MINNESOTA STATE BAR ASSOCIATION

Minnesota Law Center • Suite 300, 514 Nicollet Mall • Minneapolis MN 55402

November 22, 1991

OFFICE OF
APPELLATE COURTS
NOV 25 1991
FILED

Frederick K. Grittner
Clerk of Appellate Courts
25 Constitution Avenue
St. Paul MN 55155

Dear Mr. Grittner:

Enclosed is the original and ten copies of a petition to amend Rules 1.6, 8.3 and 8.4 of the Minnesota Rules of Professional Conduct.

We hereby request permission to appear before the Court when this matter is heard.

Sincerely,

Tim Groshens
Executive Director

TG:JG
Enclosures

TELEPHONE 612/333-1183 • IN-STATE 800/882-MSBA • FAX 612/333-4927

FILE NO.
STATE OF MINNESOTA
IN THE SUPREME COURT
C8-84-1650

In Re Petition to Amend Rules 1.6, 8.3, and 8.4 of the Minnesota Rules of Professional Conduct	PETITION OF THE MINNESOTA STATE BAR ASSOCIATION

Petitioner, Minnesota State Bar Association (MSBA), states:

WHEREAS, petitioner is a not-for-profit corporation of attorneys admitted to practice law before this Court, and

WHEREAS, this Court has the inherent and exclusive power to administer justice, protect rights guaranteed by the Constitution, prescribe conditions upon which persons may be admitted to practice in the courts of Minnesota, and supervise the conduct of attorneys admitted to practice in Minnesota, and

WHEREAS, the Minnesota Rules of Professional Conduct were adopted by the Minnesota Supreme Court, effective September 1, 1985, as the standard of professional responsibility for lawyers admitted to practice in Minnesota, and

WHEREAS, the MSBA established a subcommittee in 1990 to consider the interaction between Rule 1.6 (which addresses the confidentiality of "confidences," defined as information protected by the attorney-client privilege and "secrets," defined as non-privileged information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client) and Rule 8.3 (which addresses the reporting of professional misconduct), and

WHEREAS, during its deliberations the committee determined that changes to Rules 1.6 and 8.3 were necessary since Rule 8.3 requires the reporting of serious ethical violations by other attorneys, but neither requires nor permits the disclosure of "confidences" and "secrets" (with a few exceptions), even when the "secret" in question is that of another attorneys' professional misconduct, and

WHEREAS, the subcommittee proposed two versions of amendments to the MSBA Rules of Professional Conduct Committee, one of which provided for mandatory reporting of secrets pertaining to another attorney's misconduct, and another which provided for permissive reporting of secrets. Under the permissive rule, the reporting attorney would not violate the rules of confidentiality if the attorney chose to report such a secret, nor would Rule 8.3 be violated if the attorney chose not to report the secret, and

WHEREAS, the subcommittee and committee voted to recommend to the MSBA that it adopt the mandatory version of the proposed changes to Rules 1.6 and 8.3, which requires the reporting of non-privileged secrets involving another attorney's misconduct, and

WHEREAS, the MSBA Board of Governors and General Assembly voted to recommend to the Supreme Court that it adopt the permissive version of the proposed changes to Rules 1.6 and 8.3 due to a concern that a mandatory rule would be nonenforceable; a concern about the practical difficulties in distinguishing between confidences and secrets; a desire to preserve the attorney-client relationship by allowing lawyers to balance the

competing factors and decide when to report misconduct, rather than requiring lawyers to do so; and a desire to honor the longstanding societal interest in promoting the free and uninhibited flow of information between an attorney and a client. (Recommended changes to Rules 1.6 and 8.3 attached.)

WHEREAS, the MSBA also established a subcommittee in 1990 to consider discrimination in the legal profession, and

WHEREAS, the subcommittee and Rules of Professional Conduct Committee recommended that Rule 8.4 be amended to add a new section providing that it is professional misconduct to commit discriminatory acts prohibited by federal, state or local statute or ordinance if such acts reflect adversely on the lawyer's fitness as a lawyer, and

WHEREAS, the proposed amendment sets out four circumstances to be considered in assessing whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer, although the suggested Comments provide that it is not required that the listed factors need to be considered equally nor is the list intended to be exclusive, and

WHEREAS, the MSBA Board of Governors and General Assembly voted to recommend to the Supreme Court that Rule 8.4 of the Rules of Professional Conduct be amended to prohibit discrimination. (Recommended changes to Rule 8.4 attached.)

