust Division wishes to express its concerns about certain provisions of the Model Rules governing fees, solicitation, and advertising, which we regard as anticompetitive. We also suggest revisions for your consideration that we believe would minimize such concerns.

In the preamble to the Model Rules, the drafters recognized that "[t]he profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." We think that portions of the Model Rules governing advertising and solicitation (Rules 7.1 to 7.4) do not meet this responsibility because they would restrict the flow of useful information from attorneys to consumers of legal services. 1/ These provisions would, with limited exceptions, prohibit or discourage all oral solicitation, all written solicitation regarding a particular matter, communications regarding an attorney's record, client endorsements and certain

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1/ The Department of Justice expressed its concerns over the draft rules prior to their adoption by the ABA . See letter of Assistant Attorney General Jonathan C. Rose to Robert J. Kutak, Esquire, dated July 23, 1982.

kinds of comparisons, and all communications stating that a lawyer concentrates or specializes in particular fields. We believe these rules, if adopted, would adversely affect competition and reduce consumer welfare. In addition, Model Rule 1.5, the provision on fees, might be construed to proscribe less than "reasonable" fees. This rule could adversely affect price competition among lawyers and thus make effective legal representation less affordable.

Fees
(Rule 1.5(a))

Rule 1.5(a) would require that "[a] lawyer's fees shall be reasonable." 2/ This language, which replaces the former Model

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2/ The rule provides in part:

> RULE 1.5 Fees
>
> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Code provision that prohibited "a clearly excessive fee," may lead lawyers to infer that the new Rule prohibits "unreasonably" low fees. Such an interpretation would adversely affect price competition and discourage attorneys from offering their services for fees that are lower than those prevailing in their locality.

The Comment and Notes to Rule 1.5(a) in an earlier ABA draft of the Model Rules indicated that no substantive change from the former Model Code was intended in this revision. As ultimately adopted, however, Model Rule 1.5(a) and its accompanying Comment contain no such disclaimer and thus do not preclude the possibility that the Rule might be construed by lawyers as requiring them to charge "reasonably" high fees. Moreover, the Model Rule's eight subprovisions detailing factors that should be taken into account in setting fees may be read to suggest that lawyers' fees should be uniform. In context, Rule 1.5 (a)(3) seems to imply that fees should be similar to those charged by competing attorneys in the same locality. Such an interpretation could tend to discourage price competition among traditional practitioners; it also could restrain competition from legal clinics and other non-traditional providers of legal services. We therefore suggest that the Court consider either that Rule 1.5(a) be rewritten to provide that: "A lawyer's fee shall not be excessive," or that accompanying commentary make clear that only excessively high fees could be deemed "unreasonable" within the meaning of this rule.

Advertising and Solicitation (Rules 7.1-7.4)

Our concerns with the provisions restricting advertising and solicitation arise from the basic economic principle recognized in Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977):

> "[C]ommercial speech serves to inform the public of the availability, nature, and price of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." (Citation omitted)

The importance of commercial speech to the provision of legal services is implicitly recognized in commentary to the Model Rules that states, "[T]he public's need to know about legal services . . . is particularly acute in the case of persons of moderate means who have not made extensive use of legal

services."3/ Despite this recognition, as a practical matter, the Model Rules, in our view, would, if adopted, unnecessarily restrict the content of and the methods by which lawyers may convey such information. The rules are worded and interpreted so as to go beyond proscribing false or misleading communications and misleading or overreaching practices, to prohibit truthful, non-deceptive, non-overreaching communications and practices that can contribute to better-informed selections of counsel by those in need of legal services.

Rule 7.1

Though we do not object to Model Rule 7.1, which generally provides that communications, including advertising and solicitation, concerning a lawyer's services, shall not be false or misleading, we believe the Comment accompanying the rule is unnecessarily restrictive. Potential clients often solicit testimonials and endorsements from an attorney's present and former clients and seek information about an attorney's prior experience. The Comment states, however, that client endorsements and references to an attorney's record would ordinarily be precluded under this Rule as presumptively false or misleading on the basis of creating unjustified expectations. In our view, this stricture is overbroad because it appears to condemn most endorsements and record references regardless of their content or their context in a communication. Although not a flat prohibition, the Comment may tend to discourage useful, non-deceptive communications. We believe that client endorsements and information about an attorney's record, particularly when combined with an appropriate disclaimer, are not likely to create unjustified expectations in consumers. Accordingly, we urge the Court not to adopt the restrictive interpretations contained in the ABA's Comment.

