STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

In Re Petitions to Amend the Minnesota Rules of Professional Conduct

ORDER

WHEREAS, on July 25, 1989, the Lawyers Professional Responsibility Board filed a petition to amend Rule 1.6 (b), Rule 7.2 (d) and (e), and Rule 8.4 (g) of the Minnesota Rules of Professional Conduct; and

WHEREAS, on July 27, 1989, the Minnesota State Bar Association filed a petition to amend Rule 1.15 and Rule 8.4 (g) of the Minnesota Rules of Professional Conduct; and

WHEREAS, on December 14, 1989, a public hearing was held before this Court to determine whether the petitions should or should not be granted:

Based upon the files, records, and proceedings herein:

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The petition of the Lawyers Professional Responsibility Board to amend Rule 1.6(b) and Rule 7.2 (d) and (e) is granted. The petition to amend Rule 8.4 (g) is deferred, pending the outcome of litigation before this Court.

2. The petition of the Minnesota State Bar Association to amend Rule 1.15 is granted. The petition to amend Rule 8.4 (g) is granted, but has been restricted to those actions within a lawyer's professional activities.

3. The attached amendments to the Minnesota Rules of Professional Conduct be, and the same hereby are, prescribed and promulgated as Rules regulating attorney discipline in the State of Minnesota.

4. The comments are included for convenience and the Supreme Court does not necessarily approve the content of the comments.

5. These amended rules shall govern all disciplinary actions commenced on or after January 1, 1990.

DATED: December 27, 1989

BY THE COURT:

Peter S. Popovich

Peter S. Popovich, Chief Justice

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

EFFECTIVE JANUARY 1, 1990

Rule 1.6. Confidentiality of Information

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;

(2) use a confidence or secret of a client to the disadvantage of the client;

(3) use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

(b) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after consultation with them;

(2) confidences or secrets when permitted under the Rules of Professional Conduct or required by law or court order;

(3) the intention of a client to commit a crime and the information necessary to prevent a crime;

(4) confidences and secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(5) confidences or secrets necessary to establish or collect a fee or to defend the lawyer or employees or associates against an accusation of wrongful conduct.

(c) A lawyer shall exercise reasonable care to prevent employees, associates and others whose services the lawyer utilizes from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (b) through an employee.

(d) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

General

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the lawyer to preserve confidences and secrets of one who has employed or sought to employ the lawyer. A client must feel free to discuss whatever the client wishes with the lawyer and a lawyer must be equally free to obtain information beyond what the client volunteers. A lawyer should be fully informed of all the facts of the matter the lawyer is handling in order for the client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of independent professional judgment to separate the relevant and important from the irrelevant and unimportant.

Observance of the lawyer's ethical obligation to hold inviolate the client's confidences and secrets not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Authorized Disclosure

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client consents after consultation, when necessary to perform professional employment, when permitted by the Rules of Professional Conduct or when required by law.

The confidentiality required under this rule should not allow a client to utilize the lawyer's services in committing a criminal or fraudulent act. A lawyer is permitted to reveal the intention of a client to commit a crime and the information necessary to prevent the crime. In addition, where the lawyer finds out, after the fact, that the lawyer's services were used by the client to commit a criminal or fraudulent act, the lawyer has discretion to reveal information necessary to rectify the consequences of the client's crime or fraud. A lawyer is not permitted, however, to disclose a client's criminal or fraudulent act committed prior to the client's retention of the lawyer's services.

Unless the client otherwise directs, a lawyer may disclose the client's affairs to partners or associates.

It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved.

If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information.

A lawyer must always be sensitive to the client's rights and wishes and act scrupulously in making decisions which may involve disclosure of information

obtained in the professional relationship. Thus, in the absence of the client's consent after consultation, a lawyer should not associate another lawyer in handling a matter; nor, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the client's identity or confidences or secrets would be revealed to that lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

Unless the client otherwise directs, it is not improper for a lawyer to give limited information from the lawyer's files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in selecting the agency and warns the agency that the information must be kept confidential.

Protecting Confidences

The attorney-client privilege is more limited than the lawyer's ethical obligation to guard the client's confidences and secrets. The ethical obligation, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

Using Confidences or Secrets

A lawyer should not use information acquired in the course of the representation of a client to the client's disadvantage and a lawyer should not use, except with the client's consent after full disclosure, such information for the lawyer's own purposes.

Likewise, a lawyer should be diligent in efforts to prevent misuse of such information by employees and associates.

A lawyer should exercise care to prevent disclosure of confidences and secrets of one client to another and should accept no employment that might require such disclosure.

Former Client

The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the employment. Thus, a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve disclosure of confidences and secrets.

A lawyer should also provide for the protection of the client's confidences and secrets following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the client's personal papers to be returned to the client and for the lawyer's papers

to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the client's instructions and wishes should be a dominant consideration.

Rule 1.15 Safekeeping Property

(i) Lawyer trust accounts shall be maintained only in financial institutions approved by the Office of Lawyers Professional Responsibility.

(j) A financial institution shall be approved as a depository for lawyer trust accounts if it shall file with the Office of Lawyers Professional Responsibility an agreement, in a form provided by the Office, to report to the Office in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Lawyers Professional Responsibility Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon (3) days notice in writing to the Office.

(k) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors.

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within (5) banking days of the date of presentation for payment against insufficient funds.

(l) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(m) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(n) DEFINITIONS

"Financial Institution" - includes banks, savings and loan associations, credit unions, savings banks and any other business or person which accepts for deposit funds held in trust by lawyers.

"Properly payable" - refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

"Notice of dishonor" - refers to the notice which a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument which the institution dishonors.

Rule 7.2. Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this Rule shall include the name of at least one licensed Minnesota lawyer responsible for its content if the legal services advertised are to be performed in whole or in part in Minnesota.

(e) Every lawyer associated with or employed by a law firm which causes or makes a communication in violation of this Rule may be subject to discipline for failure to make reasonable remedial efforts to bring the communication into compliance with this rule.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's dishonesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

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

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

COMMENT--198589

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

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

Lawyers holding public office assume legal responsibility going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.