STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

IT IS HEREBY ORDERED that a hearing be had before this court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on May 18, 2004 at 1:30 p.m., to consider a petition and supplemental petition filed by the Minnesota State Bar Association to amend the Rules of Professional Conduct. Copies of the petition are annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, St. Paul, Minnesota 55155, on or before May 7, 2004, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before May 7, 2004.

Dated: February 12, 2004

BY THE COURT:

Alan C. Page
Associate Justice

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

March 26, 2004

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, MN 55155

RE: PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

To The Honorable Justices of the Minnesota Supreme Court:

The Minnesota County Attorneys Association (MCAA) hereby requests permission to make an oral presentation during the hearing on May 18, 2004, to consider the proposed amendments to the Minnesota Rules of Professional Conduct.

The MCAA represents the interests of county attorneys in the State of Minnesota. The presentation will address concerns the MCAA has about four of the proposed amendments that affect Minnesota prosecutors.

Very truly yours,

Robert D. Goodell
Assistant Anoka County Attorney
Chair, MCAA Ethics Committee

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www.mcaa-mn.org

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

March 26, 2004

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, MN 55155

RE: PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

To The Honorable Justices of the Minnesota Supreme Court:

The Minnesota County Attorneys Association (MCAA) has reviewed the proposed amendments to the Rules of Professional Conduct submitted by the Minnesota State Bar Association and would like to take this opportunity to comment on some of the proposed amendments that affect criminal lawyer practitioners and especially prosecutors.

Rule 3.3(a)(3). Candor Toward the Tribunal. (False Testimony by Criminal Defendant).

The MCAA opposes the proposed rule that exempts the testimony of a criminal defendant from the provision that permits a lawyer to refuse to offer evidence the lawyer reasonably believes is false. The MCAA believes that the proposed rule could be construed to require a lawyer to offer the testimony of a criminal defendant that the lawyer reasonably believes is false. The ethical rules should not force any lawyer to present evidence he/she reasonably believes to be false. If the proposed exception is removed, the defense attorney can rely on his/her personal ethics to decide whether to present the evidence, withdraw, or find another resolution. The MCAA also does not believe that it is prudent policy for the courts and legal profession to acknowledge publicly that lying in court is acceptable in certain circumstances.

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MCAA Position: Delete defense counsel exception from provision permitting lawyer to refuse to offer evidence reasonably believed to be false.

Rule 3.4. Fairness to Opposing Party and Counsel.

The MSBA followed the recommendation of its task force and rejected the proposed comment to Rule 3.4 that permits defense counsel to take possession of evidence of criminal activity, primarily for the purpose of conducting an examination or test.

In anticipation of attempts by the criminal defense bar to secure the adoption of the rejected comment, the MCAA continues its opposition to the comment. The MCAA is concerned that any comment that expressly permits defense counsel to take possession of evidence of criminal activity could be construed to endorse or encourage the examination of evidence by the defense. Moreover, the Rules of Criminal Procedure already provide adequate opportunities and safeguards for the testing of evidence by the defense. Minn. R. Crim. P. 9.01, Subd. 1(4) requires that prosecutors allow the defendant to have reasonable tests made on evidence and, if the scientific test or experiment may preclude any further testing, the prosecutor is required to give the defendant reasonable notice and an opportunity to have a qualified expert observe the test or experiment.

MCAA Position: Maintain the current rule without the comment permitting defense counsel to take possession of evidence of criminal activity.

Rule 3.8(e). Special Responsibilities of a Prosecutor. (Subpoenaing Defense Counsel).

The proposed rule addresses when a prosecutor may ethically subpoena a defense lawyer to testify. The MCAA questions why such a rule is needed because experience demonstrates that Minnesota prosecutors respect the nature and sanctity of the attorney-client relationship and rarely call defense counsel to testify. The MCAA also questions the advisability of incorporating a matter of criminal procedure into the ethics rules. Nevertheless, the MCAA disagrees only with the inclusion of the final limitation in the proposed rule: that there be no other feasible alternative to obtain the information. The MCAA believes that criminal defense lawyers will be adequately protected if the information sought is non-privileged and essential, without requiring that the prosecutor demonstrate there was no other feasible means of obtaining the information. The latter requirement

could prove to be unworkable, cumbersome, and in some cases, where the information is located in a foreign jurisdiction, unduly expensive to obtain.

MCAA Position: Delete the requirement of no other feasible alternative.

Rule 3.8(f). Special Responsibilities of a Prosecutor. (Dissemination of Extrajudicial Statements).

The MCAA supports the MSBA's recommendation to maintain the existing rule. The proposal endorsed by the Ethics 2000 Commission and the criminal defense bar extends a prosecutor's obligations concerning the dissemination of extrajudicial statements to individuals beyond the direct control of the prosecutor. The MCAA is not aware of any instance where lawyers can be subjected to professional discipline for the actions of individuals outside their direct control. The MCAA believes it would be a dangerous precedent and ill-advised to subject lawyers to ethical sanctions for the conduct of persons over whom they have no direct control. Furthermore, in the context of a criminal case, it is unrealistic to expect a prosecutor to control crime victims and lay witnesses who have their own First Amendment rights. Finally, the obligation to control the dissemination of publicity by persons outside the direct control of the prosecutor would impose additional financial costs at a time when prosecutors' offices are struggling just to maintain and deliver existing services in the face of substantial budget cuts.

MCAA Position: Maintain the current rule and oppose extension of prosecutor's obligation to individuals outside the direct control of the prosecutor.

On behalf of the MCAA Board of Directors, I thank the Court for considering these comments and suggestions. The MCAA appreciates the opportunity to express its views on the proposed amendments to the ethical rules that directly affect our practice of law.

Very truly yours,

Robert D. Goodell
Assistant Anoka County Attorney
Chair, MCAA Ethics Committee

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May 10, 2004

Minnesota Supreme Court
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

RE: Rule Change to Ethical Rule 7.4

Dear Sir/Madam:

I am writing in a position to propose change to Rule 7.4. I understand that a proposal is being circulated that would loosen or eliminate the restriction that those who claim to be specialists in fact have a legitimate basis to claim such a designation. As a Certified Civil Trial Specialist, I and many other specialists have undergone additional testing and met the requirements of the certifying boards in order to achieve the title of specialist. These rules were enacted to protect the public. If a practitioner with a broad and extensive expertise in a particular field of law desires specialist, he or she can certainly undergo the testing and certification process as have current specialists.

To allow any practitioner to use the work specialist, dilutes the meaning of the term and could potentially confuse or mislead members of the public who seek out attorneys who are in fact specialized in their field.

Respectfully submitted,

BARNA, GUZY & STEFFEN, LTD.

John T. Buchman

JTB:sef

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TRIAL LAWYERS

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■BOARD CERTIFIED TRIAL SPECIALIST, NBTA, MSBA

LEGAL ASSISTANTS
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JULIE M. KUMMET
LEANN K. BROMENSCHENKEL

May 7, 2004

Minnesota Supreme Court
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: Proposed change to Rule of Professional Conduct 7.4

Dear Sir/Madam:

It has come to my attention that the Court is addressing issues concerning changes to the Rules of Professional Conduct which govern legal practice in Minnesota. I am quite concerned about the potential change to Rule 7.4. Having gone through the process to achieve board certification, I am quite familiar that it is a process that is not easy nor one that can be taken lightly. Further, having been involved in advertisement discussions where the topic of "specialization" has come up, at this point I know that all lawyers are very sensitive to the importance of this word. It seems to me that the State and the consumer benefit greatly by a requirement that such a word not be used lightly. I would urge the Court to reject any change to Rule 7.4 that would drop the requirement of certification in order to be considered a specialist.

Very truly yours,

Michael A. Bryant

Michael A. Bryant

MAB\sle

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May 7, 2004

Frederick K. Grittner
Clerk of Supreme Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, Minnesota 55155

Re: In re Petition to Amend the Minnesota Rules of Professional Conduct
File No.: C8-84-1650

Dear Mr. Grittner:

I am writing to express my views upon the proposed amendment to Rule 7.4 of the Minnesota Rules of Professional Conduct. Please provide these written comments to the members of the Court for their consideration as they deliberate over the proposed changes.

I urge the Court to reject the MSBA's proposed change to Rule 7.4. Although this is presented to the Court as a recommendation of MSBA, I know this recommendation to be widely controversial within the practicing bar. This particular rule change passed only by a divided voice vote at the MSBA Convention, where it was initially proposed.

My first concern is that the existing rule seems an appropriate recognition of the expectations of the general public when it comes to professionals claiming to be specialists. It is my experience that most members of the public have infrequent contact with the legal profession and tend to form their views of professional standards by drawing upon their experiences with the medical profession. As you know, in the medical profession specialization training has long been an important part of basic medical training. A legal education, by contrast, tends to be more general in nature and does not include requirements for experiential clinical training. I believe that most members of the public perceive the concept of a "specialist" in the traditional learned professions as meaning something over and above a trained generalist who is just choosing to focus their area of practice. The certification of legal specialties insures an objective credentialing process that is much more like the typical expectation that the public has of a "specialist". If the term "specialist" is used by lawyers who are not certified as specialists, there is a substantial likelihood that the public will be misled and misunderstand the basis for the claim of "specialization". The current rule is an important protection for the public.

The second way in which the public benefits by the current rule is that it is vital to the continued viability of the legal specialization certification program. I have little doubt that private practitioners who would be free to hold themselves out as "specialists" without having to undergo the rigors of a certification program would choose not to seek certification. In my opinion the MSBA rule change would, if adopted, lead to the demise of Minnesota's legal specialization certification. I believe this development would be contrary to the public interest. Minnesota's certification program has the effect of raising professional standards. This is something that should be encouraged. Raising our professional standards is clearly in the best interests of the public.

I understand there are some legitimate concerns that the current language of Rule 7.4 raises arguable first amendment issues. I believe The Academy of Certified Trial Lawyers of Minnesota has endorsed alternative language, which provides a disclaimer requirement. I have enclosed a copy for your consideration.

Thank you.

Very truly yours,

Michael W. Unger

MWU/ras

Enclosure

ACTLM ALTERNATIVE TO MSBA PROPOSED REVISIONS TO RULE 7.4 OF THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

Rule 7.4. Communication of Fields of Practice or Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:

(1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and

(2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by that Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the claim of specialization.

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Attorneys at Law

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CHARLES A. BIRD*
VAN P. JACOBSEN
JEREMY R. STEVENS

March 15, 2004

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul MN 55155

Re: Proposed Amendment to Ethics Rule 7.4

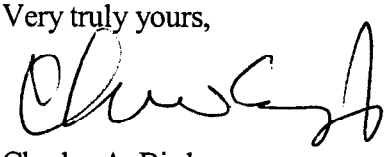
Dear Mr. Grittner:

I am writing to comment upon the proposed amendment to Ethics Rule 7.4 regarding specialization in advertising. I oppose the amendment. It demeans the specialization requirement. If a selected field is subject of testing and approval by the State, as is civil trial law, no person should be able to make such claim without certification or mandatory disclosure that the claim of specialization does not conform with state standards. Areas that have no certification, such as antitrust, would need no certification in order to make such a claim in advertising. Even now, there are too many lawyers advertising for cases requiring trial skills that have none.

Consumers are being duped into low settlements or even dismissals of meritorious claims as a result of outright incompetence or "fear of the courtroom" syndrome on the part of their chosen lawyers. Permitting such lawyers to claim they are specialists and then requiring "fact-finding" every time there is a violation, would be tantamount to no control at all. No one, as a practical matter, would ever be challenged and proving a violation would be time consuming and expensive, without any verifiable criteria for determining a violation.

The proposed amendment is wrong and I strongly oppose it.

Very truly yours,



Charles A. Bird

CAB/mbr

KLUN LAW FIRM, P.A.

A PROFESSIONAL ASSOCIATION

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March 10, 2004

Mr. Frederick Grittner
Clerk of the Appellate Court
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: Hearing to Consider Proposed Amendments to the Rules of Professional Conduct
Court File No. C8-84-1650

Dear Mr. Grittner:

I write to oppose the Amendment to Rule 7.4(b) of the Rule of Professional Responsibility.

Minnesota has had a certification program for over 15 years. I was in one of the first classes to be certified as a Real Property Law Specialist.

Amending the Rule would allow non-certified individuals to assert that they are specialists, practice a specialty, or specialize in a particular field of law.

Use of the terms "specialist" or "specialty" without certification causes confusion and does not provide a significant enough distinction to allow members of the public to differentiate between certified and non-certified practitioners. That line should remain a clear black line.

I would urge you not to adopt the proposed Amendment to Rule 7.4(b). Respectfully submitted. I remain,

Very truly,

Laurence J. Klun

LJK:kam

† Real Property Law Specialist Certified by MSBA
*Qualified Neutral Under MGRP Rule 114

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March 12, 2004

Minnesota Supreme Court
25 Constitution Avenue
St. Paul, MN 55155

Re: Public Comment on Proposed Amendment to Rule of Professional Responsibility 7.4

Dear Justices:

The purpose of this letter is to provide my comment, as a member of the public and an attorney certified as a Civil Trial Specialist by the Minnesota State Bar Association, regarding the proposed amendment to Rule 7.4.

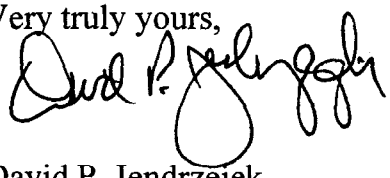
I oppose the amendment because it will create a substantial likelihood of public confusion with respect to who are "specialists" in the legal profession and because it represents a step backwards in the positive trend toward a fuller disclosure of professionals' credentials.

For 15 years, the state of Minnesota has had a procedure for certifying that attorneys are Specialists, and the public has been encouraged by the Minnesota State Bar Association and other entities to rely on the "Certified Specialist" designation. The amendment, while permitting a "certified" lawyer to advertise as a "Certified Specialist" only after satisfying the objective standards of a state approved and monitored certification program, will allow a noncertified "specialist" to use the term subject only to Rule 7.1's "false or misleading" standard.

Unfortunately, I believe that this situation will only cause confusion among the general public, who will quite reasonably expect the credentials, experience and verified knowledge of both groups of "specialists" to be the same, even though only one group's qualifications will have been independently authenticated by "certification." I believe that the proposed amendment, which would allow a conflicting use of the term "specialist" – one meaning only "limits practice to" – would do a disservice to the public and foster needless confusion.

For these reasons, I oppose the proposed amendment.

Very truly yours,



David P. Jendrzejek

DPJ/skf
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Mr. Frederick Grittner
Clerk of Appellate Courts
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St. Paul, MN 55155

March 9, 2004

IN RE: Proposed Amendment to Rule of Professional Responsibility 7.4

I understand the Court is considering the MSBA Petition to amend Professional Rule of Conduct 7.4. The amendment would allow attorneys to represent that they are "specialists," without any basis for the claim other than their self-proclamation.

I oppose this change. I think it would mislead the public, not benefit them. I do favor expansion of specialist certification programs such as the Court now has in some areas. I hold certification as a civil trial specialist, and both the original qualification and the recertification offer a barrier to entry such that I believe the public can truly rely on certification as being meaningful. To allow non-certified attorneys to make a similar or identical claim would cause great confusion and weaken the existing program.

Physicians who advertise that they are specialists must have had at least one year of post-medical training in that specialty area. That training involves an objective review of their qualifications before they advertise as a Specialist. There is nothing analogous in the legal field. However, it is common sense that the public will incorrectly conclude that, as with the medical field, legal "specialist" carries a warranty of, at the least, extended education and training past the initial professional education. Adding to the confusion, the public is familiar with board certified physicians in specialty areas with even higher standards of testing and experience, analogous to the

MSBA Legal Certification program. Because of Minnesota's state supervised legal certification program, I believe the same public understanding has been created for attorneys advertising as "Civil Trial Specialists" and Minnesota has the right to, and should, preserve that meaning.

Stephen F. Rufer
mo

JOHN H. BRENNAN

Attorney at Law
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March 22, 2004

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, MN 55155-6102

Re: Proposed Amendment to Rule 7.4
of the Rules of Professional Conduct

Dear Mr. Grittner:

This letter constitutes my written statement relative to the proposed Amendment to the above Rule. In accordance with the Supreme Court's Order, I am enclosing twelve copies of this letter.

As a lawyer who has been certified as a real property law specialist since 1990 (the first year such certification was available), I was shocked to see the proposed Amendment to Rule 7.4. The Minnesota State Bar Association has diligently worked to established a system by which certain individuals can be recognized for their dedication to a particular field of law. We annually demonstrate a level of education and experience which sets us apart from general practitioners who happen to spend some portion of their time practicing in our field of specialization. It would be extremely misleading to the public if such non-certified members of the Bar were allowed to hold themselves out as "specialists".

As an illustration, I have extensive experience in litigation and arbitration matters. Under revised Rule 7.4 as proposed, I could ethically and in good conscience hold myself out as being a litigation specialist. However, I most likely lack the experience qualifications to be certified as a trial law specialist and I have not undertaken the rigorous course of study necessary to pass the certification examination. It would be misleading to the public for me to be able to represent myself as being on the same plain as a certified trial lawyer. The public would have no way of knowing that there was a distinction in our level of specialized education and experience.

I strongly urge the Supreme Court to reject the proposed Amendment to Rule 7.4. If anyone has any questions of me, I would welcome the call.

Sincerely,

JHB/tls
Pc1\wp\docs\ltr\MN Supreme Court

John H. Brennan (Reg. No. 11198)

Real Property Law Specialist,
Certified by Minnesota State Bar Association

BRETT W. OLANDER & ASSOCIATES

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†Civil Trial Specialist
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♦Also Admitted in Florida

April 2, 2004

Frederick K. Grittner, Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, MN 55155-6102

Re: Proposed Amendment to Rule of Professional Responsibility 7.4

Dear Supreme Court:

I am writing in opposition to the proposed amendment of Rule of Professional Responsibility 7.4.

The deletion of section (b) and the inclusion of new comment (1) would permit any lawyer to represent that he/she is a specialist, without establishing any basis for such a claim, such as passing an examination, peer review, or even required level of experience.

I have been privileged to practice law in this state for 18 years, primarily as a trial attorney for the defense. I was certified as a Civil Trial Specialist by the Minnesota State Bar Association and the National Board of Trial Advocacy in 1997.

I believe that the proposed amendment to Rule 7.4 will allow any attorney to advertise as a "specialist" and will guarantee confusion to the public. In other words, members of the public will not understand and comprehend that only "Certified Specialists" have the credentials, the experience, and have been independently authenticated by the Bar Association certifying body.

I believe that the proposed amendment to the Rule will further denigrate the public's perception of lawyers. The whole purpose of obtaining certification was to improve the public perception of lawyers so they could verify that their attorney is a Certified Civil Trial Specialist. In addition, very few lawyers can qualify as Certified Specialists because they have not committed the time, money, and effort that it takes to become so qualified.

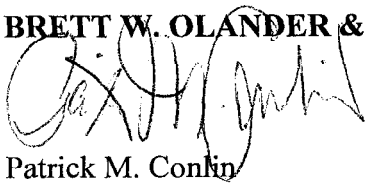
Sadly, lawyer advertising has already diminished respect for lawyers and now this rule change will add to that problem.

I respectfully request that the proposed amendment be rejected.

Thank you.

Sincerely,

BRETT W. OLANDER & ASSOCIATES



Patrick M. Conlin

PMC/sjm

cc: Meaghan Harper, CERT MGR, Minnesota State Bar Association
(12 copies enclosed)

MAHONEY
DOUGHERTY
MAHONEY
Professional Association
Attorneys and Counselors

May 7, 2004

Serving the Community
Since 1922

AUTHORIZED TO PRACTICE LAW IN MINNESOTA, WISCONSIN AND NORTH DAKOTA.

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THOMAS E. DOUGHERTY (RET.)
G.P. MAHONEY (1890-1962)
G.J. MAHONEY (1923-1969)
R.J. NEARY (1929-1984)

TO THE JUSTICES OF THE MINNESOTA SUPREME COURT

Re: Proposed Amendment to Rules
of Professional Responsibility 7.4

This letter constitutes my written statement relative to the proposed amendment to the above rule.

I have been practicing law in Minnesota and adjoining states since 1957, principally as a civil litigator and primarily on behalf of the defense although I don't turn down plaintiff cases. I have been a certified civil trial specialist, certified by both the Minnesota State Bar Association and the National Board of Trial Advocacy (NBTA) since 1990. This letter is written as my personal position and opinion and not in any official capacity as the chairman of the Civil Trial Certification Board.

There are 680 attorneys who have chosen to have the MSBA certify that they are specialists in their respective fields. Two hundred of them have been certified for 15 years or more. Eight of them are judges, including a Justice of the Minnesota Supreme Court, a Justice of the North Dakota Supreme Court and a Minnesota Appellate Court Judge.

Just as in the medical field, Certified Specialists represent the highest caliber of practice among Minnesota attorneys. That credential imparts useful information about qualifications, and is itself meaningful, especially in greater Minnesota. The references the Board receives from attorneys and judges make that clear. Typical is a reference received from an outstate judge this year: "The applicant is a vigorous advocate. He deserves this designation."

The ABA Model Rules are a positive step towards uniformity as we move towards multi-jurisdictional practice. However, states deviate from the Model Rules when they are inappropriate for their jurisdiction. In my opinion, that is the situation with the proposed amendment to Rule 7.4.

I believe Model Rule 7.4, as proposed in the Petition, should not be adopted in Minnesota. Currently, 23 states – all of which have a mechanism in place for certifying specialists either directly or indirectly – prohibit the use of the word "specialist" by a lawyer unless that

[1]CERTIFIED AS A TRIAL SPECIALIST BY THE MINNESOTA STATE BAR ASSOCIATION AND THE NATIONAL BOARD OF TRIAL ADVOCACY.

[2]QUALIFIED NEUTRAL FOR ARBITRATION AND MEDIATION.

lawyer has been certified. To give you two recent examples, the ethics committee of the Connecticut Bar, which has a certification program, considered whether to adopt Model Rule 7.4 last fall. Their ethics committee voted to recommend continued limitation of the term "specialist" to attorneys certified by an accredited organization. Tennessee, which also certifies attorneys, did the same. They did not adopt Model Rule 7.4 but instead adopted the same Rule 7.4 language that is in the current Minnesota Rule.

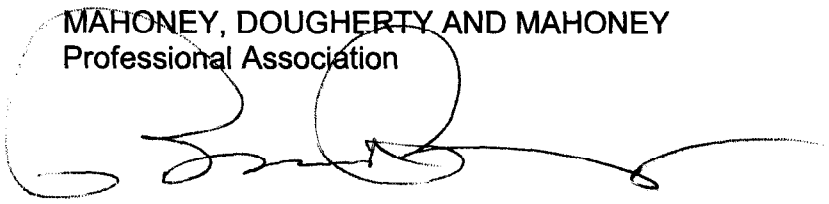
I understand constitutional concerns have been raised. However, the research and survey commissioned by the Academy of Certified Trial Lawyers of Minnesota and the Civil Trial Certification Board, respond to those concerns. The research cite those cases upholding the constitutionality of the restriction in states that certify attorneys. The empirical evidence developed by the survey shows the likelihood of confusing the public about legal qualifications if uncertified lawyers are allowed to represent themselves as specialists without qualification. Establishing their qualification for certification justifies the requirement that lawyers be certified before they may represent that they are specialists in their chosen field.

I urge the court to deny the petition and the leave the Minnesota rule stand as it now exists. This result would justify the 15-year existence of the certification program, and the time, money and effort that those attorneys who have qualified to represent themselves as certified specialists have spent in that endeavor.

Thank you for your consideration of my position.

Very truly yours,

MAHONEY, DOUGHERTY AND MAHONEY
Professional Association



Richard P. Mahoney

RPM:fb

LeVander & Vander Linden

A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

May 6, 2004

OFFICE OF
APPELLATE COURTS

MAY 07 2004

FILED

Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Boulevard
St. Paul, MN 55155-6102

Re: Proposed Amendment to Rule 7.4
of the Rules of Professional Conduct

Dear Mr. Grittner:

I am a Civil Trial Specialist certified by the Minnesota State Bar Association. I am also the current Dean of the Academy of Certified Trial Lawyers of Minnesota. I oppose the amendment to Rule 7.4 of the Rules of Professional Conduct. The organization of which I am the current leader opposes the amendment. The adoption of Rule 7.4 was predicated on the then perceived need to provide valid, demonstrable information to the consuming public regarding the attorneys of this state. The need for providing such information to the public is greater today then when Rule 7.4 was enacted. If lawyers are allowed to self anoint themselves as "specialists" the public will be the victim of the likely deception that will occur with some regularity. Other than the current certification process the public has no way of understanding what qualifies a lawyer to represent that he or she is truly a specialist in any particular area of the law. If Rule 7.4 is amended, the "certification process" will become the act of placing a yellow pages advertisement or airing a television commercial. Rule 7.4 was created to protect the consuming public. The proposed amendment will only create the significant risk of harm to the public. I strongly urge the Supreme Court to reject the proposed Amendment to Rule 7.4. If the Supreme Court is inclined to allow attorneys to use the term specialist, a disclaimer that such person is not certified by an accredited certifying agency would provide a minimal safeguard to the public.

Sincerely yours,

LeVander & Vander Linden

JAMES G. VANDER LINDEN

JGV/kmc

James G. Vander Linden, CERTIFIED CIVIL TRIAL SPECIALIST
Bernhard W. LeVander, RET.

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Anoka, MN 55303

763 427 8888 *Office*
763 421 2560 *Fax*
800 499 2394 *Toll Free*

May 5, 2004

OFFICE OF
APPELLATE COURTS

MAY 0 7 2004

FILED

Minnesota Supreme Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155-6102

Re: Hearing to Consider Proposed Amendments to
The Rules of Professional Conduct
Court File No.: C8-84-1650

Dear Members of the Court:

I am deeply concerned with the upcoming consideration of the Minnesota Rules of Professional Conduct scheduled for oral argument on May 18, 2004, regarding the proposed Amendments to Rule 7.4.

I am certified as a Civil Trial Specialist by the Minnesota State Bar Association and the National Board of Trial Advocacy. I am past dean of the Academy of Certified Trial Lawyers of Minnesota.

I understand the proposed Rule change would allow anyone to say they were a "specialist" regardless of their level of experience or depth of expertise. I have been deeply troubled by lawyers who advertise in such a manner under our current Rule 7.4(b) in such a way that it appears they are specialists despite the fact that they have not been certified.

Much of the lawyer advertising that I see, especially the direct mail type solicitations, are very misleading. I have long felt that such advertisements that give the impression that someone is a specialist should contain a disclaimer that the attorney is "not certified or proved as a specialist" by any certifying organization. I think this would be the most truthful and realistic way for the public that receives such solicitations to be apprised of whether or not such lawyers are, indeed, "specialists." I would be in favor of a rule requiring any lawyer advertising in the personal injury sector to reveal if they are not a certified specialist.

FRED M. SOUCIE*‡
DAVID M. BOLT*‡
CHRISTOPHER J. HOFFER**
KELLY A. BOYD*
PAUL V. KIEFFER

Paralegals
MONICA OLSON
ERIC WIEDERHOLD
DEELON PFEIFER
SHANNON FRAKIE

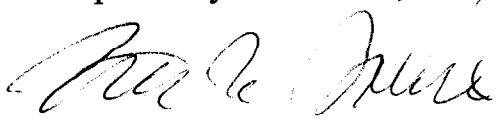
* *Also admitted in Wisconsin.*
** *Also admitted in Michigan.*
‡ *Certified as a Civil Trial Specialist by the Minnesota State Bar Association and certified as a Civil Trial Specialist by the National Board of Trial Advocacy.*

I am definitely against the proposed Rule change that would allow anyone to say they were a "specialist" regardless of their level of experience or depth of expertise. The Rule change would be very detrimental to the members of the public in making an educated choice of an attorney in an area of practice that is so heavily marketed.

I would like to see a rule that requires any personal injury lawyer who advertises to state a disclaimer if such lawyer is not certified by the Minnesota State Bar Association or the National Board of Trial Advocacy.

Thank you.

Respectfully Submitted,



Fred M. Soucie

FMS:hjw

THE SUPREME COURT OF MINNESOTA

BOARD OF LAW EXAMINERS
BOARD OF CONTINUING LEGAL EDUCATION
BOARD OF LEGAL CERTIFICATION

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Margaret Fuller Corneille, Esq., Director

May 6, 2004

Frederick Grittner
Clerk of Supreme Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr., Blvd.
St. Paul, MN 55155

Re: In re Petition to Amend the Minnesota Rules of Professional Conduct
File No. C8-84-1650

Dear Mr. Grittner

Enclosed for filing in the above matter are the original and twelve copies of the Request for Oral Presentation and Written Comments of the Minnesota Board of Legal Certification Relating to Petition to Amend the Minnesota Rules of Professional Conduct. The Board of Legal Certification respectfully requests the opportunity to make an oral presentation at the May 18, 2004 hearing before the Supreme Court. Thank you for your consideration.

Respectfully submitted,

Robert A. Awsumb, Chair

RAA/amr
Enclosure

cc: Kent A. Gernander (w/enclosure)
Kenneth L. Jorgensen (w/enclosure)
Hon. Sam Hanson (w/enclosure)

C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

In Re:

Petition to Amend the Minnesota Rules of Professional Conduct

Request for Oral Presentation and Written Comments of the Minnesota Board of Legal Certification Relating to Petition to Amend the Minnesota Rules of Professional Conduct

MARGARET FULLER CORNEILLE
Director
BOARD OF LEGAL CERTIFICATION
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(651) 297-1615

ROBERT A. AWSUMB
Chair
BOARD OF LEGAL CERTIFICATION
2010 Landmark Towers
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(651) 225-9255

INTRODUCTION

The Minnesota Board of Legal Certification (MBLC) respectfully submits these written comments addressing concerns regarding the Minnesota State Bar Association's (MSBA) proposed amendment to Rule 7.4 of the Minnesota Rules of Professional Conduct. The members of the MBLC unanimously oppose the proposed amendment because it would eliminate all restrictions on the use of the term "specialist" and thereby eliminate the protection of the public from potentially misleading and confusing advertisements. The MBLC proposes an alternative amendment Rule 7.4 that satisfies the goals of MSBA and the Lawyers Professional Responsibility Board (LPRB) while affording limited protection of the term specialist by requiring a disclaimer when the term is used by an attorney not certified by an MBLC-approved organization. The amendment proposed by the MBLC is included as Exhibit A and carries the unanimous support of the twelve members of the MBLC, including its three public members.

EXSISTING RULE 7.4 AND THE MSBA-PROPOSED AMENDED RULE

Rule 7.4 of the Minnesota Rules of Professional Conduct relates to an attorney's obligations and limitations in advertising as a specialist in a particular area of the law. Under the current rule, an attorney is precluded from using the term specialist unless the attorney is certified or approved as a specialist by an MBLC-approved organization. Specifically, the rule provides as follows:

RULE 7.4. Communication of Fields of Practice

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

(b) A lawyer shall not state that the lawyer is a specialist in a field of law unless the lawyer is currently certified or approved as a specialist in that field by an organization that is approved by the State Board of Legal Certification.

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

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

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

Minn. Rules of Prof. Conduct 7.4 (2004).

Under the current rule, attorneys are prohibited from advertising that they are specialists unless they are certified. The certification must be granted by an organization approved by the MBLC, which means that the MBLC has scrutinized and approved the standards and requirements of the organization. The MBLC thereby assures that the certification is indeed a bona fide and meaningful designation upon which the public can rely.

On September 19, 2003, the MSBA filed a Petition to Amend the Minnesota Rules of Professional Conduct requesting amendment to Rule 7.4 in two very significant ways. That initial Petition requested (1) that the American Bar Association (ABA) be designated as an alternative authority authorized to accredit agencies certifying attorneys as specialists in Minnesota and (2) complete elimination of the current limitations relating

to the use of the term specialist in attorney advertising. The amended rule as initially proposed by the MSBA would allow an attorney to use the term specialist in an advertisement whether or not the attorney is in fact certified.

After further consideration, the MSBA submitted a Supplemental and Amended Petition on January 26, 2004. The Supplemental and Amended Petition eliminated the proposal designating the ABA as an alternative organization authorized to approve agencies certifying specialists in Minnesota and maintains the present exclusive authority of the MBLC. Importantly, however, the Supplemental and Amended Petition still seeks to eliminate all protection of the use of the term specialist. The proposed amendment would allow attorneys to advertise themselves as specialists even if not certified as specialists by agencies accredited by the MBLC, and without the need for any disclaimer to advise the public of the lack of MBLC-approved certification.

ALTERNATIVE AMENDMENT PROPOSED BY THE MBLC

The MBLC endeavors to ensure that the certification process is meaningful. The stated purpose of the MBLC "is to accredit agencies that certify lawyers as specialists, so that public access to appropriate legal services may be enhanced." See Rules of the Board of Legal Certification, Rule 100. (A complete copy of the MBLC rules is included as Appendix Exhibit B). The MBLC is pleased that the MSBA has withdrawn that portion of the proposed amendment which would have effectively supplanted the authority of the MBLC to scrutinize and approve certifying agencies.

The members of the MBLC are greatly concerned, however, that the complete

elimination of the protection of the term specialist in attorney advertising will unjustly imply to the public that an attorney has met certain standards or experience requirements vital to the certification process. The MBLC also recognizes the concerns of the MSBA and LPRB that the current prohibition of the use of the term specialist may infringe upon the First Amendment protections associated with commercial speech. To balance these competing concerns, the MBLC hereby proposes an alternative amendment to Rule 7.4 that affords limited protection to the term specialist, while allowing attorneys to use the term so long as it is not false or misleading. See Minn. R. Prof. Conduct 7.4(a) (2004). The alternative Rule 7.4 proposed by the MBLC would simply require that when an attorney not certified by a MBLC-approved agency uses the term specialist, the attorney must include a disclaimer that the attorney is not certified by a MBLC-approved agency.

The MBLC's alternative would modify the MSBA's proposed amendment of Rule 7.4 as follows:

> (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
> (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
> (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
> ~~(d) A lawyer shall not state that a lawyer is certified as a specialist in a particular field of law unless 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.~~

(d) In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:

(1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and

(2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by that Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.

This alternative amendment is a prudent approach to addressing First Amendment concerns relating to the current rule and the continued need to assure that public access to appropriate legal services is enhanced. In considering its proposed alternative, the MBLC requested the opinion of the Office of the Minnesota Attorney General as to the constitutionality of MBLC's proposal. The written opinion of Assistant Attorney General Peter Krieser is attached as Exhibit C. This opinion confirms there is a substantial government interest in protecting consumers from potentially misleading and confusing advertising, and recognizes that a number of state and federal courts have approved and upheld the use of disclaimers as proposed by the MBLC.

The MBLC oversees an extensive system of certification. At present, the MBLC has accredited five agencies which certify attorneys in eight different specialty areas. As of December 31, 2003 there were 876 attorneys certified as specialists by these agencies in Minnesota. A list of Accredited Certifying Agencies is attached as Exhibit D. The twelve members of the MBLC, along with its staff, constantly and aggressively monitor these agencies and certification processes to assure that the highest standards are met and that certified specialists truly are experts in their respective specialty areas. This effort

allows the public to rely on representations made by attorneys who claim to be specialists in their field. The complete elimination of restrictions on the use of the term specialist in attorney advertising, as proposed by the MSBA, will no doubt reduce or eliminate the public's ability to understand the significance of the certification process. This can only lead to confusion and uncertainty in the mind of the public.

CONCLUSION

The MBLC's proposed alternative amendment furthers protection of the public and ensures that the public can rely on the fact that a certified specialist is a specialist who has met rigorous standards and experience requirements. Allowing the unfettered use of the term specialist would eviscerate the protections provided to the public by Minnesota's state-endorsed certification process. The MBLC's mission is to enhance the public's access to appropriate legal services and to provide information about the certification of lawyers as specialists for the benefit of the profession and public.

The MSBA's proposal eliminating protection of the term specialist will make it impossible to fulfill its purpose in a meaningful manner. The MBLC's alternative proposal is the most balanced approach which satisfies the constitutional concerns relating to the current rule while educating and protecting the public through the use of a simple disclaimer. An attorney can thereby honestly advertise as a specialist while providing the necessary information to the public about the certification process in Minnesota. The MBLC believes this is the most appropriate alternative to the current rule and urges the court to adopt its proposal.

Respectfully submitted,

Dated: May 6, 2004

By: _____

MARGARET FULLER CORNEILLE
Director #179334
BOARD OF LEGAL CERTIFICATION
Galtier Plaza, Suite 201
380 Jackson Street
St. Paul, MN 55101
(651) 297-1615

By: _____

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BOARD OF LEGAL CERTIFICATION
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APPENDIX TO WRITTEN COMMENTS OF THE MINNESOTA BOARD OF LEGAL CERTIFICATION RELATING TO PETITION TO AMEND THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

ALTERNATIVE RULE 7.4 PROPOSED BY MBLC
(Maintaining Limited Protection for Term "Specialist")

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

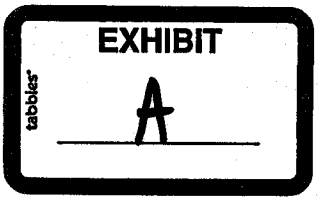
(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:

(1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and

(2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by that Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.



Minnesota State Board of Legal Certification
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Home

Specialty Fields

Accredited Agencies

Agency Application

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STATE OF MINNESOTA

RULES

of the

BOARD of LEGAL CERTIFICATION

Effective March 14, 2002

PREAMBLE:

The following rules establish procedures for continued operation of the Minnesota State Board of Legal Certification. As of the effective date of their adoption by the Minnesota Supreme Court, these rules will supersede and replace the original Plan of the Supreme Court (adopted October 10, 1985) and the Rules of the Board of Legal Certification (adopted December 15, 1986).

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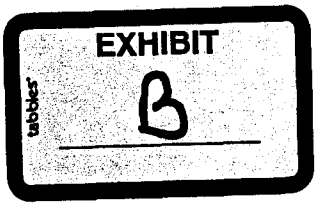


100. PURPOSE OF THE BOARD OF LEGAL CERTIFICATION

The purpose of the Minnesota State Board of Legal Certification (Board) is to accredit agencies that certify lawyers as specialists, so that public access to appropriate legal services may be enhanced. In carrying out its purpose, the Board shall provide information about certification of lawyers as specialists for the benefit of the profession and the public.

101. DEFINITIONS

a. "Applicant agency" means an entity that submits a proposal to become an accredited agency in a field of law.

b. "Applicant lawyer" means a lawyer who seeks certification from an accredited agency.

c. "Board" means the Minnesota State Board of Legal Certification.

d. "Certified lawyer" means a lawyer who has received certification from an accredited agency.

e. "Accredited agency" means an entity that has applied for and has been accredited by the Board to certify lawyers in a field of law.

f. "Rules" means rules promulgated by the Supreme Court governing the Minnesota State Board of Legal Certification.

g. "Field of law" means a field of legal practice that is identified, defined and approved by the Board as appropriate for specialist designation.

102. COMPOSITION OF THE BOARD

a. The Supreme Court shall appoint twelve (12) members of the Board, of whom nine (9) shall have active licenses to practice law in the state

and represent various fields of legal practice. Three (3) attorney members shall be nominated by the Minnesota State Bar Association and three (3) shall be non-attorney public members. The Supreme Court shall designate a lawyer member as chairperson and the Board may elect other officers, including a vice-chair who will serve in the absence of the chairperson.

b. Members shall be appointed for three-year terms. The terms of one (1) public member and one (1) member nominated by the State Bar shall expire each year. Any vacancy on the Board shall be filled by the Supreme Court by appointment for the unexpired term. No member may serve more than two (2) three-year terms with the exception of the sitting chairperson, who may be appointed for a third three-year term or such additional period as the court may order.

c. Members shall serve without compensation, but shall be paid their regular and necessary expenses.

103. MEETINGS

a. Meetings of the Board shall be held at regular intervals and at times and places set by the chairperson.

b. Meetings are open to the public except when the Board is considering:

(1) personnel matters;

(2) examination materials;

(3) legal advice from its counsel;

(4) any information which is confidential or private under Rule 106b(5).

c. The Board may make determinations by a

majority vote of those present at a meeting, with the exception of the following which must be made by a majority of the members of the Board:

(1) recommendations for changes in rules of the Board;

(2) determinations to approve or rescind an agency's accreditation.

d. The Board may meet by conference call or make determinations through mail vote.

104. CONFLICT OF INTEREST

A Board member who in the past twelve (12) months has served in a decision-making capacity for an agency that is, or seeks to become, a Minnesota accredited agency shall disclose such service to the Board and shall recuse him/herself from any vote relating to the agency's accreditation.

105. POWERS OF THE BOARD

The Board is authorized:

a. To identify, define and approve a definition or definitions of a field of law, on its own motion, or in response to an application or applications from an applicant agency.

b. To develop standards, application verification procedures, testing procedures, and other criteria for reviewing and evaluating applicant and accredited agencies.

c. To take one of the following actions with regard to an applicant agency or accredited agency:

(1) grant accreditation or conditional accreditation;

(2) deny accreditation;

(3) rescind accreditation.

d. To review and evaluate the programs and examinations of an applicant agency or accredited agency to assure compliance with these rules.

e. To investigate an applicant agency or accredited agency concerning matters contained in the application and, if necessary, to conduct an on-site inspection.

f. To require reports and other information from the applicant agency or accredited agency regarding the certification program.

g. To monitor lawyer representations concerning certification status.

h. To adopt policies and charge fees reasonably related to the certification program and not inconsistent with these rules.

106. DUTIES OF THE BOARD

a. The chairperson shall convene the Board as necessary, and between meetings shall act on behalf of the Board. The chairperson may appoint subcommittees of the Board.

b. The Board shall:

(1) Hire a Director to administer the Board's programs and to perform duties as assigned by the Board.

(2) Provide information about lawyer certification programs for the benefit of the profession and the public.

(3) Disseminate accurate information regarding lawyers' certification status.

(4) File with the Supreme Court an annual report detailing the work of the Board.

(5) Report to the Lawyers Professional Responsibility Board any lawyers who may violate the provisions of these rules or other rules concerning certification matters.

(6) Maintain appropriate records of accredited agencies and certified lawyers.

(7) Communicate with groups, agencies, and other boards and organizations regarding matters of common interest.

(8) Make rulings on applications, conduct hearings, and take other actions as are necessary to carry out the Board's purpose.

107. BOARD DISPOSITION OF AGENCY APPLICATIONS

The Board shall take the following action with respect to the agency application:

a. Grant the agency's application for accreditation.

b. Grant conditional accreditation to an applicant agency subject to receipt of evidence showing satisfaction of specific conditions imposed by the Board.

c. Deny the agency's application and issue a written decision stating the reasons for the denial. An application may be denied for any of the following reasons:

(1) The agency fails to meet criteria set forth in these rules.

(2) The application is incomplete, investigation has revealed inaccuracies, or the applicant agency has been uncooperative in the initial review.

(3) The proposed definition of the field of law is rejected by the Board.

(4) The agency's goals and methods of measuring attainment of those goals are not appropriate or not well defined.

(5) The agency's tests and other performance criteria are inadequate.

d. Rescind the agency's previously granted accreditation if the agency is found to have violated these rules.

108. APPLICATION AFTER DENIAL

An applicant agency denied accreditation may not reapply for twelve (12) months following the Board's disposition.

109. BOARD HEARINGS

An agency whose application has been denied pursuant to Rule 107c or rescinded pursuant to Rule 107d has the right to a hearing if the agency makes a written request for hearing within twenty (20) days of its receipt of notice of denial. The hearing shall be promptly scheduled before the full Board or a subcommittee thereof appointed by the chairperson. Representatives of the agency may appear personally or through counsel and may present evidence and testimony. The hearing shall be recorded. Following the hearing, the Board shall provide written notice of its decision setting forth reasons for the decision.

110. BOARD INFORMATION DISCLOSURE

The Board has the following public disclosure obligations:

a. To provide public notice when an accreditation application has been received for a particular field of law.

b. To make available for inspection, at

reasonable times, applications for accreditation submitted by applicant agencies.

c. To publish the definitions of each field of law and the address and telephone number of each applicant agency or accredited agency, along with the name of the agency's contact person.

111. BOARD SPECIFIED FEES

The Board shall periodically set and publish a schedule of reasonable fees for the costs incidental to administering these rules.

112. THRESHOLD CRITERIA FOR AGENCY AUTHORITY TO CERTIFY

An agency applying to the Board for accreditation in a field of law must complete an agency application form and submit it along with necessary documentation and fees to the Board office. An applicant agency must meet the following criteria:

a. Have among its permanent staff, operating officers, or Board of Directors at least three (3) legal practitioners not from the same law firm or business whose daily work fulfills the substantial involvement requirement in the field of law as defined in Rule 114b, and whose role in the agency includes evaluating the qualifications of specialist lawyers.

b. Provide evidence that the certification program is available to lawyers without discrimination because of a lawyer's geographic location or non-membership in an organization.

c. Provide evidence that the applicant agency is an ongoing entity capable of operating an acceptable certification program for an indefinite period of time.

d. Agree to publicize the certification program in a manner designed to reach lawyers licensed

to practice in Minnesota who may be interested in the field of law.

e. Agree to be subject to Minnesota law and rules regulating lawyers.

f. Agree to keep statistical records concerning certified lawyers and to report such numbers to the Board on an annual basis.

g. Agree to provide written notice to each certified specialist stating that if he/she communicates the specialty status, he/she shall do so in a manner consistent with the requirements of Rule 119 of these rules, as well as with the requirements of Rule 7.4 of the Minnesota Rules of Professional Conduct.

h. Provide evidence that the following have been adopted and are in use in the agency:

(1) Procedures that will assure the periodic review and recertification of certified lawyers.

(2) Due process procedures for lawyers denied certification.

(3) Procedures that will assure the periodic evaluation of the certification program.

(4) Procedures that will assure accurate ongoing reporting to the Board concerning the certification program.

113. AGENCY OBLIGATIONS

An accredited agency must provide the Board with the following:

a. At least 60 days prior to the effective date, a written summary of proposed changes in an accredited agency's standards for certification.

b. An updated lawyer application and such other

information as the Board may require.

c. Within 30 days of certifying lawyers, a roster listing the certified lawyers' names, Minnesota license numbers, home and work addresses, and other states where licensed; this document must be verified by the director of the accredited agency, and accompanied by the initial fee.

d. Within 30 days of denying or revoking a lawyer's certification, the name, Minnesota license number, work address, and reason for denial or revocation.

e. By January 20 of each year, an annual statistical and summary report showing the progress of its certification program.

f. By January 20 of each year, or at such time as is mutually agreed, submit payment of annual attorneys' fees as defined in Rule 111.

