

No. C8-84-1650  
STATE OF MINNESOTA  
IN SUPREME COURT

OFFICE OF  
APPELLATE COURTS

MAR 14 1994

FILED

In re:

Amendment of the Rules of  
Professional Conduct

**PETITION OF MINNESOTA STATE BAR ASSOCIATION**

Petitioner Minnesota State Bar Association ("MSBA") respectfully petitions this Honorable Court to amend the Rules of Professional Conduct by adding a new Rule 1.8(k). In support of this Petition, MSBA would show the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys authorized to practice before this Honorable Court and the other courts of the state.
2. This Honorable Court has the exclusive and inherent power and duty to administer justice and to adopt Rules of Practice and Procedure before the courts of this state and to establish the standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05 (1992).
3. This Honorable Court has adopted the Rules of Professional Conduct, effective September 1, 1985, as the standard of professional responsibility for lawyers admitted to practice in Minnesota.
4. In response to public concerns about the lack of an express prohibition in the Rules of Professional Conduct against lawyer-client sexual relations, the MSBA established a subcommittee of the Rules of Professional Conduct Committee ("Committee") in July 1993. The subcommittee reviewed current provisions of the Minnesota Rules of Professional Conduct relating to conflicts of interest and concluded that those provisions were inadequate to provide sufficient notice and direction to the bar on this issue. The subcommittee reviewed proposals from other jurisdictions, law review articles, ethics opinions, and rules and statutes regarding sexual involvement in other professions. The subcommittee then drafted two alternative

proposals: a *per se* prohibition against sexual relations between lawyers and clients based on Oregon's rule and a limited prohibition based on California's rule. The MSBA Rules of Professional Conduct Committee debated both rules and ultimately recommended the *per se* prohibition on a 7-5 vote. True and correct copies of the *per se* prohibition and the limited prohibition presented to the Committee are attached to this petition as Exhibit A which by this reference is made part hereof.

5. The MSBA Board of Governors approved the *per se* prohibition on September 10, 1993, after substantial debate and forwarded the proposed rule to the House of Delegates for consideration on January 29, 1994.

6. Following the approval of the *per se* rule by the MSBA Board of Governors, Minnesota Women Lawyers, Inc. ("MWL") appointed a task force to consider the issue. MWL is an organization comprising over 950 members, including lawyers, judges, law students and law firms. MWL is dedicated to enhancing the status, influence, and effectiveness of women lawyers. MWL is separate from MSBA, though it is an "affiliated organization" under the MSBA by-laws. MWL ultimately forwarded to the MSBA Board of Governors and House of Delegates a compromise proposal between the *per se* prohibition adopted by the Board of Governors and the limited rule studied by the Rules of Professional Conduct subcommittee. The MWL proposal bans lawyer-client sexual relations with current clients where the client is emotionally or financially vulnerable. The MWL proposal includes a presumption that sexual relations are likely to impair the lawyer's or client's independent judgment and places on the attorney the burden to demonstrate that such impairment did not occur. A true and correct copy of the MWL report is attached to this petition as Exhibit B and by this reference is made part hereof.

7. On January 28, 1994, the MSBA Board of Governors considered the report and recommendation from MWL. After debate, the Board determined to forward both rules (the rule previously adopted by the Board of Governors on September 10 and the MWL proposal

presented on January 28) to the House of Delegates without a recommendation for adoption on either one.

8. After considerable debate, the House of Delegates voted to accept the MWL proposal for a limited prohibition against sexual relations between lawyers and clients. The MSBA accepted the MWL report and resolved to carry out its recommendation by action of its House of Delegates on January 29, 1994, at its midyear meeting. This petition was authorized and endorsed at that time.

9. The MSBA accordingly respectfully recommends and requests this court to amend the Rules of Professional Conduct to add a new Rule 1.8(k) as follows:

Rule 1.8(k)

- (1) A lawyer shall not:
  - (A) Have sexual relations with a current client in situations in which the client is emotionally or financially vulnerable; or
  - (B) Represent a client or continue representing a client with whom the lawyer has engaged in sexual relations if the lawyer's or the client's independent judgment is likely to be impaired thereby.
- (2) For the purposes of this paragraph:
  - (A) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing such person to touch intimate parts of the lawyer.
  - (B) If the client is an organization, any individual who oversees and has decision-making authority regarding the representation shall be deemed to be the client.
  - (C) This rule does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.
- (3) In any disciplinary proceedings involving an alleged violation of these rules, a lawyer who engages in sexual relations with a client will be presumed to violate Rule 1.8(k) paragraph (A)(2). A lawyer who engages in sexual relations with a client shall have both the burden of production and the burden of persuasion that Rule 1.8(k) paragraph (A)(2) is not violated.


