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& BRAND**

a Professional Limited
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August 24, 1995

OFFICE OF
APPELLATE COURTS

AUG 25 1995

FILED

Mr. Frederick K. Grittner
Clerk of Appellate Courts
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: MSBA Petition on Amendment of the Rules of Professional Conduct
C 8-84-1650

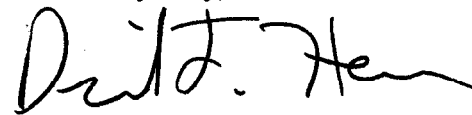
Dear Mr. Grittner:

I am pleased to include the original and ten (10) copies of the Petition for the MSBA to amend the Minnesota Rules of Professional Conduct.

As we have done in the past, I am enclosing a computer disk containing this document as a WordPerfect 6.1 document. If it would be convenient to have the document converted to any other word processor format, I would be glad to provide you that.

We appreciate your cooperation in putting this matter before the Court. If you have any questions, please let me know.

Yours very truly,



David F. Herr

DFH:ls
Enclosure

cc: Lewis A. Remele
Timothy Groshens
Mary Grau

SS #30077

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

OFFICE OF
APPELLATE COURTS

AUG 25 1995

In re:

Amendment of the Rules of
Professional Conduct

FILED

Petition of Minnesota State Bar Association

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully petitions this Honorable Court to amend the Minnesota Rules of Professional Conduct ("Rules") to:

1. Modify the rules governing advertising of a legal specialty;
2. Adopt a rule permitting the sale of a law practice; and
3. Modify the aspirational rule regarding voluntary pro bono service.

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. This Honorable Court has since amended those rules from time to time.

Advertisement of Specialization

4. Lawyers' advertisement of specialization has been a topic of discussion within the bar for a number of years. In 1990 the United States Supreme Court issued its decision in *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 S. Ct. 2281 (1990), holding that Illinois could not discipline a lawyer for truthfully advertising certification as a specialist by a national organization despite the Illinois rule explicitly prohibiting such advertising. Following the decision in *Peel*, the American Bar Association adopted an amendment to Rule 7.4 of the ABA Model Rules of Professional Conduct. The MSBA Rules of Professional Conduct Committee has considered these issues, beginning with a December 3, 1992, proposal of one of its members, Prof. Kenneth Kirwin, to adopt the ABA Model Rule change. The MSBA committee, while declining to recommend adoption of certain elements to the new ABA Model Rule, thereafter considered various alternative rule revisions, and at the MSBA House of Delegates meeting held on January 28, 1995, the MSBA voted to recommend the adoption of changes to the Minnesota rules. This Petition was authorized and endorsed at that time.

5. The MSBA accordingly respectfully recommends and requests this Court to amend Rule 7.4 of the Minnesota Rules of Professional Conduct as follows:

1 **7.4 COMMUNICATION OF FIELDS OF PRACTICE**

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

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

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

26 (d) ~~A lawyer admitted to engage in patent practice before~~
27 ~~the United States Patent and Trademark Office may use the~~
28 ~~designation "Patent Attorney" or a substantially similar~~
29 ~~designation;~~

30 (e) ~~A lawyer engaged in Admiralty practice may use the~~
31 ~~designation "Admiralty," "Proctor in Admiralty" or a substantially~~
32 ~~similar designation.~~

Sale of a Law Practice

6. A recurring problem involving potential discipline of lawyers relates to the sale of a law practice, usually upon the death or retirement of a lawyer. The ABA Model Rules of Professional Conduct had no provision for dealing with these problems when they were initially adopted. In 1990 the ABA added a Rule 1.17 and related commentary. The ABA Model Rule 1.17 is attached to this Petition as Exhibit A for the Court's convenience.