Rule 7.3

Model Rule 7.3 prohibits a lawyer from initiating communications with prospective clients either in-person, over the telephone, or by mail except in certain very limited circumstances:

> RULE 7.3 Direct Contact with Prospective Clients
>
> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise,

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3/ Comment to Rule 7.2 Advertising

> when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

The Comment to this rule contends that this stringent restriction is necessary because direct solicitation is "fraught with the possibility of undue influence, intimidation, and over-reaching." We recognize that restrictions on certain kinds of solicitation by lawyers may be necessary to deter those lawyers who would otherwise seek to represent persons whose physical, emotional, or mental states prevent them from exercising reasonable judgment in employing a lawyer. See, e.g., Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978). And of course we have no objection to prohibitions on false, deceptive, or misleading solicitation. We believe, however, that the rule would operate to prohibit solicitation that, under most circumstances, would be unlikely to engender deception or overreaching. Therefore, we believe, the rule would restrict the flow of useful information to consumers of legal services. Indeed, as drafted, the rule generally inhibits those most in need of information about the availability of legal services from receiving it: The rule forbids both written and oral communications directed to persons "known to need legal services of the kind provided by the lawyer in a particular matter." Moreover, the rule curtails the kind of communications that may be the most useful and efficient for conveying information about professional services--face-to-face conversations or written materials that focus on the prospective client's particular legal problem.

For example, the rule could restrict the offering of legal services to persons who are known to be buying or selling a house, starting a business, or contesting a contractual dispute. It could prohibit the offering of legal services to businesses or local governments regarding particular matters. Solicitation in such circumstances seems unlikely to be intimidating or overreaching. The rule may also prevent significant savings in litigation by prohibiting a lawyer who already represents a client in a controversy from contacting other persons having similar interests. A resultant joint representation might enable the lawyer to represent the clients more efficiently and allow them to enjoy a reduced pro rata fee.

To the extent "undue influence, intimidation and over-reaching" are potential problems, a less restrictive rule would, we believe, adequately protect consumers while enabling them to receive the information that they will likely need and want concerning the price, quality and availability of legal services. We suggest that the Court consider the following:

PERSONAL CONTACT WITH OR WRITTEN
COMMUNICATION TO PROSPECTIVE CLIENTS

A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(a) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person cannot exercise reasonable judgment in employing a lawyer;

(b) the person has made known to the lawyer a desire not to receive communication from the lawyer; or

(c) the lawyer reasonably should know that the communication involves coercion, duress, or harrassment.

This rule is substantially modeled after provisions adopted by the Virginia Supreme Court in 1983, and by the District of Columbia Court of Appeals five years ago. It prohibits written or oral contacts in circumstances where a consumer's judgment is or is likely to be impaired without imposing an unnecessarily broad prohibition that may leave consumers uninformed about needed legal services or make it more difficult to search for quality services at lower costs. After checking with Bar Counsel in the District of Columbia and Virginia, we are aware of no evidence that their adoption of such rules has led to solicitation fraught with "undue influence, intimidation and over-reaching" of the public.

Rule 7.4

Model Rule 7.4 regulates lawyers' communications concerning their areas of practice and specialization. Information that a lawyer has limited his or her areas of practice, concentrates in particular fields, or specializes in certain types of practice is likely to be extremely useful to consumers of legal

services. Such information would assist consumers in deciding which lawyers they may wish to approach about providing a particular legal service and which lawyers they prefer not to consider. In general, there is no apparent reason for prohibiting dissemination of truthful information about lawyers' efforts to specialize or even claims of specialization since such communications contain useful consumer information and reduce search costs.

Model Rule 7.4, however, generally prohibits explicit or implicit communications regarding attorneys' specialization and expertise while permitting them to "communicate the fact that the lawyer does or does not practice in particular fields of law." 4/ The Comment to this rule adds that "stating . . . that the lawyer's practice 'is limited to' or 'concentrated in' particular fields is not permitted [because] [t]hese terms have acquired a secondary meaning implying formal recognition as a specialist."

It is not clear to us that the terms "practice 'is limited to' or 'concentrated in'" will be broadly interpreted among laymen as implying that a lawyer has obtained "formal recognition as a specialist." We respectfully submit that consumers will be adequately protected if statements of

---

4/ It provides:

> RULE 7.4 Communication of Fields of Practice
>
> A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:
>
> (a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;
>
> (b) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and
>
> (c) (Provisions on designation of specialization of the particular state).

specialization are governed only by the general requirements of Rule 7.1 that prohibit false or misleading communications. 5/

* * *

In conclusion, we support the adoption of rules that prohibit false or deceptive communications by lawyers. In our view, however, the Model Rules are overly broad. They would restrict the flow of information that is likely to assist consumers in deciding when, how, and from whom to obtain legal services. We respectfully urge that the Court, in considering adoption of the Model Rules, weigh whether they would discourage low fees and restrict the dissemination of useful information to consumers of legal services.

Sincerely,

J. Paul McGrath
Assistant Attorney General
Antitrust Division

5/ Even when a state has adopted a formal specialty - certification program for lawyers, we believe that practitioners who are de facto specialists in areas not covered by the program should be free to communicate truthful claims of specialization or expertise. Specialists who could obtain, but have not obtained, formal certification of their specialization should be allowed to advertise their specialization if they further disclose that they lack formal certification. "[T]he remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation." In re R.M.J., 455 U.S. 191, 203 (1982). With such a disclaimer, there is little likelihood of consumers being deceived in a way that the rule appears to be designed to prevent.