NOW THEREFORE, the Minnesota State Bar Association respectfully petitions the Minnesota Supreme Court to adopt

the amendments to Rules 1.6, 8.3 and 8.4 and their Comments as follows:

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 lawyers or employees or associates against an accusation of wrongful conduct;
(6) <u>secrets necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. See Rule 8.3.</u>

(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.

<u>Comment-1988~~9~~91</u>

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 obligations 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' instructions and wishes should be a dominant consideration.

Reporting Obligation

In the course of representation a lawyer may acquire knowledge of another lawyer's violations of the Rules of Professional Conduct. In that instance, a lawyer's obligation to protect client confidences and secrets under Rule 1.6 may appear to conflict with that lawyer's obligations under Rule 8.3 to report professional misconduct by another lawyer. Where "confidences" are involved, the importance of the fiduciary relationship between lawyer and client and the proper functioning of the legal system require that the client retain the veto power over the lawyer's ability to divulge knowledge of another lawyer's violations of the Rules of Professional Conduct.

Until the Rules of Professional Conduct superseded the Code of Professional Responsibility in 1985, Minnesota lawyers were required to report professional misconduct only if their knowledge of the misconduct was "unprivileged." Until 1985, if a lawyer's knowledge of misconduct was a "secret," reporting was required; if the knowledge acquired involved a "confidence," reporting was not allowed, unless some other exception to the confidentiality rule applied. Since September 1, 1985, reporting of misconduct has been forbidden without client consent, if either a confidence or secret is involved.

Under subsection 1.6(b)(6), a lawyer now has the discretion to reveal "secrets," but not client confidences, when necessary to report the lawyer's knowledge of another lawyer's misconduct. This subsection incorporates the language of Rule 8.3 as to the type of reportable misconduct, requiring that the misconduct "raise a substantial question" about the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

This discretion to report a lawyer's misconduct balances the policy of confidentiality with the legal profession's obligation to enforce high ethical standards. If the client consents to the lawyer reporting another lawyer's misconduct, no conflict exists between these two policies. Therefore, the lawyer with knowledge of another lawyer's misconduct should seek the client's permission to report the misconduct to the disciplinary authority.

When the client opposes such disclosure, the lawyer then must determine whether knowledge of the misconduct stemmed from a client confidence. If so, the confidentiality rule prevails: disclosure is prohibited. If the knowledge stemmed from a secret, however, the lawyer faces the discretionary decision whether to report the misconduct.

Factors pertinent to the discretionary decision include the nature of the lawyer's misconduct, the likelihood that such misconduct will recur if not reported, the possible emotional harm to the client if required to testify in a disciplinary proceeding and/or the likelihood of recovery of embezzled funds.

Other factors that may merit consideration would be the ability to recover funds, such as through frozen assets or a client security fund, in which case, the client's preference might be given less weight.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the ~~appropriate professional authority~~ Office of Lawyers Professional Responsibility.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the ~~appropriate professional authority~~ Board on Judicial Standards.

(c) This Rule does not require disclosure of information ~~otherwise protected by~~ that Rule 1.6 requires or allows a lawyer to keep confidential.

Comment-1988~~91~~

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

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

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

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

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

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

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

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

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

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities; or
(h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.

Comment-1989 91

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 disorderly conduct. 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. Although a each lawyer, of course, the same as any other citizen, is personally answerable to the entire criminal law and, as well, the civil law relating to discrimination and harassment, but, a lawyer should be professionally answerable in addition only for offenses that indicate lack of those characteristics relevant to the practice of law. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

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

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

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.

Paragraph (g) specifies a particularly egregious type of discriminatory act -- harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.

Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities. Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).

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(c)~~(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.