7. Petitioner believes it is appropriate and in the interest of the public to permit the orderly sale of an entire law practice for various reasons, including, but not limited to, circumstances where a lawyer dies, becomes disabled, seeks to retire from the practice of law or seeks to relocate. The current Rules do not serve the best interests of clients or lawyers. For example, under the current Rules, an attorney who wishes to relocate, or is appointed to the Bench, is unable to arrange for an orderly transfer of the practice and client files. Under the current Rules, various methods are used to effectuate a sale of a law practice, such as the sale of only the "assets" of the practice as opposed to a sale of the files and assets. In other instances, a new partner or shareholder becomes involved in the practice and within weeks or months this partner or shareholder in effect buys out the other person's partnership or corporate interest.

8. Under the proposed Rule 1.17, these arrangements would be avoided, and the practice could be sold in an orderly manner. The proposed Rule requires the purchasing firm or attorney to accept all active files which that attorney is qualified to handle. This specifically includes pro bono matters and reduced fee matters. This protection is not provided under the

present system in which attorneys frequently sell only the assets, and in effect, leave the active files and clients to fend for themselves. The Rule as proposed also protects the clients from dramatic increases in the fee structure relating to their file for a period of one year after the practice is sold.

9. This recommended amendment, the adoption of a new Rule 1.17, was considered by the House of Delegates of the MSBA at its mid-year meeting on January 28, 1995, and was approved at that time.

10. The MSBA accordingly respectfully recommends and requests this Court to amend Rule 1 of the Rules of Professional Conduct to add a new Rule 1.17 as follows:

1 **Rule 1.17 SALE OF LAW PRACTICE**

2 (a) A lawyer shall not sell or buy a law practice unless:

3 (1) The seller sells the practice as an entirety, as defined in
4 paragraph (c) of this Rule, to a lawyer or firm of lawyers
5 licensed to practice law in Minnesota;

6 (2) The seller sends a written notification that complies with
7 paragraph (d) of this Rule to all clients whose files are currently
8 active and all clients whose inactive files will be taken over by
9 the buying lawyer or firm of lawyers.

10 (b) The buying lawyer or firm of lawyers shall not increase
11 the fees charged to clients by reason of the sale for a period of at
12 least one year from the date of the sale. The buying lawyer or
13 firm of lawyers shall honor all existing fee agreements for at least
14 one year from the date of the sale and shall continue to
15 completion, on the same terms agreed to by the selling lawyer
16 and the client, any matters that the selling lawyer has agreed to
17 do on a *pro bono publico* basis or for a reduced fee.

18 (c) For purposes of this Rule, a practice is sold as an entirety
19 if the buying lawyer or firm of lawyers assumes responsibility for
20 at least all of the currently active files except those that deal with
21 matters that the buying lawyer or firm of lawyers would not be

22 competent to handle, those that the buying lawyer or firm of
23 lawyers would be barred from handling because of a conflict of
24 interest, or those from which the selling lawyer is denied
25 permission to withdraw by a tribunal in a matter subject to Rule
26 1.16(c).

27 (d) The written notification that the seller lawyer must send
28 pursuant to paragraph (a)(2) of this Rule must include at a
29 minimum:

30 (1) A statement that the law practice of the selling lawyer has
31 been sold to the buying lawyer or law firm;

32 (2) A summary of the buying lawyer's or law firm's
33 professional background, including education and experience and
34 the length of time that the buying lawyer or members of the
35 buying law firm has been in practice;

36 (3) A statement that the client has the right to continue to
37 retain the buying lawyer under the same fee arrangement as the
38 client had with the selling lawyer or to have the client's complete
39 file sent to the client or to another lawyer of the client's choice.

40 (e) If the written notification described in paragraph (d) has
41 actually reached the client through personal service or by
42 certified mail, the notification may include a provision that states
43 that if the client does not respond to the buying lawyer by ninety
44 days from the date that the client receives the notification, the
45 client's silence shall be deemed to be the client's waiver of
46 confidentiality and the client's consent to the buying lawyer's
47 representing the client in the matter that was the subject of the
48 selling lawyer's representation. The client's failure to respond
49 within that time shall be such a waiver and consent.