114. AGENCY STANDARDS FOR CERTIFYING LAWYERS

Accredited agencies shall certify lawyers for a period not exceeding six (6) years. The following are minimum standards for lawyers certified by an accredited agency:

a. The lawyer is licensed and on active status in Minnesota.

b. The lawyer shows by independent evidence "substantial involvement" in the field of law during the three-year period immediately preceding certification. "Substantial involvement" means at least 25% of the lawyer's practice is spent in the field of law of the certification.

c. The accredited agency verifies at least three (3) written peer recommendations, in addition to references from lawyers or judges unrelated to

and not in legal practice with the lawyer.

d. The lawyer successfully completes a written examination of the lawyer's knowledge of the substantive, procedural and related ethical law in the field of law; grading standards for the examination must be made available prior to test administration; model answers must be made available for inspection after test results are determined.

e. The lawyer provides evidence of having completed at least 20 hours every three (3) years of approved CLE activity that is directly related to the certified specialist's field of law, sufficiently rigorous and otherwise appropriate for a certified specialist.

f. The lawyer provides evidence of being current with CLE credit requirements for every state of active licensure and having been current throughout the period of application or recertification.

g. The lawyer signs a release to share information with the Board from the files of the accredited agency.

115. AGENCY STANDARDS FOR AUTOMATIC/DISCRETIONARY DENIAL OR REVOCATION OF LAWYER CERTIFICATION

a. Automatic denial or revocation. An agency will automatically deny or revoke a lawyer's certification upon the occurrence of any of the following:

(1) A finding by the agency that the lawyer failed to complete 20 CLE credits in the field of law within his/her three-year reporting period or the equivalent CLE reporting period.

(2) Suspension or disbarment of the lawyer from the practice of law in any jurisdiction in which the lawyer is licensed.

(3) Suspension of the lawyer for nonpayment of license fees or for failing to maintain mandatory CLE credits in any jurisdiction in which the lawyer is licensed.

(4) Failure of the lawyer to complete satisfactorily the recertification process or failure to pay the required certification fees.

(5) Written notice from the lawyer that he/she seeks decertification.

b. Discretionary denial or revocation of certification. An agency may deny or revoke a lawyer's certification if:

c. The lawyer fails to cooperate with the certifying agency, or submits false or misleading information during the certification or recertification process.

(1) The lawyer's record contains evidence of personal or professional misconduct which is inconsistent with the standards of conduct adopted by the accredited agency.

(2) The lawyer falsely or improperly announces the field of law or certification.

116. RENEWAL OF AGENCY ACCREDITATION

Agencies are required to apply to the Board for accreditation renewal at least once every three (3) years.

a. The following must be submitted to the Board for renewal of accreditation:

(1) A completed application form seeking renewal of accreditation and a fee in an amount specified by Rule 111.

(2) A written critique of the agency's own certification program, which includes written evaluations from certified lawyers and a written analysis of achievement of program goals.

(3) Copies of examinations and model answers for the most recent examinations administered since accreditation or last renewal of accreditation.

(4) Statistical information concerning the progress of the program since the original accreditation or last renewal of accreditation.

b. The Board may require the agency to provide the following as part of the accreditation renewal process:

(1) Opportunity for Board representatives to conduct an on-site inspection of the agency.

(2) An audit of agency records by Board representatives, including a review of certified lawyers' references.

(3) Opportunity for a personal meeting with representatives of the accredited agency.

(4) Such other information as is needed to evaluate the certification program.

117. AGENCY ANNOUNCEMENT OF ACCREDITATION

An accredited agency may publish the following statement with respect to its certification status:

"This agency is accredited by the Minnesota State Board of Legal Certification to certify lawyers as specialists in the field of [name of field of law]." If conditional accreditation has been granted publication of that fact must be made.

118. AGENCY ANNOUNCEMENT OF REVOCATION OF ACCREDITATION

In the event that the Board revokes the accreditation of an agency, the agency shall contact each certified lawyer and shall advise him/her to cease all advertising, announcements and publications referencing Board authorization.

119. LAWYER ANNOUNCEMENT OF CERTIFICATION

The certified lawyer may announce that he/she is a certified specialist in a field of law and that the agency granting the certification is an agency accredited by the Minnesota State Board of Legal Certification to certify lawyers as specialists in a designated field of law. The lawyer shall not represent, either expressly or implicitly, that the specialist status is conferred by the Minnesota Supreme Court.

120. IMMUNITY

The Board and its members, employees, and agents are immune from civil liability for any acts conducted in the course of their official duties.

Minnesota State Board Legal Certification
Galtier Plaza, Suite 201, 380 Jackson Street, St. Paul, Minnesota 55101
Phone: (651) 297-1857 | Fax: (651) 296-5866 | TTY: 800 627-3529 ask for 651 297-1857

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

TO: BOARD OF LEGAL CERTIFICATION

DATE: April 29, 2004

FROM: PETER KRIESER
Assistant Attorney General
445 Minnesota St., #1400
St. Paul, MN 55101-2131

PHONE: (651) 297-5940
FAX: (651) 297-2576
TTY: (651) 297-7206

SUBJECT: **Constitutionality of Professional Responsibility Rules Regarding Protecting the Terms "Specialist" and "Certified Specialist" and Requiring Disclaimers**

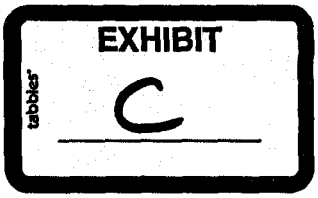
You have asked for an opinion from the Attorney General's Office regarding the constitutionality of a proposed change to Rule 7.4, of the Minnesota Rules of Professional Conduct. The proposed changes would limit the use of the terms "specialist" and "certified specialist" to those persons certified as specialists by organizations approved by the Minnesota Board of Legal Certification.

Since this Office is required to defend the constitutionality of Minnesota laws and rules, we typically do not opine on whether particular proposed language is constitutional. Notwithstanding this limitation, I believe I can provide the following comments, which I hope you will find helpful.

BACKGROUND

In 1985, the Minnesota Supreme Court established the Board of Legal Certification ("BLC") to approve boards, entities and organizations which evaluate lawyers to determine whether the lawyers meet objective standards which demonstrate special competency in an area of law. Boards, entities or organizations seeking BLC approval of their specialty certification programs are required to submit information and make a showing that their programs have criteria and testing which establish that lawyers meeting their standards have increased competency in a practice area. Minnesota's system allows a certifying agency to seek approval of its specialty certification program. Thus, any organization may seek approval of specialty designation for lawyers who have met its criteria for specialization.

Currently, only lawyers who are certified by BLC approved boards, entities or organizations may advertise that they are a "specialist" or "board certified specialist" in



an area of practice. The Minnesota State Bar Association ("MSBA") has proposed to change Rule 7.4 to focus the rule on advertisements of board certification, rather than on representations of special competence. A copy of the MSBA's changes is attached as Exhibit 1.

The MSBA's proposed changes in the Minnesota Rules of Professional Conduct would continue to protect the "board certified specialist" designation, but not reserve the term "specialist" to lawyers who had met the criteria of a BLC approved entity.

The BLC has proposed changes to the MSBA proposal, which are attached as Exhibit 2. The BLC's version reserves use of both terms "specialist" and "certified specialist" to those lawyers certified as specialists by organizations approved by the BLC. The proposals of both the MSBA and BLC also contain "disclaimer" language. This memorandum addresses the restrictions that states may constitutionally place on lawyer advertising of specialization, certification, and representations of special competence in areas of practice.

LAW AND ANALYSIS

In 1990, the United States Supreme Court, in *Peel v. Attorney Registration and Disciplinary Com'n of Illinois,* 496 U.S. 91, 110, 110 S. Ct. 2281, 2292-93 (1990), found unconstitutional a state's complete ban on advertising specialty certification received from a nationally recognized certifying board. The court held that a state board could instead institute a specialization approval system or a disclaimer system. Specifically, the court stated:

> To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty.

Id.

In order for a regulation of commercial speech to survive constitutional scrutiny, (1) "the government must assert a substantial interest," (2) the government must show that the restriction "directly and materially advances that interest," and (3) the regulation must be "narrowly drawn." (*Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 623-24, 115 S. Ct. 2371 (1995)).

1. **Protecting the Terms "Specialist" and "Certified Specialist".**

Several state and federal courts have addressed the issue of whether the terms "specialist," "certified specialist," or "board certified" may be constitutionally protected. Courts have upheld a restriction on the use of those terms to physicians and lawyers who had met the criteria that the state required for specialty designation. *See, e.g., American Academy of Pain Management v. Joseph*, 353 F.3d 1099, 1106-1112 (9th Cir. 2004). In *A. A. P. M.*, the court noted that the California Medical Board's review of certifying agencies was the "screening process suggested in *Peel* that the California legislature has adopted." The court reasoned that when a state has a statute that delineates the standards necessary for approval of certifying boards, then the use of the words "board certified" by practitioners who obtained board certification by an organization which does not meet the statutory criteria is inherently misleading, and is not protected speech.

The court further recognized that "California has a substantial interest in protecting consumers from misleading advertising by medical professionals." 353 F.3d at 1108. The court ruled that a practitioner's use of the statutorily protected words could properly be restricted even under the "potentially misleading standard." The court noted that the average consumer has no way of knowing whether the certifying organization has valid certification standards or is a bogus board.[1] Finally, the court ruled that it was not necessary to offer the use of disclaimers to practitioners whose certification was obtained from an unapproved board. 353 F.3d at 1111; *see also Texans Against Censorship v. State Bar of Texas*, 888 F. Supp. 1328 (E.D. Tex. 1995), *aff'd*, 100 F.3d 953 (5th Cir. 1996) (approving Texas disciplinary rules allowing Texas lawyers with approved certification to use the term "specialist" or "certified specialist" in association with their names, and requiring disclaimer language in advertisements by non-approved lawyers); *Iowa Board of Professional Ethics and Conduct v. Wherry*, 569 N.W.2d 822 (Iowa 1997) (upholding requirement that a lawyer certify that he had completed a certain number of continuing education credits and devoted a specified percentage of practice to a designated area of practice before advertising special competence in that area of practice.)

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[1] There was testimony in District Court stating that although there were an additional 108 self designating "board certifying agencies:"

> "the requirements for the 23 (ABMS and AMA) recognized and official certifying boards are the very highest. Although they do not always guarantee that a physician can do everything that he claims, they are still the best indicator that a physician is properly qualified...."

The language proposed by the BLC which would protect the use of the terms "specialist" and "certified specialist" is virtually identical to that upheld in *A. A. P. M. A. A. P. M.,* Consequently, if challenged, the BLC has a strong argument that the standards are constitutional.

2. **Disclaimer Requirements.**

As noted above, states may not have to offer the use of disclaimers to nonaccredited practitioners. Courts have, however, upheld the use of disclaimers. In *Texans Against Censorship,* the court held that it was constitutional to require that a disclaimer regarding specialization be included with any advertisement when lawyers were advertising areas of practice in which they had not obtained certification from the Texas Board or from an organization approved by the Texas Board. The court approved the following language: "Not Board Certified by the Texas Board of Legal Specialization." 888 F. Supp. 1354 Where the Texas Board of Legal Certification had not designated an area of law for certification, the court suggested the following additional statement could be included in the advertisement: "No designation has been made by the Texas Board of Legal Specialization for a certificate of special competence in this area." *Id.*; *Walker v. Board of Professional Responsibility of Sup. Ct. of Tennessee,* 38 S.W.3d at 540, 547-48 (Tenn. 2001) (upholding a disciplinary rule that a non-certified specialist who advertised an area of practice in which certification was available, must use the following disclaimer: "Not certified as a [area of practice] specialist by the Tennessee Commission on Continuing Legal Education and Specialization.")[2]

If disclaimers are adopted, we recommend they be consistent with those approved in *Texans Against Censorship.*

3. **Designation of the BLC as the Certifying Agency.**

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[2] In April 2003, Tennessee adopted Rules of Professional Conduct quite similar to Minnesota's current rule. The Rules apparently no longer have the disclaimer language and now merely protect the terms "specialist" or "certified specialist," stating that only those persons certified by the State Board may use the term "specialist" or "certified specialist." Advertising of areas of practice is covered under a different rule and relies on the "false, fraudulent or misleading" test.

The establishment of an entity, that is the BLC, to evaluate and approve specialty certifying agencies, likely meets constitutional requirements regarding commercial speech. See *Peel*, 2292-93 (1990); *A. A. P. M.*, 353 F.3d at 1106-12.

Courts will not second guess whether a certification board should or should not approve a specific certifying entity or organization. *See Borgner v. Brooks*, 284 F.3d 1204, 1211 (11th Cir. 2002). Challenges regarding whether a specific organization or entity should be approved as a certifying agency or whether the BLC improperly denied approval to a qualified entity or organization can be handled through the appeal process of the BLC. The "right" of any organization or entity to certify specialists will depend upon a case by case factual evaluation of the organization's certification program and the record developed before the BLC.

Please let me know if you have any questions or would like to discuss this matter further.

AG: #1219566-v1

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 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.

Minnesota BLC
ALTERNATIVE TO MSBA PROPOSED REVISIONS
(Maintaining Limited Protection for Term "Specialist")

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is **a specialist or** certified as a specialist in a particular field of law except as follows:

(1) the communication shall clearly identify the name of the certifying organization**, if any,** in the communication; and

(2) if the **attorney is not certified as a specialist or if the** certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the **attorney is not certified by any** organization ~~is not~~ accredited by that Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.

Exhibit 2

Minnesota State Board of Legal Certification
Galtier Plaza, Suite 201, 380 Jackson Street, St. Paul, MN 55101
Phone (651) 297-1857 ** Fax (651) 296-5866 ** TTY 800 627-3520 ask for (651) 297-1857

Home

Specialty Fields

Accredited Agencies

Agency Application

Rules

Annual Reports

FAQ

Public Meetings

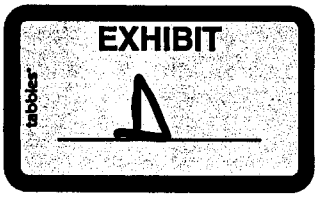
ACCREDITED CERTIFYING AGENCIES

Minnesota State Bar Association Civil Litigation Section

The Civil Litigation Section of the Minnesota State Bar Association (MSBA), a local association of attorneys located in Minneapolis, Minnesota, has been certifying Minnesota lawyers as specialists in the field of "Civil Trial Practice" since 1987. Under the terms of a cooperative agreement with the NBTA, the MSBA uses the NBTA's Civil Trial Practice examination as its test instrument. Attorneys may apply for certification and be tested simultaneously for certification by both agencies. At the end of 2000, there were 342 attorneys certified as "Civil Trial Practice" specialists through the Civil Litigation Section of MSBA.

Minnesota State Bar Association Real Property Section

The Real Property Section of the Minnesota State Bar Association (MSBA), a local association of attorneys located in Minneapolis, Minnesota, has been certifying Minnesota attorneys as "Real Property" specialists since 1989. As of the end of 2000, 342 attorneys were certified as "Real Property"



The National Elder Law Foundation (NELF) of Tucson, Arizona, was approved in 1997 to certify specialists in Minnesota in the field of "Elder Law." Elder Law specialists have a combination of expertise and experience in the areas of probate law and public benefits law, as well as knowledge and experience in the social aspects of working with elderly clients. To date, only one (1) Minnesota attorney is certified as an "Elder Law" specialist.

Minnesota State Board of Law Examiners
Galtier Plaza, Suite 201, St. Paul, Minnesota 55101
Phone: (651) 297-1857 | Fax: (651) 296-5866 | TTY: 800 627-3629 ask for (651) 297-1857

Fredrikson
& BYRON, P.A.

May 5, 2004

OFFICE OF
APPELLATE COURTS

MAY 0 7 2004

FILED

VIA MESSENGER

Frederick K. Grittner, Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

RE: Proposed Amendment to Rule of Professional Conduct 7.4

Dear Justices:

I am a Real Property Law Specialist certified by the Real Property Section of the Minnesota State Bar Association. I have been a specialist for fourteen years. I am writing this letter to oppose the MSBA's proposed modification to Rule 7.4 of the Minnesota Rules of Professional Conduct.

The website of the Minnesota State Board of Legal Certification (www.blc.state.mn.us/), which is part of the website for the Minnesota State Court System (www.courts.state.mn.us/home /default/asp), states that the Minnesota State Board of Legal Certification, which was created by this Court, "oversees the process by which lawyers in Minnesota are certified as specialists. The certification process gives the public information about certain lawyers who have earned the right to call themselves specialists in certain fields of law." The State Board of Legal Certification website further provides as follows:

Q. What does an attorney have to do to become a specialist?

A. Minnesota attorneys who wish to become certified as specialists must:

1. have at least three (3) years of practice in their specialty field;
2. take and pass a written examination in their specialty field,
3. fulfill ongoing education requirements, and
4. receive favorable evaluations from other attorneys and judges familiar with their work.

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200 South Sixth Street
Suite 4000
Minneapolis, Minnesota
55402-1425

The State Board of Legal Certification has accredited the MSBA to certify lawyers in Minnesota as Real Property Law Specialists. In its Real Property Law Specialty Certification Program, the MSBA defines Real Property Law as the practice of law in Minnesota dealing with matters relating to real property transactions including, but not limited to, real estate conveyances, title searches, leases, condominiums, mortgages, mortgages and other liens, property taxes, real estate development, real estate financing and determination of property rights, all with consideration to related fields of law. To be certified, an applicant must have three years of practice, and at least 25% of the lawyers time, but not less than 300 hours, must be spent in the area of real property law. The applicant must fully disclose any ethical complaints or malpractice claims, must be current with continuing legal education, and must have completed 30 real property continuing legal education hours in the three years before applying for certification. The applicant must obtain five positive references attesting to the applicant's competence, involvement in real property law, and reputation for ethical conduct. Finally, the applicant must obtain a score of at least 75% correct on a written examination. The examination, which is given every other year, is difficult. The passing rate for the examination for the last three years in which the exam has been give is 55% in 2000, 58% in 2002, and 63% in 2004. There are currently 327 lawyers certified as real property law specialists with 22 more applicants waiting for certification approval pending reference checks.

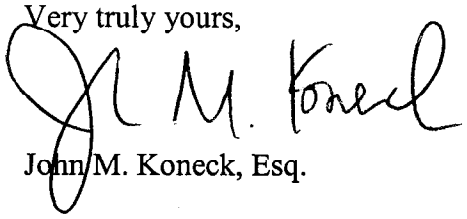
I oppose the modification of Rule 7.4 because I believe that the public will be mislead and confused by lawyers who claim to be specialists but who are not certified or approved as specialists by an entity approved by the Minnesota State Board of Legal Certification. The compelling evidence of the public confusion that will result from the MSBA's proposed modification to Rule 7.4 is found in the survey ("Survey") that the Academy of Certified Trial Lawyers of Minnesota has submitted to this Court. As the Court is aware, the Minnesota Center for Survey Research conducted the Survey to determine the lay publics' understanding of the characteristics of someone who claims to be a "specialist." The overwhelming majority of respondents to the Survey stated believed that one who claims to be a specialist was required to have experience in the specialty area, was required to take continuing education courses in the specialty area, was required to keep his or her qualifications current, had undergone a check of his or her professional discipline or malpractice history, was required to receive good references or review from other lawyers, and had passed an examination in the specialty area. Not surprisingly, the lay public's view of the requirements that a lawyer must meet to call herself or himself a specialist mirrors almost exactly as noted above what the State Board of Legal Certification has informed the public that a lawyer must do to become a specialist. Public confusion and misunderstanding will certainly result, because, notwithstanding what the Survey shows that the public believes about those who claim to be specialists, under the MSBA's proposed modification to Rule 7.4(a), a lawyer could claim to be a specialist simply if the lawyer is able to truthfully state that the lawyer limits his or her practice to a certain area of law, even though the lawyer is not required to have experience in the area, is not required to take

continuing legal education courses in the specialty area, is not required to maintain his or her qualifications currently, is not required to undergo a check of his or her professional discipline or malpractice history, is not required to receive good references or review from other lawyers, and has passed no examination in the specialty area.

Many have claimed that the legal profession has in the past used restrictions on lawyer advertising to protect itself from economic competition. To eliminate this economic protectionism, and because of constitutional mandates, courts have often struck down restrictions on lawyer advertising unless the restrictions were clearly in the public interest. The Survey submitted to this Court establishes the strong public interest in restricting the use of the term "specialists." The MSBA's proposed modification to Rule 7.4 would allow any lawyer to claim that he or she is a specialist, so long as the lawyer limits his or her area of practice to that area. The public will not benefit from this change because, as the Survey demonstrates, public confusion will result. Thus, the only beneficiaries of the proposed change to Rule 7.4 will be lawyers who have not met the requirements for certification that the Survey demonstrates the public believes they have met.

I urge the Supreme Court to reject the proposed modification to Rule 7.4.

Very truly yours,



John M. Koneck, Esq.

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Thomas C. Vasaly
117 Cambridge Street
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(651) 296-6752
May 7, 2004

Minnesota Supreme Court
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard,
St. Paul, Minnesota 55155,

In re: Amendment to Rules of Professional Conduct
No. C8-84-1650

To the Honorable Members of the Court:

I respectfully submit the following comments on the MSBA's petition to amend the Minnesota Rules of Professional Conduct.

A. Rule 1.6--Confidentiality of Information.

1. Disclosing crimes.

The proposed rule inappropriately expands the exception to confidentiality as to reporting of crimes. Proposed Rule 1.6(b)(4) allows disclosure when:

> the lawyer reasonably believes the disclosure is necessary . . . to prevent the commission of a crime . . . .

The proposed language goes far beyond the "crime/fraud" exception codified in the ABA Model Rules. Model Rule 1.6(b)(2) allows a lawyer to reveal information related to the representation when necessary:

> 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 . . . .

Thus, the Model Rule's crime/fraud exception only applies if there is potential substantial injury and the client has used the lawyer's services in furtherance of the crime or fraud. Prior to 2003, Model Rule 1.6 deservedly received much criticism because the crime/fraud exception in the rule

was extremely limited. The ABA finally addressed this problem in 2003, and the Model Rule's formulation is now consistent with the Restatement.[1]

At first glance, proposed Rule 1.6(b)(2) appears to be consistent with current Minnesota Rule 1.6(b)(3), which allows a lawyer to reveal:

> the intention of a client to commit a crime and the information necessary to prevent a crime . . . .

The current rule is ambiguous because it is not immediately clear whether "the information necessary to commit a crime" refers to crimes by the client or refers to crimes by anyone. The current comment to the rule, however, makes it clear that the rule is limited to crimes by the client:

> The confidentiality required under this rule should not allow a client to utilize the lawyer's services in committing a criminal or fraudulent act. A lawyer is permitted to reveal the intention of a client to commit a crime and the information necessary to prevent the crime.

The phrase "information necessary to commit *the* crime" (emphasis supplied) indicates that a lawyer is only permitted to reveal the information if it is the client who intends to commit the crime.[2] This interpretation is consistent with current Rule 1.6(b)(4), which allows a lawyer to disclose confidences and secrets:

> necessary to rectify the consequences of a client's criminal or fraudulent act *in the furtherance of which the lawyer's services were used* . . . .

(Emphasis supplied.) Proposed Rule 1.6(b)(5) is worded identically.

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[1] The Restatement provides:

> A lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent a crime or fraud and:
>
> (a) the crime or fraud threatens substantial financial loss;
>
> (b) the loss has not yet occurred;
>
> (c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and
>
> (d) the client has employed or is employing the lawyer's services in the matter in which the crime fraud is committed.

Restatement (Third) of The Law Governing Lawyers § 67(1) (2000).

[2] Former DR 4-101(C)(3), Minnesota Code of Professional Responsibility, allowed a lawyer to reveal "[t]he intention of a client to commit a crime and the information necessary to prevent *the* crime." (Emphasis supplied.) In the 1985 conversion to the Minnesota Rules of Professional Conduct, the wording was changed, perhaps inadvertently, to the present "information necessary to prevent *a* crime." (Emphasis supplied.)

There are some limited circumstances where it is appropriate for a lawyer to reveal confidential information to prevent wrongful conduct by a nonclient. For example, proposed Rule 1.6(b)(6) would appropriately allow disclosure where "the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm." However, proposed Rule 1.6(b)(4), which allows disclosure of confidential information in circumstances where there is not a compelling need for disclosure, is overbroad.

The crime/fraud exception requires a careful balance between the lawyer's duty of loyalty to the client and the lawyer's responsibility to society. That balance should not be altered without careful consideration. Neither the unnecessarily restrictive approach in the pre-2003 Model Rule nor the overly permissive approach in the proposed Minnesota rule is appropriate. While current Rule 1.6(b)(3) is broader than the Model Rule and the Restatement, it is within a range of reasonableness. The broad exception in proposed Rule 1.6(b)(4) takes the Minnesota rule outside that range. Whether intentional or based on an incorrect interpretation of the current rule, there is no explanation or justification in the MSBA's report for this deviation from both the current Minnesota rule and the current Model Rule.

2. Disclosing information that is generally known.

Proposed Rule 1.6(b)(2) allows the disclosure of information related to the representation that is generally known. Although the concept is appropriate, the formulation is confusing. The rule allows disclosure if:

> the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client . . . .

This language represents an attempt to incorporate the definition of "secret" in current Rule 1.6(d). However, the coverage of the proposed rule is not identical to that of the current rule, since the proposed rule would allow a client to prohibit a lawyer from disclosing information about the case that the lawyer did not gain in the professional relationship, *e.g.,* that the lawyer read in the newspaper.

The origin of this problem lies in a weakness of Model Rule 1.6: the key term in the rule, "information relating to the representation," is not defined or limited, and thus includes information neither lawyers nor clients would regard as confidential. In partially adopting the structure of Model Rule 1.6, this weakness was imported into the proposed rule. The current rule is superior to the model rule in that it defines its operative terms. *See* current Rule 1.6(d) (definition of confidences and secrets).

The MSBA changed the basic structure of the rule in an attempt to bring the structure closer to that of the Model Rule. However, the proposed rule, which deviates substantially from both the Model Rule and the current rule, is an unsuccessful hybrid. It loses the benefit of Minnesota lawyers' familiarity with the current rule without achieving uniformity with a national model.

3. Responding to accusations.

The proposed comment concerning the lawyer's right to respond to allegations of misconduct does not state the rule accurately. Paragraph [8] of the proposed comment states in part:

> The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.

The rule itself is more limited. It authorizes disclosure if:

> the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client . . . .

Proposed Rule 1.6(b)(8). This language allows disclosure of in response to potential controversies only if the controversy if between the lawyer and the client. The comment inaccurately indicates that disclosure is permitted in response to assertions by nonclients, even if a legal proceeding has not been commenced.

4. Recommendation.

The best approach for the present is to retain the language of current Rule 1.6. It has not been asserted that the current language of the rule is creating any problems in Minnesota. The MSBA should be asked to reconsider the rule. If the MSBA believes it appropriate, it should be permitted to submit a petition proposing revisions to Rule 1.6 at a later date.

If the Court rejects this recommendation, the Court may nevertheless wish to add the phrase "in furtherance of which the client has used or is using the lawyer's services" to proposed Rule 1.6(b)(4) and to delete or amend the language in the proposed comment to the rule quoted in paragraph 3 above.

B. Rule 1.13--Organization as Client

In response to the Enron debacle and other examples of corporate misconduct, the ABA, after extensive debate, revised Model Rule 1.13. The MSBA incorporated these revisions into its proposed rule, but omitted an important provision allowing the lawyer to disclose corporate misconduct in certain limited circumstances. Model Rule 1.13(c) provides:

> 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.

In contrast, the proposed Minnesota rule states:

> (c) If, despite the lawyer's efforts in accordance with paragraph (b), 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.

The public has a right to expect that the legal profession will be responsive to legitimate concerns about lawyer involvement in corporate misconduct. Ignoring these concerns only leads to pressure to enact regulation from sources external to the profession and the state supreme court regulatory systems, *e.g.*, through regulation by the U.S. Securities and Exchange Commission. The Model Rule's expansion of the confidentiality exception is modest and appropriate. A lawyer who represents a corporation has a duty to the corporation itself which must at times override relationships with the corporate officers. Unlike the crime/fraud exception, Model Rule 1.13 allows disclosure when it is the interest of the client, which is the organization. The fact that the MSBA rejected this modest expansion of the confidentiality exception for organizational clients while simultaneously proposing a significant expansion of the exception permitting disclosure of crimes suggests a lack of a coherent and consistent approach.

Recommendation.

Proposed Rule 1.13(c) should be replaced with Model Rule 1.13 paragraphs (c) and (d) quoted above. Proposed Rule 1.13(d) and (e) should be relettered (e) and (f) respectively.

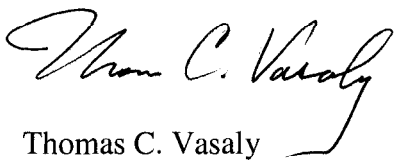
Conclusion.

In closing, I acknowledge the impressive work of the MSBA Task Force that developed the proposed rules that are now before the court.

The foregoing comments are submitted on my own behalf. Thank you for the opportunity to share them with you.

In light of the constraints on the Court's time, I request permission to appear at the May 18 hearing for the limited purpose of responding to any questions the Court may have concerning these comments.

Very truly yours,



Thomas C. Vasaly

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May 7, 2004

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RE: Proposed Amendment to the Minnesota Rules of Professional Conduct 7.4

To the Honorable Justices of the Minnesota Supreme Court:

I oppose the proposed MSBA amendment to Rule 7.4. I am an MSBA member and an attorney in private practice since 1982. I practice in a two attorney firm and most of my work is in civil litigation. I intend to become an MSBA Certified Civil Trial Specialist, and I plan to take the October, 2004 examination to become certified. I have sufficient experience to meet the requirements for certification and I believe my competence and professional reputation will meet the program's standards.

I have always thought being *certified* as a Civil Trial Specialist will be something of significant value to my practice. I do not advertise and I'm not well-known. It's no secret that private legal practice is an extremely competitive business and most practitioners struggle to attract good business. Being able to hold myself out as a *certified* specialist will allow me to project credibility as an experienced, competent litigator to my clients and prospective clients.

The proposed amendment to Rule 7.4 obviously undermines the value of the certification program for practitioners like myself. I also strongly believe the amendment will promote more aggressive advertising by attorneys who could then hold themselves out as "specialists" to an unsuspecting public. The public will assume that someone who is a "specialist" has met *extra standards* of competence for his/her practice, when that conclusion may be simply untrue.

The certification program should not be undermined by such an amendment. Certification protects the public by assuring that certified specialists have met objective standards, have a recognized level of competence, and have been vetted for fitness to hold themselves out as a

specialist. Our profession is subject to unceasing criticism and derision by a public that does not understand what we do for society, but assumes we are just a bunch of moneygrubbing sharks. The certification program serves to strengthen our profession. Please do not undermine it by passing the proposed amendment to Rule7.4.

Respectfully submitted,

Les Gelhar

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MICHAEL J. McCARTNEY IS CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE MINNESOTA STATE BAR ASSOCIATION, ADMITTED IN THE STATE COURTS OF MINNESOTA, NORTH DAKOTA, TEXAS, AND FEDERAL COURTS INCLUDING DISTRICT COURT, COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND THE UNITED STATES SUPREME COURT.

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May 5, 2004

Mr. Frederick Grittner
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St. Paul, MN 55155-6102

RE: Proposed Amendment to Rule 7.4
Of the Rules of Professional Conduct

Dear Mr. Grittner:

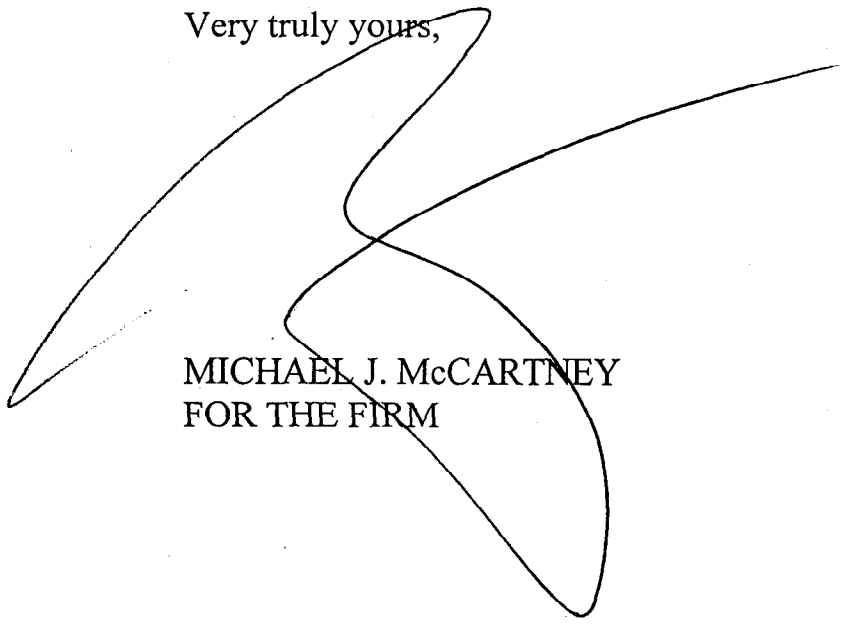
Please note my opposition to the MSBA Petition to amend the above Rule.

I have been a member of the MSBA's Civil Litigation Section, Civil Litigation Section Governing Council, and Civil Trial Certification Council for more than 15 years, and was initially certified as a Civil Trial Specialist on October 1, 1988, with re-certifications in 1994 and 2000. Interestingly enough, the MSBA made no inquiry of either individual members who are certified as specialists, its Civil Trial Certification Council, or, to my understanding, to the Civil Litigation Section Governing Council when formulating the proposal for the Petition.

I recently completed six years of service on the Supreme Court Board of Legal Certification as well. During the course of that service, I came to be extremely proud of the leadership role that Minnesota took in establishing certification of individual specialists by approval of certifying agencies, and have great confidence that the public can truly rely on the certification in Minnesota as being meaningful. To allow non-certified attorneys hereafter to make claims of "specialization" would be harmful to the public, probably destroy the existing certification programs, and, at most, create extreme confusion.

I urge the Court to decline the MSBA's Petition so that the citizens of our State can continue their level of confidence in the designation that presently exists for certified specialists.

Very truly yours,



MICHAEL J. McCARTNEY
FOR THE FIRM

MJM:jg

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

The United States Attorney's Office respectfully requests that it be permitted to make an oral presentation at the May 18, 2004 Hearing To Consider Proposed Amendments to the Rules of Professional Conduct. The oral presentation will be based upon the written statement attached to this request and which is hereby filed contemporaneously.

Dated: 4/30/04

Respectfully Submitted,

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United States Attorney
Attorney ID No. 004328X

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April 30, 2004

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Re: Proposed Amendments to the Minnesota Rules of Professional Conduct

TO: The Honorable Justices of the Minnesota Supreme Court:

The United States Attorneys' Office for the District of Minnesota opposes the adoption of proposed Rule 3.8(e). This office is concerned with the proposed changes to Rule 3.8(e). Under the McDade Act, 28 U.S.C. § 530B, federal prosecutors licensed and practicing in the District of Minnesota are bound by the Minnesota Rules of Professional Conduct. The proposed rule change will therefore adversely affect this office's practice both before the United States Grand Jury and the United States District Court.

The proposed rule should be rejected for several reasons: As it relates to the United States Grand Jury, it conflicts with United States Supreme Court and United States Courts of Appeals precedent. This case law has consistently rejected attempts, directly or indirectly, to limit the Grand Jury's authority to investigate beyond the restrictions imposed by the well-recognized testimonial privileges and Rule 17(c), Federal Rules of Criminal Procedure. Second, the proposed rule is defective as to <u>all</u> federal criminal proceedings (including the Grand Jury) because it conflicts with Federal Rules of Criminal Procedure, Rule 17(c). Finally, given both its legal infirmities and the fact that no demonstrated need has been presented to justify a modification of the present rule, it does not make sense to add further restrictions to the government's ability to investigate.

Because our concern is exclusively with federal practice, the authorities we rely on are federal. We express no opinion as to whether there are substantive distinctions between the constitutional role of the federal and state grand juries or the federal and state rules of criminal procedure. However, if the Court does not decide to reject proposed Rule 3.8(e) outright, at a minimum, we request the Court to amend the proposal so that it excludes federal prosecutors who practice in United States District Court for the District of Minnesota.

The proposed change to Rule 3.8(e) would require that:

> The prosecutor in a criminal case shall: (e)not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
>
> > (1) the information sought is not protected from disclosure by any applicable privilege;
> > (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
> > (3) there is no other feasible alternative to obtain the information.

Our objections are to Sections (2) and(3). These two sections impermissibly intrude on the Grand Jury function and conflict with the standards for issuing (and quashing) subpoenas in all criminal proceedings, as set forth by Congress in Federal Rules of Criminal Procedure, Rule 17(c).

1. The Proposed Rule Impermissibly Interferes With The Constitutionally Established Functions of the United States Grand Jury.

The United States Supreme Court has on numerous occasions refused attempts to limit the United States Grand Jury's subpoena power, beyond the recognized protections afforded by the Fifth Amendment, or well-established testimonial privileges and Rule 17(c). For example, in Branzburg v. Hayes, 92 S.Ct. 2646 (1972), the Court was asked to recognize a testimonial privilege for reporters subpoenaed before the Grand Jury. The reporters argued that they should not be required to testify before a Grand Jury unless there were no other sources available for the information and "that the need for the information is sufficiently compelling to override" First Amendment interests. 92 S.Ct. at 2656.

The Court declined, holding that the Grand Jury was a constitutionally mandated institution with its own "constitutional prerogatives":

> [T]he grand jury's authority to subpoena witnesses is not only historic...(citations omitted) but essential to its task.

92 S.Ct. at 2660.

Accordingly, the Court recognized that the Grand Jury's "investigative powers are necessarily broad". 92 S.Ct. at 2659-60. The Court refused to create another testimonial privilege because the Grand Jury is entitled to "every man's evidence", except where limited by a constitutional, common-law or statutory privilege. 92 S.Ct. at 2660.

The Court re-emphasized the judiciary's limited authority to restrict the Grand Jury's investigative function in U.S. v. R. Enterprises, 111 S.Ct. 722 (1991). R. Enterprises involved the issue whether the standards for trial subpoenas set forth in U.S. v. Nixon, 94 S.Ct. 3090, 3103-3104 (1974)(relevancy, admissibility and specificity) should also be applied to grand jury subpoenas. Holding that these standards should not apply to grand jury subpoenas, the Court found that if applied, the standards would "invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents" sought by the subpoenas. 727 S.Ct. at 726-27. The Court held that the only appropriate restrictions on the Grand Jury's subpoena power were the well-established testimonial privileges and Rule 17(c).

Of significance here, the Court specifically noted that applying the Nixon standards would "saddle a grand jury with mini-trials and preliminary showings" which would impede its functions. 111 S.Ct. at 727. The Court also held that requiring the government to show "need" for a grand jury subpoena would threaten to compromise "the indispensable secrecy" of the proceedings and provide the target of the investigation with far more information than contemplated by the secrecy rules set forth in Federal Rules of Criminal Procedure Rule, Rule 6(e). 111 S.Ct. at 727.

The proposed amendments to Rule 3.8(e), specifically (2) and (3), impermissibly limit the Grand Jury function by requiring a showing of "essentiality" and "no feasible alternative". These investigative limitations are therefore contrary to the above cited Supreme Court precedent.

The proposed rule also suffers from a second and related infirmity concerning the Grand Jury. The Supreme Court in R.

Enterprises held that " a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance". 111 S.Ct. at 728. (emphasis added) The Proposed Rule 3.8(e) reverses that presumption. Under the proposed rule, if a subpoenaed attorney brings a motion to quash, the burden is on the prosecutor to justify the subpoena.

Nor does the fact that the proposed rule focuses on prosecutors, rather than explicitly on the Grand Jury itself, save it. The Supreme Court has held that where a restriction cannot be placed directly on the Grand Jury, that same restriction cannot be placed on it indirectly by imposing it on the prosecutor. U.S. v. Williams, 112 S.Ct. 1735 (1992) involved the issue whether a prosecutor is obligated to provide exculpatory evidence to the Federal Grand Jury. The Court noted that the Grand Jury was a "constitutional fixture in its own right". 112 S.Ct. at 1742. The Court stated that over the years, it had refused all requests to exercise jurisdiction over the Grand Jury's evidence-taking process because of "the potential injury to the historic role and functions" of the grand jury. (citation omitted.) 112 S.Ct. at 1743.

The defendant in Williams acknowledged that the Grand Jury itself could properly decide not to hear exculpatory evidence, but argued the Court could instead require the prosecutor to present such evidence. The Supreme Court disagreed, holding it could not require the prosecutor to do something which the Court had no authority to require the Grand Jury itself to do:

> We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor...If the grand jury has no obligation to consider all "substantial exculpatory" evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.

112 S.Ct. at 1745.

The same, or similar, restrictions as proposed in Rule 3.8(e) have been proposed in other jurisdictions in the context of either motions to quash or ethical rules. A number of United States Courts of Appeals have rejected these attempts. For example, in Impounded, 241 F.3d 308 (3rd Cir. 2001) federal prosecutors subpoenaed a defense attorney to the Grand Jury to provide evidence concerning his client's obstruction of justice in failing to provide earlier subpoenaed records. The attorney claimed attorney-client privilege, and the government responded that the privilege

was inapplicable under the crime-fraud exception. The District Court quashed the subpoena on grounds of "fundamental fairness" without addressing the attorney-client privilege issue. While New Jersey at that time had no equivalent to proposed Rule 3.8(e), the court adopted the reasoning and standards behind the proposed rule here: that there had been less drastic alternatives available to the government and that to require defense counsel to testify would affect the attorney-client relationship. 241 F.3d at 314.

On appeal, the government argued that the District Court had exceeded its authority because the court was required to decide the motion to quash only with reference to Rule 17(c), Federal Rules of Criminal Procedure and the attorney-client privilege. The Third Circuit agreed and reversed the District Court. The Third Circuit held that trial courts cannot place the initial burden on the government to prove a Grand Jury subpoena is necessary and relevant. The judiciary, the court held, has limited authority over the Grand Jury's subpoena power. 241 F.3d at 315. By requiring the government to demonstrate the evidence sought could not be obtained by other means, the District Court had exceeded this authority and impermissibly interfered with the Grand Jury's constitutional function:

> By employing "a different analysis" [from the Rule 17(c) standard and whether the testimony was protected under the attorney-client privilege] based on "fundamental fairness" the District Court deviated from the established procedures which ensure the institutional independence of the grand jury.

241 F.3d at 316.

The Third Circuit had previously invalidated a Pennsylvania Rule of Professional Responsibility-as it applied to federal prosecutors -on the same basis. Baylson v. Dis. Bd of S.Ct. of Penn., 975 F.2d 102 (3rd Cir. 1992). There, the Acting U.S. Attorneys in each of the three federal district courts in Pennsylvania sued the Disciplinary Board of the State Supreme Court to prevent the Board from enforcing the rule against federal prosecutors who were members of the Pennsylvania Bar. The ethical rule invalidated in Baylson had essentially the same two prerequisites as we object to here. (Among other things the rule required the evidence to be relevant to the proceeding and that "there is no other feasible alternative to obtain the information sought.") However, unlike the proposed Minnesota rule, the Pennsylvania rule also required the prosecutor to obtain judicial approval before serving the subpoena. While the court in Baylson primarily relied on the judicial pre-approval component to support

its finding that the rule impermissibly intruded on the Grand Jury function, the Third Circuit also held that the rule improperly imposed substantive restraints as to whom the Grand Jury could subpoena. 975 F.2d at 109-110, and footnote 2. The Court stated:

> R. Enterprises, Williams, and other cases in which the Supreme Court has been reluctant to impose substantive restrictions on the grand jury, suggest to us that the District Court may not...impose the sort of substantive restraint on the grand jury that is contemplated [by the rule]...(footnote omitted)

975 F.2d at 110.

Other circuits have also held that it improperly infringes on the Grand Jury function to require the government to establish "need" and "no other alternative" to subpoena defense counsel. See In Re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1127-1129 (5th Cir. 1990)(judicial attempts to regulate attorney appearance before the Grand Jury would tend to create exemption beyond matters of privilege and constitutional limitations and would transgress the command of Branzburg); In Re Grand Jury Subpoenas, 906 F.2d 1485, 1495-96 (10th Cir. 1990) (no circuit court has found a right to force the government to show a need or lack of another source for the information.); In Re Grand Jury Subpoena, 781 F.2d 238, 248 (2nd Cir. 1986)(en banc)(to impose additional requirements that the government show its need for the information sought and that the attorney is the only source for that information would hamper severely the investigative function of the Grand Jury.); see also In Re Grand Jury Matter, 926 F.2d 348, 350 (4th Cir. 1991); U.S. v. Perry, 857 F.2d 1346, 1347-49 (9th Cir. 1988); In Re Klein, 776 F.2d 628, 632-34 (7th Cir. 1985).

Stern v. U.S. District Court, 214 F.3d 4 (1st Cir. 2000) is also instructive. Like Baylson, the issue was whether an ethical rule requiring judicial pre-approval could be applied to federal prosecutors. The judicial pre-approval was to be based on the same standards as are set forth in proposed Rule 3.8(e). The First Circuit held that the pre-approval process was invalid because the substantive standards violated Supreme Court precedent concerning the independence of the Grand Jury. 214 F.3d at 15-17. The First Circuit found that the rule's infirmity was specifically in its adoption of the substantive standards, and distinguished its earlier decision in Whitehouse v. U.S. District Court, 53 F.3d 1349 (1st Cir. 1995) precisely because the ethical rule in that case only required judicial pre-approval under the traditional motion to quash standards. 214 F.3d at 16.

Finally, support for this proposition is found in U.S. v. Colorado S.Ct., 988 F. Supp. 1368 (D. Colo. 1998). The rule at issue there was the same as here: no judicial pre-approval, but the same three substantive standards applied to prosecutors. The District Court held that under Supreme Court case law, the rule could not be applied to federal prosecutors practicing before the Grand Jury. 988 F. Supp. at 1369.[1]

2. The Proposed Rule Impermissibly Conflicts With The Federal Rules of Criminal Procedure.

The flaws in the proposed rule go beyond its application to the Grand Jury. In Stern, the First Circuit also held the ethical rule invalid as to non-Grand Jury criminal proceedings because it imposed standards more rigorous than Rule 17(c):

> In particular, the "essentiality" and "no feasible alternative" requirements are substantially more onerous (and, thus, more restrictive) than the traditional motion to quash standards. Essentiality is obviously a more demanding criterion than relevancy or materiality. By like token, Rule 17 jurisprudence contains no corollary to the principle that a subpoena issued to one source cannot stand if the information sought is (or may be) available from another source.

