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



In re:

Amendment to
Rules of Professional Conduct

# SUPPLEMENTAL AND AMENDED PETITION OF MINNESOTA STATE BAR ASSOCIATION

## January 26, 2004

MINNESOTA STATE BAR ASSOCIATION
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**NO. C8-84-1650**
**STATE OF MINNESOTA**
**IN SUPREME COURT**

In re:
Amendment to Rules of Professional Conduct

**SUPPLEMENTAL AND AMENDED PETITION**
**OF MINNESOTA STATE BAR ASSOCIATION**

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully submits this Supplemental and Amended Petition to supplement its Petition for Amendment of the Minnesota Rules of Professional Conduct.

1. By Petition dated September 19, 2003, Petitioner MSBA requested that this Court amend the Minnesota Rules of Professional Conduct. That Petition is pending before the Court.

2. In the September 19 Petition, Petitioner reported that it was engaged in ongoing review of the rules and, in particular, that it was considering whether to make further recommendations relating to the ABA's August 2003 amendments to Model Rules 1.6 and 1.13. See Petition ¶ 11, at 4.

3. That review, as well as a re-examination of Rule 7.4 prompted by the Office of Lawyers Professional Responsibility, culminated in a Report to the MSBA Board of Governors that recommended that further modifications be made in the Rules of Professional Conduct ("MSBA Committee Report"). That report is attached to this Supplemental and Amended Petition as Exhibit A. The rationale for each of the modifications proposed in this Supplemental and Amended Petition is set forth in the MSBA Committee Report.

4. On December 5, 2003, the MSBA Board of Governors met and approved the recommendations made in the MSBA Committee Report and authorized the filing of this Supplemental and Amended Petition.

5. Petitioner MSBA believes the further modifications to the rules are appropriate and should be made as part of the comprehensive changes proposed in the September 2003 Petition.

6. Accordingly, Petitioner requests that the Court replace the requested language of proposed Rule 1.6(b)(4) so it reads as follows (all marking of the changes recommended in this Supplemental Report compare the recommended language to the language proposed in the September 2003 Petition):

> (4) the lawyer reasonably believes the disclosure is necessary <u>to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services or</u> to prevent the commission of a crime.

7. Petitioner requests that the Court modify the requested language of proposed Rule 1.13 and its Comments to read as follows:

**RULE 1.13: ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law ~~which~~ <u>that</u> reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, <u>then</u> the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~
~~(1) asking for reconsideration of the matter;~~

~~(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and~~

~~(3) referring~~

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the ~~seriousness of the matter, referral~~ circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b)~~,~~ the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, ~~a violation of law appears likely,~~ the lawyer may resign in accordance with Rule 1.16 and may disclose information in conformance with Rule 1.6.

(d) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

~~(d)~~ (e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

~~(e)~~ (f) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

## Comment

**The Entity as the Client**

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the

lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that ~~different considerations arise~~ when the lawyer knows that the organization is likely to ~~may~~ be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. ~~In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.~~

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

**Relation to Other Rules**

~~[5]~~ [6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. ~~If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.~~ Paragraph (c) of this Rule does not modify, restrict, or limit the provisions of Rule 1.6(b). Under paragraph (c), the lawyer may reveal confidential information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.6(b) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

**Government Agency**

~~[6]~~ [8] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

**Clarifying the Lawyer's Role**

~~[7]~~ [9] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

~~[8]~~ [10] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

~~[9]~~ [11] Paragraph ~~(e)~~ (f) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

**Derivative Actions**

~~[10]~~ [12] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

~~[11]~~ [13] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

8. Petitioner requests that the Court amend Rule 7.4's title, subsection (d), and its Comments [3] and [4] to read as follows:

**RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND ~~SPECIALIZATION~~ CERTIFICATION**

* * *

(d) A lawyer shall not state ~~or imply~~ that a lawyer is certified as a specialist in a particular field of law~~,~~ unless~~:~~

~~(1) the lawyer is certified as a specialist by an organization that is approved by an appropriate state authority or that is accredited by the American Bar Association; and~~

~~(2)~~ the name of the certifying organization is clearly identified in the communication~~.~~ and:

(1) such certification is granted by an organization that is accredited by the Minnesota Board of Legal Certification; or

(2) if such certification is granted by an organization that is not accredited by the Minnesota Board of Legal Certification, the absence of accreditation is clearly stated in the communication, and in any advertising subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.