- (4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.
- (5) Rule 1.8(k) shall not apply to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

Based upon the foregoing authorities and the report attached as Exhibit B, petitioner Minnesota State Bar Association respectfully requests that this Honorable Court implement the rule amendments proposed in paragraph 9 above.

Dated this 10th day of March, 1994.

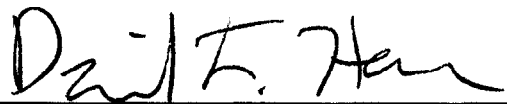
Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By   
Roger V. Stageberg  
Its President

and

MASLON EDELMAN BORMAN & BRAND

By   
David F. Herr (#44441)  
3300 Norwest Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
(612) 672-8350

ATTORNEYS FOR PETITIONER  
MINNESOTA STATE BAR ASSOCIATION

## **Per Se Prohibition**

### **Rule 1.8 Conflict of Interest: Prohibited Transactions**

**Rule 1.8(k)** A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced or after it ended. For purposes of this paragraph:

- (1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.
- (2) If the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client.
- (3) This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.
- (4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

**Exhibit A  
(Per Se Prohibition)**

## **Limited Prohibition**

### **Rule 1.8 Conflict of Interest: Prohibited Transactions**

**Rule 1.8(k)** A lawyer shall not:

- (1) Have sexual relations with a current client in situations in which the client is emotionally or financially vulnerable or
- (2) Represent a client or continue representing a client with whom the lawyer has engaged in sexual relations if the lawyer's or the client's independent judgment is likely to be impaired thereby.
- (3) For purposes of this paragraph:
  - (a) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing such person to touch intimate parts of the lawyer.
  - (b) If the client is an organization, any individual overseeing the representation and giving instructions to the lawyer on the behalf of the organization shall be deemed to be the client.
  - (c) This rule does not prohibit a lawyer engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.
- (4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

**Exhibit A  
(Limited Prohibition)**

**Proposed by Minnesota Women Lawyers**

**Resolved: that the Minnesota State Bar Association petition the Supreme Court of the State of Minnesota to amend the Rules of Professional Responsibility as follows:**

Rule 1.8(k)

- (A) A lawyer shall not:
- (1) Have sexual relations with a current client in situations in which the client is emotionally or financially vulnerable; or
  - (2) Represent a client or continue representing a client with whom the lawyer has engaged in sexual relations if the lawyer's or the client's independent judgment is likely to be impaired thereby.
- (B) For the purposes of this paragraph:
- (1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing such person to touch intimate parts of the lawyer.
  - (2) If the client is an organization, any individual who oversees and has decision-making authority regarding the representation shall be deemed to be the client.
  - (3) This rule does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.
- (C) In any disciplinary proceedings involving an alleged violation of these rules, a lawyer who engages in sexual relations with a client will be presumed to violate Rule 1.8(k) paragraph (A)(2). A lawyer who engages in sexual relations with a client shall have both the burden of production and the burden of persuasion that Rule 1.8(k) paragraph (A)(2) is not violated.
- (D) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.
- (E) Rule 1.8(k) shall not apply to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

**Exhibit B  
(Minnesota Women Lawyers' Proposal)**

## **Statement of Reasons in Support of Proposed Amendment to the Rules of Professional Conduct**

Minnesota Women Lawyers (MWL) is proposing to amend the Rules of Professional Conduct to prohibit sexual relations between lawyers and their clients under specified circumstances. In September 1993, the MSBA Board of Governors narrowly approved a recommendation for an amendment to the Rules to create a *per se* bar against such relations, rejecting a more limited restriction on sexual relations between lawyers and their clients. MWL's proposal is a compromise between the two positions. It would not bar all sexual relations between lawyers and their clients, but it would establish a presumption that such relations violate a lawyer's responsibility by impairing the lawyer's or the client's independent judgment.