214 F.3d at 18. The ethical rule was invalid because it conflicted with Rule 17(c), therefore the District Court did not have authority to adopt the rule under its local rule making authority. Similarly, in Baylson, the Third Circuit found the ethical rule violated Rule 17(c). 975 F.2d at 107-08. Because Rule 17(c) applies to all federal criminal proceedings, it is implicit in Baylson that the ethical rule is invalid as to all federal criminal proceedings. But see U.S. v. Colorado S.Ct., 189 F.3d 1281 (10th Cir. 1999).

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[1]It should be noted that unlike Stern, the District Court in Colorado S.Ct. held the ethical rule was applicable to federal prosecutors in non-Grand Jury proceedings because it concluded the ethical rule did not conflict with Rule 17(c). On appeal, only the last point, concerning non Grand Jury functions, was litigated and affirmed. The Colorado Supreme Court did not appeal the District Court's holding which voided the rule's application to United States Grand Jury functions. 189 F.3d 1281 (10th Cir. 1999).

The ethical rules in Stern and Baylson both required judicial pre-approval for an attorney subpoena. The proposed rule here does not. However, this distinction does nothing to bring the proposed rule in compliance with Supreme Court case law. Once an attorney is subpoenaed, that attorney will bring a motion to quash based upon the "need" and "no feasible alternative" requirements in the proposed rule. These standards by themselves are impermissible violations of both the Grand Jury's constitutional role and the scope of Rule 17(c), whether they are imposed by the requirement of pre-judicial approval or whether they are imposed on the basis of a motion to quash. The fault lies not in the timing of the hearing, but rather in the intrusion upon both the Grand Jury's independence and the impermissible conflict with Rule 17.

3. No Need Has Been Demonstrated For the Proposed Rule

Finally, there has been little or no demonstrated need for the rule. This office is unaware of any documented cases of abuse in Minnesota which would justify an amendment to Rule 3.8(e). The U.S. Attorneys' Office has institutional limitations concerning when it may subpoena attorneys for information relating to the representation of clients. See U.S. Attorneys' Manual 9-13.410. Any such subpoena must be approved by the Assistant Attorney General for the Criminal Division. The following principles are considered on deciding any request:

- The information sought shall not be protected by a valid claim of privilege.

- All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.

- In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information.

- The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.

- The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

While the U.S. Attorney's Manual standards overlap to a certain extent with proposed Rule 3.8(e), they do not make our concerns irrelevant. This point was specifically addressed in Stern, 214 F.3d at 12-13. The internal standards are somewhat different than Rule 3.8(e). For example, 9-13.410B "Preliminary Steps", provides that all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, "unless such efforts would compromise the investigation or case". Also, the internal standards do not, by their explicit terms, provide any substantive rights to others. Thus, as the First Circuit held in Stern:

> [W]e reject the notion that the mere existence of DOJ Guidelines dissipates any hardships.

214 F.3d at 13.

The potential deleterious effect of the proposed rule is quite real. Rule 3.8(e) is not limited to subpoenas issued to defense counsel but also applies equally to a subpoena to a lawyer for a witness or a participant in a business transaction or to a lawyer who formerly represented a defendant. Information from attorneys can be particularly significant in prosecuting important classes of federal crimes, including highly regulated conduct such as securities fraud, environmental crime, corporate fraud and bank fraud. Prosecution of other crimes such as federal tax code violations, criminal forfeiture, money laundering, drug distribution, and racketeering will be affected. The First Circuit in Stern gave two illustrative examples, which, the court noted "are not eccentric hypotheticals, but, rather, fairly typical of the sort of situation in which a prosecutor might wish to serve an attorney subpoena":

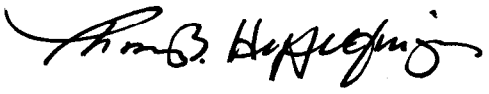
> Suppose, in a robbery case, that a defense lawyer received a lump-sum advance payment for services in the precise amount of the purloined funds from a client with no visible means of support. There is other evidence linking the client to the robbery, so the billing information could not fairly be described as "essential" to the prosecution. Hence, Local Rule 3.8(f) would prohibit the prosecutor from serving a subpoena on the defense attorney, notwithstanding the unarguable materiality and relevancy of the retainer information. Next, consider unprivileged documents in a lawyer's file

> relating to a complex, and possibly fraudulent, international real estate transaction. These documents may be obtainable without a subpoena duces tecum directed to the lawyer, but only through time-consuming, relatively expensive (but still feasible) alternative means. Local Rule 3.8(f) would prohibit an attorney subpoena, even though the situation easily satisfies standards of relevancy, admissibility, and specificity.

214 F.3d at 18.

In light of the foregoing, the U.S. Attorneys' Office for the District of Minnesota requests that the Court either not adopt Rule 3.8(e) or specifically amend the rule so that it is not applicable to federal prosecutors practicing in the District of Minnesota.

Thank you for your consideration.



THOMAS B. HEFFELFINGER
United States Attorney
Attorney ID No. 004328X

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

In re: Amendment to Rules of Professional Conduct

REQUEST FOR ORAL ARGUMENT BY MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

The Minnesota Association of Criminal Defense Lawyers (MADCL) respectfully requests an opportunity to make an oral presentation at the hearing to consider proposed amendments to the rules of professional conduct on May 18, 2004. The MACDL is filing a separate written statement addressing several recommendations of the Minnesota State Bar Association.

Dated: May 7, 2004

Respectfully submitted,

By: /s/ Peter Wold
Peter B. Wold (#118382)

Barristers Trust Building
247 Third Avenue South
Minneapolis, MN 55415

President, Minnesota Association Of Criminal Defense Lawyers

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

In re: Amendment to Rules of Professional Conduct

STATEMENT OF MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

The Minnesota Association of Criminal Defense Lawyers (MACDL) has reviewed the petition and supplemental petition filed by the Minnesota State Bar Association to amend the Rules of Professional Conduct and would like to take this opportunity to comment on several of the recommendations.

Rule 3.3(a)(3), Candor Toward the Tribunal.

MACDL Position:

The MACDL strongly supports adoption of ABA Model Rule 3.3(a)(3) in Minnesota. The rule includes a new provision, underscored here, that "a lawyer may refuse to offer evidence, *other than the testimony of a defendant in a criminal matter,* that the lawyer reasonably believes is false."

Comment:

Unlike the testimony of any witness in a civil case, or the testimony of any other witness in a criminal matter, the testimony of the accused has constitutional underpinnings. An accused has a right to testify. *Rock v. Arkansas*, 483 U.S. 44 (1987). The right is grounded in the Fourteenth Amendment's Due Process Clause, the right to

compulsory process of the Sixth Amendment, and is a necessary corollary to the Fifth Amendment's right to remain silent. *Id.*

There is, of course, no right to commit perjury. *Nix v. Whiteside*, 475 U.S. 157 (1986); *Harris v. New York*, 401 U.S. 222, 225 (1971). Continuing to follow the "knowing" standard will further the sound public policy of prohibiting lying in any proceeding, civil or criminal. A "knowing" standard, rather than a "reasonably believes" standard, maintains a workable bright-line divide between a criminal defense lawyer's ethical obligation and her obligation to protect the rights of the accused. The client's right to testify in their own defense should prevail unless the lawyer knows that a client will perjure himself or herself.

Allowing criminal defense lawyers to refuse to permit a client to testify if they "reasonably believe" the testimony to be false will often frustrate the administration of justice by interjecting delay into proceedings. What a criminal defense lawyer should do in this situation is not clear and has been the subject of much discussion and debate in Minnesota and other states. *See e.g. People v. Johnson*, 72 Cal Rptr. 2d 805 (1998) (discussing six possible actions that a criminal defense lawyer may take). Given the unique position a criminal defense lawyer is in vis-à-vis the client who wishes to testify, it should be as clear as possible when the criminal defense lawyer must confront these difficult choices. The "knowing" standard achieves this goal while the "reasonably believes" standard does not.

Moreover, allowing criminal defense lawyers to refuse to have their client testify just if they "reasonable believe" the client may commit perjury will certainly result in increased post conviction litigation. What if the attorney's "reasonable belief" is wrong?

What if the client would actually have testified truthfully but on the lawyer's direction was not permitted to testify? The "reasonable belief" standard would thus undermine the attorney client relationship in criminal cases. The MACDL strongly recommends that the Court adopt ABA Model Rule 3.3(a)(3) as proposed by the State Bar Association.

Rule 3.4, Fairness to Opposing Party and Counsel.

MACDL Position:

The MACDL recommends adoption of the proposed comment to ABA Model Rule 3.4, permitting "a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence." By contrast, the State Bar Association proposes deleting this language from the comment section of Rule 3.4.

Comment:

The MACDL believes that the proposed comment pertaining to defense counsel taking possession of evidence is consistent with and promotes fairness. The proposed comment is not reasonably construed to endorse or encourage the examination of evidence by the defense. Rather it provides strict limits as to time ("limited possession") and preservation of evidence ("will not alter or destroy material characteristics of the evidence.)" Defense counsel, like prosecutors and law enforcement personnel, is already under a duty to not destroy evidence. There may arise occasions where temporary possession of the physical evidence of a client's alleged crime for the purpose of conducting a limited examination is necessary to conduct a proper defense.

Rule 3.6, Trial Publicity.

MACDL Position:

The MACDL agrees with the Minnesota State Bar Association that this Court retain Minnesota Rule of Professional Conduct 3.6 regarding trial publicity.

Comment:

ABA Model 3.6, which applies to statements that have "a substantial likelihood of materially prejudicing an *adjudicative proceeding* in the matter (emphasis added)," has a much broader application than Minnesota Rule of Professional Conduct 3.6, which applies only to statements that "have a substantial likelihood of materially prejudicing a *pending criminal jury trial*," (emphasis added). The MACDL joins the bar association's concern that the ABA Model Rule 3.6 might not withstand a constitutional challenge on over breadth grounds.

Rule 3.8(e), Special Responsibilities of a Prosecutor (Subpoenaing Defense Counsel).

MACDL Position:

The MACDL supports adoption of ABA Model Rule 3.8(e), which provides that a prosecutor will not subpoena a lawyer in certain criminal proceedings to present evidence about a client except when the prosecutor reasonably believes that the testimony is not privileged and is otherwise not reasonably available.

Comment:

The MACDL understands that the ABA adopted the Model Rule in response to perceived abuses by prosecutors in jurisdictions other than Minnesota. While the MACDL is confident that prosecutors in this state respect the attorney-client relationship

and would not rashly subpoena a criminal defense lawyer to testify against her client, there can be an exception to every rule. Adopting the proposed rule will provide additional safeguards to protect the attorney-client relationship. The MACDL views the rule's requirements as simply a codification of existing practice: only in the last resort should a criminal defense lawyer be placed under subpoena to testify against her client. For these reasons, the MACDL supports adoption of Model Rule 3.8(e).

Rule 3.8(f), Special Responsibilities of a Prosecutor (Dissemination of Extra judicial Statements).

MACDL Position:

The MACDL also supports adoption of ABA Model Rule 3.8(f) that requires prosecutors to "exercise reasonable care to prevent certain law enforcement personnel from making extra judicial statements that would be prohibited for the prosecutor."

Comment:

Current Minnesota Rule of Professional Conduct 3.8 limits law enforcement personnel subject to the rule to those over whom "the prosecutor has 'direct control,'" while the Model Rule would extend the prohibition on extra judicial statements to all persons assisting or associated with the prosecutor. The State Bar Association recommends against adopting the Model Rule because it feels that prosecutors should not have an ethical responsibility regarding persons over whom they have no direct control.

The MACDL views the proposed model rule as a sound measure that will help preserve fair trials in criminal cases and reduce the likelihood of expensive litigation over venue and unfair publicity issues. The MACDL also believes that the rule will not be difficult or expensive to follow.

The rule will most often, if not exclusively, come into play in high profile cases. In such cases joint press conferences conducted by prosecuting and law enforcement agencies are not infrequent. In some circumstances, law enforcement officers involved in the case have made statements at these press conferences that a prosecutor could not make under Rule 3.6 or 3.8, to the detriment of the fair trial rights of the accused. The proposed Rule will help ensure that this does not occur in the future. The MACDL firmly believes, as we know prosecutors believe, that justice is served by trying criminal cases in the courtroom, not the media.

Thank you once again for considering input from the MACDL on these important proposed amendments to the rules of professional conduct in this state.

Dated: May 7, 2004

Respectfully submitted,

By: /s/ Peter Wold

Peter B. Wold (#118382)

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President, Minnesota Association Of Criminal Defense Lawyers

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PRACTICING IN THE AREAS OF
PERSONAL INJURY
PRODUCT LIABILITY
WORKERS' COMPENSATION

May 5, 2004

Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Boulevard
St. Paul, MN 55155-6102

Re: Proposed Amendment to Rule 7.4
of the Rules of Professional Conduct

Dear Mr. Grittner:

This letter is being written in opposition to the proposed amendment of Rule of Professional Responsibility 7.4. I am a member of the Minnesota Board of Legal Certification. I am also a member of the Minnesota State Bar Association-Civil Trial Certification Board. This letter is being presented in my individual capacity as an attorney and as a civil trial specialist certified by the MSBA.

I started practicing law in 1980. My practice primarily involves plaintiff's personal injury work. During the years I have practiced, I have watched lawyer advertising grow and become widespread. I have found myself wanting to become involved in legal certification as a meaningful way for the public to distinguish between the pitch of a flashy advertisement and the substance of being certified as a specialist.

The changes proposed for Rule 7.4 remove years of protection for the term "specialist," while maintaining protection for the term "certified specialist." The relevant question is: Does the public understand the difference between these terms? The changes will permit someone who has never tried a civil case to claim to be a specialist if they only handle personal injury cases. The changes will permit someone who has been decertified by the Civil Trial Certification Board, due to multiple judicial references indicating incompetence, to claim to be a specialist if they handle predominately personal injury cases. The changes will permit someone right out of law school to claim to be a specialist if they limit their practice to a particular area.

As indicated by the public survey, sponsored in part by the MSBA-Civil Trial Certification Board, the public believes that the term "specialist" is synonymous with the term "certified specialist." The public has come to believe that the term "specialist" means that the person has met standards similar to those that are required for certification. The public will be significantly deceived if protection of the term "specialist" is removed.

Given the fact that the consuming public believes the term "specialist" has a special meaning, there will be little incentive for a private practitioner to attain "certified specialist" status. If an attorney who does not meet the standards for certification can claim to be a specialist and the public believes that the term specialist denotes the qualities required of certification, a truly qualified specialist gains nothing by going through the certification process. If there is no meaningful way for qualified specialists to distinguish themselves from those lacking the qualifications for certification, they have no incentive to become certified.

If the incentive is taken away for people to become certified, the certification programs that currently exist will cease to be of any significance. The public will not be well served. The image of the legal profession will be further lowered.

I will not restate the legal authorities being submitted by other authors. The constitutionality of protecting the term specialist is persuasively set forth in the submissions on behalf of the Academy of Certified Trial Lawyers of Minnesota and in the Attorney General Opinion given to the Minnesota Board of Legal Certification and attached to their submission.

I strongly urge the Supreme Court to reject the proposed amendment.

Respectfully submitted,

SHERBURNE LAW OFFICES, P.A.

James M. Sherburne

JMS:jak

BRETT W. OLANDER & ASSOCIATES

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†Civil Trial Specialist
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April 27, 2004

Minnesota Supreme Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr., Blvd.
St. Paul, MN 55155-6102

RE: Hearing to Consider Proposed Amendments to the Rules of Professional Conduct
Court File No.: C8-84-1650

Dear Members of the Court:

This letter is written in conjunction with the upcoming consideration of the Minnesota Rules of Professional Conduct scheduled for oral argument on May 18, 2004. Specifically, I am writing on the proposed amendments to Rule 7.4.

By way of disclosure, I am a member of the Minnesota State Bar Association Civil Trial Certification Council. I am also a member of the Minnesota Supreme Court Appointed Board of Legal Certification. I write this letter not as a member of either organization or group, but as an attorney duly licensed to practice law in the State of Minnesota and as a certified civil trial specialist by the Minnesota State Bar Association and National Board of Trial Advocacy.

The current Rule 7.4(b) requires that a lawyer

> shall not state that the lawyer is a specialist in a field of law unless the lawyer is currently certified or approved as a specialist in that field by an organization that is approved by the State Board of Legal Certification.

The proposed rule would allow anyone to say they were a "specialist" regardless of their level of experience or depth of expertise. They would be subject only to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. Obviously, this

is completely subjective. I cannot imagine the Lawyer's Board investigating complaints of individuals who say they are "specialists."

Based upon anecdotal comment, the reason for the MSBA's proposal is the concern over the constitutionality of the current provision. This should not be an issue. Because Minnesota has created a board of legal certification which approves certifying organizations, it is reasonably certain that the protection of the term "specialist" or "certified specialist" exclusively for use by lawyers certified by such approved organizations is constitutional.

In Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 110 S.Ct. 2281 (1990), the Supreme Court found unconstitutional a state's complete ban on advertising specialty certification from a nationally recognized certifying board. The court held that a state could instead use a specialization approval system or a disclaimer system. A number of states have since approved certification and specialization programs and/or required disclaimers based on the following statement by the majority in Peel:

> To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty.

This is precisely what the Minnesota Board of Legal Certification does on a regular basis with respect to certifying organizations.

Likewise, if the court feels compelled to modify the current rule, the court may require a lawyer who is not certified by an organization approved by the State Board of Legal Certification to include a disclaimer in advertising whether the lawyer is certified by an unapproved certifying authority or lacks certification by any certifying organization.

In Texans Against Censorship v. State Bar of Texas, 888 F. Supp. 1328 (Eastern Dist. Texas 1995), affirmed 100 F.3rd 953 (Dist.Ct.Ap. 1996), the court approved Texas disciplinary rules allowing Texas lawyers with approved certification to use the term "specialist" or "certified specialist" in association with their names, and required disclaimer language in advertisements by lawyers who obtain specialty certification from certifying agencies not approved by the Texas State Board of Certification, or lawyers who had not been certified by any organization.

Additionally, the court in Texans Against Censorship ruled it was constitutional to require that a disclaimer regarding specialization be included with any advertisement when lawyers were advertising in areas of practice in which they had not obtained certification from the Texas Board or from an organization approved by the Texas Board.

An alternative to the current Rule 7.4 and the proposed Rule 7.4 is as follows:

> (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is **a specialist or** certified as a specialist in a particular field of law except as follows:

(1) the communication shall clearly identify the name of the certifying organization, **if any**, in the communication; and

(2) if the **attorney is not certified as a specialist or if the** certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the **attorney is not certified by any** organization accredited by that Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.

As an individual certified as a civil trial specialist by the Minnesota State Bar Association and the National Board of Trial Advocacy, I respectfully request the court continue to protect the use of the term "specialist." Alternatively, if the court determines that anyone may use the term "specialist" in lawyer advertising or marketing, then a clearly communicated disclaimer should be required as proposed above.

Respectfully submitted,

Sincerely,

Brett W. Olander

BWO:tld/L9761

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April 28, 2004

Minnesota State Supreme Court
C/o Frederick Grittner, Clerk of Appellate Courts
305 Judicial Center
25 Reverend Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

RE: Comments on Rule Changes to the Rules of Professional Conduct

Dear Mr. Grittner:

I have practiced in Hibbing since my admission to the bar in 1977. I have been a Civil Trial Specialist for approximately 15 years. My comments are directed on the proposed changes to Rule 7.4, *Communication of Fields of Practice.*

These amendments would allow attorneys to advertise themselves as "specializing" in or that they "limited their practice" to particular fields without having undergone the certification process. I believe that this is detrimental and confusing to the public. All one has to do right now is take a cursory look at the "yellow pages" to find out how this relaxed standard will be used, and abused, by members of the Bar. I believe you should keep the standard as it now is so that only those attorneys who have taken the time, effort, and expense of going through the certification process can hold themselves out as specialists.

The comments to new Rule 7.4 indicate that attorneys will still be restricted from advertising anything that is "false and misleading." However, no assurance is given to members of the public that before those attorneys decided to "specialize" or limit their practice, that they had any experience in civil trial work at all. Under these new Rules, you do not have to be experienced or competent in these fields; you do not have to report to any agency if you have had a malpractice claim filed; you do not have to report to any agency whether or not you have had an ethical complaint filed against you; and you do not have to report that you have taken CLE credits in the particular field that you claim to be specializing in.

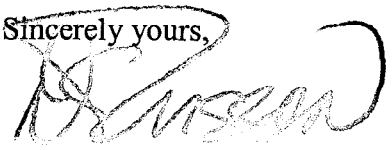
People and families in need of civil trial specialists are often very vulnerable. They could have recently suffered a catastrophic injury or they could have lost a loved one. When this happens, some attorneys (not this firm) will mail extensive brochures and "packages" to these people essentially "advertising" their services. Under these new Rules, they will be able to add to these packages that they are "specializing" or "limiting their practice" to personal injury work.

These Rules will only help endorse that kind of conduct, under the name of "free speech."

Minnesota has taken the initiative to allow those who want to "specialize" or "limit their practice" to do so by simply becoming a Certified Specialist. There is a reviewing agency in Minnesota which puts some credibility to this title and it should be retained.

The proposed Rules would, indeed, be a step backward and I urge you not to adopt the proposed changes.

Sincerely yours,



DARROLD E. PERSSON

DEP/bso

THE SUPREME COURT OF MINNESOTA

BOARD OF LAW EXAMINERS
BOARD OF CONTINUING LEGAL EDUCATION
BOARD OF LEGAL CERTIFICATION

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Margaret Fuller Corneille, Esq., Director

August 20, 2004

OFFICE OF
APPELLATE COURTS

AUG 24 2004

FILED

Frederick K. Grittner
Clerk of Appellate Courts Office
Suite 305
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Re: In re: Proposed Amendment of Minnesota Rules of Professional Conduct, C8-84-1650

Dear Mr. Grittner:

Enclosed please find a copy of a recently decided case, *Hayes v. Zakia*, 2004 WL 1663484 (W. D. N. Y.). This case may be relevant to the court's deliberations concerning amendments to Rule 7.4.

Thank you for your consideration.

Very truly yours,

MINNESOTA BOARD OF LEGAL CERTIFICATION

Margaret Fuller Corneille
Director

cb/kh

cc: Bruce Jones, Attorney for Petitioner
Kenneth Jorgensen
Will Fluegel
Robert Awsumb

H
Only the Westlaw citation is currently available.

United States District Court,
W.D. New York.

J. Michael HAYES, Esq., Plaintiff,
v.
Nelson F. ZAKIA, Esq., In His Capacity As Chairman Of The State Of New York Attorney Grievance Committee Of The Eighth Judicial District, Defendant.

No. 01-CV-0907E(SR).

July 26, 2004.

Background: Attorney sought declaratory and injunctive relief against enforcement by New York State's Attorney Grievance Committee, and its chairman, of disciplinary rule governing attorney statements as to specialization in a particular area of law. Parties cross-moved for summary judgment.

Holdings: The District Court, Elfvin, Senior District Judge, held that
(1) disciplinary rule did not infringe on attorney's First Amendment rights, and
(2) issues of material fact existed as to whether disciplinary rule was unconstitutionally vague as to its requirement that a disclaimer be prominently made.

Attorney's motion denied and defendant's motion granted in part and denied in part.

[1] Federal Civil Procedure 2546

170Ak2546 Most Cited Cases

The non-moving party must rebut a motion for summary judgment with more than conclusory allegations and general denials.

[2] Federal Civil Procedure 2466
170Ak2466 Most Cited Cases

Summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] Attorney and Client 32(9)
45k32(9) Most Cited Cases

New York State disciplinary rule governing attorney statements as to specialization in a particular area of law did not infringe on attorney's First Amendment rights; attorney's statements of certification were potentially misleading, the State had a substantial interest in protecting consumers from potentially misleading attorney advertisements and regulating lawyer advertising, and the disciplinary rule directly advanced those interests and was narrowly drawn and not more extensive than necessary to serve the State's interests. U.S.C.A. Const.Amend. 1; 22 NYCRR § 1200.10(c)(1) [DR 2-105(c)(1)].

[3] Constitutional Law 90.1(1.5)
92k90.1(1.5) Most Cited Cases

New York State disciplinary rule governing attorney statements as to specialization in a particular area of law did not infringe on attorney's First Amendment rights; attorney's statements of certification were potentially misleading, the State had a substantial interest in protecting consumers from potentially misleading attorney advertisements and regulating lawyer advertising, and the disciplinary rule directly advanced those interests and was narrowly drawn and not more extensive than necessary to serve the State's interests. U.S.C.A. Const.Amend. 1; 22 NYCRR § 1200.10(c)(1) [DR 2-105(c)(1)].

[4] Constitutional Law 90.1(1.5)
92k90.1(1.5) Most Cited Cases

Lawyer advertising is commercial speech that is protected by the First Amendment. U.S.C.A. Const.Amend. 1.

[5] Attorney and Client 32(9)
45k32(9) Most Cited Cases

New York State disciplinary rule governing attorney statements as to specialization in a particular area of law did not infringe on attorney's free speech rights under State constitution; attorney's statements of certification were potentially misleading, State had a substantial interest in protecting consumers from potentially misleading attorney advertisements and regulating lawyer advertising, and the disciplinary rule directly advanced those interests and was narrowly drawn and not more extensive than necessary to serve State's interests. McKinney's Const. Art. 1, § 8; 22 NYCRR § 1200.10(c)(1) [DR 2-105(c)(1)].

[5] Constitutional Law 90.1(1.5)
92k90.1(1.5) Most Cited Cases

New York State disciplinary rule governing attorney statements as to specialization in a particular area of law did not infringe on attorney's free speech rights under State constitution; attorney's statements of certification were potentially misleading, State had a substantial interest in protecting consumers from potentially misleading attorney advertisements and regulating lawyer advertising, and the disciplinary rule directly advanced those interests and was narrowly drawn and not more extensive than necessary to serve State's interests. McKinney's Const. Art. 1, § 8; 22 NYCRR § 1200.10(c)(1) [DR 2-105(c)(1)].

[6] Federal Civil Procedure 2500.5
170Ak2500.5 Most Cited Cases

Genuine issues of material fact existed as to whether New York State disciplinary rule governing attorney statements as to specialization in a particular area of law was unconstitutionally vague as to its requirement that a disclaimer be prominently made, precluding summary judgment for either party in attorney's declaratory action seeking relief against enforcement of the disciplinary rule. U.S.C.A. Const.Amend. 14; 22 NYCRR § 1200.10(c)(1) [DR 2-105(c)(1)].

[7] Constitutional Law 251.4
92k251.4 Most Cited Cases

In determining whether a statute or regulation is unconstitutionally vague, as would violate the Fourteenth Amendment, Court first determines whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and then considers whether the law provides explicit standards for those who apply it. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 251.4
92k251.4 Most Cited Cases

A law is unconstitutionally vague, in violation of the Fourteenth Amendment, if it impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. U.S.C.A. Const.Amend. 14.

[9] Attorney and Client 32(9)
45k32(9) Most Cited Cases

New York State disciplinary rule governing attorney statements as to specialization in a particular area of law was not unconstitutionally vague on its face, in violation of Fourteenth Amendment; proscribed conduct was clear, inasmuch as the rule clearly and explicitly prohibited an attorney from advertising the fact that he was a specialist, or that he was certified by some entity, without including the required disclaimer. U.S.C.A. Const.Amend. 14; 22 NYCRR § 1200.10(c)(1) [DR 2-105(c)(1)].

[9] Constitutional Law 287.2(5)
92k287.2(5) Most Cited Cases

New York State disciplinary rule governing attorney statements as to specialization in a particular area of law was not unconstitutionally vague on its face, in violation of Fourteenth Amendment; proscribed conduct was clear, inasmuch as the rule clearly and explicitly prohibited an attorney from advertising the fact that he was a specialist, or that he was certified by some entity, without including the required disclaimer. U.S.C.A. Const.Amend. 14; 22 NYCRR § 1200.10(c)(1) [DR 2-105(c)(1)].

[10] Constitutional Law 251.4
92k251.4 Most Cited Cases

To show that a statute or regulation is unconstitutionally vague on its face, as would violate Due Process Clause, a plaintiff must demonstrate that it either could never be applied in a valid manner or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it may inhibit the constitutionally protected speech of third parties. U.S.C.A. Const.Amend. 14.
J. Michael Hayes, Law Office of J. Michael Hayes, Buffalo, NY, pro se.

Michael J. Russo, New York State Attorney General's Office, Buffalo, NY, for Defendant.

MEMORANDUM and ORDER [FN1]

ELFVIN, D.J.

***1** Plaintiff J. Michael Hayes, Esq. commenced this action December 14, 2001, seeking declaratory and injunctive relief against defendants the State of New York Attorney Grievance Committee of the Eighth Judicial District (the "Grievance Committee") and Nelson F. Zakia, Esq., in his capacity as Chairman of the Grievance Committee. [FN2] Through his Complaint, plaintiff seeks a declaration that Disciplinary Rule 2-105(C)(1), 22 N.Y.C.R.R. § 1200.10(C)(1),--which governs statements made by attorneys that they are specialists in a particular area of law--is both facially unconstitutional and unconstitutional as applied to his use of the terms "Board Certified by the National Board of Trial Advocacy as a Civil Trial Specialist" and "Board Certified Civil Trial Advocate" in his advertising. In addition, plaintiff seeks a permanent injunction enjoining defendant from enforcing the provisions of DR 2-105(C)(1) against him. Presently before the Court are plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment. For the reasons stated hereinbelow, plaintiff's motion will be denied and defendant's cross-motion will be granted in part and denied in part.

The following facts are undisputed unless otherwise noted. [FN3] Plaintiff, an attorney licensed to practice in the State of New York, was awarded Board Certification in Civil

Trial Advocacy in 1995 from the National Board of Trial Advocacy ("NBTA"), an organization accredited by the American Bar Association. Plaintiff thereafter began to refer to himself as a "Board Certified Civil Trial Specialist" in various advertisements. On August 6, 1996 the Grievance Committee first wrote to plaintiff regarding his use of the term "Board Certified Civil Trial Specialist" on his letterhead. [FN4] On November 19 the Grievance Committee wrote to him regarding his use of the terms "Board Certified Civil Trial Specialist" and "Call Us When Your Personal Injury Case Requires A Specialist" in his advertisement in the 1996-1997 Talking Phone Book, taking the position that plaintiff's use of such terms was inconsistent with DR 2-105(B). [FN5] Hayes Aff. ¶ 54, Ex. H. In response to a request by the Grievance Committee, plaintiff agreed to include the name of the certifying organization--i.e., the NBTA--on his letterhead and in future telephone directory advertisements thereby resolving the dispute over his use of the above terms. *Id.* ¶ ¶ 56-58, Exs. I-J. Plaintiff thereafter referred to himself as a "Board Certified Civil Trial Specialist/National Board of Trial Advocacy." *Id.* ¶ 58.

On June 30, 1999 DR 2-105(C)(1) went into effect. Such rule states that "[a] lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

> "A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: 'The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.' '

***2** On November 17, 1999 the Grievance Committee wrote to plaintiff regarding his billboard near the westerly end of the Kensington Expressway. *See* Ex. 1 to Feb. 8, 2002 Decl. of Vincent L. Scarsella, Esq. Such billboard referred to plaintiff as a "civil trial specialist" and included the required disclaimer; however, the Grievance Committee opined that the disclaimer was in such small print that it could not be viewed by passing motorists and therefore requested plaintiff's response regarding whether the disclaimer was "prominently made" as required by DR 2-105(C)(1). On November 30, 1999 plaintiff responded to the Grievance Committee, stating that disclaimers on billboards which advertised tobacco products only had to be five inches high according to federal regulations and that, in an effort to comply with the "prominently made" requirement, he had directed that six-inch letters be used for the disclaimer, but that he was willing to work with the Grievance Committee to resolve the issue. *See* Hayes Aff., Ex. K. On December 14, 1999 the Grievance Committee wrote to plaintiff stating that it was closing the investigation into plaintiff's billboard, but suggested that he reconsider the size of his disclaimer and contact the Committee on Professional Ethics of the New York State Bar Association for an advisory opinion on that issue. Scarsella Decl., Ex. 3. On May 11, 2000 the Grievance Committee sent plaintiff a letter indicating that it had reopened its investigation into plaintiff's billboard advertising based upon another of his billboards on the eastbound lane of Route 5 heading toward Buffalo. According to the letter, it was the Grievance Committee's position that such disclaimer was unreadable

by passing motorists and therefore contrary to DR 2-105(C)(1). *Id.,* Ex. 4. Plaintiff responded to the Grievance Committee via a May 17, 2000 letter stating that he had directed his advertiser to remove such billboard and that he had contracted to have new billboards made wherein the disclaimer would be "very large, in bold black type and on a white background." *Id.,* Ex. 5. The Grievance Committee responded May 19, 2000 stating that it was closing the investigation into plaintiff's billboard on Route 5 due to his representation that such would be removed and that new billboards were being designed. *Id.,* Ex. 6. However, the Grievance Committee also stated that it was opening another investigation based on plaintiff's letterhead, wherein plaintiff identified himself as a "Board Certified Civil Trial Advocate National Board of Trial Advocacy" [FN6] and did not include the required disclaimer. *Ibid.* Plaintiff responded with a May 21 letter in which he indicated his belief that his letterhead did not violate DR 2-105(C)(1) because such did not contain the word "Specialist" and in which he sought clarification on the issue. *Id.,* Ex. 7. Scarsella subsequently sent plaintiff a June 14 letter clarifying the Committee's position and referring plaintiff to Opinion 722 of the New York State Bar Association's Committee on Professional Ethics, which specifically stated that the rule applies to a lawyer's letterhead that states membership in a professional organization "if such membership implies certification in the legal field." *Id.,* Ex. 8. Through his attorneys, [FN7] plaintiff reiterated his position that DR 2-105(C)(1) was not applicable to the certification statement in his letterhead. *Id.,* Ex. 10. Numerous letters were exchanged thereafter among the Grievance Committee, plaintiff and his attorneys, none of which made any progress towards resolving the dispute. The Grievance Committee stated to plaintiff in a June 25, 2001 letter that, if he refused to include the required disclaimer on his letterhead, it would "have no alternative but to request that he formally appear before the Committee with the recommendation of disciplinary action by way of a Letter of Admonition or formal proceedings in the Appellate Division." *Id.,* Ex. 16. Plaintiff subsequently commenced an action in this Court for declaratory relief against the Grievance Committee. [FN8] However, on November 2, 2001, that action was dismissed by this Court on jurisdictional grounds. [FN9] Plaintiff then advised the Grievance Committee, in a letter dated November 6, 2001, that the term "Certified Civil Trial Advocate" had been removed from his letterhead. *Id.,* Ex. 17. Consequently, the Grievance Committee closed its file regarding plaintiff's letterhead. *Id.,* Ex. 18. Plaintiff then commenced the instant action on December 14, 2001. Plaintiff subsequently moved for a preliminary injunction on December 21, 2001, which motion was ultimately denied by this Court's September 19, 2002 Memorandum and Order. *See* *Hayes v. Zakia,* 2002 WL 31207463 (W.D.N.Y.2002).

***3** FRCvP 56(c) states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving [*sic*] party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding whether summary judgment is appropriate, this Court must draw all factual inferences in favor of the non-moving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

[1][2] Nevertheless, the non-moving party must rebut the motion for summary judgment with more than conclusory allegations and general denials. FRCvP 56(e); *see also* Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir.1998) ("conclusory allegations, conjecture and speculation * * * are insufficient to create a genuine issue of fact"). Furthermore, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[3][4] Plaintiff's first claim is that DR 2-105(C)(1) is unconstitutional, both facially and as applied to him, because it violates his freedom of expression guaranteed to him under the First and Fourteenth Amendments. In support of his summary judgment motion, plaintiff argues that DR 2-105(C)(1) cannot survive the intermediate level of scrutiny with respect to restrictions upon commercial speech. In opposition and in support of his cross-motion for summary judgment, defendant counters that DR 2- 105(C)(1) is valid under such scrutiny. Lawyer advertising is commercial speech that is protected by the First Amendment. Florida Bar v. Went For It, Inc., 515 U.S. 618, 623, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) ("It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection."). Whether commercial speech may be validly restricted involves a four-part analysis:

> "First, for commercial speech to merit any First Amendment protection, it 'must concern lawful activity and not be misleading.' Next, the government must assert a substantial interest to be achieved by the restriction. If both these conditions are met, the third and fourth parts of the test are 'whether the regulation directly advances the governmental interest asserted' and whether the regulation 'is not more extensive than is necessary to serve that interest." Anderson v. Treadwell, 294 F.3d 453, 461 (2d Cir.2002) (quoting Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)).

Thus, in this case the Court must determine whether plaintiff's statement of certification is misleading and, if it is not, whether its potentially misleading character renders it susceptible to a state interest that justifies the disclaimer requirement of DR 2-105(C)(1).

***4** The United States Supreme Court, in Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), addressed an issue similar to the case at hand when it decided whether an Illinois disciplinary rule, which prohibited an attorney from advertising his certification by the National Board of Trial Advocacy, violated the First Amendment. The Supreme Court of Illinois publicly censured Peel, an attorney, for advertising that he was a "Certified Civil Trial Specialist By the National Board of Trial Advocacy." [FN10] The State Supreme Court found this statement to violate Disciplinary Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility. [FN11] The state court rejected Peel's argument that the letterhead was protected by the First Amendment, reasoning that such letterhead was misleading and thus outside the confines of First Amendment protection. The United States Supreme

Court disagreed and reversed the decision.

In finding the Illinois Disciplinary rule to be in violation of the First Amendment, the plurality reasoned that Peel was in fact so certified, and the advertisement of that fact on the petitioner's letterhead was neither actually nor inherently misleading. As such, the Illinois Disciplinary Rule's absolute prohibition on the certification statement was too broad. *See Peel,* at 110- 111. However, a majority of the Court found the certification statement to be at least potentially misleading and held that other forms of regulation other than a total ban might be allowed. *See id.* at 125 ("As a majority of this Court agree, * * * petitioner's claim to certification is at least potentially misleading.") (O'Connor, J., dissenting, joined by Rehnquist, C.J. and Scalia, J.). Thus, the Court concluded that, "[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations *or requiring a disclaimer about the certifying organization or the standards of a specialty.*" *Peel,* at 110 (citing *In re R.M.J.*, 455 U.S. 191, 201-203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982)) (emphasis added).

[5] With such principles in mind, this Court had previously held that (1) plaintiff's various statements of certification are potentially misleading and (2) plaintiff had not shown a substantial likelihood of success in arguing that DR 2-105(C)(1) is unconstitutional under the *Central Hudson* test. *See Hayes v. Zakia,* at *4-5 (noting the similarity between plaintiff's statement of certification and the one at issue in *Peel*). Plaintiff has offered nothing substantive in support of his summary judgment motion to change this Court's previous conclusions. [FN12] Conversely, defendant has met its burden under the *Central Hudson* test by showing that (1) New York State has a substantial interest in protecting consumers from potentially misleading attorney advertisements and regulating lawyer advertising, (2) DR 2- 105(C)(1) directly advances such interests and (3) DR 2-105(C)(1) is narrowly drawn and not more extensive than is necessary to serve the State's interests. *See id.* at *5-6 (citing defendant's evidence and stating the reasons why "[DR] 2-105(c)(1) is narrowly drawn to directly advance New York's substantial interest in protecting the public from potentially misleading advertising"). Therefore, summary judgment will be granted to defendant with regard to plaintiff's claim that DR 2-105(C)(1) unconstitutionally infringes upon his First Amendment rights. [FN13]

***5** [6] Next, the Court turns to the parties' motions with respect to plaintiff's claim that DR 2-105(C)(1) is unconstitutionally vague. Plaintiff contends that DR 2-105(C)(1)'s requirement that the disclaimer be "prominently made" is unconstitutionally vague because it fails to give a person of ordinary intelligence a reasonable opportunity to know either what is prohibited or when a disclaimer satisfies such requirement. In addition, plaintiff argues that DR 2-105(C)(1) is unconstitutionally vague because it fails to give explicit guidelines for the Grievance Committee in enforcing the rule thereby allowing for subjective and arbitrary enforcement. In opposition to plaintiff's motion and in support of his cross-motion, defendant contends that "prominently made" is a "common sense term clear to the average lawyer." Def.'s Mem. of Law, at 5. In addition, defendant argues that the rule is not unconstitutionally vague because the plaintiff has

the benefit of guidance from case law, court rules and the Grievance Committee itself in attempting to determine whether a particular advertisement contains a disclaimer that is "prominently made."

[7][8] Whether a statute or regulation is unconstitutionally vague involves a two-step inquiry. The Court " 'must first determine whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited and then consider whether the law provides explicit standards for those who apply it.' " *Chatin v. Coombe*, 186 F.3d 82, 87 (2d Cir.1999) (quoting *United States v. Strauss*, 999 F.2d 692, 697 (2d Cir.1993)). An unconstitutionally vague law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Such standards should not be applied mechanically. "The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Thus, greater tolerance is allowed with regard to enactments with civil rather than criminal penalties because the consequences are relatively less severe. *Id.* at 498-499. On the other hand, a law that threatens to inhibit the exercise of a constitutional right--*i.e.*, the right of free speech--is subject to a more stringent vagueness test. *Id.* at 499; *see also Grayned*, at 109 n. 5 ("Where First Amendment interests are affected, a precise statute evincing a legislative judgment that certain specific conduct be proscribed, assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation.") (citation and punctuation marks omitted).

[9][10] Neither party has carried his burden as mandated by FRCvP 56 with respect to plaintiff's claim that DR 2-105(C)(1) is unconstitutionally vague. [FN14] In denying plaintiff's preliminary injunction motion, this Court had previously held:

> ***6** "While plaintiff is correct that 'prominently made' in the context of [DR] 2-105(c)(1) is subjective in its interpretation, the language is sufficiently plain and adequate to put attorneys on notice that the disclaimer provision cannot be presented in an obscure fashion. The term "prominently made" simply informs an attorney who wants to advertise some type of certification that the accompanying disclaimer must be displayed in a manner that will not render it unreadable and meaningless for the average viewer. Furthermore, plaintiff, as an attorney, has the benefit of guidance from case law, court rules and--more importantly--the Grievance Committee." *Zakia*, at *7.
>
> However, this Court also held:
>
> "Such failure should not serve as an indication that plaintiff has not demonstrated serious questions about the merits of the case. In this regard, this Court notes the somewhat arbitrary and inconsistent manner in which the Grievance Committee has issued guidelines in its interpretation of [DR 2- 105(C)(1)]. The Court tends to agree with plaintiff that a person of ordinary intelligence would not have determined that placing the disclaimer on the reverse side of a business card would satisfy the

'prominently made' requirement. In addition, it is unclear whether defendant, as Chairman of the Eighth Judicial District Grievance Committee, has the authority to issue guidelines and what effect, if any, such guidelines have in other jurisdictions. Such arguments make them fair grounds for litigation." *Ibid.* (internal citation omitted).

Thus, while plaintiff had failed to demonstrate a substantial or clear likelihood of success on the merits in arguing that DR 2-105(C)(1) is unconstitutionally vague, he had raised significant issues of fact in support of such argument. The parties have essentially submitted the same arguments and evidence in support of their summary judgment motions as they did with respect to plaintiff's preliminary injunction motion. [FN15]

Plaintiff has proffered evidence to support his assertion that there are no explicit standards regarding whether a disclaimer is "prominently made" with respect to the various forms of advertising mediums. For example, the regulation does not require that the disclaimer be displayed in a specific font size with respect to its display in a particular advertising medium. [FN16] In addition, plaintiff has shown that the Committee's enforcement of DR 2- 105(C)(1) as applied to him has been somewhat arbitrary and inconsistent. Lastly, plaintiff has provided evidence that the Committee has vacillated in its position regarding what language is specifically and actually required by the rule. [FN17] Conversely, defendant has presented evidence to show that plaintiff's failure to comply with DR 2-105(C)(1) was not due to his confusion or misapprehension of the rule's purported vagueness, but rather due to his own disagreement with the applicability of the rule. [FN18] Further, it appears that plaintiff was provided significant informal guidance from the Grievance Committee in an effort to attain his compliance with the rule. [FN19] The conflicting nature of the submitted evidence and the fact that the Court must draw all factual inferences in favor of the non-movant upon considering the other party's summary judgment motion leads the Court to conclude that a reasonable trier of fact could return a verdict for the non-movant. Consequently, neither party is entitled to judgment as a matter of law. Therefore, summary judgment will be denied to both parties with respect to plaintiff's claim that DR 2-105(C)(1) is unconstitutionally vague.

***7** Accordingly, it is hereby ORDERED that plaintiff's motion for summary judgment is denied, that defendant's motion for summary judgment is granted with respect to plaintiff's First Amendment claims, that defendant's cross-motion for summary judgment is denied with respect to plaintiff's claim that DR 2-105(C)(1) is unconstitutionally vague and that the parties shall appear before the Court on August 13, 2004 at 3:00 p.m. (or as soon thereafter as they may be heard) to set a date for trial.

FN1. This decision may be cited in whole or in any part.

FN2. On April 22, 2002 the Grievance Committee was dismissed from this action, leaving Zakia as the sole defendant.

FN3. The Court notes initially that plaintiff has not complied with Rule 56.1 of the Local Rules of Civil Procedure ("LRCvP") inasmuch as he has failed to submit a separate "statement of the material facts as to which [he] contends there is no genuine issue to be tried." LRCvP 56.1(a). While such an omission could serve as a basis to deny plaintiff's motion, the Court will nonetheless exercise its discretion to overlook such noncompliance.

FN4. Hayes Aff. ¶ 51, Ex. G.

FN5. Former DR 2-105(B), in effect at the time, provided as follows: "A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction under the laws of this state over the subject of specialization by lawyers may hold himself or herself out as a specialist, but only in accordance with the rules prescribed by that authority."

FN6. Plaintiff's name as displayed on his letterhead is immediately followed by an asterisk. The corresponding asterisk indicated the following:
"Board Certified Civil Trial Advocate National Board of Trial Advocacy." Scarsella Decl., Ex. 5.

FN7. Barry Nelson Covert, Esq. and Michael S. Taheri, Esq.

FN8. Michael J. Russo, Esq., sent an August 16, 2001 letter to Covert in response to the complaint that had been filed by the plaintiff. Russo indicated that the Committee would take no disciplinary action against the plaintiff if his advertisements conformed to certain guidelines. Such guidelines provided the acceptable manner in which plaintiff could display the disclaimer in various media--to wit, his billboards, letterhead, business cards and television advertisements. With regard to plaintiff's business cards, Russo indicated that plaintiff could place an asterisk next to his certification statement on the front of the card and place the actual disclaimer on the back of the card. Feb. 8, 2002 Russo Decl., Ex. G.

FN9. *Hayes v. N.Y. Attorney Grievance Comm. of Eighth Judicial Dist.*, 2001 WL 1388325 (W.D.N.Y.2001).