**Comment**

* * *

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization ~~approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that is approved by the state authority to accredit organizations that certify lawyers as specialists~~ that has been accredited by the Board of Legal Certification. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[4] Lawyers may also be certified as specialists by organizations that either have not yet been accredited to grant such certification or have been disapproved. In such instances, the consumer may be misled as to the significance of the lawyer's status as a certified specialist. The Rule therefore requires that a lawyer who chooses to communicate recognition by such an organization also clearly state the absence or denial of the organization's authority to grant such certification. Because lawyer advertising through public media and written or recorded communications invites the greatest danger of misleading consumers, the absence or denial of the organization's authority to grant certification must be clearly stated in such advertising in the same sentence that communicates the certification.

9. The American Bar Association has continued to follow the progress of its Ethics 2000 initiative, and has maintains a website that is identified in the ABA Report attached hereto as Exhibit B. A Table of Status of State Review of Professional Conduct Rules, from the ABA, is attached hereto as Exhibit C.

Based upon the foregoing authorities, Petitioner MSBA requests that its proposed modifications to Rules and Comments as set forth in paragraphs 6, 7 & 8, above be adopted as

part of the comprehensive amendments to the Minnesota Rules of Professional Conduct requested in Petitioner's September 19, 2003, Petition in this matter.

Dated: January 16, 2004.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

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Its President

By _____
William J. Wernz (#11599X)
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ATTORNEYS FOR PETITIONER
Minnesota State Bar Association

**Report and Recommendations to the MSBA Board of Governors**
**MSBA Rules of Professional Conduct Committee**
**December 5, 2003**

The MSBA Rules of Professional Conduct Committee submits the following report and recommendations regarding proposed amendments to Minnesota Rules of Professional Conduct 1.6, 1.13, and 7.4. The Committee asks the Board to authorize a Supplemental Petition to the Minnesota Supreme Court, modifying the proposals in the MSBA's September 2003 Petition as outlined below.

## BACKGROUND

In June 2003, the MSBA General Assembly with minor amendments adopted the report of the MSBA Task Force on the ABA Model Rules of Professional Conduct. In September 2003, the MSBA filed a petition with the Minnesota Supreme Court seeking adoption of revised Minnesota Rules of Professional Conduct as set forth in the report adopted by the General Assembly.

In August 2003, the ABA amended Model Rule 1.6 on confidentiality and 1.13 on the responsibilities of lawyers in organizations. The MSBA notified the Minnesota Supreme Court in its Petition that the MSBA would be reviewing these new ABA amendments and might be making further recommendations to the Court regarding their implementation in Minnesota. The Committee has now completed its review of these August 2003 ABA amendments.

Additionally, after the June 2003 General Assembly, the Office of Lawyers Professional Responsibility and the Lawyers Professional Responsibility Board asked the Committee to reconsider the MSBA recommendation regarding Rule 7.4 on specialization. That review is now also complete.

## RECOMMENDATION ON RULE 1.6

The Committee recommends that the MSBA modify its proposed Rule 1.6 (b) (4) to read as follows:

> (4) the lawyer reasonably believes the disclosure is necessary <u>to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services or</u> to prevent the commission of a crime.

(Comparisons throughout are to the MSBA proposed rules currently before the Court.)