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M 3

January 3, 1985

Clerk of Appellate Courts
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Re: The Proposed Minnesota Code of Professional Responsibility

Enclosed are ten copies of a supplemental statement in connection with the Proposed Minnesota Code of Professional Responsibility. Pardon me for this late submission, but I will ask the Courts on Friday for leave to file this proposal.

Very truly yours,

Patick J. Foley

PJF/jwp

Clerk said to accept & file 1-3-85 DLW

1-3-- copies distributed by Peggy

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

IN RE PROPOSED MINNESOTA CODE
OF PROFESSIONAL RESPONSIBILITY

SUPPLEMENTAL STATEMENT OF PATRICK J. FOLEY

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TABLE OF AUTHORITIES

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

Re: Adoption of Code of Professional Responsibility

Patrick J. Foley hereby submits the following additional observations.

PROPOSED ELIMINATIONS

It is hereby suggested that the Court eliminate or radically revise the following proposed rules:

> Rules 1.1; 1.2(b); 1.2(c); 1.5(a); 1.8(g); (already discussed in principal submission); 2.1; 6.1 (already discussed in principal submission); 6.4; and 8.1.

ARGUMENT

Rule 1.1. Competence. This proposed rule provides that a lawyer shall provide competent representation. It is inconceivable that the Court wants to review a file wherein the Lawyers Professional Responsibility Board determines the competence of an attorney in conflicting, complicated cases. The Ad Hoc Committee stated that

> The Model Rules affirmatively state duties of competence * * *, diligence * * *, communication * * *, and expediting litigation * * *.

If the diligence, communication, and expediting are not violated, it is difficult in the absence of more precise definitions to understand just how the Court will demonstrate competence other than as in a case of civil litigation for damages resulting from malpractice. The goal of this rule is good, but it

may as a practical matter be unenforceable. This is particularly true because of the watered down responsibilities as described in the comment.

Rule 1.2(b). This rule provides that a lawyer's representation "* * * does not constitute an endorsement of a client's political, economic, social or moral views or activities."

These are apparently discipline rules whose violation may invoke penalty or punishment. This particular proposed rule has no sanctions that are enforceable. It may be appropriate as a comment, but it ought not to be a discipline rule.

In the comment, the last sentence of the first paragraph reads: "Law defining the lawyers scope of authority in litigation varies among jurisdictions." This could be very comfortably eliminated because it adds absolutely nothing.

Rule 1.2(c). This rule provides that a lawyer may limit the objectives of his representation. This is unenforceable because it may not be violated and is more appropriately described as a part of a comment.

Rule 1.5(a). This rule provides that lawyers' fees shall be reasonable. This has been discussed in the principal submission but deserves reiteration. Furthermore, the comments refer to a twisted reference of the relationship. Throughout the comments, there is a variance between the "attorney-client" relationship and the "client-lawyer" relationship. The latter, of course, must be a recent development in the legal literature, and there appears to be no good editorial reason for adding the twisted, clumsy description as a "client-lawyer" relationship.

Rule 1.8(g). This reference to aggregate settlements has been thoroughly discussed in the principal submission.

Rule 2.1. The first sentence suitably describes the attorney's duty to exercise independent professional judgment. The second sentence should be eliminated because it purports to authorize an attorney to refer not only to the law but to other considerations, such as moral, economic, social, and political factors. Attorneys need no authorization from this Court to do so. It is difficult to understand how a violation of this could be described in an appropriate discipline charge. There is no need for the second sentence of this proposed rule.

Rule 6.1. This pro bono authorization is totally unnecessary. It has been discussed in the principal submission. Attorneys have their own constitutional right to discharge responsibilities of public legal interest. A violation of this would be difficult to imagine. Because we have the right, and because it is unimaginable how one would frame a charge alleging a violation of this rule, it ought not to be a discipline rule. It could be added as a suitable philosophical statement to an introductory statement.

Rule 6.4. This rule authorizes an attorney to be associated with a legal reform organization although the object of the reform may affect the interest of a client of the lawyer. This requires a disclosure, but it does not say to whom, of the possibility that a client may be materially benefited by a decision in which the lawyer participates. This does not state to whom the disclosure must be made. It does not define the level of likelihood of

material benefit to be acquired by the client, nor the degree of benefit. It would not disturb the protection of the public or the protection of clients if we were to eliminate this rule or radically revise it.

Rule 8.1. This rule has some very serious constitutional dimensions. The acceptable portion provides that an applicant or a lawyer in connection with a bar application shall not make a knowingly false statement or fail to disclose necessary facts or "knowingly fail to respond to a lawful demand for information from an admissions * * * authority * * *."