FN10. Specifically, Mr. Peel advertised the following on his stationery:
"Gary Peel

Certified Civil Trial Specialist
By the National Board of Trial Advocacy
Licensed: Illinois, Missouri, Arizona."

FN11. Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility provided:
"A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or her practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or 'specialist'."

FN12. In fact, plaintiff appears to have, in support of his present motion, merely submitted a virtually identical copy of his memorandum of law in support of his motion for preliminary injunction. *Compare* Pl.'s Mem. of Law in Supp. of Prelim. Inj., § III(C)(1)(i-iii) *with* Pl.'s Mem. of Law in Supp. of Summ. J. Mot., § II(B)(1)(i-iii).

FN13. Summary judgment will also be granted to defendant with regard to plaintiff's claim that DR 2-105(C)(1) violates Article 1, § 8 of the New York State Constitution inasmuch as the basis for such claim is the same as the basis for his First Amendment claim.

FN14. The Court need not linger on the issue of the facial validity of the rule. To show that DR 2-105(C)(1) is unconstitutionally vague on its face, plaintiff must demonstrate that it "either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties." ' *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 479-480 (2d Cir.1999) (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)); *see also Brache v. County of Westchester*, 658 F.2d 47, 50 (2d Cir.1981) ("A statute is unconstitutionally vague on its face only when it cannot be applied to any conduct."). "Facial vagueness occurs when a statute is expressed in terms of such generality that 'no standard of conduct is specified at all." ' *Brache*, at 50-51 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)). DR 2-105(C)(1) is not vague on its face because the proscribed conduct is clear--to wit, the rule clearly and explicitly prohibits an attorney from advertising the fact that he is a specialist, or that he is certified by some entity, without including the required disclaimer.

FN15. Plaintiff offers some new evidence in support of his motion. He contends that the vagueness of the disclaimer requirement is evinced by the fact that Russo and Scarsella have presented conflicting positions to the Court regarding

what language is specifically required by DR 2- 105(C)(1). *See* Pl.'s Aug. 4, 2003 Mem. of Law, at 18-19 (pointing out the purported conflicting deposition testimony of Scarsella and Russo's Declaration in opposition to plaintiff's preliminary injunction motion).

FN16. Defendant counters that the term "prominently made" was utilized instead of imposing specific font size requirements because of the myriad methods and forms of advertising media meant to be covered by the rule. *See Hayes v. Zakia,* at *7 n. 19 (explaining the defendant employed such language because it could be easily applied to many forms of advertising and because it would be clear to the average lawyer).

FN17. In addition to the required language of DR 2-105(C)(1), the disclaimer in plaintiff's billboards and yellow pages advertisements includes an eighteen-word introductory statement--*viz.*, "J. Michael Hayes is Board Certified by the National Board of Trial Advocacy as a Civil Trial Specialist." Russo Feb. 8, 2002 Decl., Exs. A, C. Scarsella testified during his deposition that such language was required somewhere in the advertisement inasmuch as it serves to clarify the remaining language in the disclaimer and identifies the certifying organization. *See* Scarsella Dep.--Hayes Aff., Ex. CC--, at 93-96. With regard to plaintiff's use of the introductory language, Russo argued that such is "verbiage" that "dilutes the intended message of the Disclaimer." Russo Feb. 8, 2002 Decl. ¶ 10. In addition, Russo declared that such language as it appears on plaintiff's billboards make it "even more difficult for drivers-by to receive the intended message of the disclaimer." *Id.* ¶ 11.

FN18. For example, beginning in May of 2000, plaintiff repeatedly insisted that DR 2-105(C)(1) did not apply to his letterhead because he had not been referring to himself as a "Specialist." In his correspondences to the Committee, he did not express his confusion regarding the term "prominently made." Rather, he expressed his belief that the disclaimer was not required at all.

FN19. Defendant afforded plaintiff plenty of opportunity and notice to resolve the matter informally and the Committee consistently maintained its position that plaintiff's reference to himself as "Board Certified" implicated the inclusion of DR 2-105(C)(1)'s disclaimer provision regardless of whether or not plaintiff used the term "Specialist." Such facts weigh in favor of defendant because they support a showing that plaintiff, as an attorney, had ample notice of the proscribed conduct. *See, e.g., In re Holtzman,* 78 N.Y.2d 184, 191, 573 N.Y.S.2d 39, 577 N.E.2d 30 (1991) (holding that the guiding principle in determining whether a Disciplinary Rule is impermissibly vague is "whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed")

(citing *In re Ruffalo*, 390 U.S. 544, 554- 555, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (White, J., concurring)) (additional citations omitted).

2004 WL 1663484 (W.D.N.Y.)

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RE: Proposed Amendment to Rule 7.4 of the Rules of Professional Conduct
Our File #00002-00801

Dear Mr. Grittner:

I write to comment on the proposed amendment to Rule 7.4 of the Rules of Professional Conduct. In accordance with the Supreme Court's Order, I am enclosing twelve copies of this letter.

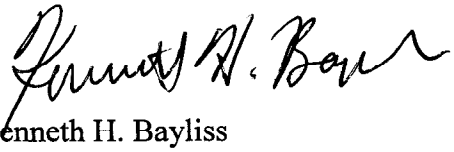
I am presently a member of the Civil Trial Certification Board, the board that administers the Civil Trial Certification Program in Minnesota. Please understand that I write in my individual capacity and not as a member of that board.

The proposed amendment to Rule 7.4 would permit attorneys to advertise themselves as "specialists" without being certified by any entity and without necessarily possessing any particular qualifications. The proposed change in the rule would harm certification programs in Minnesota. The proposed change would also expose the public to the likelihood of misleading advertisement. It is my belief that the public expects that a "specialist" is someone whose credentials have been reviewed by at least one certifying authority.

The proposed change is also an overreaction and misinterpretation of the United States Supreme Court precedent which suggests that attorneys must be allowed to engage in truthful advertisement. The problem with the advertising that would ensue following the proposed change in the rule is that the public would be deceived and misled. The floodgates of lawyer advertisement would already appear to be wide open. Lawyers wishing to advertise can make no reasonable argument that their rights to advertise are impinged or restricted by the existing rule. The existing rule simply requires that advertising not be deceptive or misleading.

The proposed amendment to Rule 7.4 should be rejected.

Sincerely,



Kenneth H. Bayliss
Attorney
KHB/cap

220359

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Lynn M. Duffy
Yvette M. Connelly
Melissa M. Jensen

May 3, 2004

Minnesota Supreme Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Boulevard
St. Paul, MN 55155-6102

Re: Proposed Change in Rule 7.4
Minnesota Rules of Professional Conduct

Gentlemen/Ladies:

Though I have been dean of the Academy of Certified Trial Lawyers in Minnesota and President of the Minnesota Trial Lawyers Association, I write in my personal capacity as a civil trial lawyer to express my strong opposition to a change in Rule 7.4 of the Rules of Professional Conduct. That one could refer to themselves as a specialist simply because they wanted to and not based on any merit or experience would be a misrepresentation that we as a community of lawyers should seek to avoid.

It is my hope that you will look upon a change in Rule 7.4 with displeasure and leave the current rules as they presently exist.

Sincerely,

HARPER & PETERSON PLLC

By 

William D. Harper

WDH/bb

MALCOLM K. MACKENZIE♦
W.M. GUSTAFSON♦
JEROLD M. LUCAS*
MICHAEL K. RILEY, SR.
PAUL H. TANIS, JR.
TODD W. WESTPHAL
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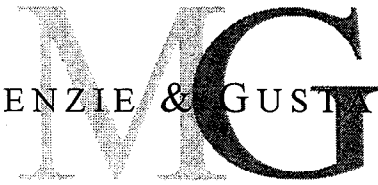


MACKENZIE & GUSTAFSON *Ltd.*
Attorneys & Counselors at Law

March 15, 2004

Mr. Chris Ruhl
Committee Staff
105 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 551555

Re: Rules of Professional Conduct
Rule 7.4 Proposed Amendment

Dear Justices of the Minnesota Supreme Court:

It is my understanding that a proposal is being advanced to change Rule 7.4 by deleting Subparagraph (b). That paragraph provides that "A lawyer shall not state that the lawyer is a specialist in a field of law unless the lawyer is currently certified or proved as a specialist in that field by an organization that is approved by the State Board of Legal Certification."

I have received a certification as a real property law specialist and have earned that designation by going through a testing procedure and meeting the criteria set down by the State Board of Legal Certification. It is my opinion that the deletion of section (b) and the inclusion of a comment (1) would essentially permit any lawyer in the State to represent that he or she is a specialist, without establishing any basis whatsoever for such a claim. Since Minnesota has had a procedure for certifying that attorneys are specialists for approximately 15 years, I believe that the proposed rule allowing any attorney to advertise as a "specialist" assures that the public will be confused. While a "certified" lawyer may advertise as a "certified specialist" after he/she satisfies the objective standards of the State approved and monitored certification program, this ill-conceived amendment would allow a non-certified "specialist" to use the term specialist subject only to Rule 7.1's "false or misleading" standard. This assures that the general public is going to be confused. I believe that it is misleading to adopt a rule that would allow a conflicting use of the word "specialist" and it is not in the best interest of the State nor in the best interest of the general public. In short, the certification procedure that we have had in place for the last fifteen years has been working and there is absolutely no reason to change it at this time. Furthermore, the proposed amendment does nothing whatsoever to improve the present system.

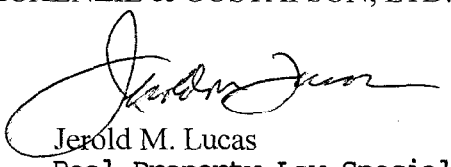
326 South Minnesota Avenue P.O. Box 360 Saint Peter, Minnesota 56082-0360 *Phone* 507.934.3430 *Fax* 507.934.2988 *e-mail* mglawjml@hickorytech.net

♦*Of Counsel* **Real Property Law Specialist, Certified by the Real Property Law Section of the Minnesota State Bar Association*

In conclusion, I strongly suggest that the proposed amendment be voted down and dismissed from further consideration.

Respectfully yours,

MACKENZIE & GUSTAFSON, LTD.

By 

Jerold M. Lucas
Real Property Law Specialist, By MSBA Real Property Section

JML:lds

MSBA

May 7, 2004

Clerk of Appellate Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155-6102

RE: Hearing to Consider Proposed Amendments to the Rules of Professional Conduct
Court File No: C8-84-1650

Dear Mr. Grittner:

I am in receipt of the submission by Wilbur Fluegel on behalf of the Academy of Certified Trial Lawyers of Minnesota regarding the proposed amendments to the Rules of Professional Conduct. Mr. Fleugel's brief attached as Appendix 2 a survey on the public's perception of the term "specialist". I am the administrator for the Minnesota State Bar Association Civil Trial Certification Council, who, along with the Academy, commissioned the survey.

Enclosed for filing in this matter at Mr. Fluegel's request, please find 12 copies of a portion of Part 2 of the University of Minnesota Center for Survey Research's survey that was inadvertently omitted from Mr. Fluegel's submission.

Please note survey QB 1(a) asks: (IF VERY OR SOMEWHAT IMPORTANT) Why would that be important to you? Survey QB6 (a) asks: (IF VERY OR SOMEWHAT CONCERNED) How would you describe your feelings about that situation? I am filing the answers received to those two questions, along with the cover letter from the University of Minnesota Center sending the Council's copy of the survey to me.

Responses to these survey questions are referenced at page eleven (11) of Mr. Fleugel's submission.

Thank you.

Sincerely,

Meaghan E. Harper

cc: Wilbur W. Fluegel

Minnesota State Bar Association

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Suite 380
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www.mnbar.org

Telephone
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UNIVERSITY OF MINNESOTA

Twin Cities Campus *Minnesota Center for Survey Research* *Suite 141*
2331 University Avenue S.E.
Minneapolis, MN 55414-3067
612-627-4282

March 11, 2004

Dear State Survey Clients:

The 2003 Minnesota State Survey is completed and results are enclosed. The questions covered a number of different topics and were very interesting for both interviewers and respondents. I hope that the results meet your needs. On behalf of the rest of the staff at the Center for Survey Research, we appreciate having had the opportunity to work with you. I hope that you will be pleased with the high quality of the data, and will choose to work with the Center in the future.

If you would like a copy of the data file on a PC diskette, please call me to discuss your data file requirements. If you would like to further analyze your questions and do not have the resources to do it yourself, we would be happy to provide that service. Also, if you are interested in publicizing the results in the state media, we would be happy to help you write a summary which could be distributed by the University News Service.

Two major items related to the completion of the survey are enclosed. First, there is the survey documentation, "2003 Minnesota State Survey: Results and Technical Report". This document summarizes the entire 2003 Minnesota State Survey. It contains both a report on the survey methodology and a copy of the questionnaire and results. Calling dates, response rates, and other technical details are also covered.

Second, I have enclosed your selected crosstabulations. The remainder of this letter is primarily intended to explain the contents of the crosstabulation tables themselves. The tables are in the same sequence as your questions on the original survey. That is, the first nine tables relate to your first question, the next nine tables refer to your second question, etc. The first nine tables are based on a crosstabulation of your first question with the nine demographic variables listed below, in the same order as they are listed here.

Variable Name	Description
QD3	Housing tenure (own, rent)
QD4	Housing type (single family detached, apartment, others)
PARTY	Political party
METRO	Location (Twin Cities or Greater Minnesota)
AGEMD	Age of respondent
EDUC	Education of respondent
GENDER	Gender of respondent
INCOME	Household income
HHCOMP	Household composition

Let me now turn to the form of individual tables. Where the independent variable (the demographic item) contained many categories, they were collapsed so that the table would not extend over more than one page. The same collapsing procedure was used on your questions if there were many response categories.

All people who had a "missing" response on either of the items in that table were omitted from the table. Missing data included the numeric responses for: don't know, refused to answer, and not applicable.

Within each cell of the table, the top number is the count, or the number of people who gave that specific answer to your question (row label) and were in that specific demographic category (column label). The next number is the percentage computed within the column (the percentage of people in that specific demographic category who gave that specific answer to your question). The numbers outside the table matrix are row and column totals with their accompanying percentages.

Finally, let me say a word about the statistics at the bottom of each table. We automatically calculated and presented the Chi-Square values for every table. Chi-Square is a measure of the chance distribution of people within the table, given the row and column totals in that table. Of the three values presented below each table, the standard measure of Chi-Square is Pearson. The Likelihood Ratio is an alternative measure which should be equivalent to Pearson for large samples such as this omnibus survey. Finally, the Linear-by-Linear association is only appropriate for ordinal level data such as education or income.

The key number for Chi-Square is the number listed under "Sig". If that number is less than 0.05, you probably have a statistically significant difference in the response to your question by the different demographic subgroups presented in that table. One exception is that the Chi-Square test is meaningless when the "expected frequencies" get too small. When this exception occurs, the computer program prints out the minimum expected frequencies (trouble if it is less than one) and the number of cells with an expected frequency of less than five (trouble if it is more than 20 percent). If these conditions exist and you really need the Chi-Square, the best approach would be to combine one or more of the smallest rows or columns and recalculate.

I would appreciate feedback about either the technical report or the presentation of the crosstabulation tables. If you have suggestions about ways to improve the presentation of survey results, I would be happy to talk with you about them.

Sincerely,

Rossana Armson

Rossana Armson
Director

MINNESOTA STATE SURVEY 2003 - PART 2
Responses to QB1a

QB1. How important would it be to your choice of attorney if you knew that an attorney who advertised as a specialist had in fact been certified as a specialist by an accredited organization that had been approved by the State of Minnesota . . . would it be very important, somewhat important, not very important, or not at all important to your choice of attorney? (1=Very important, 2=Somewhat important)

QB1a. (IF VERY OR SOMEWHAT IMPORTANT) Why would that be important to you?

ID#	QB1	QB1a Response
005	1	Well you want someone that's accredited to say that this guy is good and doesn't just want your money.
006	2	I want to know that I'm getting what I'm paying for
009	2	To know that the person had done this type of work before.
010	1	Because I would know that he was honest and truthful and he is what he claims he is.
012	1	I'd like to know that they are qualified.
014	2	Because I think it shows forethought and that they're trying to protect the consumer from being mislead or misguided.
015	2	Out here we just have general attorneys. I would like it more if we lived in the cities. They would know all the ins and outs.
018	2	It would mean that someone was monitoring him and he was doing a good job.
020	1	I think that the certification by the state lends credibility to the assertion that it is a specialty.
021	1	I think reputation is a good reference for people.
022	2	If there's nothing else to go on as far as choosing an attorney, that would be one factor for choosing an attorney for me.
024	2	If they were approved by the state of Minnesota I think they are probably just a little bit more trustworthy than the ones who are not approved.
027	2	I'd like to know that whomever I'm hiring is accredited. I know that they've passed and I'd be more satisfied knowing they really are a specialist.
031	2	Just to know that they have the specialty training that's required to carry out the work.
032	2	To know that they have the education.
033	2	Well, I work with attorneys, so I would use my own personal network to find attorneys. I would take into account about specialization but I wouldn't discount someone who wasn't a specialist.
035	1	You want the best you can get.
036	2	I don't know why I'd even need an attorney.
037	2	I just know the accreditation process and it makes it more universal. They have to agree to the same standards.
038	2	Just so that you would know that they had some expertise in the specialty.
039	2	I want to know if they'd been paid to support a certain organization.
040	1	I don't want to answer that.
041	1	For the reasons that were stated.
042	1	Because they would be specialized in that area and would have more knowledge about it.

ID#	QB1	QB1a Response
046	1	I think Minnesota has strict standards for attorneys, so if they are approved by the state, that shows something.
047	2	I1 would want a credible attorney.
048	1	I don't want somebody working as an attorney if they know nothing of that type of law.
050	1	I would be able to get the help I need and I wouldn't have to take any chances because he's certified.
052	2	So you knew you were getting somebody that was legitimate.
054	1	To make sure I'm getting a good attorney, I feel that they would be a better choice that someone not certified.
055	1	Because you want to get the right one.
058	2	Because sometimes you need somebody to do something specific. They'll know everything about everything.
059	1	Then my wishes would be carried out after my death.
062	2	It would give them credibility.
067	2	I'd want someone that knows about that kind of a case, but sometimes certification means nothing.
068	1	Then I'd know they have focused their education on that and have worked in that area long enough that they have some sort of expertise in the area, and they're interested and that they really truly care about helping people.
070	2	Just to be sure that they are legitimate.
071	1	I would realize that they had been checked out and approved by an accredited organization.
073	1	Because there are a lot of unscrupulous people out there.
074	1	Because if I am looking for someone with an expertise I want to make sure they have that.
076	1	Because you never know who you've got for an attorney. I wouldn't know, I've only had one and I've trusted him for years. I don't need one right now but I might in the future. I haven't seen one that wasn't good.
079	1	I wouldn't know. If he was a top quality one, it would be important.
080	1	It must mean he has gone to school and knows what he is talking about.
081	2	Because the lawyer would then be credible.
082	2	Hopefully he'd be on the up-and-up and honest, if that has anything to do with certification.
083	1	Accreditation is important to me.
087	2	If they're certified then they know what they're dealing with.
088	2	It would be good that there is one more area in which the person would have to know about.
091	1	I want to get what I'm expecting but I wouldn't go to anyone who advertised.
094	1	Because he would know more about what he was doing.
095	2	In case you need a good lawyer.
096	1	Because he shouldn't lie.
097	2	So he would do the best job for you.
098	1	A lot of people can advertise they're an expert but certification is a step beyond that.
099	1	Because I believe in honesty.

ID#	QB1	QB1a Response
100	1	You would like to think that depending upon what your issue would be that they would have the right credentials to guide you through whatever your issue would be in the correct manner.
101	1	If I was going to get an attorney, I would want a reputable attorney. Not someone who is looking to file lawsuits for no reason at all.
102	2	It's something I haven't had a lot of experience with so knowing that they are approved by the state would give me some comfort.
103	1	It gives you an idea that the guy knows what he is talking about.
104	1	Because it makes someone more qualified.
105	2	I don't know, like I said, I never really had to use one before.
106	2	If I had a certain area that I needed an attorney for they may be more knowledgeable in that area.
108	2	It just would be.
110	1	Because I don't want just anybody. I want to be sure that the attorney is honest and has been checked.
111	2	I think just certified means someone is testing them.
112	2	I don't really know.
113	2	Because if they were certified with the state that would probably be better.
116	1	Because most lawyers are crooks.
117	2	I don't have any opinion about that.
119	2	Because I believe that the state has guidelines and ethics that an attorney should follow.
120	2	His knowledge of the area. If he had the certification, I'm assuming he knows something about the field.
121	1	I think that it would be extra credibility that the state has given their approval of this person.
122	1	Certainly you want somebody to know what they are doing and what they are talking about so they can be helpful to a person.
123	2	Because I want a qualified attorney.
124	1	I feel that they would have to keep up their work practice.
125	2	I don't know.
126	1	It tells you that the state knows about them. You don't want to hire someone who isn't accredited.
127	1	Because I am hiring him based on that specialty, and because he is a specialist that means that he will be good in that particular area, and that is something I want in an attorney.
128	2	So that people would have more information about someone's training or background.
130	1	You would want somebody who truly knows what they are doing and knows the laws around here.
131	2	That the person has the basic level of expertise.
132	2	Because the state would have standards.
133	1	Because it's important to know that someone specializes in a particular area.
134	1	If I need help in a certain area and someone is more qualified in a certain area I would expect a better outcome.
135	1	In case I would. It would reflect their experience with the business of being an attorney.

ID#	QB1	QB1a Response
136	2	To make sure that he's not a phony.
137	1	Well, if you get a divorce attorney for a criminal charge and you end up with a divorce attorney, it would not be good.
140	1	Because if I needed an attorney I would know who to go to. They should specialize, like doctors.
141	1	Because then you would know that he knew what he was talking about.
142	2	I think they are kinda like teachers, they should know what they are teaching. It's important that they are certified, and it's just like that for attorneys.
143	2	Because he would have some credibility. Not everyone can easily be specialized. That shows they had some successes.
144	1	So you know you are getting someone who can do a good job.
145	2	It would help me in selecting them. It means that their education is good.
146	2	If the person didn't come referred to me it would give them more credibility.
147	2	I guess that it would designate some sort of professional standards for that person. It shows that they have ethical standards.
148	1	It stands the test of a good attorney and that's important. I want my attorney to be good.
149	1	Well, there are lots of people out there who try to use people. I would be very careful and I would check to see if they are a credible attorney.
151	1	Because you know that he is qualified and has learned enough to know what he is doing.
152	1	They know what they are doing for their specific area of law.
153	2	Then it verifies that they are honest.
154	1	Because I trust the state of Minnesota.
155	1	If they are certified they are probably more honest than those who are not.
156	2	So they know what they are doing.
157	1	Because I want someone that is capable of taking care of me.
159	2	It would give me a sense that the lawyer has credibility.
161	1	I want someone who can provide a quality service.
162	1	Because he would know more then a person who hasn't been certified.
164	2	I suppose just to have someone look over his credentials from the state would have him be more reputable.
165	2	Just so you know you are getting quality representation.
167	1	I would look at them personally. I want to judge them for myself.
168	2	I would guess that with accreditation I would feel that I would be best represented.
169	2	I don't have any idea why that would important. I really can't answer it.
171	2	I would want the best one to get the job done right.
173	1	They would have more knowledge in that area.
174	2	I don't have a lot of trust in attorneys and I prefer some outside regulation to make sure they are doing their jobs responsibly.
175	2	At least you would know they have the background they claim to have.
176	2	I want to be sure they're accredited.
178	1	That goes with having the required connections. It shows me that he has the credentials.

ID#	QB1	QB1a Response
180	1	I would want to know that the state of Minnesota had certification and that a lawyer advertising as a specialist in fact was one. And, that it was documented somehow that the state had criteria and that they were validated and that there was some checks and balances in there somewhere.
181	2	I would want to know that their background has been checked.
182	2	Well, I wouldn't rely on it completely but it would help.
183	2	So that I would know he's certified and he has credentials.
184	1	If somebody obtained that specific license they would have more knowledge.
185	1	Because I would tend to follow the leads of a group that would do accreditations.
187	1	I'd have to make sure he was qualified and I would hope that being certified would prove that. As a layperson I would have to trust that.
188	1	Its just credibility in general. You would know that you will get good sound advice.
189	2	Because that would be his field. If he was approved by the state of Minnesota, I would have faith in him.
190	2	I don't know. Just so he knows what he's doing.
192	2	It would depend on the person. It would help me to know that he knows what he's doing.
193	2	It would be the same thing as a doctor being certified. You assume that they would be more knowledgeable.
196	2	I would think if they're certified it would be in Minnesota's best interest.
198	1	Just because of the credibility.
199	2	If you're looking for a specialist and you have a specific problem, having a specialist in that area would be helpful.
200	2	You need a fair attorney, so he might as well be good at it if you need to get one at all.
201	1	You can put a lot of letters behind someone's name but being accredited is important and having more knowledge is important for the person you're helping. It means more credibility, I guess.
203	2	Depending on the need I guess you would want someone with a certain level of expertise to deal with the problem that you had.
204	2	Just to have a little information about him.
205	2	I don't know, maybe it would give them credibility.
207	2	It would depend on what the specialty was, because it would help out and everything.
208	1	So you know they are reliable.
209	2	I would be more knowledgeable about their background.
210	1	I would assume that he's a good lawyer.
212	1	I believe there should be accreditation for anything. There should be a standard people should be held accountable to for updates and to keep current.
213	1	I wouldn't want someone who wasn't qualified representing me in any way.
214	1	Because then they're accredited.
215	2	I would want to know that he is accredited and had dealings with other people and a good reputation.
216	1	Because I know that they would have training that I need and it'd be nice to have someone who knew about the issues that I was dealing with.
217	2	There are a lot of people out there who are not carrying the credentials that they say they do.

ID#	QB1	QB1a Response
218	2	The approval process, I'm sure, puts them through hoops and includes people attesting to how good they are at their job and their peers had to accept them as being good at their job to be in that association.
219	2	To know that there is a criteria that they are held to.
220	2	With the vast amount of law cases out there, a lot of attorneys don't know what's going on with all issues. They only know what they deal with and when it comes to a special case they may not know the rules. You want an attorney that knows more about your case, otherwise why would you need them?
221	1	It would mean extra study that this person had to go through. It signifies that it's an area of interest of that attorney so they would do better work.
224	1	Because I would want him to be knowledgeable.
225	1	You'd like to trust them and know that they know what they're doing.
226	2	We need more accredited lawyers.
228	2	Just because then they are specialized and would know more about their topic instead of just coming in cold.
229	2	It's an independent rating of a person's skills.
232	2	I don't know, I just think so. Maybe he is more able to talk about his field.
234	2	Just to know that they had the credentials.
236	2	Supposedly they would have to pass some kind of test to prove they knew something, I guess.
237	2	If they are a specialist in it then they need to have some sort of accreditation.
239	1	Because it would help with my selection of a lawyer.
240	2	I'd be able to see the credentials of the person to know that they are capable.
241	2	I guess I don't have any type of idea. I don't really know anybody who's an attorney, so to have the state as a reference and to know that the state thinks they're qualified.
242	2	It wouldn't be as important as someone else's personal reference, but absent any other information, it would at least be a little helpful.
243	2	I'd like to know what his track record is in the area that he is dealing in.
245	1	If they are claiming to be accredited then they should be.
246	1	It indicates expertise in an area.
247	2	Because it's better to have someone that's more qualified.
248	1	It would allow me to filter the list of attorneys down so that I could reasonably find one that would help me the best.
250	2	To know that they have had the education.
252	1	It shows me that she or he has gone through the process of getting a degree from an accredited institution.
253	1	I would want someone who knows what they are doing. If they claim to be an expert, they should be.
254	1	Because I would know that somebody had already checked into his or her credentials, and I wouldn't have to do that.
255	2	If he's a specialist, it sure tells me that he's qualified to handle any case I'm looking for.
256	2	Because they were accredited by the State of Minnesota and since the state checked them out, they should be better.

ID#	QB1	QB1a Response
257	2	Because if they list themselves as a specialist I would want to know that they had some kind of accreditation in the specialty or they shouldn't call themselves a specialist.
258	2	It would mean that they have training in that area.
259	1	Because maybe I could trust them a little more.
260	2	If you are going to specialize in something you should be educated in it.
261	2	Well, because like anything else, it is important because there are different parts to the law.
264	2	Well it would help me know, if I didn't have a recommendation from a personal source, that I would have some sort of measurement.
265	2	I think that because the area is so broad it is important to find someone who is current in that area. He must be an expert.
268	2	It would give me the sense that someone had passed certain criteria. It would give me reassurance.
269	1	Because you know you need people to go to school to get an education, or else they are not qualified.
270	1	I would expect the person to be up on the laws and what on is right and wrong and get the right leadership and consultation from them.
271	2	Because you would want to see if he was credible at the job.
272	1	Because I think any person who advertises him or herself as specialist, there is a question of honesty there.
275	2	Because if they advertised in that area it would be assumed they knew the most and should be the most helpful.
276	1	I would want to know that they've gone through the right training.
280	2	Because then I know they have experience in that field.
281	1	Because it would lend credibility to their practice.
282	1	If you know they are a specialist they are the best at what they do. And having a certification gives you the confidence that they have a baseline understanding in that area, and that they are not just picking up the work because they need a job.
283	1	Because you want to know who's representing you and that helps you determine that.
284	2	It shows a certain quality and professionalism.
285	1	Because it gives you the knowledge that they are good, that they have knowledge about the subject.
286	2	To know that they have to go through some qualifying exams rather than me having to qualify them.
287	1	Because lawyers, I have a really low opinion of lawyers, but if I had to hire one then I would want them to be accredited.
288	2	It gives them integrity.
289	1	I guess I would assume that the state of Minnesota would check into it and make sure that everything was okay with this person.
290	1	I'd like to think that it would be helpful that the person was specialized in that case, because I think general attorneys can not handle every case.
292	2	You'd want to know that they are really a specialist, that they know what they're talking about.
294	2	I guess because it shows that the attorney has measured up to specific criteria.
295	2	It would be another indicator of what I'm looking for in attorney quality.

ID#	QB1	QB1a Response
297	2	I suppose it would make them more credible.
298	2	I don't know who is accredited.
299	1	You would want someone honorable and who would do the right thing.
300	2	It would seem like he had more qualifications and would do a better job.
302	1	Because it's having a certification by the state adds a level of trust for me.
304	1	Well, I'd like to think that if you're hiring someone that they're honest and trained to do what they're advertising that they can do.
305	2	Confirm that the person had the credentials that they advertised.
306	1	Because it places that attorney under a set of structures that are hopefully defined by law, especially if it is the first time you are hiring an attorney. I think that would be a very important recommendation.
310	2	It's just that having someone accredited is a plus. The quality is better than just any old thing.
311	1	It establishes confidence.
313	1	Because you are depending on them to lead you in the right way so you want to make sure they know what they are doing.
316	1	Because right now I don't believe that when you are making your choices, they can say anything that they want to.
317	2	It just would be somewhat important for their experience.
318	2	I would probably want him to be good in that area. For example, if I needed someone for accident reimbursement, I would not go with a divorce specialist in that situation.
319	2	If an attorney needed to be certified. Everyone needs a certificate. They need the extra education and it's good for people, their customers, to know that these attorneys have been certified and are up to doing the job.
320	1	Credentials are very important to me. I have to trust them.
324	2	I say somewhat only because I'm not sure of an accredited agency or how valid that would be. A degree of professionalism doesn't mean competency.
326	1	A person that's trained in that area would have the best and most recent knowledge which is why I would need them.
328	2	I think that having someone that meets the requirements is good.
329	2	Because of politics, period. I pick my own attorneys.
330	2	Because you don't get to know attorneys and their experience any other way.
331	2	Because if they are certified, I would think that they would know what they are doing. They would be qualified.
332	2	Because you know that he knows what he's doing. He has a certain way that he has to do things according to the state.
333	1	You don't want a divorce attorney to work a case of a murder, for example. You want someone for your particular case.
334	1	There are too many that just scrape by and are not qualified.
336	1	They would have more expertise in that area.
337	1	It would depend upon what the organization is, but their word, if the organization is well known and they back someone up, that would be worth a lot to me.
338	1	They would know the rules and the laws because they would be certified.
339	1	Because then someone knows what they are doing.
340	2	Because, well, I really don't know why.
341	2	If he advertises you should know his credibility.

ID#	QB1	QB1a Response
344	2	It shows that the attorney knows what they are qualified for. It's somewhat because a great lawyer may have been kicked out for something, so it depends on the cases.
345	2	Because I want someone who is reputable.
346	2	So they know what they're doing and are appropriately trained.
349	1	I think the law is too complicated so they can't do everything they need to specialize.
350	2	Because you'd know they would be on the up and up.
353	1	If I needed one it would be important because he's certified and he obviously has experience in that realm.
354	1	Just to make sure that they are good quality in their special area.
355	2	Because you would know they had some experience in the field.
356	1	I want somebody to be qualified.
357	2	It signifies their expertise.
358	2	Because you'll know just a little bit about him anyway.
359	2	I'd like to know that he is certified.
361	2	Because then I know they know what they are doing.
362	1	Because they should be trained.
363	2	Because I would want to recognize their level of competency.
364	1	Because anyone can say they are a specialist in anything.
367	1	If the state approves them, he would be a little better than the guy who had never taken it.
368	1	That they are available to practice law.
369	1	Because I don't know about law, so if the state gives them accreditation, I can believe them.
371	2	To know that they know what they are talking about.
373	2	If he's a specialist I'm using him for certain means, so I'd like someone who has dealt in that area.
374	2	Because I would want them to have some school background.
375	1	Peace of mind. It makes you want to call him to handle your case.
376	1	I would want to win my case.
377	2	I want one that was specialized in the necessary area.
379	1	Well you know you're getting someone reputable.
381	1	Because I think he would have some expertise.
382	2	Just because I would have more trust in their ability to help me.
384	2	He must have experience to be certified in that field.
386	2	You can look in magazines to get the top attorney that you want. You get what you pay for.
387	2	With that certification, it would lead to the fact that he or she was an expert in the field.
388	1	Because he is learning his job as a specialist and it helps to be accredited.
389	1	To know that he had the credentials and the certificates to back up what he's advertising.
390	1	Because I want a good lawyer.
393	2	It would help to know that they have had specialized training.
394	1	These people have focused their studies in specific areas, so if the state made a certification process, they would truly know what is going on.
395	1	Because then I would know that they knew what they were talking about.

ID#	QB1	QB1a Response
396	2	Just on a credibility basis, it reflects cost. Maybe if they become more certified then they'll be more expensive to lower income people. It's just more important that they're more knowledgeable but at the same time it imposes a financial burden.
397	2	Because they went through extra steps.
398	2	To validate credentials.
400	1	You want someone who is reputable.
401	2	I guess I would like to know that he had been certified and that he knew what he was doing and had experience in the field.
402	1	I guess just to confirm that they had the proper background, education, experience, and reputation.
403	1	Because he is qualified.
406	2	Because it just assures me that he knows what he is doing.
407	1	If you have an attorney you want to know they know the area they're working in.
409	1	I would know he is an expert in his area.
411	2	Because if someone is accredited, then I would have more trust because they have been researched. It gives you more security because you know they won't take advantage of you. They are well trained to do their job.
412	2	If they are going to be accredited and advertising then you assume they are legitimate.
413	1	So you would know they were qualified in the state of Minnesota.
414	2	I think I would go for the advertising so if the attorney was good you'd hear about it and he wouldn't have to advertise.
415	1	If he's certified and has a good recommendation from the state, then from my point of view that would be good.
417	2	I guess just verification of the specialty comes with a tradeoff of the cost that it takes to add that bureaucracy.
418	1	So you know that they are experienced in certain areas.
419	2	Because you know that his credentials have been verified. There are some people who try to get into business that are not qualified.
422	1	The fact that they should be accredited and good at what they do.
423	2	It gives them more validity.
428	2	Because if he's going to advertise as a specialist I would want him to be good at it and being certified by an accredited organization would indicate that he was good at it.
429	1	If he or she is advertising as a specialist, I'd like them to actually have that certification.
430	2	Because I wouldn't want just anybody. I would certainly check it out.
431	1	Just so that you really know that the person is well equipped.
432	2	He's proven himself if he is certified.
433	2	I'd just like to have a choice and a voice in it.
434	2	I'm not even sure. I really don't know.
436	1	Because then you know they've been checked out.
437	1	It's important to know who they are.
438	2	Because then you know he is qualified.
439	2	You can have all the degrees you want but being certified shows that you know what you're doing.
440	1	Because I just had a bad attorney and I would want to have a better one in the future.
441	2	Because they would know more about the situation at hand.

ID#	QB1	QB1a Response
444	1	Because the guy who isn't a specialist wouldn't know anything about it, so the specialist would know more.
445	2	Because then there would be some standard that they went through.
447	1	That means they know what is going on.
448	1	Anytime you deal with a professional they should have some type of credentials to back them up.
451	1	Because you want someone with experience to handle your case.
452	2	I guess it's important for credentials, important that they are certified.
453	2	So that I would know they had gone through a rigorous course that would qualify them more.
454	1	So you can get an honest man. These days you wonder sometimes.
456	1	Well, a guy wants the best attorney he can get when needed, so I feel it's very important to have a good one.
457	2	Because they should have some knowledge of your problem.
458	1	Because it just shows that they are meeting certain standards, and that would be more beneficial for me.
461	2	That would maybe give you more of an idea that they know what they're doing as far as what your claim is.

MINNESOTA STATE SURVEY 2003 - PART 2
Responses to QB6a

QB6. How concerned would you be if you had an attorney who had advertised as a specialist and you found out that the attorney had NOT been certified as a specialist by an accredited organization . . . would you be very concerned, somewhat concerned, not very concerned, or not at all concerned? (1=Very concerned, 2=Somewhat concerned)

QB6a. (IF VERY OR SOMEWHAT CONCERNED) How would you describe your feelings about the situation?

ID#	QB6	QB6a Response
005	1	I'd be angry.
006	1	I'd feel cheated.
007	1	I'd feel mighty P.O.'d that I wasn't getting what I thought I was buying.
008	1	I would feel betrayed.
010	1	I would be very upset and more than that.
011	1	Very mad.
012	2	I would think that the attorney was pushing the envelope a little too hard. It would be a red flag.
013	2	I would dig deeper into his past to see what his accomplishments had been or any trouble he had had.
014	2	I guess I'd consider myself somewhat responsible for my choice of attorney because I should have done the research on the attorney.
015	2	Upset, disappointed, questioning their morality.
019	1	That the guy is lying and then he shouldn't be a lawyer.
020	1	I would feel mislead.
021	1	False advertising, taken advantage of, mislead. I expect to get what I'm paying for.
022	1	I would describe that as he is misrepresenting himself and if he can lie about that he can lie about other things.
023	2	Those attorneys that advertise as specialists and were not certified as specialists by an accredited organization are ambulance chasers.
024	1	I think that he should be disciplined by the state of Minnesota because he's falsifying information. I just say he should be disciplined because he lied to the public, especially since they are lawyers and they know the law so they should be disqualified.
025	1	It seems to me that he would be a liar.
026	1	Sounds like false advertising to me. I was mislead, taken advantage of.
028	2	I would think he should be accredited and I wouldn't have much faith in him.
029	1	I would be extremely upset and feel mislead.
031	2	Perplexed as to how they were able to advertise themselves as specialist when they were not.
032	2	I would go to someone else if I was in that situation.
033	2	If he advertised as accredited, as being a specialist, I would be concerned. If he just called himself a specialist, then I would have to judge for myself if it was okay to hire him.
034	2	I don't know. I expect them to lie so I wouldn't be very surprised.
035	2	I wouldn't want somebody who was unqualified.

ID#	QB6	QB6a Response
036	2	I would think they were misleading me, saying they were qualified, I would just feel they were specialized in one field only.
037	1	I'd feel kinda betrayed and the standards that were stated weren't lived up to.
038	2	It would be like going to a doctor. Of course you would be concerned that the specialist had the qualifications that you expected and a mastery in that certain area.
039	2	I'm not sure. It isn't fair to different people.
040	1	It would make me pretty angry.
042	2	I would think he wasn't truthful with me from the beginning and had deceived me that he didn't disclose that information ahead of time.
043	1	He should be fined or disbarred or something. He should be penalized.
044	2	I would be upset at them.
045	1	I would feel cheated.
046	1	It is false advertising. I would wonder what else they didn't tell me about.
047	1	It would be unethical.
048	1	I'd be mad and feel like I was mislead.
049	1	I'd be concerned enough to report him.
050	1	He misrepresented himself to me and he wouldn't be qualified to do the job.
051	1	Angry.
052	1	I would feel that somebody should do something about it but I don't know what.
054	1	That they were misleading me. I would not trust them.
055	1	That he's advertising something he knows nothing about, false representation.
056	1	Like I'd been lied to.
057	1	How can you trust someone who's lying to you from the start? I'd feel taken advantage of.
058	2	I think they need to keep current and tell the truth.
059	1	I think he should be qualified. I'd be disappointed in him, that's for sure.
062	2	I would look into his experience.
067	1	I would think the person was a liar and couldn't be trusted.
068	1	Scared that I chose the wrong attorney, that if they're going to lie about that, are they going be experienced enough to represent me? Are they trying to rip me off?
070	1	I would be angry if they were trying to pull something over on me.
071	1	That it was false advertising. I'd feel mislead.
073	1	Upset, angry that someone would lie to me, especially an attorney.
074	1	I would feel cheated and misrepresented.
075	1	I don't know the answer to that.
076	1	I'm not sure if I can say for sure. I did have attorneys when my husband was alive but we've always have had a good county attorney here. I would feel not very good.
077	1	Pissed off, cheated.
079	1	I'd sure drop him and find somebody else.
080	2	Very confused.
081	2	I don't know enough about law and about the professional practice of law to know how important that would be.
082	1	I don't like lawyers very much so I'm the wrong person to ask but I guess I'd feel very concerned.
083	1	I would feel like that person misadvertised themselves, that they ripped me off.
086	1	I would think that would border on malpractice.

ID#	QB6	QB6a Response
087	2	False advertising is illegal and it seems like they're covering up something.
088	1	I would feel that he has been dishonest.
089	2	That would be bogus, that wouldn't be good. I wouldn't feel good about that.
090	1	I'd feel ripped off.
091	1	I'd leave. I'd fire him.
092	2	I wouldn't go back to them.
094	1	I'd feel mad.
095	2	I'd be kind of worried in a way.
096	1	It's a rip off.
097	1	I wouldn't want him. I would want somebody else then.
098	1	I would think it's unethical.
099	1	I'm not sure.
100	2	You would think that if he was there representing whoever he was representing at the time that you would take for granted that he would have the credentials to represent you.
101	1	I'd be P.O.'d.
102	2	I'd just probably be somewhat concerned.
103	1	I would hire a second attorney to sue the son of a bitch.
104	1	Integrity is very important. He wouldn't be my attorney of choice.
105	1	I'd be upset.
106	1	I'd be angry because that's like fraud.
107	1	If I used an attorney like that I'd be unhappy and disappointed.
108	1	I'd be upset.
109	1	I wouldn't ever trust them again and would check them out from that point on.
110	1	I would report it.
111	1	I'd be upset.
112	2	I'd feel like I need more information.
113	1	If they weren't qualified I wouldn't want them representing me.
116	2	I would question their ethical background.
117	1	I don't know.
119	2	I'd feel that the attorney was a little dishonest.
120	1	If he can't even do his advertising correctly he probably isn't going to be doing much else correctly either.
121	1	I would feel that I had been mislead if he advertised that way. I would have no trust for the individual.
122	1	If he wasn't what he said he was then I would be concerned.
123	1	I don't think very well about someone who lies, and that would be a lie.
124	1	I would be upset.
125	1	I would feel angry because it would be false advertising.
126	1	Upset.
127	1	I would feel betrayed, and I would feel angry, and I would want to fire him, and report him to the bar.
128	2	I believe that you should check them out and shouldn't trust them anyways. I'm concerned if they are ethical and if they aren't then that would concern me as far as believing him.
130	1	Lied to.
132	2	It depends upon the values of the person and if I personally know them.

ID#	QB6	QB6a Response
133	2	I don't really have any reason.
134	2	I would be angry.
135	1	I would feel like they lied to me. Attorneys should always tell the truth.
136	2	If they are supposed to be a specialist they are supposed to be. I would be distrustful.
137	1	I would not be very happy
138	1	That's false advertising and it would make me angry.
139	2	I would be upset that he is telling me lie.
140	1	I would question whether he could handle my case and call and see why he was not certified.
141	1	Upset.
143	2	If I had thought they were a specialist I must have read something that said they were specialized. I would feel ambivalent. If they were still doing a good job, it would be okay.
144	2	I'd be worried.
145	1	I have no idea. I would just fire them.
146	1	I would feel mislead. I wouldn't want to be his guinea pig.
147	1	That is lying and it is unethical. I would not continue doing business with them and I would try to report them.
148	1	I think that a lot of the attorney ads that I've seen lately are very misleading, and I'm concerned about how this affects the public.
149	1	Well, again, I think that there are people out there who try to take advantage of other people. It makes me really careful.
151	1	Battling disappointment.
152	1	I would feel I had been mistreated and I would not trust them anymore.
153	2	I would feel deeply ambivalent. I just don't think about this.
154	1	I would think he was lying and I would not care for him.
155	1	I just feel that people should be certified in the area that they are working in.
156	1	I would feel mad.
157	1	I would have to find out from other lawyers why he was not certified.
159	1	I'd check with the state bar, and then I wouldn't do business with them.
161	1	I would feel mislead.
162	1	I don't know. I can't think of anything.
163	1	I sure wouldn't go to him and I wouldn't think much of him.
164	2	It's false advertising on the attorney's part.
165	2	I would be concerned that they did not have the experience or knowledge to handle case appropriately.
167	1	I believe in honesty.
168	2	I would wonder why he can advertise if they were not accredited by an organization.
169	2	It would bother me if they said they were qualified and they weren't because that would feel like lying to me.
170	1	I would feel betrayed.
171	2	I would feel uneasy.
172	1	I'd probably be mad.
173	1	I would be very, very upset. I think if you advertise like that you shouldn't lie.