50 (f) The transaction may include a promise by the selling
51 lawyer that the selling lawyer will not engage in the practice of
52 law for a reasonable period of time within a reasonable
53 geographic area and will not advertise for or solicit clients within
54 that area for that time.

55 (g) The selling lawyer shall retain responsibility for the
56 proper management and disposition of all inactive files that are
57 not transferred as part of the sale of the law practice.

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(h) For purposes of this Rule, the term "lawyer" means an individual lawyer or a law firm that buys or sells a law practice.

MSBA Committee Comment

[1] A representative of a deceased, disabled or disappeared lawyer may sell the lawyer's law practice under the same restrictions as imposed by this Rule. See Rule 5.4(a)(4).

[2] Rule 1.6 on Confidentiality of Information limits the amount and type of information that the selling lawyer may give to the potential buying lawyer during negotiations. Before the prospective buyer could see the client files the selling lawyer would be required to obtain from the affected client a waiver of confidentiality.

[3] The selling lawyer should consider extending malpractice insurance for some reasonable period of time following the sale to insure against losses arising from errors that might come to light after the sale.

11. If the foregoing amendment to Rule 1 is made, and Rule 1.17 is adopted, the following amendments to Rules 7.2(c) & 5.4 should also be made for the sake of consistency of the rules:

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Rule 7.2 ADVERTISING AND WRITTEN COMMUNICATION

* * *

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule, and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization, and may pay for a law practice that is sold in accordance with Rule 1.17.

Rule 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a)

* * *

(4) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

Rule 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

[No rule change proposed. An additional comment is recommended].

MSBA Committee Comment

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Voluntary Pro Bono Service

12. The legal profession has a long tradition of providing uncompensated legal services to people who cannot afford them and expects attorneys to provide those services as part of their conduct as members of the profession. This tradition is based in part on the unique and exclusive role of lawyers in our justice system and the recognition that meaningful access to our system of justice requires the assistance of a lawyer. This portion of this petition is brought to further this tradition by establishing a specific, aspirational goal of 50 hours of donated service per year as part of the rules of conduct governing all lawyers in the State of Minnesota.

13. The American Bar Association proposed amendments to the ABA Model Rules of Professional Conduct in 1993 to modify Rule 6.1 to include a nonmandatory, aspirational standard for pro bono legal services. The ABA model rule has formed the central foundation for the proposal set forth in this petition. Petitioner MSBA has studied the issues relating to model rule 6.1, and its Legal Assistance to the Disadvantaged Committee recommended to it adoption of the rule set forth below. In early 1995, the Hennepin County Bar Association and the Ramsey County Bar Association adopted resolutions supporting and encouraging the MSBA to petition this Honorable Court to amend Rule 6.1. The MSBA General Assembly of Petitioners voted in favor of a change in the rule at its June 23, 1995, meeting.

14. There is a significant unmet need of legal services available to the disadvantaged. The American Bar Association conducted a study in 1993 entitled *Comprehensive Legal Needs Study*. This study concluded that approximately half of all low-income households had one or more legal needs at any point in time and that nearly three-fourths of those legal needs are not finding their way into the justice system. In 1989, a study by the MSBA Legal Assistance to the Disadvantaged Committee entitled *Family Law: A Survey of the Unmet Need for Low-Income Legal Assistance* concluded that Minnesota legal services providers were able to provide full representation to only 27% of the persons contacting them for assistance with family law problems. Based on this survey's results, which the MSBA believes to be reasonably representative or even unduly optimistic of the current situation, nearly 10,000 individuals who are eligible are unable to obtain needed family law representation each year. Both this Court's Gender Fairness and Racial Bias Task Forces have also identified the unmet need for legal services as a serious problem in Minnesota. Petitioner MSBA is aware of efforts in Congress and elsewhere that would further curtail funding for legal services for the disadvantaged.