The constitutional problems develop when the rule is read in a truncated form as follows:

> * * * a lawyer * * * in connection with a disciplinary matter, shall not * * * knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority * * *.

The comment indicates that

> This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions.

This, of course, excludes the rights and privileges that one may have under the First and Fourth Amendments to the United States Constitution and corresponding provisions of state constitutions; and it entirely eliminates a claim of privilege on other grounds. It purports to restrict the obligation a response "to a lawful demand." What is lawful may not at that point be immediately clear.

This rule is derived from the proposed Rule 8.1 as applied to discipline demands and Rule 25 requires an analysis at some

length. At present, neither Rule 25 nor Rule 8.1 protects an attorney for objecting to the directions of the Director to answer interrogatories which have been presented to the attorney although they are not authorized by the Rules on Lawyers Professional Responsibility. The rules do not provide for any objections, constitutional or otherwise. The panel controlling the charges is not qualified to rule on constitutional issues. Johnson v. Director of Professional Responsibility, 341 N.W.2d 282, 283 (Minn. 1983). The rules provide that a layman be on the panel. Rule 4(d), RLPR. There is no indication that there is any possibility of protecting legitimate objections short of a special ruling by this Court.

In the absence of an effective means of controlling these issues, and resolving them with objectivity, there is no way by which Rule 25 or proposed Rule 8.1 can constitutionally be enforced. For instance, if the Director persists in requesting responses not authorized by the rules, the attorney will have to decide whether to comply with an unauthorized request or object to it and face discipline under Rule 25 or proposed Rule 8.1.

The Supreme Court could issue a Rule 8.1 consistent with due process. All the Court would have to do is to consider the civil procedures for enforcement of discovery. Interrogatories, requests for admissions, and depositions are all enforceable under Rule 37, Rules of Civil Procedure. Rule 37b provides for enforcement, but even that procedure requires that Rule 37 must be read in light of the provisions of the Fifth Amendment due process

protection. Societe Internationale, Etc. v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094 (1958). See also Brown v. McCormick, 608 F.2d 410, 414 (10th Cir. 1979); Baker v. Limber, 647 F.2d 912, 918 (9th Cir. 1981). The court could write an intelligible rule that enables the attorney and the board to obtain protection and also enable the director to enforce reasonable requests. It would appear obvious that the due process approach here would be to provide a rule that the director may seek a court order directing the attorney to respond to certain requests and that upon failure to comply with the court order, the attorney could then be held guilty of unprofessional conduct. There are no procedural protections as Rule 8.1 is presently constituted, and that makes the defect fatal.

1. Minnesota cases where the trial court was a referee.

The Minnesota tradition was to have matters referred to a district judge as a referee. See In Re Chmelik, 203 Minn. 156, 280 N.W. 283 (1938); In Re Breding, 188 Minn. 367, 247 N.W. 694 (1933). If a trial court were in charge of ruling on the propriety of requests for discovery and the exercise of objections whether constitutional or otherwise, it would be a procedure consistent with due process of law. When there is no process of protecting the attorney's rights, due process is lacking. The procedure is fatally defective.

2. Cases involving non-cooperation with clients.

One of the basic traditions of the legal profession is that there must be communications with the client. Indeed, that is the sole premise upon which the attorney client privilege is

predicated. Some cases involve a failure to cooperate with the client. In Re Gurrley, 184 Minn. 450, 239 N.W. 149 (1932); attorneys assume that a failure to communicate with the client may result in such "unenviable record of discourtesy" In Re Gurrley, 239 N.W. at 150 that would justify discipline.

3. Non-cooperation with the Board.

Some cases of non-cooperation with the Board justifies discipline. We have no quarrel with those authorities. In Re Minor, 658 P.2d 781 (Ala. 1983) involved filing a formal charge with a request to respond, and the attorney's failure to do so. The request was repeated, and Minor promised to respond but did not. She excused herself later for an extended deposition trip but actually included a vacation. That was a legitimate claim that the attorney failed to cooperate. In State Bar of Nevada v. Watkins, 655 P.2d 529 (Nev. 1982), the attorney not only failed to cooperate with the client by responding to inquiries but failed to respond to the grievances sent by the appropriate discipline board. The court pointed out that an attorney has a duty to cooperate in investigations, and I agree. In In Re Del H. Clark, 99 Wash. 2d 702, 663 P.2d 1339 (1983), the attorney was charged by the state discipline board but did not respond to it or file a brief on his behalf or appear for oral arguments. That can be a legitimate basis for failing to cooperate with the investigation. In Re Rowley, 329 N.W.2d 923 (Wis. 1983), he was charged with having violated the rule requiring a response to investigative board inquiries. He did not respond to a second letter, and then to a further request, or to a certified letter. He finally appeared at a conference. He certainly did not cooperate.