ID#	QB6	QB6a Response
174	1	I would be upset and would question their ethics and honesty. I would want to know more information about why they feel qualified to claim that.
175	2	It would smack of fraud.
176	1	I would feel that they misrepresented themselves.
178	2	If he wanted to get experience and he needs experience it would be okay. I would need to know what experience he had and check him out.
180	1	I would think that they were using false advertising and I'd feel that I purchased a service that they were not qualified to give me.
182	1	I would feel that they would be misrepresenting themselves.
183	1	He'd be a crook. I would consider him dishonest.
185	1	I would be angry because they had lied to me.
186	1	I guess what would bother me is that my attorney lied. He expects me not to lie and I expect him not to lie. Can't you go to jail for that stuff?
187	1	I'd be upset.
188	2	It would make me think about how well you can count on them if you went to court. How his word would stack up against the other lawyer's word.
189	1	I wouldn't have too much faith in the attorney if he lied about his qualifications.
190	2	I wouldn't feel very good about it.
191	1	I'd feel it was false advertising. That they didn't follow for their promise in advertising.
192	2	If he lied to me about it I would be very upset.
196	1	I would be upset that they're not really looking out for my best interests.
198	1	I'd be concerned.
199	1	I would be mad that they lied.
200	2	I believe he should be honest. I wouldn't have much trust if he wasn't honest.
201	1	I think I'd be disappointed in myself and hope that they still have the knowledge about what they say they specialize in.
202	1	I would feel that I was mislead.
203	2	If the attorney had the experience and the record of performing well in those situations than that would be more important to me than a specialist title.
204	2	I'd be a little upset.
205	2	It would seem like false advertising or just embellishing.
206	1	Well, it would seem like he's falsifying what he is.
207	2	I would be upset that he would say that he was accredited and he wasn't after all.
208	1	I would be angry and upset.
209	2	It would be false advertisement, and he may not be as honest as he should be.
210	1	I would think he was a liar.
211	1	I'd try to sue him. I mean, if I hired him to for a specialty, then I'd expect him to know it. I'd be really, really mad.
212	1	They should know what they're doing and make it official in some way.
213	1	I would feel a little bit betrayed maybe.
214	1	I'd be mad.
215	2	I'd be concerned and I would want to know why.
216	1	I'd think that I was being lied to and that they were trying to present themselves as someone they weren't.
217	1	I would not have anything else to do with this individual. I would be upset and wouldn't hire him anymore.

ID#	QB6	QB6a Response
218	1	I would feel that they had deceived me.
219	2	I would be frustrated that they lied.
220	1	It would feel like it was false advertising and that I had been mislead. If they could advertise that they were a specialist and not really be one, then what they say really means nothing. Just like I could go around advertising I was a lawyer and not really be one
221	2	I do believe in experience. You can acquire experience without having gone to a lot of extra schooling. Experience speaks very highly, but I think if you're going to advertise, I would make the assumption they were certified. I would feel mislead.
223	1	I would be very angry and upset.
224	1	I would want to sue him since he did not advertise himself honestly.
225	1	I think if I was under the impression he had been certified, I would expect that he'd be that.
226	1	My trust in him would be lost.
227	1	I don't think that they should even practice law. I would feel mislead.
228	1	Well that would not be completely honest and if I'm going to have a lawyer I want to have an honest one.
229	2	It would depend on the situation. If he did have experience, I would be not as upset as if he had no experience.
232	2	Well, it is completely false advertising.
234	2	I would just be somewhat concerned.
236	1	Well, it would be just like malpractice, so I'd be upset.
237	1	I would be very mad about false advertising.
238	2	I would ask the attorney why they advertised as a specialist, and what that means is that he didn't tell the truth.
239	2	If they were to pose them selves to be an expert in the field and they did not have the credentials I would feel very betrayed.
240	2	Somewhat concerned about on what grounds they consider themselves a specialist.
241	2	I would just want to make sure he would really be sure of what he's doing.
242	1	I'd look for another lawyer. I would feel he had misrepresented himself.
243	1	He's doing a bit of false advertising.
245	1	I would be angry and would report him to the bar.
247	2	I don't know. How would you know anything about him, would be my question.
248	2	It would seem like he should have some type of training to be certified other than just his word that he is certified as an expert.
249	1	I don't know how to answer that. They all lie. I'd be very upset, of course. I went to the best, what I thought was the best, and I got screwed.
250	2	I would want to find out why the did that. It's misrepresentation. I would think it's illegal.
251	2	I don't know. That's beyond my thinking.
252	1	I would absolutely decide not to go with that person because it would tell me that person was dishonest.
253	1	I would be in a rage.
254	1	I would be angry.
255	2	I would feel that he misrepresented himself.
256	2	I would feel ripped off.

ID#	QB6	QB6a Response
257	2	It's basically a lie if an attorney or anyone says that they are a specialist in an area and doesn't have anything to back that up.
258	2	I would want to know that they knew what they were doing.
259	1	I just think he better have some good references or I wouldn't hire him.
260	2	That they may not be certified but if they have lots of experience in that specialty than I might let it fly.
261	2	I would assume that he would already have experience.
265	1	It depends on how involved I was with the attorney. I would feel lied to if I found out later.
267	2	I really have no opinion.
269	1	It is very bad because he had not satisfied the requirements. You have to consider the quality not the quantity.
270	1	I would say he lacks credibility and he's misleading the clients.
271	1	I would feel very concerned and upset that they lied.
272	1	I would think it was a question of honesty and I'd feel that he was dishonest.
273	1	I would be mad and feel that I couldn't trust them as a lawyer.
274	1	If you're telling me you are specialist, and you haven't had any certification, I would want to know how you can call yourself a specialist.
275	1	I'd be upset and probably fire him.
276	1	If he's advertising as a specialist, he should have a background in it.
277	2	I'd be disappointed in the person for doing that.
278	2	If he's saying that in ads I would be upset that he is lying to me.
279	1	I would feel like I had lost trust in him.
280	2	I'd be worried that they weren't legit in what they were doing.
281	2	I would think it would be false advertising.
283	1	Misinformed. I would feel mislead because I believed he was one thing yet he wasn't.
284	2	I would want to find out more about the lawyer.
285	1	I would be mad that they said something and then it's really something else, and that they don't have the qualifications.
286	2	I think it's a great idea but if the law required them to be accredited as a specialist, I would feel very upset if they were not.
287	2	Well, I wouldn't be surprised, and then I'd have to find a different lawyer.
288	1	I would be shocked.
289	1	I would kind of question their credibility.
290	2	Well, if they advertised that they were and they were not I'd feel deceived.
292	1	It's almost fraud.
294	2	I would become more skeptical of them and want to check out what it meant to be a specialist.
295	1	I'd be very concerned about what else the attorney wasn't telling me.
297	2	I would want the person to be honest, but sometimes you can be good at what you are doing without every little certification or specialization deal.
298	1	I would depart from association with them.
299	2	If I wanted one I would get a darn good one so I would be upset if he was a liar.
300	1	I would feel like I was lied too.
301	1	I would feel upset if they were claiming something that was not true.
302	1	I would feel as though it was a scam.

ID#	QB6	QB6a Response
304	1	I would be incredibly angry and mistrust that person.
305	1	I would feel the person was dishonest and not trustworthy.
306	1	Needing a lawyer is stressful enough, though I would be extremely worried at the repercussions of such an event.
309	2	It's okay. I would feel okay, not too upset or not too happy. It should be okay, it wouldn't bother me if I found out that the attorney is not certified.
310	1	That he is lying, especially in a case where you are paying them money and they didn't tell the truth.
311	1	It would be a misrepresentation and a violation of their license.
313	1	He would get canned and I would be upset about it.
316	1	I would be angry for one, and I would feel betrayed for another, and I would not trust that person. I think that they need to be trustworthy and that they should be accountable about what they say they are doing and what they are specialized in. What they say is true needs to be true.
317	1	I'm against dishonesty in any manner.
318	1	I would be upset. If they were advertising as a specialist I would expect them to be one.
319	1	Cheated, pissed off. If you have trouble with a car, you bring it to a mechanic. In some other countries, people need to be certified before they can have a job. That way you know that they can do the job you need them to do.
320	1	Duped and taken advantage of. They would have been showing a lack of integrity.
322	1	It's not right. If he said that he was a specialist you think you are getting the best but if he's not and he said he is, then he's breaking the law almost.
324	1	That they had a total lack of credibility.
326	1	I'd be very angry.
327	2	I don't know. I guess I wouldn't really care.
328	1	That is misrepresentation and that is a big negative.
329	2	Not too happy.
331	1	I would be mad because they lied, and you can't trust them.
332	1	I would feel like someone was lying and it was false advertising.
333	1	I would think it would be false advertising if they say they're skilled in the field you're looking for. It wouldn't make sense. They would do better in the field they say they are in.
334	1	I would feel like he had been practicing when he shouldn't be.
335	2	I would feel pretty disappointed.
336	1	It sounds like he falsely represented himself, so I would mad.
337	1	I take people at their word. If they say they have someone backing them up, and in reality they don't, I'd probably drop them all together.
338	1	I'd want to know how did he say he got that and how was he able to advertise that.
339	1	I would feel disappointed.
340	2	I don't know. I don't care because I don't deal with attorneys. I just don't know.
341	1	If he was advertising as a specialist and he wasn't, then he would be lying and I would say that would be false advertising.
342	2	Whatever they advertised to be, that's what they should be.
344	2	If he knew what he was doing I wouldn't be worried, and if I were winning I wouldn't worry. If it's a small case it's not a big deal but if it's a big case it would be a big deal. It depends on situation.

ID#	QB6	QB6a Response
345	1	I would want someone who does what he claims to be doing.
346	2	For attorneys, you typically find your attorney by word of mouth. I don't always understand the licensing procedures, so if I found out that somebody falsified their qualifications, I would be somewhat concerned.
348	1	I wouldn't be happy. If it was me looking for that lawyer, and it was false, I wouldn't be happy at all.
349	1	I think it would be fraud.
350	1	I would be upset because that would be false advertising.
351	1	If they are advertising that they are a specialist, they better be a specialist. I would be mad.
352	1	I would think the guy would be a crook.
353	1	That he was allowed to advertise. I would be very disappointed in who ever let him advertise it. I would hope there would be boundaries.
354	2	If a lawyer is advertising that they are a specialist then they should be certified as a specialist or that is false advertising.
355	1	I would say that he's not telling me the truth so I'd be pretty upset.
356	2	I would like someone who is qualified if they are going to represent me.
358	1	I just want a lawyer who morally does right, to be an honest person, and well-schooled in what he's doing.
359	2	I'd feel like I'd been lied to.
361	2	I would think that it was maybe false advertising, so I would be skeptical.
362	1	You are probably paying for that specialty, so they should have high knowledge of what they are doing.
363	2	I would want to know if there was a process that denied him or if he failed, and if he doesn't have the certification how much experience does he have.
364	2	I would not expect that they would be certified unless they advertised that they were certified.
367	1	That's kind of like a malpractice type of thing. They would be lying.
368	1	I would feel like I was lied to.
369	1	I would feel like he is lying.
370	1	I wouldn't want to pay him. I'd be upset and feel lied to. He represents a state organization and those state organizations deny people their rights.
371	2	They advertised illegally. It would be false advertisement.
373	1	I'd be pretty angry that he misrepresented himself.
375	1	It would be very unethical to do something like that. I think it's wrong if he's trying to advertise with false claims.
376	1	It would be false advertising.
377	2	It would reflect on how they represented me.
378	2	It would lead to not trusting that individual. He would be lying and it would be false advertising.
379	1	I'd say he's claiming he's something that he's not. I wouldn't be very happy about it. He's basically lying and you can't trust a liar.
381	1	I would fire the guy. I would be mad. You don't lie.
382	1	If it was somebody I had hired, I guess I would be angry. I would feel mislead.
383	1	I'd be very upset, because I think that's dishonest. Why would I want to hire a lawyer who is dishonest, when that's the whole justice system's point to be honest?

ID#	QB6	QB6a Response
384	1	My feelings would be I would fire him and go after his credibility.
385	1	That would be fraud.
386	2	I would consider him misleading.
387	1	I would be a little bit bitter. I would feel there would be a lack of truth in advertising, or representation of oneself. Lawyers should be looking for the truth.
388	1	I think I would be mad because it is kind of like false advertising.
389	1	If he says he specialized in something and he's not, then he's no good to you. He's dishonest.
390	1	I wouldn't hire him and I would have a very negative feeling.
392	1	I would feel that I had been lied to.
394	1	If they are not being honest in their advertising, then why would I trust them to be honest?
395	1	I would not trust them because they lied.
396	1	I think that being certified is especially important, so I guess I'd be concerned about their qualifications and their credibility.
397	1	I would feel that they were misrepresenting themselves.
398	2	I don't know, I would just be somewhat concerned.
400	1	I would be disappointed that he had not been up front with me.
401	2	I would be very upset if he was pretending to be a certain type of lawyer and he wasn't.
402	1	I'd probably be feel the need to contact the Better Business Bureau or the bar association and let them know about the situation and who could explain it to me.
403	1	That the attorney is unethical because he doesn't follow his advertising.
404	1	I guess I would think they were trying to deceive me. I would feel betrayed or angry.
406	1	I would be disappointed and feel mislead.
407	2	You don't know how much he really knows if he has lied to you.
408	2	He shouldn't be advertising something that he's not.
409	1	I would think he was a fraud.
411	1	I would feel that I could not trust that they know what they are doing or that they have the necessary experience. I would also feel a lack of security with them.
412	1	I would be upset because of false advertising.
413	2	I'd want to know if they were qualified to do the work. I'd feel lied to.
414	1	I would be upset if I hired a man who was supposed to be a specialist and he wasn't. I'd ask if he could be looked into by the bar association.
415	1	I would be concerned but I just figure that they would have the qualifications to do their job right.
416	2	I would feel angry.
418	1	I wouldn't be able to trust the lawyer if he is advertising one thing and doing something different.
419	1	I would find that kind of fraudulent in advertising. I would find that very concerning.
422	1	If I hired someone who vowed that they weren't who they said they were, I'd sue them for fraud.
423	1	I think that honesty is the most important thing in choosing someone, so I would be upset with him.
429	2	I would be concerned because the certification wasn't available.

ID#	QB6	QB6a Response
430	2	I want my attorney to be honest, to know what the heck is going on.
431	1	They shouldn't write it down if it ain't true.
432	1	I would say he was lying.
433	1	I just wouldn't be able to believe that someone could be representing me or anyone else without having that certification.
434	2	I don't know.
435	1	I would be very frustrated and upset.
436	2	I would feel that they mislead me and that I can't trust them.
437	2	I would just be somewhat concerned because different people have different personalities and word of mouth is more important than a degree or technicalities.
438	2	He isn't as qualified as what he said he was.
439	1	I'd be angry.
440	1	Past experience shows me that I can get a better attorney if they tell the truth.
441	2	If they knew what they were doing it wouldn't make that much difference.
444	1	I think he should be disbarred because it's false advertising.
445	1	It would probably be a little aggravating or disturbing.
446	1	Because that's just wrong to say that your expertise is something and totally not be qualified.
447	1	I wouldn't like it at all.
448	2	I would feel betrayed.
449	2	I don't know. I don't want to answer that.
450	1	I would be very mad.
451	1	I would probably be angry and feel lied too.
452	2	I guess I'd feel that maybe there was some deceit there, but he still may be very qualified.
453	2	I would feel mislead. It is up to the person hiring them to represent them correctly.
454	1	I can't answer that.
455	2	I don't know. It depends on the outcome and if he was dishonest up front.
456	1	I'd be very pissed.
457	1	Everything is important but if he really screwed up I would take it to someone who could help. Then, I would turn him in.
458	1	I would be a little angry that he was misrepresenting himself.
459	2	I would almost expect it.
461	1	I think if you're getting a lawyer you should assume that they had all the proper credits.

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

In re:

Hearing to Consider Proposed Amendments to
the Rules of Professional Conduct

REQUEST FOR ORAL PRESENTATION & WRITTEN COMMENTS OF THE ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA

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STATE OF MINNESOTA

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TO: The Minnesota Supreme Court

INTRODUCTION

The Minnesota Supreme Court solicited comment regarding the modification of the Rules of Professional Conduct addressing, among other things, the issue of attorneys advertising that they are "specialists" in the absence of any "certification" of special expertise by an independent authority. The Court requested input by May 8, 2004. This submission by the Academy of Certified Trial Lawyers of Minnesota ["ACTLM"] opposes this change and requests to make an oral presentation.

The ACTLM is a group of over 200 attorneys who have achieved specialty certification by at least one of the two civil or criminal trial specialty certifying agencies approved by the Minnesota State Board of Legal Certification. The current Rule 7.4 (b) requires that a lawyer

> shall not state that the lawyer is a specialist in a field of law unless the lawyer is currently certified or approved as a specialist in that field by an organization that is approved by the State Board of Legal Certification.

Among the proposals before the Supreme Court is one advocated by the Minnesota State Bar Association, which would delete the foregoing and alter Rule 7.4(a) to allow any lawyer to advertise that they are a "specialist" whether or not they have achieved any specialty certification.

The only check proposed by the new rule would limit the use of the term "specialist" so that it is not "a false or misleading communication" under Rule 7.1.

SUMMARY

1. A marked contrast exists between a "specialist" and a "certified specialist." If adopted, the change would allow anyone who truthfully limits their practice to a few fields to do so without demonstrating any special ability and without accountability to any independent certifying agency. In contrast, those lawyers who have achieved certification are held to much more exacting standards by passing a rigorous additional written examination, compiling references among bench and bar to attest to demonstrated ability and ethics, showing the regular attendance of specialty-field CLEs and the absence of malpractice or other professional competence issues. If a "specialist" need not be certified, the economic realities of legal practice make it likely that fewer practitioners will try to attain or keep the more exacting standards of certification if they can claim a "specialty" without added cost or effort.

2. Polls show the public will be confused by the use of the phrase "specialist," assuming it means the lawyer has additional qualifications which only a "certified specialist" actually possesses. The MSBA Trial Certification Board and the ACTLM together commissioned a poll, Ex. 2, that shows that when the public hears that a lawyer is a "specialist," it assumes the lawyer has achieved specialty training and approval of a state board or other agency and has demonstrated ethics and professionalism.[1] Under the proposed rule that would not be required. The public would be

[1] A poll was earlier undertaken in 1986, yielding similar conclusions, but its questioned failed to explore the public's assumptions about the roll of a government agency in determining a lawyer was a "specialist." The 1986 Poll is attached as Ex. 3. The current poll specifically determined that the public erroneously assumes that the state or one of its agencies has verified a lawyer is a specialist.

misled.

3. Something more exacting than "false or misleading communication" is required to avoid public confusion. The proposed rule depends for the protection of the public solely on the prohibition against "false or misleading communication"of current Rule 7.1. To avoid the high likelihood of confusion Minnesota must make two additional changes if it chooses to adopt the MSBA's recommendation: First Rule 7.1(a) must also be modified to mandate a disclaimer that a "specialist" has not been "certified" by an approved agency, and second Rule 7.1(b) should also be changed to express the presumption that "unjustified expectations" are created unless an uncertified "specialist" discloses their lack of certification. Only if a mandatory disclaimer warns the public that its presumptions about the meaning of "specialist"are wrong with the MSBA's change avoid confusion.

4. The Court has a constitutional right to control lawyer advertising and assure proper certification of its licensed attorneys. To avoid public confusion, the standard for the use of the term "specialist" must be controlled by something more than the "false or misleading communication" standard of Rule 7.1. It should be governed by the use of current certification standards. As noted by other states[2] and by the Minnesota Attorney General's Office,[3] this is a constitutionally defensible position, because the public may objectively assess a factual statement about whether someone is

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[2] For example, South Carolina's Comments to Rule 7.4 note that "Independent certifying organizations accredited by the ABA meet objective and consistently applied standards similar to those of the [state] Commission. This approach is consistent with *Pee v. Attorneys Registration and Disciplinary Commission*, 496 U.S. 91 (1990).

[3] The April 29, 2004 Opinion is that the language of the current Minnesota Rule 7.4 which requires a "specialist" to be certified meets the constitutional test established in *Peel* and is nearly identical to that upheld by other courts, *citing American Acad. of Pain Mgt v. Joseph,* 353 F.3d 1099, 1106-12 (9th Cir. 2004).

certified, but may not readily test someone's opinion that they are a "specialist."

ANALYSIS

I. The Court has a Responsibility to Assure the Public is not Misled and the Constitutional Authority to do so.

A. Courts have the Authority to Regulate the Legal Profession

While the American Bar Association initially barred advertising by its attorney members in 1908, the United States Supreme Court established in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977), that under the First Amendment, a lawyer had the right to advertise routine legal services so long as the medium was not a face-to-face solicitation for business. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912 (1978), the Court established the principal that the courts had an absolute right to regulate lawyers to bar face-to-face solicitations because of their responsibility to police the legal profession against the risk that lawyers skilled in verbal communications could engage in overreaching through face-to-face communications that would fall outside the scrutiny available for written forms of communication.

Thus in *In re R.M.J.* , 455 U.S. 191, 102 S.Ct. 929 (1982), the Court allowed direct mail advertising because it could be supervised and scrutinized by the bar and courts to check misleading forms of communication, which it ruled were not constitutionally protected. Truthful case-specific forms of written advertisement were allowed by *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265 (1985), again because the communications could be regulated against the risk of misleading statements, even if the ad encouraged people to file lawsuits.

Zauderer and *R.M.J.* read together, indicate that the operative distinction between

constitutionally protected speech and speech subject to regulation is that those forms that are not conducive to a potential client's informed reflection and the exercise of choice are subject to limitation. Thus in *Shapero v. Kentucky State Bar Association*, 486 U.S. 466, 108 S.Ct. 1626 (1988), the Court said that non-deceptive direct mail solicitation letters aimed at potential clients with specific known legal problems were constitutionally protected as they lacked the risk of coercion or overreaching that face-to-face solicitation poses. The Court has allowed to stand state bar regulation of non-deceptive television ads and thus affirmed the legitimate regulation of such ads by the bar to limit the manner in which an advertisement is presented. *See Committee on Professional Ethics and Conduct v. Humphrey*,377 N.W.2d 643 (Iowa 1985), *appeal dismissed sub nom.*, 475 U.S. 1114, 106 S.Ct. 1626 (1986) (prohibition of background sound, visual displays and requirement of a single non-dramatic voice).

The history of regulation of lawyer advertising thus clearly establishes that there is no constitutional right to present misleading information to the public and communications that have the capacity to deceive or confuse may be policed by the court or bar.

B. Advertisement of Lawyer Certification may be Limited

In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 281 (1990), the Court held that a lawyer has a constitutional right to advertise their certification as a trial specialist by the National Board of Trial Advocacy, as such an advertisement was not actually or inherently misleading as the advertisement stated factually verifiable information, rather than an unverifiable opinion of someone's credentials. To the extent the speech was capable of a consumer's reflective examination of the factual assertions, it could be regulated so that any potential for deception or confusion of the public could be controlled. In *Ibanez v. Florida Dep't of Bus. &*

Prof. Reg., 512 U.S., 114 S.Ct. 2084 (1994), the Court allowed an attorney with certification as a certified public accountant to advertise her credentialing as a CPA and "Certified Financial Planner." *Ibanez* said that to justify regulation, the government must show that the harms it recites are real and that its restrictions will alleviate them.

The potential for even truthful information to confuse the public prompted the Court in *The Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371 (1995), to uphold Florida's 30-day ban on direct mail solicitation to accident victims and their families. The Court noted that even truthful communications could, when presented within a window during which the recipient is vulnerable, be confusing to the public and that they were thus susceptible to reasonable regulation and an absolute bar within a reasonable time period.

Reading these case together suggests that although the advertisement of one's certification status is allowed, other forms of even truthful communication are subject to regulation and even to a ban if they present a reasonable chance for confusion or overreaching. The Minnesota Attorney General's Office recently issued an opinion to the Board of Legal Certification that the language in current Rule 7.4 was constitutionally sound because it required reference to the factually demonstrable status of "certification" by anyone claiming specialization.

C. Verifiable Facts may be Advertised, Unverifiable Opinion may be Barred.

The key to understanding what may be regulated is the difference between a verifiable fact and an unverifiable opinion. In *Peel*, the Supreme Court said that "the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality" is the means by which unprotected speech may be separated from commercial free speech. In *Peel*, it was because the "lawyer's certification by the NBTA [National Board of Trial Advocacy]

is a verifiable fact [and] not an unverifiable opinion of the ultimate quality of the lawyer's work or a promise of success," that the Supreme Court allowed the advertisement of credentialing. *Id.* at 101, 110 S.Ct. at 289. The disclosure of a specific certification thus "both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys." *Id.* at 111, 110 S.Ct. at 294.

The type of advertisement or commercial speech that falls outside the scope of constitutional protection is a qualitative opinion that cannot be verified; a general statement like "I am a specialist." That opinion is incapable of factual verification. In contrast, a statement that "I am certified as a trial specialist by the NBTA," would be a verifiable fact and would be constitutionally protected. This important distinction led the Minnesota Attorney General's Office to conclude that the current language of Minnesota's Rule 7.4 was constitutionally defensible.

II. MSBA's Proposal to Strike Limitations from Rule 7.4(a) Presents Unprotected Speech that has the Potential to Mislead the Public, even though the Information Conveyed may be Technically True

The MSBA has proposed to modify Rule 7.4(a) to omit the current limitations that now state:

> A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing the lawyer's or the lawyer's firm's practice or in indicating it nature or limitations.

MINN.R.PROF.CON. 7.4(a) (2004). This admonition would be omitted from the rule so that it would merely read "A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law." MSBA PROPOSED RULE 7.4(A): COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION. The Committee Comment to the change outlines the main area of the ACTLM's concern:

> A lawyer is generally permitted to state that the lawyer is a "specialist," practices

> a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

Id., COMMITTEE COMMENT (emphasis added). If the intent of the rule is to allow the use of qualitative opinions that cannot be verified, such commercial speech is not constitutionally protected under *Peel*, as it would not be a factual statement that is capable of verification, like "certified by the MSBA and NBTA."

Without constitutional protection, the "I am a specialist" statement is subject to regulation by the bar and the courts. While the Comment invokes Rule 7.1 as a device to protect the public, Rule 7.1 says only that:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false and misleading if it:
>
> (a) contains a material misrepresentation of fact or law, omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of professional Conduct or other law; or
>
> (c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

MINN.R.PROF.COND. 7.1 (emphasis added). A first year law school graduate could truthfully advertise that they "specialize" in Type A law and arguably not violate the requirements of Rule 7.1 because of their then-present intent to focus their practice on a specific area of the law, though they have in fact never practiced in it, but have merely studied it.

Does this type of constitutionally unprotected commercial speech nonetheless have the

potential to mislead, even though it is true? The poll commissioned by the MSBA Civil Trial Certification Board and the ACTLM undertook to answer that question.

III. Poll Shows that the Public Assumes a "Specialist" has been "Certified" or is Approved by an Independent Authority.

The MSBA Civil Trial Certification Board and the ACTLM commissioned a poll by the Minnesota Center for Survey Research, which is attached to this submission. The survey first reflects the importance to the public of knowing that someone who advertises they are a "specialist" has been certified by an accredited organization approved by the state, indicating that 81% of the over 450 respondents rated that as either "very important" or "somewhat important." *Survey,* Question QB1, QB2.

More significant is the fact that 80% of respondents said they assumed that anyone who advertised they were a "specialist" had "passed an exam in the specialty area,"[4] 85% said they assumed it meant that the lawyer was "required to have experience in the specialty area,"[5] 82% assumed that a "specialist" was required to "take continuing education courses in the specialty area"[6] and 90% assumed that it meant the lawyer had to "keep his or her qualifications current."[7] Two-thirds of respondents said they assumed that a "specialist" was "required to receive good references or reviews from other lawyers,"[8] and 73% said they assumed a lawyer who advertised they were a

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[4] *Survey,* Question QB3a.

[5] *Survey,* Question QB3b.

[6] *Survey,* Question QB3c.

[7] *Survey,* Question QB3f.

[8] *Survey,* Question QB3e.

"specialist" had "undergone a check of his or her professional discipline or malpractice history."[9]

While these criteria are indeed those exacted from the credentialing boards approved by the Minnesota Board of Legal Certification, none of those criteria would be required under the MSBA's proposed rule 7.4(a), as indeed under the proposal,

> A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

MSBA PROPOSED RULE 7.4(A): COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION, COMMITTEE COMMENT (emphasis added). The only check is a bar against the use of "materially misleading" statements under Rule 7.1.

The result of allowing the MSBA's proposed Rule 7.4(a) to go into effect is that any lawyer will generally be allowed to say they are a specialist, so long as they do not employ an untruth, and this will clearly have the effect of misleading between 66-81% of the consuming public. The public will assume that the "specialists" have been accredited and tested by an approved neutral agency, that their references and practice records have been checked and that they have maintained their educational acumen in the "specialty" fields, when in fact they need have done none of those things. They merely need to truthfully say that they are a "specialist" in the fields in which they intend to limit their area of practice. At a minimum, the chance for the public to be misled is a realistic and significant risk under the MSBA proposal.

IV. The Supreme Court should not Approve a Program that will Mislead the Public.

The Supreme Court is being asked to approve a change that will have the effect of misleading

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[9] *Survey,* Question QB3d.

the vast majority of the consuming public. The survey-takers made follow-up inquiries to ask the public's reaction upon being told that "specialist" status carried none of the protections they had assumed existed. Upon learning the reality of the situation, the public's responses included the following, "I would be mad,"[10] "mad because they lied,"[11] "cheated,"[12] "misled,"[13] "shocked,"[14] "deceived,"[15] "It's almost a fraud,"[16] "I would feel as though it was a scam,"[17] "false advertising,"[18] and similar characterizations.

The reasonable expectations of consumers hearing that a lawyer is a "specialist" is that such an opinion must be backed up by verifiable facts from a certifying agency, and the public has a profoundly negative reaction upon learning that such would not be the case under the proposed new rule. The change would thus not have the likelihood of bringing the law into higher esteem or repute, but rather would have a drastically negative impact.

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[10] *Survey*, Response 285, at 7.; *see also* Response 381, at 9 ("mad"); 416, at 10 ("angry"); 450, at 11 ("very mad"); 456 ("pissed").

[11] *Survey*, Response 331, at 8; *see also* Response 368 ("lied"; 369 ("he is lying"); 378 ("He would be lying"); 379 ("He's basically lying"); 395, at 10 ("they lied"); 451 ("feel lied to").

[12] *Survey*, Response 319, at 8.

[13] *Survey*, Response 382, at 9; *see also* Response 453, at 11 ("feel mislead")..

[14] *Survey*, Response 288, at 7.

[15] *Survey*, Response 290, at 7.

[16] *Survey*, Response 292, at 7; *see also* Response 349, at 9 ("fraud"); 422, at 10 ("I'd sue them for fraud").

[17] *Survey*, Response 302, at 7.

[18] *Survey*, Response 341, at 8; *see also* Response 375 at 9; 419, at 10 ("fraudulent in advertising"); 444, at 11 ("false advertising").

This is not the type of situation that the state's court system should condone, let alone give its approval to. Other states have consistently placed limitations on commercial speech by lawyers claiming to be "specialists."

V. Other States Regulate against the Use of a "Specialist"Characterization.

Twenty-five states, including Minnesota, currently prohibit the use of the word "specialist" unless the lawyer is certified by an approved organization.[19] In addition four other states require some method of certification for lawyers to be authorized to use the word "specialist,"[20] and many states require the use of a disclaimer in advertising to avoid public misunderstanding about the meaning of the word "specialist."[21]

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[19] These states are Alabama, Alaska, Arizona, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, New Hampshire, New jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin. *See* Submission of Connecticut Bar Assoc. Standing Committee on Workers' Compensation Certification, Nov. 14, 2003, at 7, n.13 [hereafter "CBA"], attached as Ex. 4.

[20] These are Maryland, Rhode Island, Nebraska and West Virginia. *See* CBA at 7, n. 14.

[21] For example, Alabama states "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services provided by other lawyers." ALABAMA R. PROF. COND. 7.2(e) (2002). Hawaii's rule says that the "Supreme Court of Hawaii grants certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association." HAWAII R. PROF. COND. 7.4(c) (2002). Iowa says that "Memberships and offices in . . . societies of law or field of practice do not mean that a lawyer is a specialist or expert in a field of law . . . ." IOWA CODE OF PROF. RESP. DR 2-101(C) (1997). In Illinois, Massachusetts, Mississippi and Missouri the rules state that the court does not approve anyone to be certified and that any certification is by a private agency only. *See* ILL R. PROF. COND. 7.4(c)(2) (2002); MASS. R. PROF. COND. 7.4(b) (2002); MISS. R. PROF. COND. 7.4(a) (2002), 7.6(b); MO. R. PROF. COND. 5-7.4 (2002). Nevada warns that "Neither the state bar of Nevada not any agency of the State Bar has certified any lawyer identified here as a specialist or as an expert." NEV. R. PROF. COND. 198 (2002). A similar admonition is expressed in New Jersey, *see* N.J. R. PROF. COND. 7.4(b) (2002), Rhode Island, *see* R.I. R. PROF. COND. 7.4 (2002), Washington, *see* WASH R. PROF. RESP. 7.4(b)(3) (2002), and Wyoming. WYO. R. PROF. COND. 7.2(g) (2002). Texas requires a statement "Unless otherwise indicated, [the lawyer is]

The purpose of certification is to assure a factual verification is possible by the consumer, as opposed to the mere expression of an opinion that presents only a qualitative assessment that cannot be readily verified. The purpose of regulation is to assure the lack of consumer confusion. Sixteen states permit the use of the term "specialist" by non-certified lawyers if the communication is not "false" or "misleading."[22]

Since the survey undertaken by the MSBA Civil Trial Certification Board and the ACTLM shows clearly that the public would be misled by the use of the term "specialist" because they assume it does entail certification, the Minnesota Supreme Court is in a position unique among the states that have weighed this issue. It has unequivocal evidence that the approach suggested by the MSBA will create consumer confusion even if the statement of "specialization" is not intentionally false and is technically true. Unlike the 16 states who trust to the criteria of Rule 7.1 to protect against public confusion by prohibiting "false or misleading" references to "specialization," the benefit of the ACTLM survey is to demonstrate that Rule 7.1 is an ineffective device to protect against consumer confusion. Communications may be confusing even if not "false and misleading."

The ACTLM survey shows unequivocally that the public assumes a "specialist" is "certified." and is angry when advised that such would not be the case.

VI. Alternatively, the MSBA Suggestion must be Modified to Require a Disclaimer.

As suggested at the outset of this paper the ACTLM has recommended that if the Minnesota

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Not Certified by the Texas Board of legal Specialization." TEX. R. PROF. COND. 7.04(b)(3) (2002). New Mexico points to the need for recognition of its own certifying agency for that status to be declared. N.M. R. PROF. COND. 16-704(D) (2002).

[22] These jurisdictions are Arkansas, California, Colorado, Delaware, the District of Columbia, Georgia, Hawaii, Maine, Massachusetts, Montana, Nevada, New Mexico, Oklahoma, Oregon, Vermont and Virginia. *See* CBA at 7, n.15.

Supreme Court feels inclined to allow lawyers to use the term "specialist" without requiring certification, it should mandate that a disclaimer accompany the general use of the term "specialist" to warn the public that the lawyer has not been certified by an agency approved by the state or its regulatory agency.

Specifically, the ACTLM has recommended that

> if the attorney is not certified as a specialist or if the certifying agency is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by that Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the [specialization].

ALTERNATIVE TO MSBA PROPOSED REVISIONS. Since polls demonstrate the public's assumption that "specialists" are certified, the only way to overcome the errant assumption is to mandate the use of a disclaimer that removes the confusion.

CONCLUSION

Since *Peel* demonstrates that qualitative opinions of "specialization" are not constitutionally protected, but factually verifiable statements of certification are, the Minnesota Supreme Court may constitutionally regulate lawyer's use of the qualitative phrase "specialist" in the absence of an accompanying reference to "certification." Since the goal of certification is to establish objectively verifiable credentials, a rational basis exists for its use. Lastly, since the ACTLM survey shows that the public perception is that anyone using the word "specialist" is certified, the Minnesota Supreme Court is uniquely in the position of knowing that the approach urged by the MSBA and adopted by a minority of 16 other states - - using the "false and misleading" criteria of Rule 7.1 to protect the public from confusion - - will not work.

Since a legitimate basis exists to insist on the criteria of "certification" and there is no

constitutional protection to advertise the opinion of a "specialty" in the absence of factual verification, the ACTLM respectfully urges the Minnesota Supreme Court to reject the proposed modification of Rule of Professional Conduct 7.4(a) and its corresponding *Comment*.

Respectfully submitted,

Dated: 5-5-04

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APPENDIX INDEX

MODEL RULES ETHICS 2000
STATE BY STATE COMPARISON - CERTIFYING/NON-CERTIFYING STATES
"SPECIALIST" SUMMARY

Rules Approved	Direct Certification	Restricts Use of Specialist to Certified Specialist	Allows general use of Specialist	Other language
Arizona	X	X		
Louisiana	X	X		
New Jersey	X	X		
North Carolina	X	X		
South Carolina	X	X		
Tennessee	X	X		
Delaware			X	
Idaho	X – (Idaho Trial Lawyers Association)		X	
Montana				'False and misleading' standard as to advertisement of "expertise"
North Dakota			X	
South Dakota		X		
Virginia			X	

Report Issued	Direct Certification	Restricts Use of Specialist to Certified Specialist	Allows General use of Specialist	Other language
Florida	X	X		
Indiana	X	X		
Minnesota	X		X	
Pennsylvania	X	X		
Nevada	X			Ethics 2000 commission did not adopt Rules 7.1 - 7.5: "ABA Model Rules are too broad" and attorney specialization under consideration at the time. Separate Committee is reviewing 7.1 – 7.5. Current

MODEL RULES ETHICS 2000
STATE BY STATE COMPARISON - CERTIFYING/NON-CERTIFYING STATES
"SPECIALIST" SUMMARY

				Rule restricts "specialist" unless objective standards are demonstrated by attorney.
Report Issued	**Direct Certification**	**Restricts Use of Specialist to Certified Specialist**	**Allows General use of Specialist**	**Other language**
Arkansas	X		X	
Illinois				Revised ABA Model Rule 7.4. 7.4 (c) Except when identifying certificates, awards, or recognitions issued to him or her by an agency or organization, a lawyer may not use the term "certified", "specialist", expert" or any other, similar terms... [If used,] (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1 Comment [3] Paragraph (c) permits a lawyer to state that the lawyer is a specialist...only if certain requirements are met.
Iowa		X		
Maryland				Lawyer may not hold himself out publicly as "specialist"
Mississippi				Did not adopt 7.4 Requires inclusion of factual basis in advertisement of "special expertise"
Oregon				False/ misleading standard if lawyer uses "specializes in" or "qualified"
Washington				Did not adopt 7.4. (d) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, except upon issuance of an identifying certificate, a lawyer may use the terms.. If the terms are used to identify any certificate...the reference must: (1) be truthful and verifiable

MODEL RULES ETHICS 2000
STATE BY STATE COMPARISON - CERTIFYING/NON-CERTIFYING STATES
"SPECIALIST" SUMMARY

				(2) identify the certifying group (3) includes disclaimer

STATUS OF STATE REVIEW / ETHICS 2000 COMMITTEES
PROFESSIONAL CONDUCT RULE 7.4
{ HYPERLINK "http://www.abanet.org" }
4/27/04 This chart summarizes Rule 7.4 only. It does not list State reports not addressing that Rule.

STATE	CERTIFICATION (State Board or Bar Association)	COMMITTEE REPORT	COURT APPROVED	RESTRICTS SPECIALIST	NOTES
Alabama					
Alaska					
Arizona	X		12/1/03	**X**	Restricts "specialist" to "certified specialist"
Arkansas	X	X			Allows general use of "specialist"
California	X				
Colorado					
Connecticut	X				State Bar Ethics Committee report will recommend restricting "specialist" to "certified specialist"
D.C.					
Delaware			7/1/03		Allows general use of "specialist"
Florida	X	X		**X**	In light of recent amendment of Florida's advertising rules, 7.1 – 7.5 were referred to Standing Committee. Current rule restricts "specialist" to "certified specialist"
Georgia					No review being conducted
Hawaii					
Idaho	**Idaho Trial Lawyers Association certifies		7/1/04		Allows general use of "specialist"

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STATE	CERTIFICATION (State Board or Bar Association)	COMMITTEE REPORT	COURT APPROVED	RESTRICTS SPECIALIST	NOTES
Illinois		X		**X**	Revised ABA Model Rule 7.4. 7.4 (c) Except when identifying certificates, awards, or recognitions issued to him or her by an agency or organization, a lawyer may not use the term "certified", "specialist", expert" or any other, similar terms… [If used,] (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1 Comment [3] Paragraph (c) permits a lawyer to state that the lawyer …is a specialist…only if certain requirements are met.
Indiana	X	X		**X**	Attorney shall not express or imply any particular expertise except certified specialist
Iowa		X		**X**	Rule 7.5(e) restricts "specialist" to "certified specialist"
Kansas					
Kentucky					
Louisiana	X		3/1/04	**X**	Restricts "specialist" to "certified specialist"
Maine					

STATUS OF STATE REVIEW / ETHICS 2000 COMMITTEES
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STATE	CERTIFICATION (State Board or Bar Association)	COMMITTEE REPORT	COURT APPROVED	RESTRICTS SPECIALIST	NOTES
Maryland		X		X	Did not adopt ABA Model Rule 7.4. Rule states: 'A lawyer shall not hold himself out publicly as a specialist"
Massachusetts					
Michigan		X			Adopted ABA Model Rule 7.4 language however, Rule comments, including comment (a), are not online.
Minnesota	X	X			Allows general use of term "specialist"
Mississippi			11/1/03	X	Did not adopt Model Rule 7.4. Rule requires factual basis included in ads claiming "special expertise"
Missouri		X			
Montana			4/1/04		"False or misleading" standard as to advertisement of "expertise"
Nebraska		X			
Nevada	X	X		X	Ethics 2000 commission did not adopt Rules 7.1 - 7.5 because "ABA Model Rules are too broad" and because attorney specialization was under consideration. Separate Committee reviewing 7.1 – 7.5. Current Rule restricts use of term "specialist" unless certain objective standards are met.
New Hampshire					
New Jersey	X		1/1/04	X	Restricts "specialist" to "certified specialist"

STATUS OF STATE REVIEW / ETHICS 2000 COMMITTEES
PROFESSIONAL CONDUCT RULE 7.4
{ HYPERLINK "http://www.abanet.org" }
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STATE	CERTIFICATION (State Board or Bar Association)	COMMITTEE REPORT	COURT APPROVED	RESTRICTS SPECIALIST	NOTES
New Mexico	X				
North Carolina	X		3/1/03	**X**	Restricts "specialist" to "certified specialist"
North Dakota			3/1/04		Allows general use of "specialist"
Ohio					
Oklahoma					
Oregon		X			Silent as to "specialist", allows use of "specialize in"
Pennsylvania	X	X		**X**	Restricts "specialist" to "certified specialist"
Rhode Island					
South Carolina	X		1/1/04	**X**	Restricts "specialist" to "certified specialist" Rule 7.4(c) states:...To avoid confusing or misleading the public and to protect the objectives of the South Carolina specialization program,...any such advertisement or public statement shall not contain any form of the words "certified," "specialist, "expert," or "authority" unless the lawyer is certified.

STATUS OF STATE REVIEW / ETHICS 2000 COMMITTEES
PROFESSIONAL CONDUCT RULE 7.4
{ HYPERLINK "http://www.abanet.org" }
4/27/04 This chart summarizes Rule 7.4 only. It does not list State reports not addressing that Rule.

STATE	CERTIFICATION (State Board or Bar Association)	COMMITTEE REPORT	COURT APPROVED	RESTRICTS SPECIALIST	NOTES
South Dakota			1/1/04	**X**	Restricts "specialist" to "certified specialist"
Tennessee	X		3/1/03	**X**	Restricts "specialist" to "certified specialist" Court adopted language of ***current*** MN Rule 7.4.
Texas	X				*Current Rule restricts "specialist" to "certified specialist"; requires disclaimer if not certified.*
Vermont					
Virginia			1/1/04		Allows general use of specialist
Washington		X		**X**	Did not adopt ABA Model Rule7.4. Rule 7.4 (d) states: A lawyer shall not state or imply that a lawyer is a specialist…except upon issuance of an identifying certificate, award or recognition by a group…If the terms are used, the reference must: (1) be truthful and verifiable and otherwise comply with Rule 7.1 and (3) include disclaimer.
West Virginia					
Wisconsin					
Wyoming					

UNIVERSITY OF MINNESOTA

MINNESOTA CENTER FOR SURVEY RESEARCH

2003 MINNESOTA STATE SURVEY - PART II:

RESULTS AND TECHNICAL REPORT

TECHNICAL REPORT #04-4

March 10, 2004

Report prepared by:
Rossana Armson, Director

2003 MINNESOTA STATE SURVEY - PART II:

RESULTS AND TECHNICAL REPORT

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I gratefully acknowledge the contributions of the 23 interviewers and one coder who spent numerous hours producing the data for this study. In addition, my thanks are extended to the staff of the 2003 Minnesota State Survey, whose responsibilities were:

Data Collection Manager	Pamela Jones
Shift Supervisors	Amanda Bartsch Sarah Grunhard Justin Horstman Todd Kimlinger Maggie Langmo Jasmine Leung Amy Peckman Jennifer Rovere Julie Stratton
Data Manager	Anne Caron

I anticipate that the use of this data will justify the effort that was spent to collect the information.

Rossana Armson, Director
Minnesota Center for Survey Research
University of Minnesota

TABLE OF CONTENTS

2003 MINNESOTA STATE SURVEY - PART II: TECHNICAL REPORT

CHAPTER 1

METHODS AND PROCEDURES

OVERVIEW

The 2003 Minnesota State Survey (MSS 2003) was the twentieth annual omnibus survey of adults, age 18 and over, who reside in Minnesota. Data collection was conducted from January to February 2004 by the Minnesota Center for Survey Research at the University of Minnesota. MSS is an "omnibus" survey, where individual organizations define and pay for those questions which are of special interest to them.

Because more organizations wanted to include questions than could be accomodated in one questionnaire, the 2003 Minnesota State Survey was split into two totally independent surveys. The eight topics in Part I of the Minnesota State Survey were quality of life, volunteerism, education, employment, health, advance health care directive, traffic safety, and assault weapons. The three topics in Part II of the Minnesota State Survey were quality of life, attorney certification, and organ donation.

A total of 405 telephone interviews were completed for Part II of MSS 2003. The overall response rate was 36% and the cooperation rate was 46%. Declining response rates are a national concern for survey research organizations, and are due at least in part to increases in the total number of survey projects conducted by all organizations.

The survey sample consisted of households selected randomly from all Minnesota telephone exchanges. Selection procedures guaranteed that every telephone household in the state had an equal chance to be included in the survey, and that once the household was sampled every adult had an equal chance to be included. No more than one time in twenty should chance variations in the sample cause the overall MSS 2003 results to vary by more than 4.9 percentage points from the answers that would be obtained if all Minnesota residents were interviewed.

Since the individuals who participated in MSS 2003 were randomly selected from the population of Minnesota, the survey results can be generalized to the entire state. These generalizations can be made either to households, using the unweighted data file, or to individuals, using the weighted data file as the source of the percentages. The questionnaire and results presented in Chapter 4 of this report are based on the weighted computer data file and all percentages presented there generalize to individuals.