## Analysis

The ABA's August 2003 amendments to Model Rule 1.6 add the following permissive disclosures as exceptions to the general rule of confidentiality:

> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

The Committee's recommendation accords with ABA paragraph (2) above except in continuing to permit a lawyer to disclose regarding *any* crime. The matter in ABA paragraph (3) above is already addressed in MSBA proposed Rule 1.6(b)(5), which allows disclosure when:

> (5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in furtherance of which the lawyer's services were used;

## RECOMMENDATION ON RULE 1.13

The Committee recommends that the MSBA modify its proposed Rule 1.13 and Comments to read as follows:

**RULE 1.13: ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law ~~which~~ that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~

~~(1) asking for reconsideration of the matter;~~
~~(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and~~
~~(3) referring~~
Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the ~~seriousness of the matter, referral~~ circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b)~~,~~ the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, ~~a violation of law appears likely,~~ the lawyer may resign in accordance with Rule 1.16 and may disclose information in conformance with Rule 1.6.

(d) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

~~(d)~~ (e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

~~(e)~~ (f) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

## Comment

### The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly

authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that ~~different considerations arise~~ when the lawyer knows that the organization is likely to ~~may~~ be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. ~~In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.~~

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

**Relation to Other Rules**

~~[5]~~ [6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. ~~If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.~~ Paragraph (c) of this Rule does not modify, restrict, or limit the provisions of Rule 1.6(b). Under paragraph (c), the lawyer may reveal confidential information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.6(b) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

**Government Agency**

~~[6]~~ [8] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

**Clarifying the Lawyer's Role**

~~[7]~~ [9] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

~~[8]~~ [10] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

**Dual Representation**

~~[9]~~ [11] Paragraph ~~(e)~~ (f) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

**Derivative Actions**

~~[10]~~ [12] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

~~[11]~~ [13] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

## Analysis

The above recommendation adopts all of the ABA's August 2003 amendments to Model Rule 1.13 except the following:

> (c) Except as provided in paragraph (d), if
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

The Committee believes that the ABA's August 2003 version of Model Rule 1.13 is an improvement on the prior Model Rule and recommends its adoption as an MSBA proposal, except that because the Committee views present MRPC 1.13(c) as preferable to Model Rule 1.13(c), the Committee's proposal retains a modified form of MSBA Rule 1.13(c). The Committee believes that the organizational lawyer should be subject to the same restrictions on disclosing confidential information as other lawyers. With this change in paragraph (c), Model Rule 1.13(d) becomes redundant, so the Committee recommends that it should be deleted and the remaining provisions re-numbered. These changes necessitated appropriate modifications of the Comments.

## RECOMMENDATION ON RULE 7.4

The Committee recommends that the MSBA modify its proposed Rule 7.4 title, Rule 7.4(d), and Rule 7.4 Comments [3] and [4] to read as follows:

**RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND ~~SPECIALIZATION~~ CERTIFICATION**

. . . .

(d) A lawyer shall not state ~~or imply~~ that a lawyer is certified as a specialist in a particular field of law~~,~~ unless~~:~~

~~(1) the lawyer is certified as a specialist by an organization that is approved by an appropriate state authority or that is accredited by the American Bar Association; and~~

~~(2)~~ the name of the certifying organization is clearly identified in the communication~~.~~ and:

(1) such certification is granted by an organization that is accredited by the Minnesota Board of Legal Certification~~;~~ or

(2) if such certification is granted by an organization that is not accredited by the Minnesota Board of Legal Certification, the absence of accreditation is clearly stated in the communication, and in any advertising subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.

**Comment**

. . . .