DATE: 11.22.91

Minnesota State Bar Association

BY: _____
Robert J. Monson
President

BY: _____
R. Walter Bachman, Chair
1990-91 Rules of Professional
Conduct Committee

Attachments: 1991 Rules of Professional Conduct Committee Report

MINNESOTA STATE BAR ASSOCIATION
RULES OF PROFESSIONAL CONDUCT COMMITTEE
SUBCOMMITTEE ON LAWYERS' DUTY TO REPORT MISCONDUCT BY ANOTHER ATTORNEY WHEN KNOWLEDGE HAS BEEN GAINED AS A RESULT OF CLIENTS' "SECRETS" (PROPOSED CHANGES TO RULES 1.6 AND 8.3)

I. Background

The original impetus for the work of this subcommittee came from a 1988 decision by the Illinois Supreme Court, In re: Himmel, 533 N.E. 2d 790 (Ill. Sup. 1988). In the Himmel case, a lawyer representing a client whose previous lawyer had stolen the client's money, was disciplined for failing to report the earlier lawyer's misconduct. The lawyer had not reported in part because, in attempting to persuade the previous lawyer to repay the stolen funds, he had agreed not to do so. At a time when the ethics of lawyers have been very much in the news, the In re: Himmel decision was inevitably bound to generate controversy. Multiple law review articles appeared in which the authors expressed the perception that there was a conflict between an attorney's obligations of confidentiality and loyalty to his or her client and the needs of the bar to discipline its members for malfeasance and to prevent future harm.

William Wernz wrote an article in the December 1988 Bench and Bar titled "To Report Or Not To Report" analyzing the Himmel decision in relation to Minnesota's Code of Professional Responsibility. As Mr. Wernz pointed out, the Himmel case coincidentally occurred almost simultaneously with the "Greylord" investigations into bribery schemes in the Illinois Courts. Many Chicago attorneys had been aware of the corruption and had not reported it. The rigorous penalty of a one-year suspension from practice imposed in Himmel may have been a product of a backlash against the Greylord cases.

The Office of Lawyers Professional Responsibility in Minnesota, interpreting Rules 8.3 and 1.6 of the Rules of Professional Conduct, in response to an inquiry, advised that, in a situation such as Himmel's, the attorney would not be allowed to report the misconduct under the present code. In his Bench and Bar article, Mr. Wernz stated that the difference between the Illinois result and the Minnesota result was partly due to the changes in the Code effective September 1985. The earlier rule, D.R.1-103 had required the reporting of any "unprivileged knowledge" of any rule violation. The new Rule 8.3 requires reporting only of serious violations but the disclosure of "confidences" and "secrets" (which are unprivileged) is neither required or permitted (with a few exceptions).

In the Himmel case, the knowledge of the prior attorney's theft had been unprivileged information because it had been shared with others. The Illinois decision turned on the unprivileged nature of the communications and the concomitant obligation to report. In Mr. Wernz's opinion, the 1985 change in the Code which brought "secrets" into the ambit of the exception to the reporting rule had gone too far because it gave the client veto power over the attorney's ability to report the misconduct, even though the information was nonprivileged.

Judge Noah S. Rosenbloom wrote to Mr. Wernz expressing concern about the disparate outcomes under Illinois and Minnesota's Professional Responsibility Codes and requesting analysis and a clarifying comment for the benefit of Minnesota practitioners. Mr. Wernz submitted the issue to Walter Bachman, the Chair of the Minnesota State Bar Association's Standing Committee on the Rules of Professional Conduct. Accordingly, Mr. Bachman established a Subcommittee on Rules 8.3 and 1.6 to consider the interaction between the two rules and to advise the Standing Committee regarding whether any changes to the rules were necessary. The Subcommittee first met on January 31, 1990 and continued to meet regularly until April of 1991.

The members of the Subcommittee for the entire period were:

R. Terri Mandel, Chairperson, Minneapolis
L. Michael Tobin, St. Paul
Douglas Shrewsbury, St. Paul
William J. Wernz, St. Paul
Douglas Heidenreich, St. Paul

Also serving on the Subcommittee at various times were:

Charles Lundberg, Minneapolis
Francis A. Magill, Jr., Minneapolis
Paul Sortland, Minneapolis
Robert E. Eelkema, St. Paul
Robert G. Rancourt, Lindstrom, Minnesota

Excellent staff assistance to the subcommittee was also provided by Mary Jo Ruff, Associate Executive Director for the Minnesota State Bar Association.