As in all public opinion surveys, the results are also subject to other types of error associated with telephone data collection procedures. One general type of error is sampling error, and includes the systematic exclusion of households without telephones. The other general type of error is non-sampling error, and includes such things as question wording and question order.

OBJECTIVES

The Minnesota State Survey has four basic objectives. The first and most important of these is to obtain useful and technically sound information for researchers and public policy decision-makers about the characteristics, attitudes, and behaviors of Minnesota residents. MSS is an "omnibus" survey, where individual organizations define and pay for those questions which are of special interest to them. Such information is potentially relevant to a multitude of needs, including market analysis, needs assessment, project evaluation, and organizational planning.

The second objective is to develop an ongoing social monitoring capability for the state of Minnesota. Because the survey has been an annual event since 1984, it provides the means to maintain an updated statewide database and to monitor change in this database over the course of time.

The third objective is to provide students at the University of Minnesota with an opportunity to participate in a professional survey operation. This training experience greatly enhances the methodological skills of such students, which also enlarges and enriches the pool of social researchers ultimately available to other projects in the community.

The fourth objective is to develop and refine methods for conducting social surveys. The most advanced methods and techniques are utilized in surveys at the Minnesota Center for Survey Research (MCSR), but attention is given to explorations that improve upon existing research methods.

SURVEY TOPICS AND PARTICIPATING ORGANIZATIONS

Because more organizations wanted to include questions than could be accomodated in one questionnaire, the 2003 Minnesota State Survey was split into two totally independent surveys. The eight topics in Part I of the Minnesota State Survey were quality of life, volunteerism, education, employment, health, advance health care directive, traffic safety, and assault weapons (see Technical Report 04-1). The three topics in Part II of the Minnesota State Survey were quality of life, attorney certification, and organ donation.

1) The first **Quality of Life** question asked about the most important problem facing people in Minnesota today. This question was included by MCSR.

2) The next questions asked about the importance of **Attorney Certification** by an accredited organization that had been approved by the State of Minnesota, the importance of being certified as a specialist by the Minnesota State Bar Association, which of a list of credentials you believed had been met by a lawyer advertising as a specialist, whether the two phrases "civil trail specialist" and "limited his practice to civil trial law" made people believe that lawyers using these two descriptions of their practice had the same qualifications or different qualifications, how concerned you would be if you had an attorney who had advertised as a specialist and you found out that the attorney had NOT been certified as a specialist by an accredited organization, how you would describe your feelings about that situation, and whether the phrases "civil trail specialist" and "civil trial specialist certified by the Minnesota State Bar Association" made you believe that lawyers using these two desctiptions of their practice had met requirements for special training or experience BEYOND the basic qualifications to practice law. These questions were funded by the Minnesota State Bar Association.

3) The final survey questions asked if the respondent supported or opposed **Organ Donation**, whether they had signed up to be an organ donor, which of a list of possible reasons BEST explained why they support the idea but have not signed up to be a donor themelves, whether their wishes about organ donation had been discussed with their family, and to what extent they agreed or disagreed with a statement about the fairness and ethics of organ donation in the United States. These questions were funded by LifeSource/Upper Midwest Organ Procurement Organization, Inc.

SAMPLING DESIGN

The survey sample consisted of households selected randomly from all Minnesota telephone exchanges. The random digit telephone sample was acquired from Survey Sampling, Inc. of Fairfield, Connecticut. Known business telephone numbers were excluded from this sample. In addition, the selected random digit telephone numbers were screened for disconnects, by using a computerized dialing protocol which does not make the telephone ring, but which can detect a unique dial tone that is emitted by some disconnected numbers. Evidence of the integrity of the sampling frame and the survey procedures is given in a later section of this chapter (Evaluation of the Sample).

Selection of respondents occurred in two stages: first a household was randomly selected, and then a person was randomly selected for interviewing from within the household. The selection of a person within the household was done using the Most Recent Birthday Selection Method, a sample of which appears in the introduction (See Appendix E: Administrative Forms). These selection procedures guaranteed that every telephone household in the state had an equal chance to be included in the survey, and that once the household was sampled every adult had an equal chance to be included.

INTERVIEWING

The 2003 Minnesota State Survey was the twentieth annual omnibus survey of adults, age 18 and over, who reside in Minnesota. Data collection was conducted from January 24 to February 25, 2004 by the Minnesota Center for Survey Research at the University of Minnesota. Computer Assisted Telephone Interviewing (CATI) was the data collection technology used for this project.

Interviewer Selection

Interviewers were students at the University of Minnesota. They were selected for their communication skills, were trained for this project, and were supervised closely in their work.

Training of Interviewers

Training of interviewers at MCSR was conducted in three phases. In the first phase, new interviewers were required to attend an initial training session during which they were given basic instructions in survey interviewing. In the second phase, interviewers attended a training session that covered survey procedures and policies for this project and review of the actual survey questionnaire. For the final phase of training, before beginning the telephone survey, each interviewer had a practice session with a supervisor or other MCSR staff member, followed by a fully-monitored pilot interview with a randomly selected respondent.

In addition, as an employment requirement, all interviewers were required to read and sign a statement of professional ethics that contains explicit guidelines about appropriate interviewing behavior and confidentiality of respondent information. A copy of this statement is included in Appendix E.

Twenty three interviewers collected data for this survey. All of them had worked on at least one other telephone survey at MCSR before their involvement in this project.

Computer Assisted Telephone Interviews

This project used the WinCati System for Computer Interviewing, from Sawtooth Software. With minimal editing, data were available immediately after completion of data collection.

To conduct interviews using CATI, each interviewer uses a microcomputer, which displays questions on the computer screen in the proper order. The interviewer wears a headset and has both hands free for entering responses into the computer via the keyboard. Responses are entered as numbers, such as "1" for yes and "2" for no.

WinCati also allows the computer to present specified questions in random order. This is particularly useful when asking respondents about a series of items with the same response categories. Randomization in CATI is governed by respondent number. The following survey questions were randomized:

Attorney Certification (QB3a to QB3f).

Supervision

Interviewers were supervised throughout the data collection process. Supervisory responsibilities included distributing new phone numbers and scheduled appointments, reviewing completed questionnaires for errors and omissions, maintaining a Master Log of completed interviews, and monitoring interviews.

Monitoring

The silent entry monitoring system utilized at MCSR enabled supervisors to listen to interviews and provide immediate feedback to interviewers regarding improvements in interviewing quality. This system allowed the monitor to hear both the interviewer and the respondent during the survey. Interviewers whose performance was not satisfactory were re-evaluated on subsequent shifts. During this project, all of the interviewers and 34 percent of the interviews were monitored.

Operations

Interviews were conducted by telephone from the phone bank located at MCSR. The interviewing was organized into evening and daytime shifts during weekdays and weekends.

Telephone numbers to be called were recorded on contact record forms, and were distributed to interviewers at the beginning of each shift. The disposition of each attempt to complete an interview was recorded on these contact records. Each telephone number in the sample continued to be called until it had been attempted at least ten times without success or until data collection ended on February 25.

The back of each contact record contained two forms: (1) a refusal form for recording relevant information about those respondents refusing to participate in the interview, and (2) a callback form for scheduling future interview appointments. The refusal form included entries for the respondents' reasons for declining to participate in the study, the arguments used by the interviewer to encourage participation, and the point at which termination of the interview occurred. The appointment form required the interviewer to specify the date and time of the scheduled appointment, the name of the targeted respondent (if selected), and whether the appointment was firm, probable, or uncertain.

For each call made, interviewers recorded the date, time, and disposition of the call as well as their interviewer ID number. Copies of the contact records and explanations for all possible disposition codes are included in Appendix E.

Open-ended responses were typed, verbatim, directly into the computer. In addition, interviewers were instructed to use a special "comment sheet" to record any incidents of repeating questions or categories, miscellaneous ad libs by respondents, and any problems they encountered during the interview. This information was also attached to the contact record.

Completed interviews were saved on the MCSR computer network. Interviewers recorded information for each respondent on a contact record, and each completed survey was then assigned a unique identification number in the Master Log. The CATI identification number, telephone number, and other pertinent information also were recorded in the Master Log. All contact records were returned to the supervisor at the end of the shift.

Answering Machine Messages

The sample for this study included many households with answering machines. Interviewers were instructed to leave a message stating they were calling from the University of Minnesota, and they would be calling back; or the respondent could call MCSR to participate in the study. A copy of the answering machine message is included in Appendix E.

Verification

To verify that respondents were in fact interviewed, every twentieth respondent was selected from the master log and called back by a shift supervisor. Five percent of the respondents were contacted for verification and all confirmed that they had been interviewed.

Refusal Conversion

Nearly all of the initial refusals were recontacted by an interviewer. Sixteen percent of the completed interviews had initially been refusals, and were completed when they were subsequently recontacted.

MANAGEMENT OF THE DATA

Coding Open-Ended Questions

As many questions as possible were pre-coded. All open-ended coding was done by one experienced coder, who used an existing hierarchical code structure to categorize responses to the initial survey question about problems facing people in Minnesota today.

Data Cleaning

After the data were transferred from the WinCati file to an SPSS file, a systematic examination was conducted to remove data entry errors. Data cleaning involved using a computer program to evaluate each case for variables with out-of-range values. In addition, the file was examined manually to identify cases with paradoxical or inappropriate responses.

EVALUATION OF THE SAMPLE

Completion Status

A total of 405 telephone interviews were completed for Part II of MSS 2003 (see Table 1). An additional 426 individuals refused to participate, and 52 telephone numbers were still active when interviewing was terminated. The remainder of the sample was categorized as follows: 213 potential respondents were unreachable during ten or more attempted contacts and 41 individuals were not able to complete the survey because of physical or language problems. In addition, 879 telephone numbers were eliminated: 246 because they were not home telephone numbers, 403 because they were not working numbers, and 230 because they were disconnected numbers identified by the Survey Sampling screening service. Finally, 84 households were ineligible because they contained no adult males, and only male respondents were being interviewed during the last stages of data collection to correct a slightly skewed gender distribution. The overall response rate for the survey was 36% and the cooperation rate was 46%, based on formulas specified by the American Association for Public Opinion Research. Declining response rates are a national concern for survey research organizations, and are due at least in part to increases in the total number of survey projects conducted by all organizations.

TABLE 1

FINAL OVERALL SAMPLE STATUS FOR MSS 2003

Status	Number	Percent
Completed survey	405	19%
Refusal	426	20%
Active	52	2%
10 or more attempted contacts	213	10%
Physical/Language problem	41	2%
Eliminated:		
Not a home phone	246	12%
Not a working number	403	19%
SSI disconnected number	230	11%
No adult males	84	4%
TOTAL	2,100	99%

$$\text{RESPONSE RATE 1} = \frac{\text{Completions}}{\text{(Total - Eliminated)}} = 36\%$$

$$\text{COOPERATION RATE 3} = \frac{\text{Completions}}{\text{Potential Interviews*}} = 46\%$$

* Potential interviews are defined as all instances where contact was made with the selected person and are represented by the sum of the first three categories in Table 1.

Representativeness

The accuracy of MSS 2003 can be evaluated by comparing selected characteristics of the survey respondents with 2000 data from the U.S. Census.

The geographic representation of the sample is compared to actual household distribution in the state of Minnesota (Tables 2 and 3). In addition to these geographic comparisons, gender and age comparisons based on the weighted data file are presented (Tables 4 and 5). The Census comparison for gender has been corrected for age, so that those percentages are based on the population 18 and over.

The percentage of households in each of the state development districts and regions was very close to the household distribution reported by the Census (Table 2 and Table 3, respectively).

TABLE 2

DISTRICT OF RESIDENCE COMPARISON OF MSS 2003 AND CENSUS DATA

(Household Units, Unweighted Data)

	MSS 2003	2000 CENSUS
DISTRICT 1	1%	2%
DISTRICT 2	1%	2%
DISTRICT 3	7%	7%
DISTRICT 4	4%	4%
DISTRICT 5	3%	3%
DISTRICT 6E	1%	2%
DISTRICT 6W	0%	1%
DISTRICT 7E	3%	3%
DISTRICT 7W	8%	6%
DISTRICT 8	4%	3%
DISTRICT 9	4%	4%
DISTRICT 10	8%	9%
DISTRICT 11	56%	54%
TOTAL	100% (405)	100% (1,895,127)

Figure 1, on the following page, shows the Minnesota counties represented by each district.

FIGURE 1

MINNESOTA DEVELOPMENT REGIONS

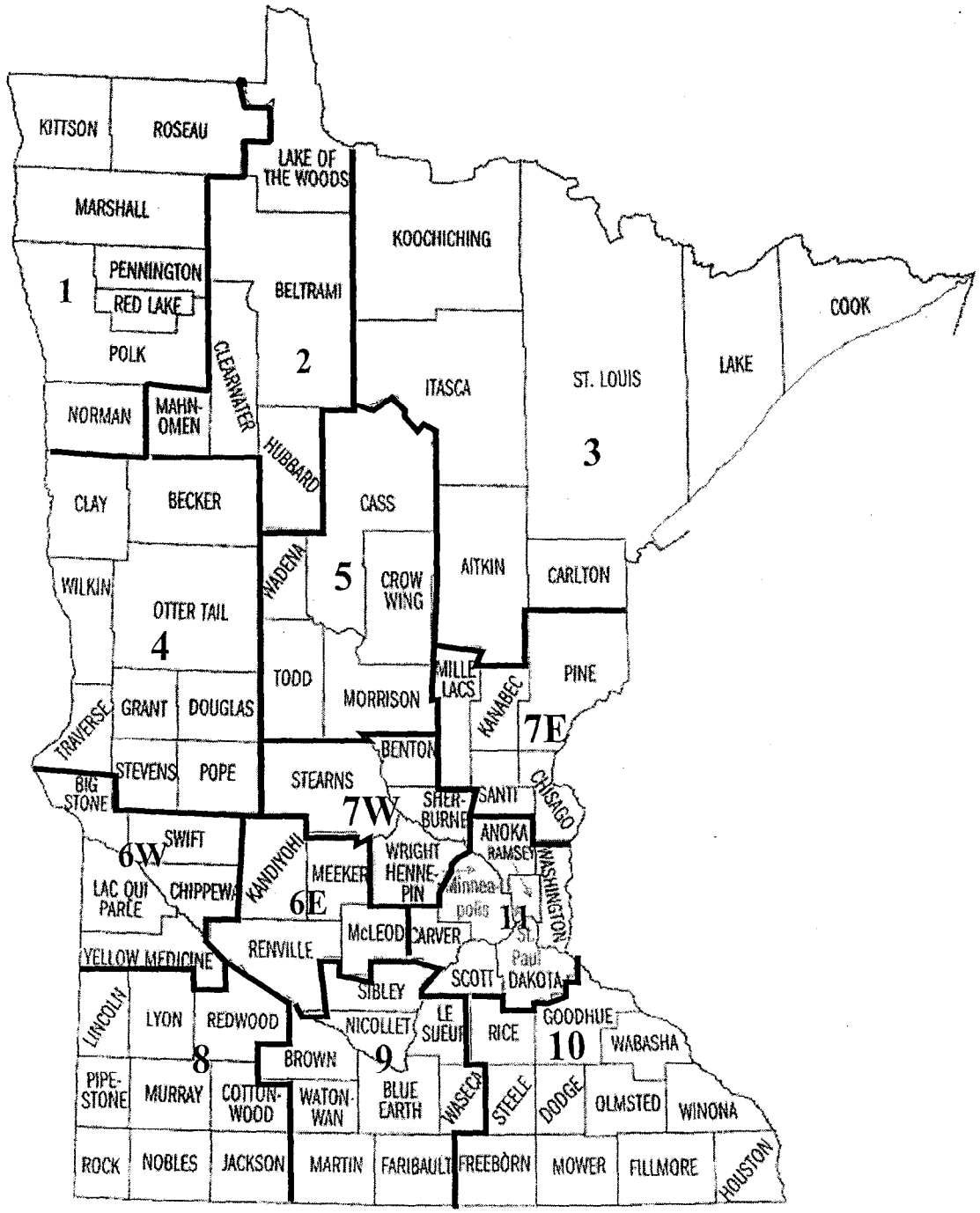

TABLE 3

REGION OF RESIDENCE COMPARISON OF MSS 2003 AND CENSUS DATA

(Household Units, Unweighted Data)

	MSS 2003	2000 CENSUS
Northwest	2%	3%
Northeast	7%	7%
Central	19%	20%
Southwest	8%	7%
Southeast	8%	9%
Metro	56%	54%
TOTAL	100% (405)	100% (1,895,127)

Figure 2, below, shows the Minnesota counties represented by each region.

FIGURE 2

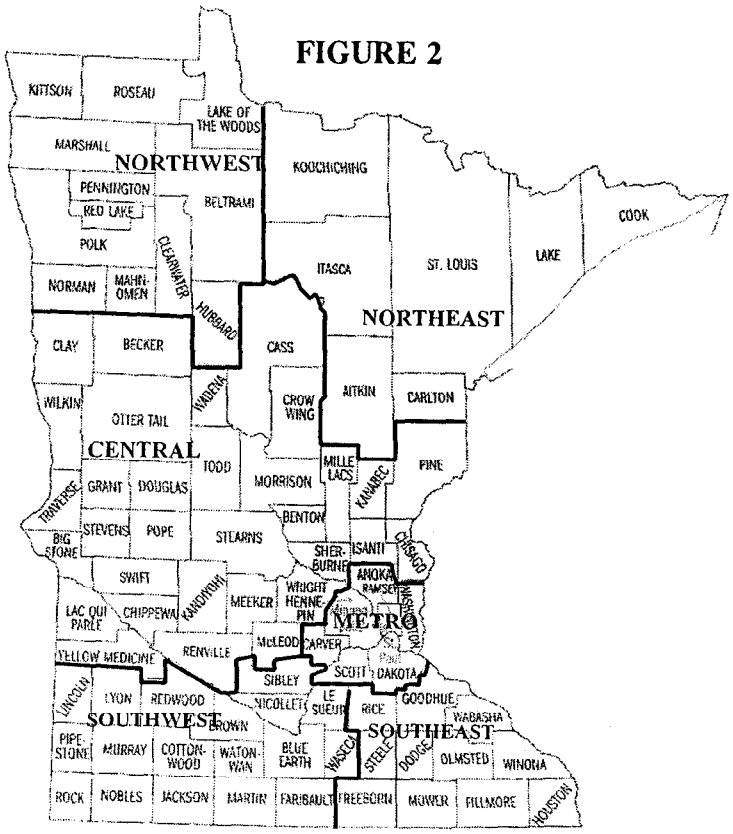

TABLE 4

GENDER COMPARISON OF MSS 2003 AND CENSUS DATA
(Weighted data)

	MSS 2003	2000 CENSUS
Male	46%	49%
Female	54%	51%
TOTAL	100% (405)	100% (3,632,585)

The distribution of respondents by gender, based on the weighted data file, was also very close to the individual distributions reported by the Census (Table 4). However, the proportion of MSS 2003 respondents in various age categories does differ from the Census percentages (Table 5). The survey respondents include fewer individuals than would be expected in the 25 to 34 year old group and more individuals than would be expected in the 45 to 54 year old group.

Using these tables to evaluate the degree to which the MSS 2003 sample matches the profile of individuals currently living in Minnesota shows that it is generally an adequate representation of Minnesota residents.

TABLE 5

AGE COMPARISON OF MSS 2003 AND CENSUS DATA
(Weighted data)

	MSS 2003	2000 CENSUS
18 - 24	9%	13%
25 - 34	14%	19%
35 - 44	19%	23%
45 - 54	29%	18%
55 - 64	15%	11%
65 +	14%	16%
TOTAL	100% (391)	100% (3,632,585)

Generalizability of Results

Since the individuals who participated in MSS 2003 were randomly selected from the population of Minnesota, the survey results can be generalized to the entire state. These generalizations can be made either to households, using the unweighted data file, or to individuals, using the weighted data file as the source of the percentages.

The questionnaire and results presented in Chapter 4 of this report are based on the weighted computer data file and all percentages presented there generalize to individuals. Each percentage point in MSS 2003 represents approximately 36,326 individuals, since there are an estimated 3,632,585 adults in Minnesota.

SAMPLING ERROR

The margin of error for a simple random sample of the size of the Minnesota State Survey is plus or minus 4.9 percentage points, when the distribution of question responses is in the vicinity of 50 percent. This sampling error presumes the conventional 95% degree of desired confidence, which is equivalent to a "significance level" of .05. This means that no more than one time in twenty should chance variations in the sample cause the overall MSS 2003 results to vary by more than 4.9 percentage points from the answers that would be obtained if all Minnesota residents were interviewed.

The distribution of sample responses is represented by the proportion of people responding to any question with a particular answer. For a sample size of 400 and a 50/50 distribution of question responses, the sampling error is 4.9 percentage points. A more extreme distribution of question responses has a smaller error range. Suppose that 80% of the respondents answer "Yes" and 20% say "No." The sampling error in this case would be 3.9 percentage points (see Table 6 on the following page). That is, each percentage would have a range of plus or minus 3.9 percentage points.

The importance of sample size in estimating sampling error also needs to be mentioned since many of the organizations using the MSS 2003 data will be interested in subgroups, and not always the total sample of 405 completed interviews. Essentially, the margin of sampling error is larger for responses of subgroups. For example, for a subgroup of 200 persons the sampling error may be as high as plus or minus 6.9 percentage points.

As in all public opinion surveys, the results are also subject to other types of error associated with telephone data collection procedures. One general type of error is sampling error, and includes the systematic exclusion of households without telephones. The other general type of error is non-sampling error, and includes such things as question wording and question order.

TABLE 6

SAMPLING ERROR (IN PERCENTAGE POINTS) BY DISTRIBUTION OF QUESTION RESPONSES AND SAMPLE SIZE

		Size of Sample (N)				
		800	600	400	200	100
Distribution of Question Responses (percent)	50/50	3.5	4.0	4.9	6.9	9.8
	60/40	3.4	3.9	4.8	6.8	9.6
	70/30	3.2	3.7	4.5	6.4	9.0
	80/20	2.8	3.2	3.9	5.5	7.8
	90/10	2.1	2.4	2.9	4.2	5.9

B34/MFS03B.REP

CHAPTER 2

DEMOGRAPHIC PROFILE OF THE SAMPLE

The purpose of this chapter is to briefly describe the MSS 2003 sample according to its demographic characteristics. In addition to variables which are reported here as raw survey results, certain variables have been constructed for the convenience of the user, such as household income and household work status. (It should be noted that while the category labels for household income are not mutually exclusive, actual practice is to record incomes in the higher category. For example, a respondent who reported a household income of exactly $10,000 would be recorded in the category "$10,000 to $15,000".) The definitions for the construction of these variables can be found in Appendix C. The first eight variables describe characteristics of the respondent, while the remaining variables are characteristics of the household.

AGEMD AGE OF RESPONDENT, GROUPED

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 18 - 24	34	8.5	8.8	8.8
2 25 - 34	54	13.3	13.8	22.6
3 35 - 44	72	17.9	18.5	41.1
4 45 - 54	115	28.3	29.3	70.4
5 55 - 64	60	14.7	15.2	85.7
6 65 and older	56	13.8	14.3	100.0
Total valid	391	96.6	100.0	
99 DK/RA Missing	14	3.4		
Total	405	100.0		

RACE RACE OF RESPONDENT

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 White	366	90.4	92.0	92.0
2 Black	7	1.8	1.8	93.8
3 Other	25	6.1	6.2	100.0
Total valid	398	98.2	100.0	
9 DK/RA Missing	7	1.8		
Total	405	100.0		

GENDER RESPONDENT'S GENDER

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Male	188	46.3	46.3	46.3
2 Female	217	53.7	53.7	100.0
Total	405	100.0	100.0	

EDUC RESPONDENT'S LEVEL OF EDUCATION

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Less than HS	7	1.8	1.8	1.8
2 Some HS	13	3.2	3.2	5.0
3 HS graduate	91	22.5	22.6	27.6
4 Some tech school	6	1.5	1.5	29.2
5 Tech school grad	37	9.1	9.2	38.4
6 Some college	89	22.1	22.3	60.6
7 College graduate	104	25.6	25.8	86.4
8 Postgrad/prof degree	54	13.5	13.6	100.0
Total valid	402	99.2	100.0	
99 DK/RA Missing	3	.8		
Total	405	100.0		

MARSTAT MARITAL STATUS OF RESPONDENT

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Married	264	65.2	65.6	65.6
2 Single	89	22.0	22.1	87.7
3 Divorced	30	7.4	7.4	95.1
4 Separated	1	.3	.3	95.4
5 Widowed	19	4.6	4.6	100.0
Total valid	402	99.4	100.0	
9 DK/RA Missing	3	.6		
Total	405	100.0		

WKSTATUS WORK STATUS OF RESPONDENT

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Worked full time	246	60.7	61.1	61.1
2 Worked part time	53	13.2	13.3	74.4
3 Unemployed	25	6.1	6.1	80.6
4 Student	4	1.0	1.0	81.6
5 Retired	50	12.4	12.5	94.1
6 Homemaker	24	5.8	5.9	100.0
Total valid	402	99.2	100.0	
9 DK/RA Missing	3	.8		
Total	405	100.0		

PARTYID POLITICAL IDENTIFICATION

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Strong Dem	77	18.9	20.3	20.3
2 Weak Dem	58	14.2	15.3	35.6
3 Indep Dem	63	15.6	16.8	52.3
4 Indep Ind	49	12.1	12.9	65.3
5 Indep Rep	41	10.2	10.9	76.2
6 Weak Rep	46	11.3	12.1	88.3
7 Strong Rep	44	10.9	11.7	100.0
Total valid	377	93.1	100.0	
9 Apolitical Missing	28	6.9		
Total	405	100.0		

PARTY POLITICAL PARTY, GROUPED

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Democratic	197	48.7	52.3	52.3
2 Independent	49	12.1	12.9	65.3
3 Republican	131	32.4	34.7	100.0
Total valid	377	93.1	100.0	
9 Apolitical Missing	28	6.9		
Total	405	100.0		

HHCOMP HOUSEHOLD COMPOSITION

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Married, kids	119	29.4	29.6	29.6
2 Married, no kids	145	35.8	36.0	65.6
3 Single parent	32	7.9	7.9	73.6
4 Single, no kids	106	26.3	26.4	100.0
Total valid	402	99.4	100.0	
9 DK/RA Missing	3	.6		
Total	405	100.0		

HHSIZE HOUSEHOLD SIZE

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 One person	44	10.8	10.9	10.9
2 Two people	140	34.6	35.1	46.0
3 3 or 4 people	159	39.2	39.7	85.7
4 5 or more people	57	14.1	14.3	100.0
Total valid	400	98.7	100.0	
9 DK/RA Missing	5	1.3		
Total	405	100.0		

NADULTS NUMBER OF ADULTS IN HOUSEHOLD

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1	57	14.1	14.1	14.1
2	236	58.4	58.4	72.5
3	71	17.5	17.5	90.0
4	31	7.6	7.6	97.6
5	3	.6	.6	98.2
6	3	.8	.8	99.0
8	4	1.0	1.0	100.0
Total	405	100.0	100.0	

NKIDS NUMBER OF CHILDREN IN HOUSEHOLD

Value	Frequency	Percent	Valid Percent	Cumulative Percent
0	254	62.7	62.7	62.7
1	59	14.5	14.5	77.2
2	64	15.7	15.7	92.9
3	20	4.8	4.8	97.7
4	5	1.1	1.1	98.9
5	3	.6	.6	99.5
6	1	.3	.3	99.7
8	1	.3	.3	100.0
Total	405	100.0	100.0	

INCOME HOUSEHOLD INCOME

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Under $10,000	10	2.5	3.3	3.3
2 $10 to 20,000	11	2.8	3.6	6.8
3 $20 to 30,000	23	5.7	7.3	14.1
4 $30 to 40,000	34	8.5	10.9	25.0
5 $40 to 50,000	34	8.4	10.7	35.8
6 $50 to 60,000	34	8.4	10.7	46.5
7 $60 to 70,000	42	10.4	13.3	59.8
8 $70 to 80,000	32	8.0	10.2	70.1
9 $80 to 90,000	24	5.8	7.5	77.6
10 $90 to 100,000	24	6.0	7.6	85.2
11 $100 to 110,000	10	2.4	3.1	88.3
12 $110 TO 120,000	8	2.0	2.6	90.9
13 $120,000 or more	29	7.1	9.1	100.0
Total valid	316	78.0	100.0	
99 DK/RA Missing	89	22.0		
Total	405	100.0		

CITY CITY WHERE RESPONDENT LIVES

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Minneapolis	22	5.3	5.4	5.4
2 St Paul	27	6.7	6.9	12.3
3 Other	347	85.8	87.7	100.0
Total valid	396	97.8	100.0	
9 DK/RA Missing	9	2.2		
Total	405	100.0		

DDREGION DEVELOPMENT DISTRICT REGION

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 District 1	3	.8	.8	.8
2 District 2	3	.8	.8	1.5
3 District 3	30	7.5	7.5	9.0
4 District 4	11	2.8	2.8	11.8
5 District 5	11	2.8	2.8	14.6
6 District 6E	6	1.4	1.4	16.0
7 District 6W	2	.5	.5	16.5
8 District 7E	12	3.0	3.0	19.5
9 District 7W	30	7.5	7.5	27.0
10 District 8	13	3.3	3.3	30.3
11 District 9	15	3.8	3.8	34.1
12 District 10	34	8.4	8.4	42.5
13 District 11	233	57.5	57.5	100.0
Total	405	100.0	100.0	

GEOREGN GEOGRAPHIC REGION OF MINNESOTA

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Northwest	6	1.5	1.5	1.5
2 Northeast	30	7.5	7.5	9.0
3 Central	73	18.0	18.0	27.0
4 Southwest	29	7.1	7.1	34.1
5 Southeast	34	8.4	8.4	42.5
6 Metro	233	57.5	57.5	100.0
Total	405	100.0	100.0	

METRO GREATER MN OR TWIN CITIES AREA

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Greater Minnesota	172	42.5	42.5	42.5
2 Twin Cities area	233	57.5	57.5	100.0
Total	405	100.0	100.0	

WGHT CASE-WEIGHTING FACTOR

Value	Frequency	Percent	Valid Percent	Cumulative Percent
.5139593908629440	57	14.1	14.1	14.1
1.0279187817258880	236	58.4	58.4	72.5
1.5418781725888320	71	17.5	17.5	90.0
2.0558375634517760	31	7.6	7.6	97.6
2.5697969543147210	3	.6	.6	98.2
3.0837563451776650	3	.8	.8	99.0
4.1116751269035530	4	1.0	1.0	100.0
Total	405	100.0	100.0	

CHAPTER 3

INSTRUCTIONS FOR USING THE QUESTIONNAIRE AND RESULTS

OBJECTIVES

The questionnaire and results (Chapter 4 of this report) for a survey data file serve three basic functions: (1) a record of the exact wording and order of the survey questions; (2) a report of the responses to those questions; and (3) documentation of the variable names, which are necessary to access the computer data file. The questionnaire and results section of this report is a copy of the questionnaire with the frequency distributions and percentages added to those questions which were pre-coded or closed-ended. Appendix A contains the responses to open-ended questions, while Appendix B shows the responses to numeric variables, such as year of birth. Appendix C provides the definitions for constructed variables, such as age group, which make many of these responses more useful. The distributions for these constructed variables are presented in Chapter 2 of this report: Demographic Profile of the Sample. Appendix D contains the frequency counts for administrative variables, such as interview length. Finally, Appendix E contains copies of the administrative forms used for this survey.

INTERPRETING THE QUESTIONNAIRE RESULTS

Chapter 4 of this report contains a replica of the 2003 Minnesota State Survey questionnaire. Two pieces of information have been added to this replica: question labels, and the response frequencies and percentages for each question. The questionnaire and response frequencies and percentages will be of major interest to most readers. The question labels, or variable labels, are useful documentation for those who wish to use a computer and the SPSS software package for more detailed analysis.

The questionnaire is an exact replica. This is important in order to know how questions were phrased, in what order they were asked, and when it was proper to skip certain questions. Interviewers were instructed to read these questions verbatim and to avoid giving their interpretations or opinions in any way. Two types of markings which appear on the survey form were not indicated to respondents: instructions to the interviewers which are shown in parentheses, and section and survey labels which are shown in bold type.

Below each question is printed a list of permissible answers and a code number for each answer. The interviewer was instructed to enter into the CATI program the code number of the answer given by the respondent. A new CATI questionnaire was used for each interview and was assigned a unique code number to identify the answers of each respondent. The third question in the demographics section of the survey provides a good example of this coding scheme. If a respondent reported being a homeowner, "1" would be entered into the computer for that question.

The responses to open-ended questions were entered verbatim into the CATI computer program for each survey. These responses were later either: (1) classified into categories by specially trained coders who entered a category number into the CATI coding program for those questions or (2) transcribed verbatim. The responses which were classified into categories are summarized in Appendix A. The responses from open-ended questions that were transcribed verbatim were provided to the funding organization. These listings are available from the MCSR office upon request, once the funding organization has approved their release.

Questions with continuous distributions, where many discrete answers are possible, were shown with open spaces below the question. Interviewers simply typed numbers, such as zip code and year of birth, into the CATI computer program. The responses to those questions are presented in Appendix B.

Missing Value Nomenclature

For all types of questions, two to three types of "missing" response categories exist: DK or don't know, RA or refused to answer, and NA or not applicable. The first two categories are self-explanatory and are always options for respondents. Not applicable is an option when some respondents were not required to answer a particular question. The code associated with each missing value category is indicated for each question in the survey.

Response Frequencies

The responses summed for all 405 respondents are shown in the first two columns below each question. The first of these columns shows the number of people in each response category: these should sum to 405, with some rounding error. The second number is the percentage response, adjusted to exclude the missing response categories.

For most analytical purposes, people will want these adjusted percentages. They were computed and presented here to meet that need. These adjusted percentages are less appropriate when used as a public opinion poll, for showing public support for policies. For example, if 15 percent of the respondents did not answer a question, but 55 percent of those who did answer supported a particular position, it is inappropriate to argue that the issue has majority support. In this example, only 47 percent of all people would actually be supportive. For policy choices, it may be more appropriate to show the percentage distribution of all 405 respondents.

Analysts should beware of using these adjusted percentages. Where the number of people not responding is large, the adjusted percentages will misrepresent public sentiment. Contact MCSR if you have any doubt which percentages to use.

One final comment: the frequencies shown here are "weighted" by the number of adults in the household as explained below. This technique introduces some rounding errors, so that the sum of the frequencies for a given question may not equal exactly 405.

VARIABLES PRESENTED IN APPENDICES

Open-Ended Variables

The results from the open-ended question (the most important problem facing people in Minnesota today) are presented in Appendix A. The results from any other open-ended questions on the survey were transcribed verbatim and provided to the funding organization. These listings are available from the MCSR office upon request, once the funding organization has approved their release.

Continuous Variables

The results from questions which have continuous response distributions, such as zip code and year of birth, are presented in Appendix B.

Constructed Variables

Appendix C contains the operational definitions of the constructed variables for the convenience of the data file user. The distribution of these variables is presented in Chapter 2 of this report: Demographic Profile of the Sample. These constructed variables are contained in the SPSS data file along with all of the original variables.

Administrative Variables

The results from survey administration items, such as date of completion and interviewer ID, are presented in Appendix D.

VERBATIM RESPONSES

MCSR maintains records of verbatim responses. For open-ended questions, this record is in the CATI data file. A separate listing of responses is also created and maintained for most question answers which fall outside a permissible list and are coded as "other". For example, a Socialist would fall outside the normal political list of Republican, Democrat, or Independent and would be coded as "other". These lists are available from the MCSR office upon request for most questions in the survey.

WEIGHTING OF DATA

The responses presented in the questionnaire and results section of this report and in the appendices have been weighted based upon the total number of adults living in the household.

The results for this omnibus survey are routinely weighted by the number of adults living in the household because telephone surveys tend to oversample people who live in single-individual households. Consequently, these individuals were downweighted by about 50% and all others upweighted accordingly to more accurately represent the distribution of adult members within households in the population of the state.

Weighted response distributions will differ slightly from unweighted distributions. The construction and activation of the weighting factor is described in Appendix C, under the variable "WGHT."

A. QUALITY OF LIFE

The first questions are about quality of life.

QA1GRP. In your opinion, what do you think is the SINGLE most important problem facing people in Minnesota today? (WRITE IN VERBATIM RESPONSE)

(IF "TAXES", PROBE: Is that income taxes, property taxes, or sales tax?)

(SEE APPENDIX A, PAGE A-2,
FOR A MORE COMPLETE LIST OF PROBLEMS)

Freq	(%)		
25	(6)	01.	Taxes
33	(8)	02.	Education
7	(2)	03.	Environment
119	(31)	04.	Economy
73	(19)	05.	Health care
14	(4)	06.	Transportation
6	(2)	07.	Housing
4	(1)	08.	Food
17	(4)	09.	Government
1	(0)	10.	War
15	(4)	11.	Crime
3	(1)	12.	Energy
44	(11)	13.	Social issues
6	(2)	14.	Family
22	(6)	15.	Other
17		88.	DK
2		99.	RA

B. ATTORNEY CERTIFICATION

The next questions are about attorneys who are specialists in particular areas.

QB1. How important would it be to your choice of attorney if you knew that an attorney who advertised as a specialist had in fact been certified as a specialist by an accredited organization that had been approved by the State of Minnesota . . . would it be very important, somewhat important, not very important, or not at all important to your choice of attorney?

Freq	(%)			
145	(36)	1.	Very important	
177	(45)	2.	Somewhat important	
45	(11)	3.	Not very important	(IF NOT VERY, GO TO 2)
30	(8)	4.	Not at all important	(IF NOT AT ALL, GO TO 2)
7		8.	DK	(IF DK, GO TO 2)
1		9.	RA	(IF RA, GO TO 2)

a. (IF VERY OR SOMEWHAT IMPORTANT) Why would that be important to you?

_____

_____

QB2. How important would it be to your choice of attorney if you knew that an attorney who advertised as a specialist had in fact been certified as a specialist by the Minnesota State Bar Association . . . would it be very important, somewhat important, not very important, or not at all important to your choice of attorney?

157	(40)	1.	Very important
160	(41)	2.	Somewhat important
47	(12)	3.	Not very important
27	(7)	4.	Not at all important
14		8.	DK
1		9.	RA

QB3. Would you believe that a lawyer advertising as a specialist (READ LIST)?

			YES 1	NO 2	DK 8	RA 9	
___	QB3a.	Had passed an exam in the specialty area	310 (80)	79 (20)	15	1	Freq (%)
___	QB3b.	Was required to have experience in the specialty area	335 (85)	61 (15)	6	3	
___	QB3c.	Was required to take continuing education courses in the specialty area	319 (82)	72 (18)	12	2	
___	QB3d.	Had undergone a check of his or her professional discipline or malpractice history	272 (73)	101 (27)	29	3	
___	QB3e.	Was required to receive good references or reviews from other lawyers	259 (66)	133 (34)	11	2	
___	QB3f.	Was required to keep his or her qualifications current	359 (90)	38 (10)	6	2	

RANDOM START B3: ___

(IF NO, DK, OR RA TO ALL ITEMS, GO TO 5)

QB4. (IF YES TO AT LEAST ONE ITEM IN 3) If you wanted to hire an attorney who was a specialist, how important would it be to your choice that the attorney had the qualifications you just identified . . . would it be very important, somewhat important, not very important, or not at all important to your choice of attorney?

Freq	(%)		
242	(64)	1.	Very important
120	(32)	2.	Somewhat important
13	(4)	3.	Not very important
3	(1)	4.	Not at all important
3		8.	DK
3		9.	RA
21		.	NA

QB5. If one attorney advertised that he was a "civil trial specialist" and another attorney advertised that he "limited his practice to civil trial law", would you believe that both attorneys had the same qualifications or that they had different qualifications?

Freq	(%)		
161	(45)	1.	Same
197	(55)	2.	Different
40		8.	DK
7		9.	RA

QB6. How concerned would you be if you had an attorney who had advertised as a specialist and you found out that the attorney had NOT been certified as a specialist by an accredited organization . . . would you be very concerned, somewhat concerned, not very concerned, or not at all concerned?

237	(60)	1.	Very concerned	
132	(34)	2.	Somewhat concerned	
20	(5)	3.	Not very concerned	(IF NOT VERY, GO TO 7)
4	(1)	4.	Not at all concerned	(IF NOT AT ALL, GO TO 7)
7		8.	DK	(IF DK, GO TO 7)
6		9.	RA	(IF RA, GO TO 7)

a. (IF VERY OR SOMEWHAT CONCERNED) How would you describe your feelings about that situation?

_____

_____

QB7. If one attorney advertised as a "civil trial specialist" and another attorney advertised as a "civil trial specialist certified by the Minnesota State Bar Association", would you believe that both attorneys had met requirements for special training or experience BEYOND the basic qualifications to practice law?

188	(52)	1.	Yes
173	(48)	2.	No
40		8.	DK
5		9.	RA

C. ORGAN DONATION

The next few questions are about donating organs for transplants.

QC1. Do you support or oppose organ donation?

Freq	(%)			
380	(97)	1.	Support	
13	(3)	2.	Oppose	(IF NO, GO TO 2)
8		8.	DK	(IF DK, GO TO 2)
4		9.	RA	(IF RA, GO TO 2)

QC1a. (IF SUPPORT) Have you signed up to be an organ donor on your driver's license or on another donor card that you carry?

201	(54)	1.	Yes, on license	(IF YES, GO TO 2)
12	(3)	2.	Yes, on other card	(IF YES, GO TO 2)
6	(2)	3.	Yes, both	(IF YES, GO TO 2)
156	(42)	4.	No	
4		8.	DK	(IF DK, GO TO 2)
1		9.	RA	(IF RA, GO TO 2)
25		.	NA	

QC1a-1. (IF NO) Which of the following reasons BEST explains why you support the idea, but have not signed up to be a donor yourself . . . you don't have enough information on the benefits and process of donation, you don't know where or how to sign up, your religion or personal values prevent you from donating, you think it's just too gruesome to consider for yourself, or some other reason?

Freq	(%)		
25	(17)	01.	You don't have enough information on the benefits and process of donation
11	(7)	02.	You don't know where or how to sign up
19	(12)	03.	Your religion or personal values prevent you from donating
10	(7)	04.	You think it's just too gruesome to consider for yourself
2	(1)	05.	You are waiting until you renew your license (VOL)
43	(29)	06.	You haven't gotten around to it (VOLUNTEERED)
14	(9)	07.	Other (specify) _____
10	(7)	08.	You're too old (VOLUNTEERED)
15	(10)	09.	Illness prevents it (VOLUNTEERED)
4		88.	DK
4		99.	RA
249		.	NA

QC2. Have you discussed your wishes about organ donation with your family?

245	(61)	1.	Yes
159	(39)	2.	No
0		8.	DK
2		9.	RA

QC3. To what extent do you agree or disagree with the following statement . . . "Organ donation in the United States is managed in a fair and ethical manner." Would you say that you strongly disagree, somewhat disagree, somewhat agree, or strongly agree?

10	(3)	1.	Strongly disagree
68	(20)	2.	Somewhat disagree
184	(55)	3.	Somewhat agree
73	(22)	4.	Strongly agree
67		8.	DK
4		9.	RA

H. DEMOGRAPHICS

Before ending this interview I have a few remaining background questions.

QD1. What county do you live in?
(SEE APPENDIX B, PAGE B-2, FOR A COMPLETE COUNTY LIST)

Freq	(%)		
28	(7)	02.	Anoka
8	(2)	10.	Carver
34	(8)	19.	Dakota
81	(20)	27.	Hennepin
10	(2)	55.	Olmsted
45	(11)	62.	Ramsey
19	(5)	69.	St. Louis
9	(2)	71.	Sherburne
8	(2)	73.	Stearns
29	(7)	82.	Washington
10	(2)	86.	Wright

QD2. What is your zip code?

(SEE APPENDIX B, PAGE B-4)

QD3. Do you own or rent your residence?

348	(86)	1.	Own
56	(14)	2.	Rent
0	(-)	3.	Other (SPECIFY) _____
0		8.	DK
2		9.	RA

QD4. What kind of housing unit do you live in? (DO NOT READ LIST; CODE 4-PLEX OR TRI-PLEX AS APARTMENT)

340	(85)	1.	Single family detached
14	(4)	2.	Townhouse
11	(3)	3.	Duplex or 2-unit building
24	(6)	4.	Apartment building
6	(1)	5.	Mobile home
7	(2)	6.	Condominium
0	(-)	7.	Other (SPECIFY) _____
1		8.	DK
3		9.	RA

QD5. Are you married, single, divorced, separated, or widowed?

Freq	(%)		
264	(66)	1.	Married
89	(22)	2.	Single
30	(7)	3.	Divorced
1	(0)	4.	Separated
19	(5)	5.	Widowed
0		8.	DK
3		9.	RA

QD6. What year were you born?
(THE CONSTRUCTED VARIABLE 'AGEMD' IS SHOWN ON PAGE 16)

(SEE APPENDIX B, PAGE B-10)

QD7. What is the highest level of school you have completed? (DO NOT READ LIST. CLARIFY "HIGH SCHOOL" OR "COLLEGE")

7	(2)	01.	Less than high school
13	(3)	02.	Some high school
91	(23)	03.	High school graduate
6	(2)	04.	Some technical school
37	(9)	05.	Technical school graduate
89	(22)	06.	Some college
104	(26)	07.	College graduate (Bachelor's degree, BA, BS)
54	(14)	08.	Post graduate or professional degree (Master's, Doctorate, MS, MA, PhD, Law degree, Medical degree)
0	(-)	09.	Other (SPECIFY) _____
0		88.	DK
3		99.	RA

QD8. What race do you consider yourself?
(DO NOT READ LIST UNLESS NEEDED)

366	(92)	1.	White/Caucasian
5	(1)	2.	Mexican/Hispanic
7	(2)	3.	Black/African American
2	(0)	4.	American Indian
10	(2)	5.	Asian or Pacific Islander
1	(0)	6.	No dominant racial identification
7	(2)	7.	Other (SPECIFY) _____
2		8.	DK
6		9.	RA

QD9. Generally speaking, do you usually think of yourself as a Republican, a Democrat, an Independent, or what?
(THE CONSTRUCTED VARIABLE 'PARTY' IS SHOWN ON PAGE 19)

Freq	(%)		
91	(25)	1.	Republican
136	(37)	2.	Democrat
117	(32)	3.	Independent
26	(7)	4.	Other (SPECIFY) _____
15		8.	DK
19		9.	RA

QD9a. (IF REPUBLICAN) Would you call yourself a strong Republican or a not very strong Republican?