4. The Cartwright suggestion has not been followed.

This Court's opinion in Cartwright, 282 N.W.2d 548 (Minn. 1979) produced Rule 25. However, it did not produce very well. This Court had earlier pointed out, In Re Rerat, 224 Minn. 124, 28 N.W.2d 168 (1947) that:

> Although the exercise of the court's disciplinary jurisdiction is not to be encumbered by the technical rules and formal requirements of either criminal or civil procedure, nevertheless, in the conduct of a disciplinary inquiry by the court, it is essential that the requirements of due process of law be observed, and to this end the charges of professional misconduct, though informal, should be sufficiently clear and specific, in the light of the circumstances of each case, to afford the respondent an opportunity to anticipate, prepare, and present his defense. It goes without saying that a proceeding which may result in depriving a person of the right of following a profession to which he has dedicated his life is a serious matter. It deprives him of his established means of livelihood. He is entitled to a fair and impartial hearing and to a reasonable opportunity to meet the charges brought against him. 28 N.W.2d at 173.

Due process of law protected that lawyer. In Re Rerat, 227 Minn. 248, 35 N.W.2d 291 (1948).

South Dakota has reaffirmed due process requirements of attorney's discipline proceedings. In Re Kunkle, 88 S.D. 269, 218 N.W.2d 521, 527 (1974).

Then we get to Cartwright. In Re Cartwright, 282 N.W.2d 548 (Minn. 1979) involved action against the attorney, and the matter was referred to a district judge for a hearing. The charge was a lack of cooperation before the Board in its investigation. Cartwright had made repeated failures to respond to inquiries of the Board's representative in violation of DR 1-102(A)(5) and DR 1-102(A)(6). Cartwright was warned and had a right to appeal that

warning. He refused to respond to the Board's inquiry as to a second complaint. He then told the trial court referee that he had no intention of responding to the Board's inquiries. Cartwright followed up and promised to forward certain information but refused to do so. He persisted in his refusal to respond to inquiries in violation of the aforementioned discipline rules. He later on made an after the fact rationalization for the repeated failure to respond. All of this was of course before Rule 25. The violations were with respect to specific discipline rules, those referring to conduct prejudicial to justice, conduct adversely reflecting on one's fitness to practice law, and dishonesty, fraud, deceit, and misrepresentation. That seemed to be enough at the time to effect discipline. However, this Court then quoted Court Rules for the State of Washington and recommended to the Lawyers Professional Responsibility Board that it "* * * draft such a rule for submission to this court." After the drafting and submission, this Court issued a different type of rule. It is critical for an understanding of this matter that, however defective the Washington court rule was, the one that this Court issued has less protection and is more unconstitutional and is not covered by proposed Rule 8.1.

The Washington rule, quoted in Cartwright, 282 N.W.2d at 552 as well as In Re Clark, supra, 663 P.2d at 1341, provided that the attorney had an obligation to cooperate with the discipline board "* * * subject only to the proper exercise of his privilege against self-incrimination where applicable * * *." It also provided that the duty included appearing before the committee.

However, as it evolved through this Court, Rule 25 did not include that caveat protecting an attorney, did not protect any other privilege or objection, and furthermore obligated the attorney to appear for conferences and hearings. Thus, Washington was not followed, Cartwright was not followed, and we now have a rule that is even more vague and less protection than Washington. We do not even know whether Washington provided for constitutional protections at that early stage. Obviously it did not because of Miller v. Washington State Bar Association, 691 F.2d 430 (9th Cir. 1982), which pointed out that the federal courts had jurisdiction because the state court had no remedy to protect the attorney's objections. Thus, if we were to follow literally the Washington procedure, and there is no evidence that we should not, there is no procedure in Minnesota for the protection of the attorney under the rule requiring cooperation. This Court should revise the rule and procedure to foreclose federal intervention.

5. Rule 25 and proposed Rule 8.1 are overbroad.

Rule 25, RLPR, and proposed Rule 8.1 are unconstitutionally vague in violation of Minnesota Constitution, Article I, Section 7, which provides for due process of law; and on the Fifth and Fourteenth Amendments to the United States Constitution.

The practical difficultues involved in interpreting Rule 25 are enormous. There are no standards by which an attorney may determine cooperation. There is no description of who makes the determination of whether the attorney is cooperative. There is no provision for evaluating an attorney's objections to any requests under Rule 25 and Rule 8.1; and it would appear from a plain

reading that if the request be valid, and reasonable, or lawful, the Director's allegation of uncooperativeness would appear to be sustained. This wreaks with due process problems.

The present characteristics of Rule 25 appear to vest the charging and final determining power in the Director, who would make lawful requests, determine that they are lawful, and conclude that a failure to respond is uncooperativeness. This merging of various powers and responsibilities into the Director should not be countenanced. This Court many years ago pointed out that "the tendency to sacrifice established principles of constitutional government in order to secure centralized control and high efficiency in administration may easily be carried so far as to endanger the very foundations upon which our system of government rests." State Ex Rel Young v. Brill, 100 Minn. 499, 111 N.W. 294 and 639, 640 (1907).