The subcommittee circulated relevant Law Review articles and other reading materials including articles about reporting requirements for other professionals such as physicians and other health professionals and met to discuss their readings. Once a consensus was reached about the need for changes to the two rules, various subcommittee members drafted proposed rules, comments and committee reports and then met for working and voting sessions. Ultimately two proposed versions were submitted to the Standing Committee. The first version provided for

mandatory reporting of secrets (i.e., nonprivileged matters) and the second version provided for permissive reporting of secrets, (i.e., the reporting attorney would not be penalized for violating the rules of confidentiality if he or she chose to report a secret.) Ultimately, both the Subcommittee and the Standing Committee voted to recommend to the Minnesota State Bar Association that it adopt the mandatory version of the proposed changes to Rules 1.6 and 8.3 which requires the reporting of nonprivileged "secrets".

Comments were also solicited and received from members of Minnesota Lawyers Mutual Defense Panel. Members of the panel expressed strong opinions regarding the need for changes to the two rules and the desirability of mandatory reporting of secrets. A majority of the members of the panel were opposed to a mandatory reporting requirement out of concern for preservation of the attorney/client relationship.

Both the Subcommittee and the Standing Committee agreed that the permissive rule should also be submitted to the State Bar as an option if there was widespread resistance to the mandatory rule. Some members of the Standing Committee were concerned that a mandatory rule would not be enforceable, some argued that it was more appropriate to trust lawyers to balance the competing factors and decide whether to report rather than to require lawyers to do so; some believed that the reporting lawyer would have more protection from civil litigation resulting from disclosure if the rule were mandatory.

Ultimately, the Standing Committee unanimously supported a mandatory reporting requirement for secrets. The most important reasons for the adoption of the mandatory version were as follows:

1. The change is not a drastic one, the rules will return to the "status quo" as it existed prior to September, 1985.

2. The "attorney/client privilege" will remain protected and unaffected by the proposed change.

3. Lawyers should not be treated differently from others in society who are required to report various forms of serious misconduct, such as child abuse, even when the knowledge is gained from the physician/patient relationship.

4. Traditionally, it has been the case that lawyers seldom report or complain against other lawyers probably due to a natural human and moral repugnance against reporting on the conduct of others.

5. If the rule were mandatory, lawyers would be encouraged to report misconduct, but would be protected against civil suits

for having reported misconduct, and the desirable goal of protecting the public would be served.

6. Since the mandatory version only requires the reporting of "secrets which raise substantial questions as to a lawyer's honesty, trustworthiness or fitness," lawyers still have some flexibility and discretion in determining when to report.

II. Recommendations

A. The Subcommittee and the Standing Committee recommend that Rules 1.6 and 8.3 of the Minnesota Rules of Professional Conduct be amended to read as follows. See Appendix A.

The Subcommittee also drafted changes to the Comments to Rules 1.6 and 8.3 which the Subcommittee believes are necessary and integral to explain the changes to the mandatory versions of the two rules and to analyze the individual situations in which a duty to report secrets may arise. See Appendix A.

B. In the event that the Bar Association chooses to reject the proposed mandatory changes to Rules 1.6 and 8.3, the Subcommittee and the Standing Committee recommend that the two rules be amended to read as follows. See Appendix B.

The Subcommittee also drafted changes to the Comments to the permissive versions of the two rules which the Subcommittee believes are necessary and integral to explain the changes to the permissive versions and to analyze the individual situations in which a duty to report secrets may arise. See Appendix B.

R. Terri Mandel
Chairperson - Subcommittee
on Rules 1.6 and 8.3

1.6 AND 8.3
PROPOSED CHANGES TO RULES AND THEIR COMMENTS

Subcommittee Membership:

R. Terri Mandel, Chair
Douglas Heidenreich
Douglas Shrewsbury
Michael Tobin
William Wernz

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 or secrets necessary to establish or collect a fee or to defend the lawyers or employees or associates against an accusation of wrongful conduct.

(5) 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.*

(6) Secrets necessary to inform the Office of Lawyers' Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other

respects. See Rule 8.3.

(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.

*Effective January 1, 1990.

(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.

Comment-1985

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 the 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.

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 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.