Before adopting its recommendation for a proposed rule, MWL explored available information on rules adopted by other jurisdictions and solicited opinions on the issue from a broad spectrum of its members. Those who spoke in favor of adopting a rule banning sexual relations between attorneys and their clients were concerned about several kinds of problems. First, a client may be emotionally or financially vulnerable to coercion by his or her lawyer, especially when the legal matter involves domestic relations. Such coercion may be either overt or subtle. As a consequence, genuine consent to a sexual relationship may be impossible to obtain.

Second, a lawyer is expected always to be able to act in the best interests of his or her client and to exercise independent professional judgment. When the lawyer and client are participating in a sexual relationship, such independence is often threatened. The client, too, may no longer be able to exercise independent judgment about the progress of the legal matter. Such problems may develop whenever a personal relationship, sexual or not, exists between lawyer and client, but the potential for harm is magnified when the relationship is sexual.

Third, in many lawyer-client relationships, the lawyer exercises a substantial amount of power. Even if the client is not especially vulnerable, the lawyer may unduly influence the client into entering into a sexual relationship. Fourth, regardless whether sexual relations between lawyers and clients pose a real and currently unredressed problem, the public perceives there to be a problem. If lawyers fail to address it, that failure will add to the public perception that lawyers are prepared to put their own interests ahead of those of the public.

There were others who opposed adoption of a rule of this kind, arguing that the current Rules adequately address the problems raised by sexual relations between lawyer and client and that banning such relations unnecessarily intrudes upon the personal choices of both lawyers and clients. In proposing an amendment to the Rules, the MWL Board of Directors agrees with the proponents that the Rules should expressly address the issue because of the potential for abuse of a lawyer's position of power, combined with the particular problems arising when the client is especially vulnerable and the likelihood that any sexual relationship with a client would impair the lawyer's independent judgment.

**Exhibit B  
(Minnesota Women Lawyers' Proposal)**



MWL believes, however, that the *per se* rule proposed by the MSBA Board of Governors is unnecessarily broad. As indicated, the evils that most agree should be addressed by any rule are the potential for coercing vulnerable clients and the possibility of impairing the independent judgment of the attorney. MWL has proposed a rule that makes it a violation of the disciplinary rules to engage in sexual relations with a client under those circumstances. At the same time, however, if discipline of an attorney depends upon a showing that the client was especially vulnerable or that the lawyer's or client's independent judgment was in fact impaired, it may be unreasonably difficult to establish a violation of the rule. Moreover, it would be unfortunate if an effort to discipline an attorney for inappropriate behavior became a trial that focused on the emotional or financial status of the client.

Consequently, MWL has proposed that a limited rule include a presumption that any sexual relations between lawyer and client is likely to impair the lawyer's or client's independent judgment and places on the attorney the burden of production and persuasion to demonstrate that such impairment is not likely. This presumption makes clear that sexual relationships between lawyer and client should be engaged in only where it is clear that, because of the particular circumstances, the lawyer can continue to exercise his or her independent professional judgment despite the existence of intimate personal ties. The presumption is a critical part of ensuring that a limited ban on lawyer-client sexual relations will be strong enough to protect clients adequately.

In addition, MWL's proposed rule differs from both the MSBA Board of Governors proposal and the limited rule considered by the Board of Governors by narrowing the definition of client when the client is an organization. MWL believes that the narrower definition is warranted to avoid including more organizational employees within the sweep of the rule than necessary to address the problems caused by lawyer-client sexual relations. MWL believes it is sufficient to include as clients those individuals who have "decision-making authority regarding the representation" rather than the potentially much broader class of individuals who are involved with "overseeing the representation and giving instructions to the lawyer on behalf of the organization."

MWL applauds the MSBA Board of Governors for taking action to address this difficult issue. In view of the continuing controversy and disagreement over the extent of the problem and the contours of a reasonable solution, MWL believes it has offered an alternative that will satisfy the need to take action with respect to this problem while protecting the privacy interests of attorneys to carry on personal relationships that do not threaten their professional judgment.

**Exhibit B**  
**(Minnesota Women Lawyers' Proposal)**