Vagueness is inherently conflicting with due process of law. An analogous problem developed in Juster Bros., Inc. v. Christgau, 214 Minn. 108, 7 N.W.2d 501 (1943), where there was litigation over the state's division of employment and security and its fixing of certain rates of contributions to unemployment compensation due from the employer. The court pointed out:

> The due process of law clauses of our state and federal constitutions are 'standing guarantee[s] of substantial justice, and prevent such caprice or arbitrary action as would prevent a litigant from having a substantially fair trial. The requirement of due process means opportunity for a hearing, i.e., opportunity to be present during the taking of testimony or evidence, to know the nature and contents of all evidence adduced in the mattter, and to present any relevant contentions and evidence the party may have. * * * While a statute may confer upon an administrative board exemption from rules of evidence or procedure, it cannot authorize exemption

> from the due process clause, which is a permanent safeguard against the recurrence of abuses such as characterized by the Court of 'star chamber.' * * *
>
> The observance of the constitutional 'due process' requirement is as important in administrative law as elsewhere * * *. 7 N.W.2d at 507. * * *

This Court has long held, Lee v. Delmont, 228 Minn. 101, 36 N.W.2d 530, 538 (1949) that:

> If the law furnished a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon those facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers, the discretionary power delegated to the board or commission is not legislative.

The essence of non-delegability is that the legislative power must be created with precise standards for the administrator to carry out and for the persons affected by it to comply. In legislating rules and codes, this Court is acting in a legislative function. Rapp v. Committee on Professional Ethics and Conduct, 560 F.Supp. 1092, 1097 (D.C. Iowa 1980). Thus, it would appear as a practical matter that the Court's legislative delegation of powers to the Lawyers Professional Responsibility Board is a legislative function that as a constitutional matter, this Court's delegation must comport with the concept of due process of law.

Justice Powell in Smith v. Goguen, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 1247 (1974) stated in regard to the due process doctrine that:

> The subtle principles of that doctrine require no extensive restatement here. The doctrine incorporates notions of fair notice of warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'

Justice Douglas held that "vague laws in any area suffer a constitutional infirmity." Ashton v. Kentucky, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410 (1966). In dealing with an ordinance making criminal a failure to comply with a lawful order of a police officer, it was held, "that kind of law bears the hallmark of a police state." Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91, 86 S.Ct. 211, 213 (1965).

The vagueness is indicated by the purported duty of an attorney to respond "to a lawful demand." It does not describe what the lawful demands are, or what makes them lawful. It leaves the attorney to the risk of cooperating in conformity with the rule, but it leaves to the Director the discretion to define what the lawfulness is and whether to file charges for lack of response. It fails to provide for good faith defenses or objections, except perhaps by hindsight, other than the Fifth Amendment.

Judge Diana E. Murphy in United States Jaycees v. McClure, 534 F.Supp. 766, 772 (D.C. Minn. 1982) pointed out that "* * * an enactment is void for vagueness if its prohibitions are not clearly defined, or if it does not give a person of ordinary intelligence a reason to know what is prohibited."

The classic overbreadth decision invalidated a discipline rule which prevented advertising by attorneys. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977).

The Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 1194 (1972) described the constitutional problem of vagueness in an ordinance as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive values of basic first amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' 408 U.S. at 108-109, 92 S.Ct. at 2298-2299.

An anti-solicitation statute was struck down in Woll v. Kelley, 409 Mich. 500, 299 N.W.2d 578, 585 (1980) where the court said:

> It is especially important that a criminal statute provide fair warning of the conduct proscribed so that persons affected can conform their conduct to the statutory requirement.

In Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1360 (1964), the Supreme Court struck down a Washington State statute which imposed an oath by which a person swore that he was not subversive. The court there said:

> The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed. The teacher who refused to salute the flag or advocated refusal because of religious beliefs might well be accused of breaching his promise. 377 U.S. at 371, 84 S.Ct. at 1322.

The court specifically pointed out that a prosecutor's sense of fairness would not be sufficient to sustain the oath because there was a hazard of being prosecuted for knowing but guiltless

behavior, 377 U.S. at 373, 84 S.Ct. at 1323, because "It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." 377 U.S. at 374, 84 S.Ct. at 1324.

Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377 (1917) has pointed out that disbarment proceedings are quasi-criminal and require due process of law in regard to notice. In Staud v. Stewart, 366 F.Supp. 1398 (D.C. Pa. 1973), the Federal Court refused to abstain from resolving constitutional issues in the state judicial proceedings against attorneys and held that "procedural due process, including fair notice of any charge against him, is a federally protected right of an attorney." 366 F.Supp. at 1401.