COMMENT-1991

Reporting Obligation

In the course of representation a lawyer may acquire knowledge of another lawyer's violations of the Rules of Professional Conduct. In that instance, a lawyer's obligation to protect client confidences and secrets under Rule 1.6 may appear to conflict with that lawyer's obligations under Rule 8.3 to report professional misconduct by another lawyer. Where "confidences" are involved, the importance of the fiduciary relationship between lawyer and client and the proper functioning of the legal system require that the client retain the veto power over the lawyer's ability to divulge knowledge of another lawyer's violations of the Rules of Professional Conduct.

Until the Rules of Professional Conduct superseded the Code of Professional Responsibility in 1985, Minnesota lawyers were required to report professional conduct only if their knowledge of the misconduct was "unprivileged." Until 1985, if a lawyer's knowledge of misconduct was a "secret," reporting was required; if the knowledge acquired ~~required~~ involved a "confidence," reporting was not allowed, unless some other exception to the confidentiality rule applied. Since September 1, 1985, reporting of misconduct has been

forbidden without client consent, if either a confidence or secret is involved.

Under subsection 1.6(b)(6), a lawyer now has the discretion to reveal "secrets", but not client confidences, when necessary to report the lawyer's knowledge of another lawyer's misconduct. This subsection incorporates the language of Rule 8.3 as to the type of reportable misconduct, requiring that the misconduct "raises a substantial question" about the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

This discretion to report a lawyer's misconduct balances the policy of confidentiality with the legal profession's obligation to enforce high ethical standards. If the client consents to the lawyer reporting another lawyer's misconduct, no conflict exists between these two policies. Therefore, the lawyer with knowledge of another lawyer's misconduct should seek the client's permission to report the misconduct to the disciplinary authority.

When the client opposes such disclosure, the lawyer then must determine whether knowledge of the misconduct stemmed from a client confidence. If so, the confidentiality rule prevails: disclosure is prohibited. If the knowledge stemmed from a secret, however, the lawyer faces the discretionary decision whether to report the misconduct.

Factors pertinent to the discretionary decision include the nature of the lawyer's misconduct, the likelihood that such misconduct will recur if not reported, the possible emotional harm to the client if required to testify in a disciplinary proceeding and/or the likelihood of recovery of embezzled funds.

Other factors that may merit consideration would be the ability to recover funds, such as through frozen assets or a client security fund, in which case, the client's preference might be given less weight.

COMMITTEE REPORT REGARDING 1991 CHANGES TO RULE 1.6 AND ITS COMMENTS

Historically, in connection with an attorney's professional reporting obligations, Rule 1.6 protected only "confidences" that is "information protected by the attorney-client privilege under applicable law." The 1985 rule changes also brought "secrets" which are not protected by the attorney-client privilege, under the ambit of the rule. This expansion of the rule of confidentiality has, in some cases, led to a dilemma for individual attorneys who find themselves in the

possession of "secrets" which they perceive should be divulged in order to further the goals of self-regulation by attorneys and to prevent further misconduct, but who must respect and balance their clients' desires regarding secrecy. This slight modification of the existing rule is intended to aid that lawyer's decision- making process.

Under certain limited circumstances, that is, where those "secrets" involve another lawyer's violations of the Rules of Professional Conduct that raise a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, the lawyers in the possession of those "secrets" may divulge them to the Board of Professional Responsibility, without fear that they, by the process of divulging a secret, may themselves be in violation of Rule 1.6.

A lawyer who reasonably believes that the need to report another lawyer's violation outweighs the client's desire that the secret be held inviolate should refer to Rule 8.3 and its comments for guidance in evaluating the nature of the violations which, in the interest of self-regulation of the legal profession and the prevention of harm to any other clients or to the public, may dictate that the secret should be divulged.

This narrow exception to the obligation to protect the confidences and secrets of a client is permissive and requires that lawyers exercise a measure of judgment in complying with the provisions of this exception to the rule.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform ~~the appropriate professional authority~~ Office of Lawyers Professional Responsibility.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform ~~the appropriate authority~~ the Board on Judicial Standards.

(c) This Rule does not require disclosure of information ~~otherwise protected by Rule 1.6~~ that Rule 1.6 requires or allows a lawyer to keep confidential.