44	(49)	1.	Strong
46	(51)	2.	Not very strong
2		8.	DK
0		9.	RA
314		.	NA

QD9b. (IF DEMOCRAT) Would you call yourself a strong Democrat or a not very strong Democrat?

77	(57)	1.	Strong
58	(43)	2.	Not very strong
2		8.	DK
0		9.	RA
269		.	NA

QD9c. (IF INDEPENDENT, OTHER, DK, OR RA) Do you think of yourself as closer to the Republican or to the Democratic party?

41	(27)	1.	Republican
63	(41)	2.	Democratic
49	(32)	3.	Neither (VOLUNTEERED)
10		8.	DK
14		9.	RA
228		.	NA

QD10. Did you have a paying job last week?

Freq	(%)			
299	(74)	1.	Yes	
104	(26)	2.	No	
0		8.	DK	(IF DK, GO TO 11)
2		9.	RA	(IF RA, GO TO 11)

QD10a. (IF YES) Were you working full-time or part-time?

246	(82)	1.	Full-time
53	(18)	2.	Part-time
0		8.	DK
0		9.	RA
106		.	NA

b. (IF NO) Do you consider yourself retired, unemployed, a student, or a homemaker? (CIRCLE ALL MENTIONS)

		YES 1	NO 2	DK 8	RA 9	NA .	
QD10b-1.	Retired	54 (52)	49 (48)	2	0	301	Freq (%)
QD10b-2.	Unemployed	25 (24)	78 (76)	2	0	301	
QD10b-3.	A student	7 (7)	96 (93)	2	0	301	
QD10b-4.	A homemaker	36 (35)	67 (65)	2	0	301	

QD11. How many people are living in your household now INCLUDING yourself?
(IF 01, LIVES ALONE, GO TO 13)
(IF DK, GO TO 12)

(SEE APPENDIX B, PAGE B-15)

QD11a. (IF MORE THAN ONE) How many of these are under 18?

(SEE APPENDIX B, PAGE B-15)

QD12. Now I'd like to know the employment status of the person in your household who contributed most to the household income in the year 2002. Is this person you or someone else in your household?

Freq	(%)			
192	(56)	1.	Respondent	(IF RESPONDENT, GO TO 13)
151	(44)	2.	Someone else	
1	(0)	3.	Someone no longer in household	(IF NOT IN HH, GO TO 13)
8		8.	DK	(IF DK, GO TO 13)
10		9.	RA	(IF RA, GO TO 13)
44		.	NA	

QD12a. (IF SOMEONE ELSE) Did this person have a paying job last week?

127	(84)	1.	Yes	
24	(16)	2.	No	
0		8.	DK	(IF DK, GO TO 13)
0		9.	RA	(IF RA, GO TO 13)
254		.	NA	

QD12a-1. (IF YES) Were they working full-time or part-time?

122	(96)	1.	Full time
5	(4)	2.	Part time
0		8.	DK
0		9.	RA
278		.	NA

12a-2. (IF NO) Are they retired, unemployed, a student, or a homemaker? (CIRCLE ALL MENTIONS)

	YES 1	NO 2	DK 8	RA 9	NA .	
QD12a-2a. Retired	19 (82)	4 (18)	1	0	381	Freq (%)
QD12a-2b. Unemployed	3 (13)	20 (87)	1	0	381	
QD12a-2c. A student	1 (4)	22 (96)	1	0	381	
QD12a-2d. A homemaker	0 (-)	23 (100)	1	0	381	

QD13. Was your total household income in the year 2002 above or below $60,000? (THE CONSTRUCTED VARIABLE 'INCOME' IS SHOWN ON PAGE 21)

Freq	(%)		
192	(54)	1.	Above
165	(46)	2.	Below
13		8.	DK (IF DK, GO TO 16)
35		9.	RA (IF RA, GO TO 16)

QD13a. (IF ABOVE) I am going to mention a number of income categories. When I come to the category which describes your total household income BEFORE taxes in the year 2002, please stop me.

42	(25)	1.	60 to 70,000
32	(19)	2.	70 to 80,000
24	(14)	3.	80 to 90,000
24	(14)	4.	90 to 100,000
10	(6)	5.	100 to 110,000
8	(5)	6.	110 to 120,000
29	(17)	7.	120,000 or more
1		8.	DK (IF DK, GO TO 16)
22		9.	RA (IF RA, GO TO 16)
213		.	NA

QD13b. (IF BELOW) I am going to mention a number of income categories. When I come to the category which describes your total household income BEFORE taxes in the year 2002, please stop me.

10	(7)	1.	Under 10,000
11	(8)	2.	10 to 20,000
23	(16)	3.	20 to 30,000
34	(23)	4.	30 to 40,000
34	(23)	5.	40 to 50,000
34	(23)	6.	50 to 60,000
9		8.	DK (IF DK, GO TO 16)
9		9.	RA (IF RA, GO TO 16)
240		.	NA

QD14. This income figure you just gave me includes the income of everyone who was living in your household in the year 2002. Is that correct?

Freq	(%)		
316	(100)	1.	Yes
0	(-)	2.	No (IF NO, REPEAT QUESTION 13)
0		8.	DK
0		9.	RA
89		.	NA

QD15. How many persons in the household contributed earnings or income that was part of the total household income you gave me for the year 2002?

(SEE APPENDIX B, PAGE B-16)

(ASK ONLY IF UNSURE)

QD16. Are you male or female?

188	(46)	1.	Male
217	(54)	2.	Female
0		9.	RA

END. Thank you for answering all these questions. I really appreciate your time.

(IF A RESPONDENT ASKS FOR SURVEY RESULTS,
HAVE THEM CONTACT ROSSANA ARMSON AT 612-627-4282
DURING BUSINESS HOURS, 9 AM TO 5 PM.)

INTERVIEWER COMMENTS:

APPENDIX A

OPEN-ENDED VARIABLES

QA1 MOST IMPORTANT MN PROBLEM

Value		Frequency	Percent	Valid Percent	Cumulative Percent
10000	Taxes	11	2.7	2.8	2.8
10100	Income tax	8	1.9	2.0	4.8
10200	Sales tax	1	.1	.1	4.9
10300	Property tax	6	1.4	1.5	6.4
20000	Education	5	1.3	1.3	7.7
20100	Quality of educ	10	2.5	2.7	10.4
20200	Financing educ	17	4.3	4.5	14.9
30000	Environment	1	.3	.3	15.2
30100	Pollution	1	.3	.3	15.4
30102	Water quality	1	.3	.3	15.7
30103	Air pollution	1	.3	.3	16.0
30600	Weather	3	.8	.8	16.8
40000	Economy	22	5.3	5.6	22.3
40100	Unemploymt/jobs	1	.3	.3	22.6
40101	Youth unemploymt	1	.3	.3	22.9
40103	Quality of jobs	16	3.9	4.1	27.0
40104	Wages	10	2.5	2.7	29.7
40106	Quantity of jobs	62	15.4	16.1	45.7
40300	Savings/investmts	3	.6	.7	46.4
40400	Business climate	4	1.0	1.1	47.5
50000	Health care	1	.3	.3	47.7
50100	Health care-cost	41	10.2	10.6	58.4
50101	Prescr drugs-cost	7	1.8	1.9	60.2
50200	Health care-qual	1	.3	.3	60.5
50300	Health care-avail	14	3.6	3.7	64.2
50400	Health care-elderly	2	.4	.4	64.6
50401	Nursing homes	2	.5	.5	65.2
50500	Mental health	3	.6	.7	65.8
50600	Disease-general	3	.6	.7	66.5

QA1 MOST IMPORTANT MN PROBLEM (continued)

Value		Frequency	Percent	Valid Percent	Cumulative Percent
60000	Transportation	3	.8	.8	67.3
60100	Traffic	7	1.8	1.9	69.1
60200	Road construction	1	.3	.3	69.4
60700	Mass transit	1	.3	.3	69.7
60800	Snow plowing	2	.4	.4	70.1
70100	Housing-cost	6	1.4	1.5	71.5
80000	Food	1	.3	.3	71.8
80200	Shortage of food	3	.6	.7	72.5
90000	Government	10	2.4	2.5	75.0
90300	Govt programs	3	.8	.8	75.8
90400	Govt funding	3	.8	.8	76.6
90600	Federal deficit	1	.3	.3	76.9
100200	Terrorist attacks	1	.1	.1	77.0
110000	Crime	4	1.0	1.1	78.1
110100	Crim justice sys	8	2.0	2.1	80.2
110200	Drug-reltd crime	3	.6	.7	80.9
120100	Energy cost	3	.6	.7	81.5
130200	Welfare	3	.6	.7	82.2
130201	Abuse of welfare	1	.3	.3	82.4
130400	Discrimination	2	.5	.5	83.0
130500	Drugs	8	2.0	2.1	85.1
130600	Morality	12	2.9	3.1	88.2
130601	Religion	6	1.5	1.6	89.8
130700	Immigration	2	.5	.5	90.3
130800	Poverty	7	1.8	1.9	92.2
131000	Homeless	3	.8	.8	93.0

QA1 MOST IMPORTANT MN PROBLEM (continued)

Value		Frequency	Percent	Valid Percent	Cumulative Percent
140000	Family	3	.8	.8	93.8
140200	Child raising	3	.6	.7	94.4
150000	Other	22	5.3	5.6	100.0
Total valid		386	95.4	100.0	
888888	DK	17	4.2		
999999	RA	2	.4		
Total missing		19	4.6		
Total		405	100.0		

APPENDIX B

NUMERIC VARIABLES

QD1 COUNTY OF RESIDENCE

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Aitkin	2	.5	.5	.5
2 Anoka	28	6.9	6.9	7.4
3 Becker	3	.6	.6	8.0
4 Beltrami	3	.6	.6	8.6
5 Benton	3	.8	.8	9.4
7 Blue Earth	5	1.3	1.3	10.7
8 Brown	2	.4	.4	11.0
9 Carlton	4	.9	.9	11.9
10 Carver	8	2.0	2.0	14.0
11 Cass	3	.8	.8	14.7
12 Chippewa	2	.4	.4	15.1
13 Chisago	7	1.8	1.8	16.9
14 Clay	2	.5	.5	17.4
17 Cottonwood	3	.6	.6	18.0
18 Crow Wing	3	.8	.8	18.8
19 Dakota	34	8.5	8.5	27.3
20 Dodge	2	.4	.4	27.7
21 Douglas	1	.1	.1	27.8
23 Fillmore	2	.5	.5	28.3
24 Freeborn	3	.8	.8	29.1
25 Goodhue	2	.5	.5	29.6
26 Grant	1	.1	.1	29.7
27 Hennepin	81	20.1	20.1	49.7
29 Hubbard	1	.1	.1	49.9
30 Isanti	2	.4	.4	50.3
31 Itasca	5	1.1	1.1	51.4
32 Jackson	1	.3	.3	51.6
33 Kanabec	1	.1	.1	51.8
40 Le Sueur	4	.9	.9	52.7
42 Lyon	4	.9	.9	53.6
43 McLeod	4	.9	.9	54.4
45 Marshall	1	.3	.3	54.7
46 Martin	2	.5	.5	55.2
48 Mille Lacs	1	.3	.3	55.5
49 Morrison	2	.4	.4	55.8
50 Mower	3	.8	.8	56.6
51 Murray	1	.1	.1	56.7
52 Nicollet	2	.5	.5	57.2
53 Nobles	2	.4	.4	57.6

QD1 COUNTY OF RESIDENCE (continued)

Value		Frequency	Percent	Valid Percent	Cumulative Percent
54	Norman	2	.4	.4	58.0
55	Olmsted	10	2.5	2.5	60.5
56	Otter Tail	4	1.0	1.0	61.5
57	Pennington	1	.1	.1	61.7
58	Pine	2	.5	.5	62.2
59	Pipestone	1	.3	.3	62.4
61	Pope	1	.1	.1	62.6
62	Ramsey	45	11.0	11.0	73.6
64	Redwood	2	.5	.5	74.1
65	Renville	2	.5	.5	74.6
66	Rice	4	.9	.9	75.5
67	Rock	1	.3	.3	75.8
69	St Louis	19	4.7	4.7	80.5
70	Scott	7	1.8	1.8	82.2
71	Sherburne	9	2.3	2.3	84.5
72	Sibley	1	.3	.3	84.8
73	Stearns	8	2.0	2.0	86.8
74	Steele	1	.3	.3	87.1
77	Todd	2	.5	.5	87.6
79	Wabasha	2	.5	.5	88.1
80	Wadena	2	.4	.4	88.5
81	Waseca	1	.3	.3	88.7
82	Washington	29	7.2	7.2	95.9
84	Wilkin	1	.3	.3	96.2
85	Winona	5	1.3	1.3	97.5
86	Wright	10	2.4	2.4	99.9
87	Yellow Medicine	1	.1	.1	100.0
Total		405	100.0	100.0	

QD2 ZIP CODE

Value	Frequency	Percent	Valid Percent	Cumulative Percent
55003	1	.3	.3	.3
55005	1	.3	.3	.5
55006	1	.3	.3	.8
55014	1	.1	.1	.9
55016	1	.3	.3	1.2
55020	1	.3	.3	1.4
55021	2	.4	.4	1.8
55024	3	.8	.8	2.6
55025	3	.6	.6	3.2
55027	2	.4	.4	3.6
55031	1	.3	.3	3.9
55033	3	.6	.6	4.5
55037	1	.3	.3	4.8
55038	1	.3	.3	5.1
55040	1	.3	.3	5.3
55044	3	.6	.6	6.0
55045	2	.5	.5	6.5
55046	1	.3	.3	6.7
55051	1	.1	.1	6.9
55055	1	.3	.3	7.1
55056	3	.8	.8	7.9
55057	1	.3	.3	8.2
55060	1	.3	.3	8.4
55066	1	.1	.1	8.6
55068	3	.6	.6	9.2
55071	3	.6	.6	9.9
55073	1	.3	.3	10.1
55075	2	.5	.5	10.6
55076	3	.6	.6	11.3
55082	4	1.0	1.0	12.3
55084	1	.3	.3	12.6
55089	1	.3	.3	12.8
55101	4	.9	.9	13.7
55102	1	.3	.3	14.0
55103	1	.1	.1	14.1
55104	1	.1	.1	14.3
55105	8	1.9	1.9	16.2
55106	6	1.5	1.6	17.8
55108	1	.1	.1	17.9

QD2 ZIP CODE (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
55109	2	.4	.4	18.3
55110	7	1.6	1.7	20.0
55112	8	1.9	1.9	21.9
55113	6	1.5	1.6	23.5
55115	3	.6	.6	24.1
55116	1	.3	.3	24.4
55117	5	1.3	1.3	25.7
55118	3	.8	.8	26.5
55119	1	.3	.3	26.7
55122	1	.3	.3	27.0
55123	2	.4	.4	27.4
55124	4	.9	.9	28.3
55125	5	1.3	1.3	29.6
55127	2	.4	.4	30.0
55128	5	1.3	1.3	31.3
55275	1	.3	.3	31.5
55303	3	.8	.8	32.3
55304	5	1.1	1.2	33.5
55307	1	.3	.3	33.7
55309	1	.3	.3	34.0
55313	3	.8	.8	34.8
55316	1	.3	.3	35.0
55317	2	.5	.5	35.5
55318	2	.5	.5	36.1
55320	1	.1	.1	36.2
55321	2	.4	.4	36.6
55330	4	1.0	1.0	37.6
55331	3	.8	.8	38.4
55336	2	.5	.5	38.9
55337	8	1.9	1.9	40.9
55340	2	.4	.4	41.2
55343	4	.9	.9	42.2
55345	1	.1	.1	42.3
55346	4	.9	.9	43.2
55347	6	1.4	1.4	44.6
55350	2	.4	.4	45.0
55362	3	.8	.8	45.8
55364	1	.3	.3	46.0
55369	4	.9	.9	47.0

QD2 ZIP CODE (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
55371	2	.5	.5	47.5
55372	2	.5	.5	48.0
55376	1	.3	.3	48.2
55379	3	.6	.6	48.9
55386	1	.3	.3	49.2
55387	2	.5	.5	49.7
55388	1	.3	.3	49.9
55391	2	.5	.5	50.5
55398	1	.3	.3	50.7
55403	1	.1	.1	50.8
55406	5	1.1	1.2	52.0
55407	3	.8	.8	52.8
55408	1	.3	.3	53.0
55409	2	.4	.4	53.4
55410	2	.4	.4	53.8
55411	1	.1	.1	54.0
55414	1	.1	.1	54.1
55416	2	.5	.5	54.6
55417	3	.8	.8	55.4
55418	3	.6	.6	56.0
55420	1	.1	.1	56.2
55421	3	.6	.6	56.8
55422	2	.5	.5	57.3
55423	6	1.5	1.6	58.9
55424	1	.1	.1	59.0
55425	1	.3	.3	59.3
55426	3	.6	.6	59.9
55427	4	.9	.9	60.8
55430	1	.3	.3	61.1
55431	1	.3	.3	61.3
55432	3	.6	.6	62.0
55433	4	1.0	1.0	63.0
55434	4	1.0	1.0	64.1
55435	1	.3	.3	64.3
55438	3	.6	.6	65.0
55439	2	.5	.5	65.5
55443	1	.1	.1	65.6
55446	1	.1	.1	65.8
55447	2	.4	.4	66.1

QD2 ZIP CODE (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
55448	2	.4	.4	66.5
55449	1	.3	.3	66.8
55455	1	.1	.1	66.9
55616	1	.3	.3	67.2
55719	1	.1	.1	67.3
55721	3	.6	.6	68.0
55723	1	.3	.3	68.2
55724	2	.5	.5	68.7
55732	1	.3	.3	69.0
55733	1	.1	.1	69.1
55734	2	.4	.4	69.5
55744	3	.6	.6	70.2
55746	1	.3	.3	70.4
55749	1	.3	.3	70.7
55776	1	.3	.3	70.9
55779	1	.3	.3	71.2
55792	1	.3	.3	71.5
55797	1	.3	.3	71.7
55802	1	.3	.3	72.0
55804	4	1.0	1.0	73.0
55807	1	.1	.1	73.2
55811	2	.4	.4	73.5
55831	1	.3	.3	73.8
55901	6	1.5	1.6	75.4
55902	1	.3	.3	75.6
55904	2	.4	.4	76.0
55912	3	.6	.6	76.7
55920	2	.4	.4	77.0
55927	1	.1	.1	77.2
55936	1	.1	.1	77.3
55944	1	.3	.3	77.6
55945	1	.3	.3	77.8
55959	1	.3	.3	78.1
55964	1	.3	.3	78.3
55965	1	.3	.3	78.6
55971	1	.3	.3	78.9
55987	4	1.0	1.0	79.9
56001	3	.6	.6	80.5
56007	2	.5	.5	81.1

QD2 ZIP CODE (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
56009	1	.3	.3	81.3
56010	1	.3	.3	81.6
56011	1	.3	.3	81.8
56031	1	.1	.1	82.0
56054	1	.3	.3	82.2
56057	2	.4	.4	82.6
56063	2	.4	.4	83.0
56069	1	.3	.3	83.3
56071	2	.4	.4	83.7
56073	2	.4	.4	84.0
56082	2	.5	.5	84.6
56083	1	.3	.3	84.8
56093	1	.1	.1	85.0
56096	1	.1	.1	85.1
56122	1	.1	.1	85.2
56137	1	.3	.3	85.5
56152	1	.1	.1	85.6
56156	1	.3	.3	85.9
56159	1	.1	.1	86.0
56164	1	.3	.3	86.3
56165	1	.3	.3	86.5
56183	1	.3	.3	86.8
56220	1	.1	.1	86.9
56222	2	.4	.4	87.3
56239	1	.3	.3	87.5
56258	2	.4	.4	87.9
56264	1	.3	.3	88.2
56277	1	.3	.3	88.5
56285	1	.3	.3	88.7
56293	2	.4	.4	89.1
56303	1	.3	.3	89.4
56304	1	.3	.3	89.6
56307	1	.1	.1	89.8
56308	1	.1	.1	89.9
56310	2	.4	.4	90.3
56320	2	.4	.4	90.7
56329	1	.3	.3	90.9
56345	1	.3	.3	91.2
56347	1	.3	.3	91.4

QD2 ZIP CODE (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
56359	1	.3	.3	91.7
56362	1	.1	.1	91.8
56364	1	.1	.1	92.0
56367	2	.5	.5	92.5
56374	1	.3	.3	92.7
56379	1	.3	.3	93.0
56381	1	.1	.1	93.1
56387	2	.4	.4	93.5
56401	3	.8	.8	94.3
56438	1	.3	.3	94.6
56466	1	.3	.3	94.8
56469	2	.5	.5	95.3
56470	1	.1	.1	95.5
56472	1	.3	.3	95.7
56477	1	.3	.3	96.0
56481	1	.3	.3	96.2
56482	1	.1	.1	96.4
56501	2	.4	.4	96.8
56520	1	.3	.3	97.0
56531	1	.1	.1	97.1
56537	3	.8	.8	97.9
56560	2	.5	.5	98.4
56569	1	.3	.3	98.7
56584	2	.4	.4	99.1
56601	2	.5	.5	99.6
56619	1	.1	.1	99.7
56626	1	.3	.3	100.0
Total valid	396	97.8	100.0	
88888 DK	4	1.0		
99999 RA	5	1.1		
Total missing	9	2.2		
Total	405	100.0		

QD6 YEAR BORN

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1912	1	.1	.1	.1
1913	1	.1	.1	.3
1914	1	.3	.3	.5
1917	1	.3	.3	.8
1918	1	.1	.1	.9
1919	1	.3	.3	1.2
1921	1	.3	.3	1.4
1922	2	.4	.4	1.8
1923	4	1.0	1.1	2.9
1924	1	.3	.3	3.2
1925	1	.3	.3	3.4
1926	5	1.1	1.2	4.6
1927	1	.1	.1	4.7
1928	5	1.1	1.2	5.9
1929	2	.4	.4	6.3
1930	3	.6	.7	7.0
1931	7	1.6	1.7	8.7
1932	2	.5	.5	9.2
1934	3	.8	.8	10.0
1935	4	.9	.9	10.9
1936	3	.8	.8	11.7
1937	5	1.1	1.2	12.9
1938	2	.5	.5	13.4
1939	4	.9	.9	14.3
1940	7	1.8	1.8	16.2
1941	6	1.5	1.6	17.7
1942	2	.4	.4	18.1
1943	8	2.0	2.1	20.2
1944	5	1.1	1.2	21.4
1945	7	1.8	1.8	23.3
1946	5	1.3	1.3	24.6
1947	7	1.6	1.7	26.3
1948	8	2.0	2.1	28.4
1949	5	1.1	1.2	29.6
1950	12	3.0	3.2	32.7
1951	6	1.5	1.6	34.3

QD6 YEAR BORN (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1952	12	2.9	3.0	37.3
1953	9	2.3	2.4	39.7
1954	9	2.2	2.2	41.9
1955	13	3.3	3.4	45.3
1956	15	3.7	3.8	49.1
1957	16	3.9	4.1	53.2
1958	8	1.9	2.0	55.2
1959	14	3.6	3.7	58.9
1960	10	2.5	2.6	61.5
1961	14	3.4	3.5	65.0
1962	7	1.8	1.8	66.9
1963	7	1.8	1.8	68.7
1964	9	2.3	2.4	71.1
1965	5	1.1	1.2	72.3
1966	7	1.8	1.8	74.1
1967	5	1.1	1.2	75.3
1968	5	1.3	1.3	76.6
1969	3	.8	.8	77.4
1970	6	1.4	1.4	78.8
1971	5	1.3	1.3	80.2
1972	6	1.4	1.4	81.6
1973	6	1.4	1.4	83.0
1974	3	.8	.8	83.8
1975	5	1.3	1.3	85.2
1976	3	.8	.8	85.9
1977	8	1.9	2.0	87.9
1978	6	1.5	1.6	89.5
1979	7	1.6	1.7	91.2
1980	6	1.4	1.4	92.6
1981	7	1.8	1.8	94.5
1982	6	1.5	1.6	96.1

QD6 YEAR BORN (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1983	3	.6	.7	96.7
1984	4	.9	.9	97.6
1985	9	2.3	2.4	100.0
Total valid	391	96.6	100.0	
8888 DK	2	.5		
9999 RA	12	2.9		
Total missing	14	3.4		
Total	405	100.0		

AGE AGE OF RESPONDENT

Value	Frequency	Percent	Valid Percent	Cumulative Percent
19	9	2.3	2.4	2.4
20	4	.9	.9	3.3
21	3	.6	.7	3.9
22	6	1.5	1.6	5.5
23	7	1.8	1.8	7.4
24	6	1.4	1.4	8.8
25	7	1.6	1.7	10.5
26	6	1.5	1.6	12.1
27	8	1.9	2.0	14.1
28	3	.8	.8	14.8
29	5	1.3	1.3	16.2
30	3	.8	.8	17.0
31	6	1.4	1.4	18.4
32	6	1.4	1.4	19.8
33	5	1.3	1.3	21.2
34	6	1.4	1.4	22.6
35	3	.8	.8	23.4
36	5	1.3	1.3	24.7
37	5	1.1	1.2	25.9

AGE **AGE OF RESPONDENT** (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
38	7	1.8	1.8	27.7
39	5	1.1	1.2	28.9
40	9	2.3	2.4	31.3
41	7	1.8	1.8	33.1
42	7	1.8	1.8	35.0
43	14	3.4	3.5	38.5
44	10	2.5	2.6	41.1
45	14	3.6	3.7	44.8
46	8	1.9	2.0	46.8
47	16	3.9	4.1	50.9
48	15	3.7	3.8	54.7
49	13	3.3	3.4	58.1
50	9	2.2	2.2	60.3
51	9	2.3	2.4	62.7
52	12	2.9	3.0	65.7
53	6	1.5	1.6	67.3
54	12	3.0	3.2	70.4
55	5	1.1	1.2	71.6
56	8	2.0	2.1	73.7
57	7	1.6	1.7	75.4
58	5	1.3	1.3	76.7
59	7	1.8	1.8	78.6
60	5	1.1	1.2	79.8
61	8	2.0	2.1	81.9
62	2	.4	.4	82.3
63	6	1.5	1.6	83.8
64	7	1.8	1.8	85.7
65	4	.9	.9	86.6
66	2	.5	.5	87.1
67	5	1.1	1.2	88.3
68	3	.8	.8	89.1
69	4	.9	.9	90.0
70	3	.8	.8	90.8
72	2	.5	.5	91.3
73	7	1.6	1.7	93.0
74	3	.6	.7	93.7
75	2	.4	.4	94.1
76	5	1.1	1.2	95.3
77	1	.1	.1	95.4

AGE **AGE OF RESPONDENT** (continued)

Value	Frequency	Percent	Valid Percent	Cumulative Percent
78	5	1.1	1.2	96.6
79	1	.3	.3	96.8
80	1	.3	.3	97.1
81	4	1.0	1.1	98.2
82	2	.4	.4	98.6
83	1	.3	.3	98.8
85	1	.3	.3	99.1
86	1	.1	.1	99.2
87	1	.3	.3	99.5
90	1	.3	.3	99.7
91	1	.1	.1	99.9
92	1	.1	.1	100.0
Total valid	391	96.6	100.0	
Missing 99 DK/RA	14	3.4		
Total	405	100.0		

QD11 NUMBER OF PERSONS IN HOUSEHOLD

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1	44	10.8	10.9	10.9
2	140	34.6	35.1	46.0
3	69	17.1	17.4	63.4
4	89	22.1	22.4	85.7
5	35	8.8	8.9	94.6
6	13	3.2	3.2	97.8
7	1	.3	.3	98.1
8	7	1.6	1.7	99.7
10	1	.3	.3	100.0
Total valid	400	98.7	100.0	
99 RA Missing	5	1.3		
Total	405	100.0		

QD11A NUMBER OF PERSONS IN HOUSEHOLD UNDER 18

Value	Frequency	Percent	Valid Percent	Cumulative Percent
0	205	50.6	57.6	57.6
1	59	14.5	16.5	74.0
2	64	15.7	17.9	91.9
3	20	4.8	5.5	97.4
4	5	1.1	1.3	98.7
5	3	.6	.7	99.4
6	1	.3	.3	99.7
8	1	.3	.3	100.0
Total valid	356	87.9	100.0	
System Missing	49	12.1		
Total	405	100.0		

QD15 # OF PEOPLE CONTRIBUTED TO 2002 HH INCOME

	Value	Frequency	Percent	Valid Percent	Cumulative Percent
	1	82	20.3	26.2	26.2
	2	202	49.9	64.3	90.5
	3	23	5.6	7.2	97.7
	4	7	1.8	2.3	100.0
	Total valid	314	77.5	100.0	
	88 DK	2	.4		
	99 RA	1	.1		
	System	89	22.0		
	Total missing	91	22.5		
Total		405	100.0		

APPENDIX C

DEFINITIONS OF CONSTRUCTED VARIABLES

Certain variables have been constructed for the convenience of the user, and to aid interpretations of the variables used in this survey to summarize multi-variable composites, such as the respondent's employment status or household size. In this Appendix, the variables are operationally defined, and the SPSS Windows statements are presented which were used to construct each variable. The distributions for these variables are presented in Chapter 2 of this report.

AGE Age of respondent in years (uncollapsed). This variable was constructed by subtracting the respondent's year of birth from 2004. Those who refused to give their year of birth were assigned a value of 99 and defined as missing.

```
COMPUTE AGE = 2004 - QD6.
IF (QD6 = 8888 OR QD6 = 9999)AGE = 99.
VARIABLE LABELS AGE 'AGE OF RESPONDENT'.
VALUE LABELS AGE 99 'DK/RA'.
MISSING VALUES AGE (99).
FORMAT AGE (F2.0).
```

AGEMD Age of respondent in years, collapsed into 6 midpoint categories. This variable recodes AGE so that 18 through 24 year olds are in group 1, 25 through 34 year olds are in group 2, 35 through 44 year olds are in group 3, 45 through 54 year olds are in group 4, 55 through 64 year olds are in group 5, and those 65 and older are in group 6. Those refusing to give their ages were assigned to category 99.

```
COMPUTE AGEMD=AGE.
RECODE AGEMD (LO THRU 24=1) (25 THRU 34=2) (35 THRU 44=3)
        (45 THRU 54=4) (55 THRU 64=5) (65 THRU 98=6) (99=99).
VARIABLE LABELS AGEMD 'AGE OF RESPONDENT, GROUPED'.
VALUE LABELS AGEMD 1 '18 - 24' 2 '25 - 34' 3 '35 - 44' 4 '45 - 54' 5 '55 - 64'
        6 '65 and older' 99 'DK/RA'.
MISSING VALUES AGEMD (99).
FORMAT AGEMD (F2.0).
```

RACE Respondent's self-reported racial or ethnic background. The original variable D8 was recoded into White and Black, and the remaining individuals are combined into an 'other' category.

```
COMPUTE RACE = QD8.
RECODE RACE (1=1) (3=2) (2,4 THRU 7=3) (8,9=9).
VARIABLE LABELS RACE 'RACE OF RESPONDENT'.
VALUE LABELS RACE 1 'White' 2 'Black' 3 'Other' 9 'DK/RA'.
MISSING VALUES RACE (9).
FORMAT RACE (F1.0).
```

GENDER Gender of respondent. This variable is merely the D16 variable set to a new name for the convenience of the datafile users.

```
COMPUTE GENDER = QD16.
VARIABLE LABELS GENDER 'RESPONDENT'S GENDER'.
VALUE LABELS GENDER 1 'Male' 2 'Female'.
FORMAT GENDER (F1.0).
```

EDUC Educational level of respondent. This variable is merely the D7 variable set to a new name for the convenience of the data file users.

```
COMPUTE EDUC = QD7.
RECODE EDUC (88,99=99).
VARIABLE LABELS EDUC 'RESPONDENT'S LEVEL OF EDUCATION'.
VALUE LABELS EDUC  01 'Less than HS' 02 'Some HS' 03 'HS graduate'
        04 'Some tech school' 05 'Tech school grad' 06 'Some college'
        07 'College graduate' 08 'Postgrad/prof degree' 09 'Other' 99 'DK/RA'.
MISSING VALUES EDUC (99).
FORMAT EDUC (F2.0).
```

MARSTAT Marital status of respondent. This variable is merely the D5 variable set to a new name for the convenience of the data file users.

```
COMPUTE MARSTAT = QD5.
RECODE MARSTAT (8,9=9).
VARIABLE LABELS MARSTAT 'MARITAL STATUS OF RESPONDENT'.
VALUE LABELS MARSTAT 1 'Married' 2 'Single' 3 'Divorced' 4 'Separated'
        5 'Widowed' 9 'DK/RA'.
MISSING VALUES MARSTAT (9).
FORMAT MARSTAT (F1.0).
```

WKSTATUS Respondent's employment status. This variable was constructed from the working variables D10, D10a, and D10b-1 through D10b-4 and is prioritized so that those respondents who have more than one status, for example, women who have a part time job and who are housewives, are assigned to the working category status as opposed to the housewife (or retiree, student...) category. Full-time workers are in WKSTATUS value 1; part-time workers are in WKSTATUS value 2; those who are unemployed are in WKSTATUS value 3; individuals who are students and retirees and do not have paying jobs are in WKSTATUS values 4 and 5, respectively. Individuals who are homemakers and who do not have paying jobs outside the home are in WKSTATUS value 6.

```
COMPUTE WKSTATUS = 0.
IF (QD10A = 1)WKSTATUS = 1.
IF (QD10A = 2)WKSTATUS = 2.
IF (QD10A = 8)WKSTATUS = 9.
IF (QD10A = 9)WKSTATUS = 9.
IF (QD10B4 = 1)WKSTATUS = 6.
IF (QD10B1 = 1)WKSTATUS = 5.
IF (QD10B3 = 1)WKSTATUS = 4.
IF (QD10B2 = 1)WKSTATUS = 3.
IF (QD10 = 8) WKSTATUS = 9.
IF (QD10 = 9) WKSTATUS = 9.
IF (QD10B1=8 AND QD10B2=8 AND QD10B3=8 AND QD10B4=8)
        WKSTATUS = 9.
IF (QD10B1=9 AND QD10B2=9 AND QD10B3=9 AND QD10B4=9)
        WKSTATUS = 9.
VARIABLE LABELS WKSTATUS 'WORK STATUS OF RESPONDENT'.
VALUE LABELS  WKSTATUS  1 'Worked full time' 2 'Worked part time'
        3 'Unemployed' 4 'Student' 5 'Retired' 6 'Homemaker' 9 'DK/RA'.
MISSING VALUES WKSTATUS (9).
FORMAT WKSTATUS (F1.0).
```

PARTYID Political party identification of respondent. This variable indicates strength of political affilitation as well as party identification. It represents a composite of questions D9a, D9b, and D9c.

```
COMPUTE PARTYID = 0.
IF (QD9A = 1) PARTYID=7.
IF (QD9A = 2) PARTYID=6.
IF (QD9C = 1) PARTYID=5.
IF (QD9C = 3) PARTYID=4.
IF (QD9C = 2) PARTYID=3.
IF (QD9B = 2) PARTYID=2.
IF (QD9B = 1) PARTYID=1.
IF (QD9A=8 OR QD9A=9 OR QD9B=8 OR QD9B=9 OR QD9C=8 OR QD9C=9)
        PARTYID=9.
VARIABLE LABELS PARTYID 'POLITICAL IDENTIFICATION'.
VALUE LABELS PARTYID 1 'Strong Dem' 2 'Weak Dem' 3 'Indep Dem'
        4 'Indep Ind' 5 'Indep Rep' 6 'Weak Rep' 7 'Strong Rep' 9 'Apolitical'.
MISSING VALUES PARTYID (9)
FORMAT PARTYID (F1.0).
```

PARTY This is the recoded version of the political party identification variable PARTYID. The Democratic category includes Independents who think of themselves as closer to the Democratic party as well strong and weak Democrats. A comparable procedure is followed for the Republican category. The only people who remain in the Independent category are those individuals who do not think of themselves as close to either of the major political parties.

```
COMPUTE PARTY = 9.
IF (PARTYID = 7 OR PARTYID = 6 OR PARTYID = 5) PARTY=3.
IF (PARTYID = 1 OR PARTYID = 2 OR PARTYID = 3) PARTY=1.
IF (PARTYID = 4) PARTY = 2.
VARIABLE LABELS PARTY 'POLITICAL PARTY, GROUPED'.
VALUE LABELS PARTY 1 'Democratic' 2 'Independent' 3 'Republican' 9 'Apolitical'.
MISSING VALUES PARTY (9).
FORMAT PARTY (F1.0).
```

HHCOMP This variable is constructed from the marital status of the respondent and the number of children reported living in the household. Respondents who were married, and had children living in the home were assigned a value of 1. Those who were married, and had no children living in the home were assigned a value of 2. Individuals who were divorced, separated, widowed, or single, and who had children in the home were assigned a value of 3. Singles without children were assigned a 4.

```
COMPUTE TEMPVAR = QD5.
COMPUTE TEMPVAR2 = QD11A.
RECODE TEMPVAR (3,4,5 = 2)/TEMPVAR2 (SYSMISS=0).
IF ((TEMPVAR = 1) AND (TEMPVAR2 = 0))HHCOMP = 2.
IF ((TEMPVAR = 1) AND ((TEMPVAR2 GE 1) AND
        (TEMPVAR2 LT 88)))HHCOMP = 1.
IF ((TEMPVAR = 2) AND (TEMPVAR2 = 0))HHCOMP = 4.
IF ((TEMPVAR = 2) AND ((TEMPVAR2 GE 1) AND
        (TEMPVAR2 LT 88)))HHCOMP = 3.
IF (TEMPVAR GE 8)HHCOMP = 9.
IF (TEMPVAR2 GE 88)HHCOMP = 9.
MISSING VALUES HHCOMP (9).
VARIABLE LABELS HHCOMP 'HOUSEHOLD COMPOSITION'.
VALUE LABELS HHCOMP 1 'Married, kids' 2 'Married, no kids'
        3 'Single parent' 4 'Single, no kids' 9 'DK/RA'.
FORMAT TEMPVAR HHCOMP (F2.0).
```

HHSIZE The total number of people reported to be living in the household. This variable is derived from D11, and recoded so that the value 3 represents households with 3 or 4 persons living in the household, and value 4 represents those households in which more than 4 persons live.

```
COMPUTE HHSIZE = QD11.
RECODE HHSIZE (3,4 = 3)(5 THRU 87 = 4)(88,99 = 9).
VARIABLE LABELS HHSIZE 'HOUSEHOLD SIZE'.
VALUE LABELS HHSIZE 1 'One person' 2 'Two people' 3 '3 or 4 people'
        4 '5 or more people' 9 'DK/RA'.
MISSING VALUES HHSIZE (9).
FORMAT HHSIZE (F2.0).
```

NADULTS The number of adult members living in the respondent's household, including him/her self. This variable was constructed by taking the total number of individuals living in the household (D11), and subtracting the total number of children (18 or younger) reported to be living in the household (D11a). Since this variable was used in the construction of the weighting variable, the few missing cases were assigned to the 1 category.

```
COMPUTE TEMPVAR = QD11A.
RECODE TEMPVAR (88,99, SYSMISS = 0).
COMPUTE NADULTS = QD11 - TEMPVAR.
IF (QD11 GE 88) NADULTS = 1.
VARIABLE LABELS NADULTS 'NUMBER OF ADULTS IN HOUSEHOLD'.
FORMAT NADULTS (F2.0).
```

NKIDS The number of household members who are under 18 years of age. This variable is merely the D11a variable set to a new name for the convenience of the data file users.

```
COMPUTE NKIDS = QD11A.
RECODE NKIDS (SYSMISS = 0)(88,99 = 99).
VARIABLE LABELS NKIDS 'NUMBER OF CHILDREN IN HOUSEHOLD'.
VALUE LABELS NKIDS 99 'DK/RA'.
MISSING VALUE NKIDS(99).
FORMAT NKIDS (F2.0).
```

INCOME Reported household income level for 2002. This variable represents a composite of questions D13 through D13b. The categories of INCOME are those under D13a and D13b.

```
COMPUTE INCOME = 99.
COMPUTE TEMPVAR = QD13A.
COMPUTE TEMPVAR2 = QD13B.
RECODE TEMPVAR (1=7) (2=8) (3=9) (4=10) (5=11) (6=12) (7=13) (8=99)
        (9=99)/TEMPVAR2 (8=99)(9=99).
IF (QD13 = 1)INCOME = TEMPVAR.
IF (QD13 = 2)INCOME = TEMPVAR2.
RECODE INCOME (88,99=99).
VARIABLE LABELS INCOME 'HOUSEHOLD INCOME'.
VALUE LABELS INCOME 1 'Under $10,000' 2 '$10 to 20,000' 3 '$20 to 30,000'
        4 '$30 to 40,000' 5 '$40 to 50,000' 6 '$50 to 60,000'
        7 '$60 to 70,000' 8 '$70 to 80,000' 9 '$80 to 90,000'
        10 '$90 to 100,000' 11 '$100 to 110,000' 12 '$110 to 120,000'
        13 '$120,000 or more' 99 'DK/RA'.
MISSING VALUES INCOME (99).
FORMAT INCOME (F2.0).
```

CITY City where the respondent lives. This is a recoded version of zip code, so it is only an approximation of actual city of residence.

```
COMPUTE CITY = 3.
IF (QD2 = 55401 OR QD2 = 55402 OR QD2 = 55403 OR QD2 = 55404 OR
        QD2 = 55405 OR QD2 = 55406 OR QD2 = 55407 OR QD2 = 55408
        OR QD2 = 55409 OR QD2 = 55410 OR QD2 = 55411 OR
        QD2 = 55412 OR QD2 = 55413 OR QD2 = 55414 OR QD2 = 55415
        OR QD2 = 55416 OR QD2 = 55417 OR QD2 = 55418 OR
        QD2 = 55419 OR QD2 = 55454 OR QD2 = 55455 OR QD2 = 55440)
        CITY=1.
IF (QD2 = 55101 OR QD2 = 55102 OR QD2 = 55103 OR QD2 = 55104 OR
        QD2 = 55105 OR QD2 = 55106 OR QD2 = 55107 OR QD2 = 55108
        OR QD2 = 55116 OR QD2 = 55117 OR QD2 = 55119) CITY=2.
IF (QD2 = 88888 OR QD2 = 99999) CITY=9.
VARIABLE LABELS CITY 'CITY WHERE RESPONDENT LIVES'.
VALUE LABELS CITY 1 'Minneapolis' 2 'St Paul' 3 'Other' 9 'DK/RA'.
MISSING VALUES CITY (9).
FORMAT CITY (F2.0).
```

COUNTY County in which the respondent reports living. COUNTY is an unrecoded duplicate of question D1.

```
COMPUTE COUNTY = QD1.
RECODE COUNTY (88=99).
VARIABLE LABELS COUNTY 'COUNTY OF RESIDENCE'.
VALUE LABELS COUNTY 1 'Aitkin' 2 'Anoka' 3 'Becker' 4 'Beltrami' 5 'Benton'
        6 'Big Stone' 7 'Blue Earth' 8 'Brown' 9 'Carlton' 10 'Carver' 11 'Cass'
        12 'Chippewa' 13 'Chisago' 14 'Clay' 15 'Clearwater' 16 'Cook'
        17 'Cottonwood' 18 'Crow Wing' 19 'Dakota' 20 'Dodge'
        21 'Douglas' 22 'Faribault' 23 'Fillmore' 24 'Freeborn' 25 'Goodhue'
        26 'Grant' 27 'Hennepin' 28 'Houston' 29 'Hubbard' 30 'Isanti'
        31 'Itasca' 32 'Jackson' 33 'Kanabec' 34 'Kandiyohi' 35 'Kittson'
        36 'Koochiching' 37 'Lac Qui Parle' 38 'Lake' 39 'Lake of the Woods'
        40 'Le Sueur' 41 'Lincoln' 42 'Lyon' 43 'McLeod' 44 'Mahnomen'
        45 'Marshall' 46 'Martin' 47 'Meeker' 48 'Mille Lacs' 49 'Morrison'
        50 'Mower' 51 'Murray' 52 'Nicoller' 53 'Nobles' 54 'Norman'
        55 'Olmsted' 56 'Ottertail' 57 'Pennington' 58 'Pine' 59 'Pipestone'
        60 'Polk' 61 'Pope' 62 'Ramsey' 63 'Red Lake' 64 'Redwood'
        65 'Renville' 66 'Rice' 67 'Rock' 68 'Roseau' 69 'St Louis' 70 'Scott'
        71 'Sherburne' 72 'Sibley' 73 'Stearns' 74 'Steele' 75 'Stevens'
        76 'Swift' 77 'Todd' 78 'Traverse' 79 'Wabasha' 80 'Wadena'
        81 'Waseca' 82 'Washington' 83 'Watonwan' 84 'Wilkin' 85 'Winona'
        86 'Wright' 87 'Yellow Medicine'.
FORMAT COUNTY (F2.0).
```

DDREGION Development District or Financial Planning Region in the State of Minnesota. The state is divided geographically into 13 regions, where district 11 represents the seven county metro area. The variable is constructed through recoding the variable COUNTY into the appropriate region. Non-responses to the county variable were assigned a missing code of 99.

```
COMPUTE DDREGION=COUNTY.
RECODE DDREGION (35,45,54,57,60,63,68=1) (4,15,29,39,44=2)
        (1,9,16,31,36,38,69,72=3) (3,14,21,26,56,61,75,78,84=4)
        (11,18,49,77,80=5) (34,43,47,65=6) (6,12,37,76,87=7)
        (13,30,33,48,58=8) (5,71,73,86=9) (17,32,41,42,51,53,59,64,67=10)
        (7,8,22,40,46,52,71,81,83=11) (20,23,24,25,28,50,55,66,74,79,85=12)
        (2,10,19,27,62,70,82=13).
VARIABLE LABELS DDREGION 'DEVELOPMENT DISTRICT REGION'.
VALUE LABELS DDREGION 1 'District 1' 2 'District 2' 3 'District 3' 4 'District 4'
        5 'District 5' 6 'District 6E' 7 'District 6W' 8 'District 7E'
        9 'District 7W' 10 'District 8' 11 'District 9' 12 'District 10'
        13 'District 11'.
FORMAT DDREGION (F2.0).
```

GEOREGN Geographic area of household. Recoded version of the variable DDREGION, so the state is broken up into six areas, as follows: Northwest (regions 1,2); Northeast (region 3); Central (regions 4 through 7W); Southwest (regions 8,9); Southeast (region 10); Metro (region 11).

```
COMPUTE GEOREGN=DDREGION.
RECODE GEOREGN (1,2=1) (3=2) (4 THRU 9=3) (10,11=4) (12=5) (13=6).
VARIABLE LABELS GEOREGN 'GEOGRAPHIC REGION OF MINNESOTA'.
VALUE LABELS GEOREGN 1 'Northwest' 2 'Northeast' 3 'Central' 4 'Southwest'
        5 'Southeast' 6 'Metro'.
FORMAT GEOREGN (F1.0).
```

METRO Respondent's area of residence is in the Twin Cities Metro Area or outside the metro area. Respondents living in DDREGION code (13), actually District #11, were assigned to value 2, Twin Cities area residents, while others were assigned to value 1.

```
COMPUTE METRO=DDREGION.
RECODE METRO (13=2) (99=9) (ELSE=1).
VARIABLE LABELS METRO 'GREATER MN OR TWIN CITIES AREA'.
VALUE LABELS METRO 1 'Greater Minnesota' 2 'Twin Cities area'.
FORMAT METRO (F1.0).
```

WGHT Case-weighting factor to adjust for household size bias in the final sample of completed interviews. This variable weights each respondent's representation in the sample according to the number of adult members living in the household, with the purpose being to downweight respondents living in one-adult households, and upweight those living in two or more person households. The weighting factor was derived by looking at a frequency distribution of NADULTS in UNWEIGHTED form, and making the following computation:

VALUE		FREQUENCY (n)		PRODUCT
1	x	n	=	n
2	x	n	=	nn
3	x	n	=	nnn
4	x	n	=	nnnn
5	x	n	=	nnnnn
6	x	n	=	nnnnnn
		SUM		nnnnnnnnn

Weighting factor = sampling size (405)/sum of NADULTS.