Specificity has been mandated. Vorbeck v. Schnicker, 660 F.2d 1260, 1262 (8th Cir. 1981) cert. den. 455 U.S. 921 held that "due process requires that a penal statute be 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.'" Finally, in Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974), with respect to charges against police officers for conduct unbecoming a member, the court struck down the regulation because the words had "* * * no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned." The court added,

> Further, where, as here, a rule contains no ascertainable standards for enforcement, administrative and judicial review can be only a meaningless gesture. Thre are simply no benchmark against which the validity

> of the application of the rule in any particular disciplinary action can be tested. The language of the rule additionally offers no guidance to those conscientious members of the Department who seek to avoid the rules proscription. 501 F.2d at 1190.

Late interpretations now, either by this Court or by the respondent Director would not suffice to lend that specificity required by due process of law. The Court would first have to make the interpretation before it seeks to enforce it. Dombrowski v. Pfister, 380 U.S. 479, 491, 85 S.Ct. 1116, 1123 (1965).

Because there are no standards by which an attorney subject to the Rules on Lawyers Professional Responsibility can determine what his obligations are with respect to lawfulness, nor is there any procedural device by which an attorney may assert rights and have them resolved, the rule as presently constituted is unconstitutionally vague.

5. Rule 8.1 deprives Petitioner of his right to due process of law.

The attorney is left to determine at great risk whether to cooperate with the district committee, the director staff, the board, or a panel by complying with the lawful demand requests. There is no provision enabling the attorney to assert objections, procedural, statutory, or constitutional, and there is no way to resolve any objections.

Attorneys are entitled to due process of law. In Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625 (1967), the Supreme Court stated that the Fifth Amendment protects attorneys as well as others and that "* * * it should not be watered down by imposing the dishonor or disbarment and the deprivation of a livelihood as a price for asserting it." 385 U.S. at 514, 876 S.Ct. at 627.

Facing the threat of being charged with unprofessional conduct for failure to cooperate, without specific standards, deprives an attorney of the opportunity to conform actions to the rule. Furthermore, it violates one's right to procedural due process. See In Re: Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968).

A similar case is Committee on Professional Ethics v. Johnson, 447 F.2d 169 (3rd Cir., 1971), where the District Court suspended the attorney for unethical conduct. The committee issued specific findings that he had failed to disclose certain information. This was reversed for lack of proper notice of the charges, thus a violation of Johnson's right to due process of law. The court said:

> Due process contemplates notice whcih gives a party adequate opportunity to prepare his case. In these circumstances, respondent was entitled to know the exact nature of the charges against him before the commencement of proceedings. 447 F.2d at 173.

While that case involved charges after the evidence had been completed, they are analogous to the problem to the plight of an attorney who now is faced with a possible charge of failure to cooperate in violation of Rule 8.1 when there is no way by which the attorney can cooperate without waiving fundamental rights.

In Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967). The court stated that "we conclude that policemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights." 385 U.S. at 500, 87 S.Ct. at 620.

It is obvious that attorneys enjoy those same constitutional rights to maintain their professional and to exercise constitutional rights as city employees, policemen, and teachers. Rule 8.1 deprives attorneys of their right to due process of law.

PROPOSED EDITING OF COMMENTS

THE PREAMBLE

The Preamble has certain pious platitudes that should be re-evaluated. In the fourth paragraph it states:

> While it is a lawyer's duty, when necessary to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Three paragraphs later, it reads:

> Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.

If we attorneys can be zealous and assume that justice is being done, then we ought not to add rules and regulations as have been pointed out in the preceding document, and this one, that are inconsistent. For instance, apparently stricken from the Preamble for Minnesota is the following comment:

> An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

It would seem that if we are correct in contending that the freedom of the judiciary, the freedom of the press, and the freedom of the trial advocate and the legal profession generally are essential ingredients of a democracy, this statement should be reinserted. Anyone who has read the life of Alexander Solzhenitsyn would realize that the distinctions between this country and the USSR may be reduced to the independence of the judiciary, the press, and the legal profession.

In the third column of the Preamble as printed for the Court's consideration, the committee starts to refer to the

"client-lawyer relationship." It is not known for how long the phrase "client-lawyer" has been applied to our profession and our client; but the term "attorney" goes back to the 12th Century. We have for centuries been acclimated to the "attorney-client" description, and there seems no good reason why we should adopt the latter day synonym lawyer for our ancient tradition. Besides, it is very clumsy to refer to a "client-lawyer" relationship.

Later on in the Preamble, on page 38 of the Bench and Bar, April, 1984 publication of the proposed rules, there is a reference to the "attorney-client" privilege. It would seem that consistency in expression would be more appropriate than the latter day attempt at the public relations argument that in putting the client first, we are putting first things first. It is just not traditional and has no role to meet necessity or history.