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization ~~approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that is approved by the state authority to accredit organizations that certify lawyers as specialists~~ that has been accredited by the Board of Legal Certification. Certification signifies that an objective entity has recognized an advanced degree

of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[4] Lawyers may also be certified as specialists by organizations that either have not yet been accredited to grant such certification or have been disapproved. In such instances, the consumer may be misled as to the significance of the lawyer's status as a certified specialist. The Rule therefore requires that a lawyer who chooses to communicate recognition by such an organization also clearly state the absence or denial of the organization's authority to grant such certification. Because lawyer advertising through public media and written or recorded communications invites the greatest danger of misleading consumers, the absence or denial of the organization's authority to grant certification must be clearly stated in such advertising in the same sentence that communicates the certification.

## Analysis

In September 2003, Ken Jorgensen, Director of the Minnesota Office of Lawyers Professional Responsibility, presented his concern to the Committee that MSBA proposed Rule 7.4(d) might be vulnerable to First Amendment challenge. He also reported that the Minnesota Board of Legal Certification (MBLC) was considering policy questions regarding a provision in the proposed rule permitting certification of Minnesota specialists by ABA-accredited organizations. The Committee agreed that the issues raised by Mr. Jorgensen deserved serious consideration and had not been specifically addressed by the MSBA Task Force on the Model Rules or by the MSBA General Assembly.

The MSBA's proposed Rule 7.4 would allow organizations that are accredited by the ABA but do not meet the MBLC's standards to certify lawyers in Minnesota. Although in the long term it is desirable to have national standards so that national organizations are not required to satisfy differing standards in different states, in the short term it is far from clear that the ABA's accreditation standards are adequate. Accordingly, for the present, the Committee recommends removing from MSBA proposed Rule 7.4(d) the extension of accrediting authority to the ABA.

Although MSBA proposed Rule 7.4 (limiting when a lawyer may "state or imply that the lawyer is certified as specialist"), appears easier to defend constitutionally than current Minnesota Rule 7.4 (limiting when a lawyer may "state that the lawyer is a specialist"), it still is arguably subject to attack under *Peel v. Lawyer Disciplinary Comm'n,* 496 U.S. 91 (1990). To sufficiently safeguard it from First Amendment challenge, Rule 7.4(d) should specify only "state," not "state or imply," and should permit a disclaimer when a certifying organization is not accredited by the MBLC.

The Committee understands that the Lawyers Professional Responsibility Board is considering a proposed rule that is substantially the same as what the Committee proposes here. By contrast, the MBLC, the MSBA Civil Trial Certification program, and the Academy of Certified Trial Lawyers favor a rule limiting when a lawyer may state that the lawyer is a specialist.

The Committee also understands that the MSBA Civil Trial Certification Council may support a statewide public survey on whether it is misleading for a lawyer to claim to be a specialist when not certified as a specialist. Perhaps the results of such a survey might justify proposing another amendment to Rule 7.4 at some time in the future, but at present the Committee believes that its proposal is the soundest approach.

Respectfully submitted,

MSBA Rules of Professional Conduct Committee
Ken Kirwin, Chair

This report has not been adopted by the MSBA. It will not reflect the official position of the Association unless and until it is adopted by the MSBA Board of Governors.

Additional information about the Rules of Professional Conduct Committee's analysis of these rules, as well as minutes of committee meetings, are available on the MSBA web site at http://www2.mnbar.org/committees/rules/index.htm.

September 2003

As of September 30, 2003, 49 states and the District of Columbia have committees reviewing their professional conduct rules in light of the Ethics 2000 changes to the ABA Model Rules of Professional Conduct. Contact information and status updates can be found at http://www.abanet.org/cpr/jclr/jclr_home.html.

To date, 18 states have published reports from committees reviewing the changes to the Model Rules adopted by the ABA House of Delegates based on the recommendations of the Ethics 2000 Commission. (AZ, AR, DE, FL, IN, IA, LA, MD, MI, MN, MT, NJ, NC, OR, PA, SC, SD, VA) Of those states, four have adopted new rules: NC, effective 3/1/03; DE, effective 7/1/03; AZ, effective 12/1/03; and NJ, effective 9/10/03.