COMMENT-1985

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

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

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional

conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

COMMENT-1991

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

Committee report regarding 1991 changes to Rule 8.3 and its comments

In addition to lawyers' obligations to protect client secrets, lawyers have duties to their profession and to the public to prevent harm and repeated unprofessional conduct. Allowing a client to veto disclosure of "secrets" even when disclosure would fulfill professional duties without detriment to the client or it appears that any such detriment would be compensated by the Client Security Fund is not good policy.

The Language of Rule 8.3 has been changed slightly to aid the lawyer who must report by identifying which body is the appropriate authority" in Minnesota.

1.6 AND 8.3
PROPOSED CHANGES TO RULES AND THEIR COMMENTS

Subcommittee Membership:

R. Terri Mandel, Chair
Douglas Heidenreich
Douglas Shrewsbury
Michael Tobin
William Wernz

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 or secrets necessary to establish or collect a fee or to defend the lawyers or employees or associates against an accusation of wrongful conduct.

(5) 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.*

(6) secrets necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises substantial question as to that lawyer's

^a

honesty, trustworthiness or fitness as a lawyer in other respects and required to be disclosed by Rule 8.3.

(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.

*Effective January 1, 1990.

(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.

Comment-1985

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 the 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.

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 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.

COMMENT-1991

Reporting Obligation

In the course of representation a lawyer may acquire knowledge of another lawyer's violations of the Rules of Professional Conduct. In that instance, a lawyer's obligation to protect client confidences and secrets under Rule 1.6 may appear to conflict with that lawyer's obligations under Rule 8.3 to report professional misconduct by another lawyer. Where "confidences" are involved, the importance of the fiduciary relationship between lawyer and client and the proper functioning of the legal system require that the client retain the veto power over the lawyer's ability to divulge knowledge of another lawyer's violations of the Rules of Professional Conduct.

Until the Rules of Professional Conduct superseded the Code of Professional Responsibility in 1985, Minnesota lawyers were required to report professional misconduct only if their knowledge of the misconduct was "unprivileged." Until 1985, if a lawyer's knowledge of misconduct was a "secret," reporting was required; if the knowledge required involved a "confidence," reporting was not allowed, unless some other

exception to the confidentiality rule applied. Since September 1, 1985, reporting of misconduct has been forbidden without client consent, if either a confidence or secret is involved.

Under subsection 1.6(b)(6), a lawyer now has the mandatory obligation to reveal "secrets", but not client confidences, when necessary to report the lawyer's knowledge of another lawyer's misconduct. This subsection incorporates the language of Rule 8.3 as to the type of reportable misconduct, requiring that the misconduct "raise a substantial question" about the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

COMMITTEE REPORT REGARDING 1991 CHANGES TO RULE 1.6 AND ITS COMMENTS

Historically, in connection with an attorney's professional reporting obligations, Rule 1.6 protected only "confidences" that is "information protected by the attorney-client privilege under applicable law." The 1985 rule changes also brought "secrets" which are not protected by the attorney-client privilege, under the ambit of the rule. This expansion of the rule of confidentiality has, in some cases, led to a dilemma for individual attorneys who find themselves in the possession of "secrets" which they perceive should be divulged in order to further the goals of self-regulation by attorneys and to prevent further misconduct, but who must respect and balance their clients' desires regarding secrecy.

Under certain limited circumstances, that is, where those "secrets" involve another lawyer's violations of the Rules of Professional Conduct that raise a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, the lawyers in the possession of those "secrets" must divulge them to the Board of Professional Responsibility, and need not fear that they, by the process of divulging a secret, may themselves be in violation of Rule 1.6.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the ~~appropriate professional authority~~ Office of Lawyers Professional Responsibility.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform ~~the appropriate professional authority~~ the Board on Judicial Standards.

(c) This Rule does not require disclosure of information ~~otherwise protected by~~ that Rule 1.6 requires a lawyer to keep confidential.

COMMENT-1985

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

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

The duty to report professional misconduct does not apply to

a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

COMMENT-1991

While a lawyer is forbidden to report, without client consent, the serious misconduct of another lawyer when he or she learns of that misconduct through a "privileged" attorney-client communication, the lawyer must report such misconduct even though such disclosure entails the disclosure of a client's "secrets." See Rule 1.6(b)(6) and the accompanying Comment.