Comment to Rule 1.2. This rule refers to scope of representation, and the last sentence of the first paragraph of the comment reads "law defining the lawyer's scope of authority in litigation varies among jurisdictions." This has absolutely no legitimate role in purporting to interpret the rule. Good editing would require that it be eliminated. In the fifth paragraph of that comment, there is a reference to the "rules of professional conduct and other law." The rules, of course, are not law. The last paragraph of that comment concludes with this expression:

> The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by government authorities.

This seems to be inconsistent with the above quoted excerpt from the fifth paragraph of the Preamble, although I agree that an attorney may legitimately disobey a statute or regulation or "the interpretation placed upon it by governmental authorities." The inconsistencies here suggest that the various comments were written by various committees and not coordinated. The rules should be consistent, and the comments should also.

Rule 1.6 comment. The second last paragraph to the comments refer to the "attorney-client privilege." That same paragraph then refers to "the lawyer." Good editing would make the references consistent.

Rule 1.8 comment. The comment on the third column of page 43 of the April, 1984 edition refers to the reassignment of military lawyers. I assume that the rules presently under consideration are not really involved in resolving matters within the military jurisdiction. The comments should be restricted to the lawyers under this Court's jurisdiction so that they have some poignancy.

Comment to Rule 1.16. Rule 1.16(a)(4) refers to that which is "criminal or fraudulent." However, the comment, paragraph 2, refers to that which is "illegal." Assuming that those are inter-related, I believe that they should be in the same phraseology so that the context is clear.

Rule 2.1 comments. This rule purports to enable an attorney to exercise independent professional judgment and give candid advice. The second sentence refers to giving advice other than the law. The comments add no substantial information to

interpreting the rule and should be entirely rewritten to eliminate the unncessary observation that a lawyer is not a moral advisor but may refer to moral and ethical considerations. There are just too many gratuitous aphorisms in the comments, and they really add no particular interpretive value to the rules.

Rule 2.2 comments. In the second section, under confidentiality, the comment includes this poor phraseology:

> A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege.

The sophistication of our profession would allow for a consistency in our references.

Rule 3.3 comment. The comment in the second paragraph refers to Rule 1.2(d) and the proscription against counseling a client and committing a fraud. Rule 1.2(d) refers to giving advice involved in "criminal or fraudulent" elements. That which is fraudulent may not for litigation purposes be criminal, because of the parties, but there should be a consistency in the references.

In this same rule, on page 51 of the April, 1984 edition, column 1, the second last paragraph, there appears this expression:

> In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

This comment refers to the right of an attorney to refuse to offer certain testimony. The reference to some jurisdictions does not resolve the problem; and this Court should make a determination of what the law is in Minnesota so that the rule is specific.

Rule 3.4 comment. The third paragraph of the comment refers to the common law rule in most jurisdictions with respect to paying an occurrence witness. This Court should make the statement as to what is allowed in Minnesota.

Rule 3.5 comment. The first paragraph of the comment refers to the ABA Model Code of Judicial Conduct, "with which an advocate should be familiar." The Court should make a statement as to the Minnesota Code of Judicial Conduct, rather than the ABA model code.

Rule 5.5 comment. This comment refers to unauthorized practice of law and the first sentence of the comment is "the definition of the practice of law is established by law and varies from one jurisdiction to another." This comment does not materially aid in interpreting the rule and should be more specific.

Rule 7.3 comment. The April, 1984 edition, page 56, in the third column, first paragraph, invokes a novel description as "third-scrutiny." This has not been defined.

CONCLUSION

An attorney is not a candle in the wind. A member of the legal profession is involved in businesses, sciences, and arts foreign to the legal profession's education. A trial attorney is involved not only with the attorney's personal education, proclivities, experiences, and professional preferences but also with frightened and insecure clients, real or imagined fierce opponents, complexities of litigation extending into fields foreign to the attorney's education, jurors of varying degrees of

sophistication and education, and judges of varying personalities and expertise. Yet these elements constitute the essence of the adversary system. We ought not to incrust this system, which has served so well for so long, with a policing mechanism which has a large number of excuses for injecting itself, unnecessarily, into the legal profession on a day to day basis. Some conflicts must be left to criminal prosecution. Some conflicts must be left to civil litigation for legal malpractice or claims of fiduciary breach.

This Court's committee forwarded to the Court a letter under the apparent signatures of the chairperson and the reporter and referred to the possibility that some may interpret some regulations as having "Draconian consequences." Minnesota has no need for anything approaching such drastic results. Interpretation is as important as the original terminology. I have on other occasions addressed the Court's attention to the procedural rules for conducting a discipline. The Rules on Lawyer's Professional Responsibility should be re-evaluated to enable attorneys undergoing discipline investigation to assert the appropriate objections on constitutional, privilege, statutory, and professional custom bases. History has demonstrated that the public is best protected when the adversary system is exalted, not when the attorneys are intimidated either by doubt or unnecessarily strict control.

This statement is given in addition to the statement heretofore filed by the Court; and I apologize for not having

added these concepts and observations in the original statement.

Respectfully submitted,

By: _____

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