15. Despite the long history of lawyers providing pro bono legal services, petitioner MSBA believes that an amendment of Rule 6.1 to provide a nonmandatory, aspirational goal of 50 hours of service per year, with a clear definition of pro bono which focuses on legal services to persons of limited means, will encourage the legal profession of Minnesota to meet the public service expectations of the profession and provide more legal services to the disadvantaged. Petitioner believes this will enhance the administration of justice and the delivery of legal services for all Minnesotans.

16. The MSBA accordingly respectfully recommends and requests this Court to amend Rule 6.1 of the Rules of Professional Conduct as follows:

1 **6.1 VOLUNTARY PRO BONO PUBLICO SERVICE**

2 ~~—A lawyer should render public interest legal service. A lawyer may~~
3 ~~discharge this responsibility by providing professional services at no fee~~
4 ~~or a reduced fee to persons or limited means or to public service or~~
5 ~~charitable groups or organizations, by service in activities for improving~~
6 ~~the law, the legal system or the legal profession, and by financial~~
7 ~~support for organizations that provide legal services to persons of limited~~
8 ~~means.~~

9 A lawyer should aspire to render at least 50 hours of pro bono
10 publico legal services per year. In fulfilling this responsibility, the
11 lawyer should:

12 (a) provide a substantial majority of the 50 hours of legal services
13 without fee or expectation of fee to:

- 14 (1) persons of limited means or
- 15 (2) charitable, religious, civic, community,
16 governmental and educational organizations in matters
17 which are designed primarily to address the needs of
18 persons of limited means; and

19 (b) provide any additional services through:

- 20 (1) delivery of legal services at no fee or substantially reduced fee to
21 individuals, groups or organizations seeking to secure or protect the civil
22 rights, civil liberties or public rights, or charitable, religious, civic,
23 community, governmental and educational organizations in matters in
24 furtherance of their organizational purposes, where the payment of
25 standard legal fees would significantly deplete the organization's
26 economic resources or would be otherwise inappropriate;

- 27 (2) delivery of legal services at a substantially reduced fee to
28 persons of limited means; or

- 29 (3) participation in activities for improving the law,
30 the legal system or the legal profession.

31 In addition, a lawyer should voluntarily contribute financial
32 support to organizations that provide legal services to persons of
33 limited means.

MSBA Committee Comment

~~Every practicing lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and~~

personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. All practicing lawyers should aspire to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer than 50 hours but during the course of a legal career, each lawyer should aspire to render on average of 50 hours of service per year. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually be furnished to the disadvantaged without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means and otherwise contributing legal talents. The variety of these activities should facilitate participation by government attorneys, even when restrictions exist on their engaging in the outside practice of law.

Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remain unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory, or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation

~~in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.~~

~~Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.~~

~~Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.~~

~~Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.~~

~~The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.~~

17. Without endorsing or adopting the MSBA Committee Comments, Petitioner respectfully suggests that the Court include them in any amendments adopted pursuant to this Petition for the reason that they are likely to be of value to lawyers facing the situations governed by the rules.

WHEREFORE, Petitioner MSBA respectfully petitions this Court to:

1. Amend Rule 7.4 of the Minnesota Rules of Professional Conduct as set forth in paragraph 5 above.
2. Amend Rule 1 of the Minnesota Rules of Professional Conduct to adopt a new Rule 1.17 as set forth in paragraph 10 above, and adopt the companion amendments to Rules 7.2 & 5.4 of the Minnesota Rules of Professional Conduct as set forth in paragraph 11 above.

3. Amend Rule 6.1 of the Minnesota Rules of Professional Conduct, replacing the existing Rule 6.1, as set forth in paragraph 16 above.

Dated: August 22, 1995.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By 

Lewis A. Remele, Jr.
Its President

MASLON EDELMAN BORMAN & BRAND
A Professional Limited Liability Partnership

By 

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ATTORNEYS FOR PETITIONER

RULE 1.7 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The practice is sold as an entirety to another lawyer or law firm;

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

(3) the client's right to retain other counsel or to take possession of the file; and

(4) the fact that the client's consent to the sale will be prepared if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

Exhibit A ABA Model Rule 1.7