This paper provides a comparison of the state proposed rules or newly adopted rules with the ABA Model Rules in several important areas.

Rule 1.0: Terminology

17 states, all except VA, have proposed rules that are substantially similar to the MR. Variations in the 17 states include definitions of additional terms and some changes to defined terms.

Of the 17, all except FL have followed the new format of the Model Rules, changing the former Terminology Section into a Rule. All except IA have included the new term, "informed consent." IA retained "consents after disclosure" but uses as its definition the same language used in the Model Rules to define "informed consent."

VA has retained the old Model Rule with some variation.

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

Of the 18 states, all except IA and VA have proposed changes substantially similar to new paragraphs (a), allocation of authority, and (c), limitation of scope, in the Model Rules. NC does not require the client to give informed consent in (c).

Two states, IA and VA, follow the old Model Rule.

Rule 1.4: Communication

13 states have proposed rules that are the same as new paragraph (a). Three others are substantially similar but slightly different: MD does not include (a)(2); NJ does not include (a)(1) or (a)(2); and MI adds as (a)(6) a requirement that the lawyer promptly notify the client of all settlement offers, case evaluations or plea bargains. AZ adds a new paragraph requiring a lawyer to inform the client of proffered plea agreements.

Two states, IA and VA, follow the old Model Rule.

Rule 1.5: Fees

14 states follow the amendments in paragraph (a) of the Model Rule. Of those, 3 states, ND, OR and PA use the same factors as the Model Rules but have different introductory language. The most common variation is to use the phrase "illegal or clearly excessive" rather than "unreasonable." Three additional states (IA, NJ and VA) include the same list of factors found in paragraph (a) but retained the old Model Rule language in the introduction.

FL's rule is significantly different from the Model Rule.

16 states have followed the Model Rule changes in paragraph (b). Four of those, AZ, MT, NJ and SC, require fee agreements to be in writing. NC deleted any reference to changes in the basis or rate, and IA added a provision that changes in the basis or rate should be communicated *preferably in writing*.
Two states, PA and VA, follow the old Model Rule language in paragraph (b). One, PA, requires fee agreements to be in writing.
One state, OR, has no provision similar to paragraph (b).

13 states follow the Model Rules changes in paragraph (c). FL's rule is substantively similar but significantly more detailed. Three states, IA, PA and VA, follow the old Model Rule. One state, OR, has no provision similar to paragraph (c).

Rule 1.7: Conflict of Interest: Current Clients
All 18 states have followed the new format and essentially the new language of Rule 1.7. IN requires the writing to be signed by the client. PA does not require the consent to be confirmed in writing. VA replaces "informed consent, confirmed in writing" with "consents after consultation." FL, NJ and SC add provisions relating to common representation. IA and OR add provisions regarding related lawyers. IA also adds a provision related to dissolution of marriage proceedings.

Rule 1.8(j): Prohibition regarding sexual relationships with clients
13 states have proposed adding new Model Rule 1.8(j) or an equivalent rule regarding sexual relationships with clients. Of those, three, IA, MN and OR, added additional provisions in (j). Five states, FL, LA, MD, MI and VA, did not add this provision.

Rule 1.10: Imputation of Conflicts of Interest: General Rule
All of the states except VA added the new exception in 1.10(a) regarding imputation of personal interest conflicts.

11 of the 18 states, AZ, DE, IA, MD, MI, MN, MT, NJ, NC, OR and PA, include screening provisions in Rule 1.10. These vary in several respects but most require some kind of notice and most require that the lawyer be apportioned no part of the fee from the representation. MN, NC and OR do not include provisions relating to the apportionment of the fee. IA and MD do not include a provision relating to notice.