RulelA

Committee report regarding 1991 changes to Rule 8.3 and its comments

In addition to lawyers' obligations to protect client secrets, lawyers have duties to their profession and to the public to prevent harm and repeated unprofessional conduct. Allowing a client to veto disclosure of "secrets" even when disclosure would fulfill professional duties without detriment to the client or it appears that any such detriment would be compensated by the Client Security Fund is not good policy.

The language of Rule 8.3 has been changed slightly to aid the lawyer who must report by identifying which body is the "appropriate authority" in Minnesota.

MINNESOTA STATE BAR ASSOCIATION
RULES OF PROFESSIONAL CONDUCT COMMITTEE
SUBCOMMITTEE ON DISCRIMINATION

I. Background.

The Minnesota State Bar Association Ad Hoc Committee on Rule 8.4(b), which recommended the amending of Rule 8.4 of the Minnesota Rules of Professional Conduct to create a subsection g which prohibits harassing a person while the lawyer is acting in a professional capacity, also recommended that the Minnesota State Bar Association establish and appoint an ad hoc committee to consider and further study discrimination in the practice of law and to prepare recommendations to the Minnesota State Bar Association for possible additional amendments to the Minnesota Rules of Professional Conduct regarding discrimination. Consequently, in December 1989, R. Walter Bachman, chairperson of the Rules of Professional Conduct Committee, established a Subcommittee on Discrimination to consider the issues which had been referred to it by the Ad Hoc Committee on Rule 8.4(b). That Subcommittee met, beginning in January of 1990, until April of 1991.

Members of this Subcommittee were:

Phyllis Karasov, St. Paul, co-chairperson
Phillip Arzt, Bloomington, co-chairperson
Joan M. Hackel, St. Paul
Keith F. Hughes, St. Cloud
Dr. Charles Keffer, St. Paul (public member)
Kenneth F. Kirwin, St. Paul
Paul J. Marino, St. Paul
Glenn D. Oliver, Minneapolis
Betty M. Shaw, St. Paul
Seth M. Colton, St. Paul
Jennie M. Brown, Bloomington

Mary Jo Ruff, Associate Executive Director for the Minnesota State Bar Association provided excellent staff assistance to the subcommittee.

Initially, the Subcommittee was entitled the Discrimination in Employment Subcommittee. However, after reviewing the report of the Minnesota Supreme Court Task Force for Gender Fairness in the Courts and the Minnesota State Bar Association Report of the Committee on Women in the Legal Profession, the Subcommittee recommended to the Rules of Professional Conduct Committee that its name and purpose be expanded to incorporate discrimination in the legal profession rather than in employment only. Accordingly the Subcommittee changed its name to the Discrimination Subcommittee, and considered whether a rule or rules was necessary to address discrimination in the legal profession as a whole, rather than in employment only.

II. Recommendations.

A. The Subcommittee recommends that Rule 8.4 of the Minnesota Rules of Professional Conduct be amended to read as follows:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

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

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

The Subcommittee also drafted changes to the Comment to Rule 8.4 which the Subcommittee believes are integral to the intent and spirit of the recommended Rule 8.4(h). The recommended comment is as follows:

Comment--1989 1991

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

interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyers 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.

Paragraph (g) specifies a particularly egregious type of discriminatory act--harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status. What constitutes harassment in this context may be determined with reference to anti-discrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.

Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities. Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by anti-discrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. § 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).

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(c)~~(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."

B. The intent of the Rule is to discipline attorneys only for acts which are prohibited by federal, state or local statute or ordinance, if such prohibited discriminatory acts reflect adversely on the lawyer's fitness as a lawyer. The Rule sets out four circumstances to be considered in assessing whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer. The language proposed by the Subcommittee to be included in the Comment provides that it is not required that the listed factors be considered equally, nor is the list intended to be exclusive. There are other factors which may be considered as well. The Comment specifically refers to at least two situations which are of significant concern to attorneys who serve in a volunteer capacity as directors or trustees of non-profit organizations. The proposed Comment provides that consideration is to be given to an attorney's reasonable belief that his or her conduct is constitutionally protected or is exempt from civil liability under, for example, the Minnesota Non-Profit Corporation Act's provisions for unpaid directors or officers of non-profit organizations.