STATE OF MINNESOTA
IN SUPREME COURT
C8-84-1650

Promulgation of Amendments to the Minnesota Rules of Professional Conduct

ORDER

WHEREAS, the Minnesota State Bar Association filed a petition with this court on November 25, 1991 proposing amendments to Rules 1.6, 8.3 and 8.4 of the Minnesota Rules of Professional Conduct, and

WHEREAS, the Supreme Court held a hearing on these amendments on March 20, 1992 and is fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The petition of the Minnesota State Bar Association to amend Rules 1.6, 8.3 and 8.4 is granted.

2. 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.

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

4. These amended rules shall govern all disciplinary actions commenced on or after June 1, 1992.

DATED: April 14, 1992

BY THE COURT:

A.M. Keith
Chief Justice

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

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) 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.

(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-~~198~~991

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-1985~~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.

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.

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-198991

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.

~~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.