Rule 1.18: Duties to Prospective Clients
All states except FL and VA proposed adding this new Rule. PA is still reviewing the rule.
Nine states, AR, DE, IN, LA, MD (no notice required), MI, MN, SD and SC (without the screening option, essentially follow the new Model Rule; while 6 states, AZ, IA, MT, NC (without the limitation on apportionment of fees), OR (without the limitation on apportionment of fees), and NJ, follow the earlier Ethics 2000 version of the Rule. The earlier version did not include the provision in (d)(2) requiring the lawyer to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client.

Rule 2.4: Lawyer Serving as Third-Party Neutral

All states except VA proposed adding this new Rule. Only two vary the language from the new Model Rule. MT adds a reference to "settlement masters" in paragraph (a), and requires in paragraph (b) that all parties be informed of the lawyer's focused role. OR's rule only refers to mediators and includes more detail regarding permissible activities of the mediator.

Rule 4.2: Communication with Person Represented by Counsel

14 states added "or court order" to their rule. Four states, AZ, AR, FL and VA, did not.
Only AZ has retained the term "party" in the text of the rule.
7 of the 18 states, FL, IA, LA, MD, NJ, NC and OR, have added additional provisions in Rule 4.2.

Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs

All states except FL proposed adding this new Rule.

## STATUS OF STATE REVIEW OF PROFESSIONAL CONDUCT RULES

| I. State | **Committee Reviewing Rules** | **Committee Issued Report** | **Supreme Court Approved Rule Amend-ments** | **Notes** |
|---|---|---|---|---|
| II. Alabama | X | | | State Bar Committee on Disciplinary Rules and Enforcement conducting review. |
| III. Alaska | X | | | Bar Association Rules of Professional Conduct Committee conducting review. |
| IV. Arizona | | | X | Effective 12/1/03 http://www.supreme.state.az.us/media/pdf/test%20ule%2042%20%2043.pdf |
| V. Arkansas | | X | | Supreme Court considering State Bar Professional Ethics Committee report. http://www.arkbar.com/whats_new/new_model_rules.html |
| A. California | X | | | State Bar Commission for the Revision of the Rules of Professional Conduct conducting review. |
| VI. Colorado | X | | | State Bar Ethics Committee conducting review. |
| VII. Connecticut | X | | | Bar Association Committee on Professional Ethics conducting review. |
| A. Delaware | | | X | Effective 7/1/03 http://courts.state.de.us/supreme/pdf/FinalDLRPCclean.pdf |

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| **D.C.** | X | | | Rules of Professional Conduct Review Committee conducting review. |
| **Florida** | | X | | Report of the State Bar Special Committee to Review the ABA Model Rules out for public comment. http://www.flabar.org/tfbtemplates.nsf/newwebsite?openframeset&frame=content&src=/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/b08fd9c0754b9f6c85256cf700577362?OpenDocument |
| **Georgia** | | | | No review |
| **Hawaii** | X | | | Disciplinary Board of Supreme Court Ethics 2000 Committee conducting review. |
| **Idaho** | X | | | State Bar Ethics 2000 Committee conducting review. Updates at http://www2.state.id.us/isb/ |
| **Illinois** | X | | | Supreme Court Professional Responsibility Committee and State Bar Ethics 2000 Committee conducting simultaneous reviews. |
| **Indiana** | | X | | State Bar Ethics 2000 Task Force has issued report. http://www.inbar.org/content/news/article.asp?art=200 |
| **Iowa** | | X | | Supreme Court is considering report of Rules of Professional Conduct Drafting Committee. http://cartwright.drake.edu/gregory.sisk/IowaEthicsRulesDrafting.html |
| **Kansas** | | X | | State Bar Ethics 2000 Review Task Force has issued report. |
| **Kentucky** | X | | | State Bar Ethics Committee conducting review. |
| **Louisiana** | | X | | Supreme Court is considering State Bar report. http://216.116.171.141/ethics2000/ |
| **Maine** | X | | | Supreme Court Advisory Committee on the Rules of Professional Responsibility conducting review. |
| **Maryland** | | X | | Court of Appeals Ethics 2002 Committee has issued draft for public comment. http://www.courts.state.md.us/lawyersropc.html |

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| VIII. Massachusetts | X | | | Supreme Court Standing Committee on Rules of Professional Conduct conducting review. |
| A. Michigan | | X | | State Bar Ethics Committee has issued report to be considered by the Representative Assembly of the State Bar. http://www.michbar.org |
| B. Minnesota | | X | | Supreme Court is considering State Bar Task Force report. http://www2.mnbar.org/committees/task-force-aba-rules/report.htm |
| C. Mississippi | X | | | State Bar Committee conducting review. Supreme Court approved changes to Rules 7.1, 7.2 and 8.5. http://www.mssc.state.ms.us/news/sn104819.pdf |
| D. Missouri | X | | | Bar Special Committee conducting review. |
| E. Montana | | X | | State Bar Ethics Committee has issued report to be considered by the Board of Trustees. http://www.montanabar.org/manuals/ethicsrulechanges/introduction.html |
| F. Nebraska | X | | | Subcommittee of State Bar Ethics Committee is conducting review. |
| G. Nevada | X | | | State Bar Ethics 2000 Committee conducting review. |
| H. New Hampshire | X | | | Bar Association Ethics Committee conducting review. |

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| I. New Jersey | | | X | Supreme Court has issued revised Rules of Profession Conduct. Effective 1/1/04. http://www.judiciary.state.nj.us/notices/reports/admin-deter-rpcs.pdf |
| J. New Mexico | X | | | Supreme Court Code of Professional Conduct Committee conducting review. |
| K. New York | X | | | State Bar Association Committee on Standards of Attorney Conduct conducting review. |
| L. North Carolina | | | X | Effective 3/1/03 http://www.ncbar.com/home/proposed_rules.asp |
| M. North Dakota | X | | | Supreme Court and Sate Bar Association Joint Committee on Attorney Standards conducting review. |
| N. Ohio | X | | | Supreme Court Task Force conducting review. |
| O. Oklahoma | X | | | Rules of Professional Conduct Committee conducting review. |
| P. Oregon | | X | | State Bar House of Delegates approved proposed changes. Now under consideration by Supreme Court. http://www.osbar.org/rulesregs/ProposedORPC15Jan03.htm |
| IX. Pennsylvania | | X | | Bar Association House of Delegates has approved amendments to be considered by the Supreme Court. |

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| X. Rhode Island | X | | | Supreme Court Committee conducting review. |
| XI. South Carolina | | X | | Supreme Court Rules Commission conducting review.<br><br>State Bar Committee submitted report for Supreme Court review.<br>http://www.scbar.org/pdf/ethics2000.pdf |
| XII. South Dakota | | | X | Supreme Court approved revisions to Rules of Professional Responsibility. Effective 1/1/04.<br>http://www.sdbar.org/members/Default.htm |
| XIII. Tennessee | X | | | State Bar Ethics Committee reviewing Ethics 2000 amendments. Tennessee switched to Model Rules format effective 3/1/03.<br>http://www.tba.org/ethics2002.html |
| XIV. Texas | X | | | State Bar Disciplinary Rules of Professional Conduct Committee conducting review. |
| XV. Utah | X | | | Supreme Court Advisory Committee on Rules of Professional Conduct conducting review. |
| XVI. Vermont | X | | | Subcommittee of the Vermont Supreme Court's Advisory Committee on Rules of Civil Procedure is conducting review. |
| XVII. Virginia | | X | | Supreme Court reviewing Ethics Committee recommendations. |
| XVIII. Washington | X | | | State Bar Ethics 2000 Task Force conducting review. |
| XIX. West Virginia | X | | | State Bar Committee conducting review. |
| XX. Wisconsin | X | | | State Supreme Court Ethics 2000 Committee conducting review. |
| XXI. Wyoming | X | | | State Bar Select Committee for Review of Disciplinary Functions conducting review. |

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