For the MSS sample the weighting factor is approximately 0.5139593. Each respondent is assigned a case weight by multiplying his/her value of NADULTS by this weighting factor. This is accomplished in SPSS using the following statements:

```
COMPUTE WGHT=(NADULTS * 405/788).
VARIABLE LABELS WGHT 'CASE-WEIGHTING FACTOR'.
WEIGHT BY WGHT.
FORMAT WGHT (F17.16).
```

APPENDIX D

ADMINISTRATIVE VARIABLES

CDOC DATE INTERVIEW COMPLETED

Value	Frequency	Percent	Valid Percent	Cumulative Percent
124	24	5.8	5.8	5.8
125	20	4.8	4.8	10.7
126	24	6.0	6.0	16.6
127	25	6.1	6.1	22.7
128	15	3.8	3.8	26.5
129	32	7.9	7.9	34.4
131	24	5.8	5.8	40.2
201	21	5.2	5.2	45.4
202	19	4.6	4.6	50.0
203	14	3.6	3.6	53.6
204	7	1.8	1.8	55.3
205	25	6.1	6.1	61.4
207	14	3.4	3.4	64.8
208	11	2.8	2.8	67.6
209	17	4.2	4.2	71.8
210	14	3.4	3.4	75.3
211	16	4.1	4.1	79.3
212	17	4.3	4.3	83.6
214	12	2.9	2.9	86.5
215	8	2.0	2.0	88.6
216	8	1.9	1.9	90.5
217	2	.5	.5	91.0
218	4	.9	.9	91.9
219	10	2.5	2.5	94.4
221	1	.1	.1	94.5
222	2	.5	.5	95.1
223	6	1.4	1.4	96.4
224	10	2.4	2.4	98.9
225	5	1.1	1.1	100.0
Total	405	100.0	100.0	

CIID MCSR INTERVIEWER ID NUMBER

Value	Frequency	Percent	Valid Percent	Cumulative Percent
4	7	1.8	1.8	1.8
6	13	3.3	3.3	5.1
7	20	4.9	4.9	10.0
10	23	5.6	5.6	15.6
11	13	3.3	3.3	18.9
12	11	2.7	2.7	21.6
13	17	4.2	4.2	25.8
15	17	4.3	4.3	30.1
16	9	2.2	2.2	32.2
17	28	7.0	7.0	39.2
19	16	3.9	3.9	43.1
21	8	2.0	2.0	45.2
22	10	2.4	2.4	47.6
24	9	2.3	2.3	49.9
25	14	3.6	3.6	53.4
29	16	4.1	4.1	57.5
33	12	2.9	2.9	60.4
34	10	2.4	2.4	62.8
38	11	2.7	2.7	65.5
40	9	2.2	2.2	67.6
41	19	4.6	4.6	72.2
43	7	1.8	1.8	74.0
44	25	6.1	6.1	80.1
46	12	3.0	3.0	83.1
48	20	4.8	4.8	87.9
51	22	5.5	5.5	93.4
53	25	6.2	6.2	99.6
55	2	.4	.4	100.0
Total	405	100.0	100.0	

TIME LENGTH OF INTERVIEW IN MINUTES

Value	Frequency	Percent	Valid Percent	Cumulative Percent
5	4	1.0	1.0	1.0
6	13	3.2	3.2	4.2
7	47	11.5	11.5	15.7
8	63	15.5	15.5	31.2
9	88	21.7	21.7	52.9
10	69	17.1	17.1	70.1
11	28	6.9	6.9	76.9
12	31	7.7	7.7	84.6
13	14	3.6	3.6	88.2
14	13	3.2	3.2	91.4
15	17	4.2	4.2	95.6
16	6	1.5	1.5	97.1
17	5	1.3	1.3	98.4
18	3	.6	.6	99.0
19	2	.4	.4	99.4
20	2	.5	.5	99.9
22	1	.1	.1	100.0
Total	405	100.0	100.0	

MONITOR INTERVIEW MONITORED BY SUPERVISOR

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Yes	138	34.1	34.1	34.1
2 No	267	65.9	65.9	100.0
Total	405	100.0	100.0	

CRCON REFUSAL CONVERSION

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1 Yes	64	15.9	15.9	15.9
2 No	341	84.1	84.1	100.0
Total	405	100.0	100.0	

CCONT NUMBER OF CONTACTS TO COMPLETE INTERVIEW

Value	Frequency	Percent	Valid Percent	Cumulative Percent
1	113	27.9	27.9	27.9
2	62	15.4	15.4	43.3
3	54	13.5	13.5	56.7
4	46	11.4	11.4	68.1
5	28	7.0	7.0	75.1
6	22	5.5	5.5	80.6
7	14	3.6	3.6	84.1
8	8	2.0	2.0	86.2
9	14	3.4	3.4	89.6
10	8	1.9	1.9	91.5
11	7	1.8	1.8	93.3
12	4	1.0	1.0	94.3
13	5	1.3	1.3	95.6
14	4	1.0	1.0	96.6
15	2	.4	.4	97.0
16	2	.5	.5	97.5
17	2	.4	.4	97.8
18	2	.4	.4	98.2
19	1	.3	.3	98.5
22	3	.6	.6	99.1
23	2	.5	.5	99.6
30	2	.4	.4	100.0
Total	405	100.0	100.0	

APPENDIX E

ADMINISTRATIVE FORMS

Appendix E contains brief explanations for the contact record disposition categories and copies of the administrative forms used in MSS 2003. There were two primary administrative forms: the contact record with callback/refusal forms on the back, and the interviewer introduction. Contact records were used to record the time and status of each attempted contact with a respondent, the interviewer ID, and the final disposition of each attempted contact.

INTRODUCTION

MINNESOTA STATE SURVEY 2003 - PART 2

A. Hello, my name is _____. I'm a student calling from the University of Minnesota.

B. We're doing a study about state issues such as quality of life and other important issues.

C. I need to talk to the person in your household who is 18 or older and had the most RECENT birthday. Would that be you or someone else in your household?

(IF RESPONDENT ASKS, SAY, "It's a method of randomly selecting people within the household.")

D. Your answers will be put with a lot of other people's, so you can't be identified in any way. If there are questions you don't care to answer, we'll skip over them. Okay, let's begin.

(INTERVIEWERS: HOUSEHOLD MEANS WHATEVER THE RESPONDENT THINKS IT MEANS.)

ANSWERING MACHINE MESSAGE

This is _____calling from the University of Minnesota. We're doing a study about state issues such as quality of life and other important issues. Your household was selected to participate in our study, and we'll be calling you back another day. Or, to make sure your opinion is counted, you may call us collect at 612-627-4300. Thank you.

VERIFICATION SCRIPT

2003 MINNESOTA STATE SURVEY - PART 2

A. Hello, my name is _____. I'm a student calling from the University of Minnesota.

B. A few (days/weeks) ago we called and interviewed someone in your household. I'm calling to verify that a member of your household was interviewed on (DATE) by a member of our staff. Could I please speak with that person?

IF KNOWN/NEEDED: The person we interviewed is a (MALE/FEMALE) born in (YEAR).

WHEN CORRECT PERSON IS ON THE PHONE:

C. I'm just calling to verify that you were interviewed on (DATE) by one of our interviewers. The survey was about a number of topics such as quality of life, attorney certification, and organ donation.

Do you recall this interview?

D. **WHEN VERIFIED:** Thank you very much!

Callback time:

CONTACT RECORD (CATI SURVEY)
MINNESOTA STATE SURVEY 2003 - PART 2

[ID# __ __ __ __]

(CODER USE ONLY)
ID __ __ __ __

DATE: _____ _____

TIME: _____ _____

Completed
Partial
disc/not working
Not home phone
Physical problem _____
Lang. problem _____
1st Refusal
2nd Refusal
Callback
Other
Ans Machine - LEFT MSG
Ans Machine - No msg left
No Answer / Busy

Completed
Partial
disc/not working
Not home phone
Physical problem _____
Lang. problem _____
1st Refusal
2nd Refusal
Callback
Other
Ans Machine - LEFT MSG
Ans Machine - No msg left
No Answer / Busy

INTERVIEWER: _____ _____

CONTACTS: _____ _____

DATE: _____ _____

TIME: _____ _____

Completed
Partial
disc/not working
Not home phone
Physical problem _____
Lang. problem _____
1st Refusal
2nd Refusal
Callback
Other
Ans machine - LEFT MSG
Ans machine - No msg left
No Answer / Busy

Completed
Partial
disc/not working
Not home phone
Physical problem _____
Lang. problem _____
1st Refusal
2nd Refusal
Callback
Other
Ans Machine - LEFT MSG
Ans Machine - No msg left
No Answer / Busy

INTERVIEWER: _____ _____

CONTACTS: _____ _____

REPAIR OPERATOR
(after 4 NAs or busy):
Dial 1-800-573-1311
Date: ___/___
I-ID __ __
Working 01
Not working 02
Business 03
Other (SPEC) 04
_____
_____

SUPERVISOR: _____

EDITED: Y N BY: _____

TIME START _____

TIME END _____

INTERVIEW IN MIN _____

INTERVIEWER ID# _____

MINNESOTA STATE SURVEY 2003 - PART 2

CALLBACK FORM

	Date___/___	Date ___/___	Date___/___	Date___/___
Speak with resp in person?	Yes / No /DK	Yes / No / DK	Yes / No /DK	Yes / No / DK
Respondent is:	F / M / DK	F / M / DK	F / M / DK	F / M / DK
Respondent's name:	_____	_____	_____	_____
Who arranged callback?	Resp / Else	Resp / Else	Resp / Else	Resp / Else
Callback Time:	___:___	___:___	___:___	___:___
Date:	___/___	___/___	___/___	___/___
Was appointment:	Firm/Prob/?	Firm/Prob/?	Firm/Prob/?	Firm/Prob/?
Was resp open/cooperative?	Yes / No / DK	Yes / No / DK	Yes / No / DK	Yes / No / DK

Comments/Information: _____

_____

REFUSAL FORM

Respondent is: Female / Male / DK **Was respondent person who refused?** Yes / No / DK

Person answering phone was: Female / Male / DK **Were they busy or inconvenienced?** Yes / No / DK

When was interview terminated? (*Circle one.*) INTRO A INTRO B INTRO C INTRO D INTRO E

QUESTION #:_____ Other (SPECIFY)_____

What reasons were given for refusal? (*Circle all that apply.*) **What arguments did you use?**

REASON	ARGUMENTS USED
a. NONE (person hung up)	_____
b. Not interested	_____
c. Too busy	_____
d. Too old	_____
e. Has unlisted phone number	_____
f. Bad health; sick	_____
g. Doesn't like surveys	_____
h. Doesn't like phone surveys	_____
i. Doesn't think it's confidential	_____
j. Doesn't know about the topic	_____
k. Doesn't think topic is important	_____
l. Other (SPECIFY_____	_____
_____	_____

Other comments or information:_____

_____

_____

CONTACT RECORD DISPOSITION CATEGORIES

There were 10 possible disposition categories for each contact that was made. A brief explanation for each of these disposition categories is presented below.

Disposition	Explanation
Completed	All questions in the interview schedule were asked.
Partial	The interview began, but was not completed. In such a case, interviewers were instructed to schedule an appointment to finish, and fill out the callback form on the back of the contact record. If a respondent declined to complete the interview, the refusal form was completed.
Disconnected/not working	The number was not in operation.
Not Home Phone	The number was not a residential telephone.
Physical problem	Respondent was reached, but could not complete the interview, for example, because of illness or hearing impairment.
Language problem	Respondent was reached, but could not complete the interview because English is not the primary language spoken in the household.
Refusal and Second refusal	The respondent declined to participate, even following appropriate prompts by the interviewer. Interviewers were instructed to complete the refusal form.
Callback	A callback was scheduled. The appointment form was filled out.

Disposition	Explanation
Other	Reserved for contingencies not covered by the other dispositions, for example, respondent will call back to MCSR.
Answering Machine	The first time a respondent's answering machine was reached, the interviewer left a message stating the nature of the survey and that she or he would receive another call from MCSR. The message also suggested that the respondent call MCSR to ensure inclusion of her or his opinion. This message was left periodically on subsequent attempts where the same answering machine was reached, while on other attempts no message was left.
No Answer/Busy	All attempts during a shift resulted in the phone ringing six times without being answered; or every attempt to contact the person during the shift resulted in a busy signal. If the respondent could not be contacted on a minimum of ten separate shifts, the telephone number was eliminated.

STATEMENT OF PROFESSIONAL ETHICS

All interviewers working for the Minnesota Center for Survey Research (MCSR) are expected to understand that their professional activities are directed and regulated by the following statements of policy:

All research projects conducted at MCSR have received approval from the University's Committee on the Rights of Human Subjects. When study findings are made available, the utmost care is taken to ensure that no data are released that would permit any respondent to be identified.

Interviewers perform a professional function when they obtain information from individuals. Interviewers are expected to maintain professional ethical standards of confidentiality regarding what they hear in telephone interviews or see in a mail survey form. All information about respondents obtained during the course of research is privileged information; whether it relates to the interview itself or to the respondent's home, family, or activities. This information is confidential and should not be discussed with anyone who is not affiliated with the research project.

In addition, blank survey forms, survey questions, and other survey materials should not be distributed to or discussed with anyone who is not affiliated with the research project.

I hereby agree to abide by the policy statements above, and in signing this statement I testify that I, in fact, agree to abide by and understand the contents of this statement. I also understand that if I fail to abide by the policies presented above, my actions constitute grounds for dismissal.

_____

(Please print name here)

_____ Date _____

(Please sign name here)

A SURVEY
ON HOW THE PUBLIC PERCEIVES A SPECIALIST*

A public survey completed in 1986 by the American Bar Foundation provides empirical evidence that the public expects a lawyer who claims to be a specialist to have certain qualifications not necessarily expected of a non-specialist in the same field of law, and to do a better job than a non-specialist. In short, the term "specialist," in the mind of the public, is a "quality" term. This is important to the subjects of lawyer competence, specialization and advertising. Why?

First, it reaffirms the obligation of the legal profession to assure the public that a lawyer claiming to be a specialist meets the standards the public expects of the lawyer. Second, it justifies an appropriate regulation of the use of the term "specialist." This immediately touches on lawyer advertising.

The United States Supreme Court, in its Bates and R.M.J. decisions, (433 U.S. 350 and 455 U.S. 191) indicated quite clearly that the states may still, consistent with constitutional guidelines, regulate certain aspects of lawyer advertising. This was so, notwithstanding the removal by the Court of much, but not all, of the then existing broad ethical restrictions on lawyer advertising. The Court held that where a particular type of advertising could be shown to be "inherently misleading," or "when experience has proven that in fact such advertising is subject to abuse," a state could regulate its use so long as the restriction was not unreasonable. More specifically, the Court indicated in both opinions that the use of a "quality" term in advertising might well be an example of a situation in which regulation of its use would be proper.

This brings us to the use of the term "specialist." Lawyers are using the term "specialist" or its variations with increasing frequency in their advertising. What has the legal profession prescribed for its use?

This analysis was prepared by the American Bar Association's Standing Committee on Specialization. The Committee gratefully acknowledges the contribution of former Chair George H. Nofer to the preparation of this article.

Rule 7.4 of the Model Rules of Professional Conduct (MRPC), the ABA's most recent recommendation to the states for rules on lawyer conduct, restricts the use of the word "specialist" in lawyer advertising. (Its predecessor, DR 2-105 of the Code of Professional Responsibility, contains a similar restriction.) While the exact form of the rule may vary as the MRPC is adopted from state to state, in the Model it reads as follows:

> A lawyer may communicate the fact that the lawyer does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:
>
> (a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
>
> (b) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation; and
>
> (c) (Provisions on designation of specialization of the particular state.)

Paragraph (c) of the Rule contemplates that the states, under the authority of the state Supreme Courts, will adopt reasonable regulations on the use of the term "specialist." To that end, the ABA Standing Committee on Specialization has been assigned the role of assisting the states in the formulation of Specialization Plans and specialty standards for the various areas of legal practice. The Committee was concerned, however, that if the term "specialist" were not deemed a quality term, any attempt to regulate its use through the establishment of a Specialization Plan could be defeated. Therefore, the Committee decided to determine whether the term "specialist," when used by a lawyer in advertising the lawyer's practice, is a "quality" term. If it is, then its use in lawyer advertising could be regulated by a state, lest its indiscriminate use could be misleading. The regulation, however, must be reasonable and no greater than is necessary to prevent the recognized problem.

As far as the committee knows, this specific rationale for Rule 7.4(c), i.e. that the term "specialist" is a "quality" term and therefore may be regulated, has not yet been tested in any court. At the various conferences which the Committee has held semi-annually during the past four years, this rationale has been presented without challenge. The persons who were invited to these conferences, in different groups, were state Supreme Court Chief and Associate Justices, Presidents-Elect of state bar associations, Executive Directors of state bar associations, and various chairmen of specialization committees. However, many of them raised the question as to what evidence exists to substantiate to a court that the word "specialist" is a "quality" term. Would a court be asked merely to take judicial notice of the fact that in the eyes of the public lawyers who said they were specialists were thereby claiming to have certain qualifications in the specialty field that non-specialists might not have?

We know that courts are reluctant to take judicial notice of matters that are related to constitutional issues, especially ones dealing with First Amendment rights. Therefore, the committee was urged to commission a carefully and professionally prepared survey to determine the public's perception of the qualifications of a lawyer who claimed to be a specialist. It was believed this would determine whether the term was truly a "quality term," and in addition would give some indication as to the specific qualifications the public expects to find in a specialist.

The survey has been completed. We were very fortunate in being able to enlist the professionals associated with the ABA Foundation. They designed a telephone questionnaire focusing on the exact question, but also including appropriate supporting questions to assure a statistically sound random sample. Two states were chosen, Minnesota which has no established specialization plan, and Florida which has a very extensive one. A broad coverage by telephone was used for both states. The Survey Research Laboratory of the University of Illinois conducted 1000 telephone interviews, 500 in each state. All of this was done using well-established statistical techniques to assure a proper random and unbiased sample.

The Committee believes the results clearly demonstrate that the term "specialist," in the eyes of the public, is a "quality" term. Here are some of the salient points:

92 percent in both states said it was either "very likely" or "likely" (as opposed to "unlikely" or "very unlikely") that a lawyer who was a specialist would be more efficient in handling matters in the specialty than a non-specialist;

94/93 percent (the figure for Florida is listed first in each instance) said it was either "very likely" or "likely" that the specialist would provide better advice in the specialty area;

97/94 percent responded in the same manner that the specialist would have more experience in the area of law involved;

79/88 percent responded in the same manner that the specialist would have additional formal education in the area of law involved;

73/71 percent said "yes" when asked whether lawyers should meet certain standards in order to use the term "specialist;"

The question was put as to whether additional education in the specialty area, without more experience in the area, was deemed sufficient to qualify as a specialist. 52/58 percent said "yes," and 30/24 percent said "no:"

The inverse was put as to whether more experience in the specialty area, without additional formal education in the specialty area, would be deemed sufficient to qualify as a specialist. 66/69 percent said "yes," and 18/15 percent said "no:"

It is significant to note that 92/90 percent were aware that lawyers specialize, even though 73/82 percent did not know whether their state imposed requirements before lawyers could call themselves specialists; this in spite of the fact that Florida has a Specialization Plan.

The Committee believes the survey establishes that the public perceives a "specialist" as a lawyer who has certain qualifications not necessarily expected of a non-specialist in the same field of law, and will do a better job. Clearly, the term "specialist" as perceived by the public is what the Supreme Court meant by a "quality" term. It follows that the public could be misled by a lawyer claiming to be a specialist and yet does not have the qualifications associated with that term. The use of the term may and should be regulated by a state.

In substance, the ABA Model Plan of Specialization, as well as the various specialization plans that have been adopted in 12 states (and pending court approval in another 11), are the answers. They represent an appropriate and reasonable regulation on the use of the term "specialist," or variations of that term such as "recognized specialist," "certified specialist," or "designated specialist." The adoption of such a plan, together with Rule 7.4(c) limiting the use of the term "specialist" to those who qualify under the specialization plan, is an appropriate and reasonable limitation.

Of course, that is only one purpose of a specialization plan. Its main purpose is to establish standards for lawyers who want to be specialists; and by supervising the achievement of those standards, give some assurance to the public that a lawyer who claims to be a specialist has the qualifications normally attributed to that term.

ABA Standing Committee on Specialization
Joan Wolff, Chair
J. Rex Farrior, Jr.
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April 1988

The Public's Perception of the Qualifications of a Lawyer Specialist

A report prepared for the
Standing Committee on Specialization
of the
American Bar Association

ANALYTICAL REVIEW OF SURVEY

Submitted by
Margaret A. Troha
American Bar Foundation

May 1986

This report presents the results of 1,009 telephone interviews conducted with Florida and Minnesota residents concerning their perceptions about the qualifications needed by a lawyer who wants to be considered a specialist. Florida and Minnesota were chosen as sites to provide a comparison between a locale where a formalized specialization program is in place and one where no such program has been adopted. Florida currently has such a specialization program; Minnesota does not.

The telephone interviews in each state were conducted by the Survey Research Laboratory (SRL) of the University of Illinois. To obtain a representative group of respondents SRL used random-digit dialing methods to select households and a screening matrix to choose randomly among the persons in the household who fit the criteria for sampling. In order to focus on individuals who were more likely to have come in contact with lawyers, only those who were at least 23 years of age were interviewed. Lawyers and their spouses were omitted from the sample. A report submitted by SRL, which provides a complete description of the sample design, as well as a copy of the survey instrument, is attached.

Profile of the respondents

Of the 1,009 interviews, 503 were completed by residents of Florida and 506 by residents of Minnesota. Table 1 presents the general demographic characteristics of these respondents for each state. It should be noted that there are some statistically significant differences in the demographic make-up of the interviewed groups in the two states. There were more persons over 60 years of age in the Florida sample (34%) than there were in the interviewed group in Minnesota (23%); and, likewise, a higher percentage of respondents in Florida reported that they were retired or disabled - 31% compared to 17% of the Minnesota respondents. Alternatively, a large number of Minnesota respondents fall into the youngest age group - 21% compared to 16% in Florida. Minnesota respondents were also more likely to report that they work in non-white collar settings, principally as farmers of farm laborers. Another significant difference between the respondent groups was based on marital status. There were fewer currently divorced respondents among the Minnesota sample than in the Florida group (8% versus 14%). The other characteristics are fairly similar in the two states. The sample drawn from each state has about the same proportion of males and females and each has about the same distribution across educational background, household income, and location of resident.

Since there are significant differences in the demographic make-up of the two samples, caution should be used in attributing any observed response variations between the two sample groups to the presence or absence of a formalized specialization program. Variations could be the result of the demographic differences that exist between the two states. Where analysis of responses showed that demographic characteristics were related to attitudes about, or use of specialists, this fact is reported in the text.

Use of lawyers and awareness of specialization

Table 2 provides an overview of the use of lawyers by the respondents in both Florida and Minnesota. Both state samples are fairly similar in respect to the proportion of respondents who knew or were related to lawyers, (28% in Florida, 25% in Minnesota). Likewise, the majority of respondents in both states have used a lawyer for some matter at least once; only 23% of those in Florida and 27% of the Minnesota sample have never used a lawyer. Thirty-five percent of those in Florida and 31% of the respondents in Minnesota reported having used lawyers for both personal and business matters. Another 36% in Florida and 35% in Minnesota reported using a lawyer for only personal matters. As one might expect, few respondents said they had used lawyers for business matters only.

Though respondents in both states were fairly similar in regard to the type of contact they had with lawyers, the responses to this item were nonetheless reexamined in terms of the demographic characteristics of the respondents. Predictably, in both states those who were under 30 years of age were less likely to have used the services of lawyers than those 30 years old or older. Those who indicated that they had never married were also less likely to have consulted a lawyer. Respondents in each state who had over $40,000 in household income during 1985 were more likely than those with less income to report using lawyers.

Among those who had used a lawyer at least once, respondents in Florida reported more frequent contacts with lawyers than did their Minnesota counterparts. Twenty percent of those in Florida reported frequent contacts with lawyers. The comparable percentage in Minnesota was 13%. Respondents in Florida were also more likely to report that a lawyer they used was a specialist in some area of the law; 55% of legal service users in Florida answered "yes" when asked if a lawyer they used specialized in any area of the law, while only 34% did so in Minnesota. It is worthy of note that only 8% of the interviewed groups in either state said that they did not know whether their lawyers were specialist.

While both the Florida and Minnesota respondents were clearly aware that some lawyers specialize in particular areas of law (92% in Florida reported they knew lawyers specialized and 90% in Minnesota reportedly knew), the majority of respondents did not know if their state had any requirements which lawyers must meet before calling themselves "specialists". In Florida, 73% of the respondents said that they did not know if their state had such requirements and in Minnesota, 82% of the respondents indicated that they did not know.

The three questions that showed a difference in response between the responses in the two states: frequency of contact; use of a specialist; and, awareness of state requirements were examined for any associations they might have with the demographic background characteristics of the respondents. Table 3 presents some of the results of this more detailed analysis focussing on those respondents who reported some contact with lawyers. Panel A of Table 3 shows that the respondents aged 30 to 59 in Florida and Minnesota were not significantly different in the frequency with which they used lawyers. However, both the youngest group and the most senior group showed significant differences. In Florida both of these age groups reported more frequent contacts with lawyers than did their counterparts in Minnesota. Among the under 30 age group in Florida, only 9% said that they had used a lawyer only once; the comparable figure was 40% in Minnesota. Correspondingly, 16% of the youngest group in Florida reported that they used lawyers frequently, but only four percent of the youngest group in Minnesota reported frequent use of lawyers.

Among the respondents who were 60 years old or older, those in Florida were less likely to report having used a lawyer only once; 8% in Florida said they had used a lawyer only once while 19% did so in Minnesota. That group also had a higher percent of respondents who reported using lawyers frequently - 30% as compared with 15% in Minnesota.

Panel B of Table 3 presents, for each state, the percentage of each age group who reported that they used a lawyer who was a specialist. As the asterisks indicate, there is a relationship between state and use of a specialist even after controlling for differences in age. Each group in Florida had a higher percentage of respondents who had used the services of a specialist as compared to the same groups in Minnesota; as a matter of fact, the majority of respondents in three of the four age groups in Florida reported using a lawyer who was a specialist. None of the groups of Minnesota respondents had a majority reporting

that they had used a specialist. This may not be surprising, given that Florida does have a formalized specialization program, and therefore, has a larger percentage of lawyers who could identify themselves as "specialists" to their clients. None of the demographic factors were related to the answers respondents gave about the existence of state requirements regarding the use of the term specialist, so no figures are reported for that question. Even those who were related to or close friends of lawyers were no more likely than other respondents to know whether restrictions on the use of the term "specialist" were in effect in their state.

Perceptions about specialists

Respondents were asked whether lawyers should have to meet certain standards before calling themselves "specialist." A strong majority of respondents in each state said that they should. Table 4, Panel A, presents the responses given to this question. Those who indicated that they thought standards should be imposed were asked to suggest qualifications which might be appropriate. While the responses were in the respondents' own words, it was possible to categorize the answers in a general way. A summary of these responses is presented in Panel B of able 4. The most frequently mentioned qualifications given by respondents in both states were: additional education; experience of some duration; and an apprenticeship. Those who gave multiple responses to this question most frequently combined requirements of additional education and experience, and additional education and an apprenticeship. Among the Florida respondents 35% suggested one requirement, 25% made comments that could be summarized into two of the categories, and 3% made suggestions that included three general requirements. The comparable figures in Minnesota were: 29%, 23%, and 4%.

After being asked to suggest appropriate qualifications for specialists, the respondents were then asked to rate how likely specialists were to have qualifications such as more education or more experience and how likely they were to be more efficient and to give better advice. Table 5 presents the responses given this short series of questions. Respondents in both Florida and Minnesota were quite similar in their ratings for these questions. On the whole, the respondents felt that specialists were likely to have each of these qualifications: very few chose to rate specialists as being unlikely to have these traits.

A full majority of respondents in each state (55% in Florida and 52% in Minnesota) felt that it was "very likely" that specialists would have more experience in the area of law involved than their nonspecialist colleagues. No other question had a full majority expressing that degree of high expectation. For instance, they were less willing to say that specialists would "very likely" have more formal education; though they did not say it was "unlikely" to be the case (in Florida 40% said "very likely" and 39% said "likely"; and, in Minnesota 34% said "very likely" and 44% said "likely".) Similarly, the respondents in both states felt it was "likely" that specialists would be more efficient and provide better advice, though the ratings were split between those who thought it was "very likely" and those who simply said it was "likely".

Additional analysis of these perception questions showed that some responses were related to demographic characteristics or to the type of contact the respondents had with lawyers. For instance in both states women, more so than men, said that specialists would be "very likely" to give better advice and to have more experience than nonspecialists. They did not differ however in their rating of specialists' efficiency or likelihood of having additional education. Several characteristics were found to be related to how the respondents answered the question about added education. In Florida, the younger respondents; those with a college degree; those who had household incomes higher than $25,000; and, those in professional or managerial occupations were among those who were less likely to say that specialists would be "very likely" to have additional education. In Minnesota, the demographic characteristics related to the responses were education and age; those with a college degree and those who reported that they were in their 30s were the ones who did <u>not</u> tend to state that it was "very likely" that specialists had additional education.

The type of lawyer contact the respondent reported also showed some association with two of the perception questions. In Minnesota, respondents who reported that they had used lawyers for both personal and business matters tended to state that specialists were "very likely" to have more experience than other practitioners. Those who had never used a lawyer, and those who had used them only for one type of matter were less positive on this score. And, in Florida, those who reported using a lawyer who was a specialist were more likely to report that specialists gave better advice.

Finally, the respondents were asked a pair of parallel questions about specialists. They were asked if a lawyer could be considered a specialist if that lawyer had additional education in an area of the law but not necessarily more experience. Then, they were asked if the lawyer could be considered a specialist if that lawyer had more experience in some area of the law but not necessarily more formal education. Table 6 presents the responses provided for these two questions. In Florida 66% of the sample indicated that they would consider a lawyer a specialist if that lawyer had more experience though not more education, and in Minnesota 69% would. Fewer, though still a majority, would consider a lawyer a specialist if that lawyer had additional formal education though not more experience (in Florida 52% and in Minnesota 58%). Almost a third of the Florida respondents (30%) said, "no, formal education is not sufficient" and in Minnesota 23% said "no."

Interestingly, when analyzed together so that the joint responses given for these two questions are reported, one notes that very few respondents thought that neither more education alone nor more experience alone would provide sufficient qualification for use of the term, specialist. Only 5% of the respondents in Florida, and 3% in Minnesota answered "no" to both items. On the other hand, a sizable percent in each state were ready to accept either of these qualifications as a sufficient reason for considering a lawyer to be a "specialist." In Florida 33% were ready to do so and in Minnesota 41% of the sample said that either more experience or added education would warrant calling a lawyer a "specialist".

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Table 1. Demographic Characteristics by State

Background Categories:	States	
	Florida*	Minnesota*
Sex:		
Male	44%	42%
Female	56	58
	(N=503)	(N=506)
Age group:**		
23-29	16%	21%
30-39	22	25
40-59	28	31
60 +	34	23
	(N=495)	(N=496)
Education:		
<12 years	13%	14%
12 years	36	40
13-15 years	26	25
16 + years	26	21
	(N=501)	(N=501)
Marital Status:**		
Married	58%	65%
Widowed	12	11
Separated	1	2
Divorced	14	8
Never married	14	13
	(N=502)	(N=505)
Occupation:**		
Profesn/Techn	15%	15%
Admin/Mngr	9	12
Sales/Clerical	19	15
Other employment	14	26
Keeping house	8	10
Retired/Disabled	31	17
Other unemployed	4	4
	(N=501)	(N=504)
1985 Household income:		
<$15,000	20%	21%
$15,000-$24,999	24	25
$25,000-$39,999	30	32
$40,000 +	27	22
	(N=422)	(N=446)
Location of Residence:		
Metropolitan area	64%	63%
Elsewhere	36	37
	(N=489)	(N=497)

* Some of the columns do not equal 100% due to rounding.

** Statistically significant difference between states at .05 level of significance.

Table 2. Use of Lawyers and Awareness of Specialization by State

	Florida	Minnesota
Related or close friend of lawyer:	28% (N=501)	25% (N=506)
Used Lawyer for:		
Both business & personal matters	35%	31%
Personal matters only	36	35
Business matters only	6	6
Never used a lawyer	23	27
	(N=503)	(N=504)
Frequency of contact:*		
Once	16%	24%
Several times	64	63
Frequently	20	13
	(N=387)	(N=370)
Reported using a specialist:*	59% (N=344)	34% (N=328)
Aware that lawyers specialize:	92% (N=501)	90% (N=506)
Aware of state setting requirements for use of term "specialist":*		
Yes	17%	11%
No	10	8
Don't Know	73	82
	(N=501)	(N=506)

*Statistically significant difference between states at .05 level of significance.

Table 3. Comparison of Frequency of Contact and Use of a Specialist, Controlling for Age Category.

	Florida		Minnesota	
I. Frequency of contact				
A) 23-29 years of age*				
Once only	9%		40%	
Several times	75		56	
Frequently	16		4	
	(N=44)		(N=52)	
B) 30-39 years of age				
Once only	21%		21%	
Several times	54		64	
Frequently	26		15	
	(N=82)		(N=91)	
C) 40-59 years of age				
Once only	16%		16%	
Several times	61		66	
Frequently	23		18	
	(N=114)		(N=135)	
D) 60+ years of age				
Once only	15%		30%	
Several times	67		61	
Frequently	18		8	
	(N=140)		(N=82)	
II. Reported using a specialist				
A) 23-29 years of age*	68%	(N= 40)	39%	(N= 44)
B) 30-39 years of age*	57%	(N= 75)	35%	(N= 88)
C) 40-59 years of age*	65%	(N=100)	37%	(N=124)
D) 60+ years of age*	42%	(N=123)	23%	(N= 65)

*Statistically significant difference between states at .05 level of significance.

Table 4. Attitudes Regarding Standards to be Applied to Specialists

	Florida	Minnesota
A. Lawyers should meet certain standards in order to use term "specialist":		
Yes	73%	71%
No	13	13
Don't Know	14	16
	(N=503)	(N=506)
B. Types of qualifications needed by specialists:		
1. Additional education	48%*	45%*
2. Experience of some duration	32	25
3. An apprenticeship	16	23
4. More training (not specified as formal education or experience)	10	13
5. Specialized knowledge (not specified how acquired)	10	14
6. Past success, reputation, skillful handling of matters	2	2
7. Test or examination of some sort	10	11
8. Other (general comments)	15	15
	(N=319)	(N=287)

* In Florida, there were 49 respondents who did not give any qualifications and 70 did not do so in Minnesota. The percentages do not add to 100% since some respondents gave extended comments that included several categories.

Table 5. Expectations Regarding Specialists as Compared to Nonspecialists by State

	Very Likely	Likely	Unlikely	Very Unlikely	(N)
A. Florida:					
More efficient in handling matters than a nonspecialist	48%	44	5	3	(445)
Provides better advice	48%	46	4	1	(441)
Would have more experience in the area of law involved	55%	42	2	1	(434)
Would have additional formal education in area	40%	39	17	4	(429)
B. Minnesota:					
More efficient in handling matters than a nonspecialist	46%	46	5	3	(488)
Provides better advice	45%	48	5	3	(468)
Would have more experience in the area of law involved	52%	42	4	3	(464)
Would have additional formal education in area	34%	44	17	6	(455)

Table 6.

Sufficiency of Education or Experience as Qualification for Use of term "Specialist"

	Florida	Minnesota
A. Additional formal education — all that is necessary for specialist:		
Yes	52%	58%
No	30	24
Don't Know	18	18
	(N=503)	(N=506)
B. More experience in area — all that is necessary for specialist:		
Yes	66%	69%
No	18%	15%
Don't Know	16%	16%
	(N=503)	(N=506)

November 14, 2003

Wesley W. Horton, Esquire
Chair Committee on Professional Ethics
Connecticut Bar Association
90 Gillette Street
Hartford, CT 06105

RE: Position of the CBA Standing Committee on Workers' Compensation Certification, The Examining Committee and The Workers' Compensation Section on Proposed Changes to Rules of Professional Conduct 7.4 through 7.4C

Dear Attorney Horton:

Thank you for postponing the vote of your committee on the proposed changes to Rules 7.4 through 7.4C so that the Standing Committee on Workers' Compensation Certification could do a more thorough evaluation of the proposal and present its concerns in a more comprehensive way. This document presents our thoughts and positions on the proposed changes, which we believe are inappropriate and should be rejected or modified for various reasons. We request that this document be circulated within your committee so that members may review and consider it before discussing and voting on the proposals. We would appreciate an opportunity to verbalize our concerns before your Committee votes on this proposal.

Current Connecticut Rule

Existing Rule 7.4 and Comment:

- The Rule prohibits a lawyer from stating or implying that he or she is "a specialist" unless the lawyer is "certified" by an entity approved by the Rules Committee of the Superior Court in one of the twenty-six areas enumerated and described in Rule 7.4A.[1]
- The Comment prohibits describing one's practice as "limited to" or "concentrated in" particular fields.
- The Comment states that all of these terms "have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be

[1] Patent, Trademark and Admiralty attorneys can use the term "specialist" without actual certification, though these areas are also recognized certification areas in Rule 7.4A.

misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice."

Existing Rule 7.1

- Prohibits a lawyer from making a "false or misleading communication."

Proposed Changes[2]

The pending proposal would:

- Permit any lawyer to use the terms "specialist", "specialty" or "specializes in", without certification, so long as the communication is not false and misleading.
- Permit only lawyers who have been certified by an entity approved by the Rules Committee to use the term "certified specialist".
- Permit any lawyer to describe a practice as "limited to", or "concentrated in", so long as the claim is not "false and misleading".
- Delete the reference in the Comments to any "secondary meaning" attached to these terms.

Position of the Standing Committee on Workers' Compensation Certification on pending proposal

- The claim of "specialist", "specialize in" and "specialty" should be reserved to lawyers who have been certified as specialists by an approved entity. The public infers from these labels that a lawyer has met certain qualifications of experience, additional/current training, testing and has been certified by the state, directly or indirectly, yet the pending proposal applies no minimum standards to non-certified "specialist" lawyers. The proposed rule further misleads the public by permitting two groups to use the same "specialist" label while applying two very different standards to each group. This framework violates Rule 7.1 because it is misleading, it omits important facts and it permits an implied comparison (i.e. relative equality) between lawyers' services that is generally false in light of the very different standards applied to each group. Limiting the use of "specialist" terms to certified lawyers would communicate accurate information to the public about available legal resources while encouraging certification programs, continuing education and increased competence of lawyers generally. The majority of states with certification programs have similar restrictions, and similar restrictions have survived constitutional challenge in several courts.
- The claim of practice "limited to" or "concentrated in" particular areas should not be permitted without some clarification of the terms and perhaps a requirement for simple disclaimers of state approved certification. Surveys show that the public tends to infer similar qualifications and state approval when these terms

[2] See Appendix A, a copy of Rule 7.4 reflecting current language and proposed revisions.

are used; and even if not, use of the terms without defining some threshold levels of "limitation" and "concentration" is likely to mislead and confuse.

- The proposed "false and misleading" test conflicts with Connecticut's Rule 7.1 which prohibits "false or misleading" communications. The proposal does not recommend any change to Rule 7.1 and we urge the Committee to retain the current standard, which is the same as the current ABA Model Rule and provides a time-tested, unambiguous and broad protection for consumers of legal services.
- Regulating the use of these terms using only the Rule 7.1 prohibition against "false or misleading" communications will be ineffective in all but the most egregious cases of blatant violation, and will encourage some lawyers to make unsupportable claims of "specialist", which will place great pressure on other lawyers to follow suit in order to be competitive in the public marketplace.

Discussion

History

In 1977, the ABA amended Model Code DR 2-105 prohibiting a lawyer from advertising as a "specialist", or as limiting his or her practice, unless the lawyer used the designation established by the appropriate bar organization or was certified. This change was part of a general move towards encouraging certification programs among the states as a method of improving the competence of lawyers and the quality of legal resources available to the public, by setting reasonable standards of knowledge, experience, continuing education, etc. When the ABA moved away from the Model Code, and into the Model Rules format, this prohibition was carried over to the initial version of Model Rule 7.4.[3] In 1989 the ABA amended the Comment to delete the prohibition on use of the phrases "limited to" and "concentrated in", but kept the prohibition against use of "specialist", "specializes in" and "specialty" by anyone not formally certified, and the reference to a "secondary meaning" implied by these terms.[4] In 1992 the ABA reversed course, amending the Comment to specifically authorize use of the "specialist" terms[5] by any lawyer, without certification, subject only to the "false or misleading" standard of Rule 7.1. All references to the "secondary meaning" of these terms was deleted from the Comment. Where a state chose to have a certification program, lawyers who qualified for certification were permitted to add "certified" to

[3] See Appendix B, the initial version of Model Rule 7.4, some commentary regarding its adoption in 1983, and a copy of its predecessor, DR2-105, for comparison. The language of the initial Model Rule 7.4 and its Comment is, with respect to this issue, identical to the existing Connecticut Rule.

[4] See Appendix C, the 1989 ABA changes to the Model Rule 7.4 Comment.

[5] In all of these changes the words "specialist", "specializes in" and "specialty" have traveled together, and all have been prohibited, or permitted, as a group, with each change by the ABA. For simplicity, we will simply refer to the term "specialist", or "specialist" terms, hereafter in this document, with the understanding that all of the terms are included.

claims of "specialist", but certification was no longer a pre-requisite to use the label "specialist".[6]

Connecticut's existing Rule 7.4 and Comment appear identical to the original 1983 ABA Model Rule.[7] It appears that Connecticut has never amended Rule 7.4 to conform to the 1989, 1992 or more recent ABA suggested revisions. Thus use of the "specialist" terms by Connecticut attorneys is prohibited, except by attorneys who have been certified by a Rules Committee approved certifier.[8] The Comment to Connecticut's Rule contains the original ABA language stating that "these terms have acquired a secondary meaning implying formal recognition as a specialist...".

The Public's perception of "specialist" terms

The earliest survey we have found is a 1986 American Bar Foundation survey that was commissioned by the ABA Standing Committee on Specialization to evaluate the public's perception of the qualifications of a lawyer who claimed to be a "specialist". This survey confirmed that the public does expect a lawyer who claims to be a "specialist" to have met certain additional qualifications and standards not expected of a non-specialist (more experience, additional formal education in the specialty area, certain standards) and that such a lawyer would do a better job generally with a legal assignment. See, ABA Standing Committee on Specialization, *The Public's Perception of the Qualifications of a Lawyer Specialist* (1986), reprinted in ABA Standing Committee on Specialization, Information Bulletin Number 10 at 20-32 (1988). This survey supports the 1983 "secondary meaning" language, and that the term "specialist" is a "quality" term, the use of which may be reasonably regulated.

It is unclear what caused the ABA to reverse course, permit claims of "specialist" without certification and remove the "secondary meaning language from its model in 1992, nearly ten years later. We have consulted with the staff at the ABA who state they are unaware of any new empirical data, such as surveys of consumers of legal services, to explain this change. We have not been referred to any ABA Committee reports or empirical data to support a new premise - that use of the term "specialist" no longer implies additional qualifications or formal recognition. [9]

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[6] Since 1992 the ABA has made additional amendments to Model Rule 7.4 and its Comment, to permit claims of certification by entities approved by the ABA even if not approved by the local state entity (In Connecticut the Rules Committee), to delete the requirements of disclaimers for certifications by entities not approved or in states with no approval mechanism, and to require the name of the certifying organization to be stated in the communication. These more recent ABA changes are not included in the pending proposal in Connecticut.

[7] Mr. Elliott's Comments state that Connecticut did not adopt ABA Model Rule 7.4, suggesting that the source of the Connecticut Rule antedates the ABA Model Rules. Since the language of Connecticut's current Rule 7.4 is identical to the 1983 ABA Model Rule and Comment, we suspect that Mr. Elliott intends to refer to Rules 7.4A through 7.4C, which set out the specialization scheme adopted by Connecticut. The source of those rules does seem to be separate from the ABA Model Rules; but it seems clear that Connecticut Rule 7.4 itself, and its Comment, were adopted straight from the 1983 ABA Model Rules.

[8] Use of the terms "limited to" and "concentrated in" also continues to be prohibited by Connecticut's Rule.

[9] The ABA did have a survey conducted by the ABA Young Lawyers division that found that 64% of lawyers in private practice spend at least 50% of their time in one substantive field of law. These statistics, however, focus on lawyers' perceptions of their own practice, and the tendency to concentrate

We have found references to other studies that support the ABA's original1983 premise that legal consumers are likely to be misled by use of "specialist" terms in the absence of certification. The United States Court of Appeals for the Eleventh Circuit recently upheld a rule which, like Connecticut, prohibited a lawyer from stating or implying that he was a "specialist" unless certified by an approved program. Falanga v. State Bar of Georgia, 150 F.3d 1333 (11th Cir. 1998), cert. denied, 1999 U.S. Lexis 2864 (1999). The court relied, among other things, upon a survey entitled "Consumer Reactions to Legal Services Advertising in the State of Georgia", which supported the Bar's contention that there was a substantial risk that consumers would infer from the term "specialist" that an attorney had additional qualifications exceeding those for general admission to the bar. The Eleventh Circuit said: "The State Bar defends the district court's judgment pointing to anecdotes, the ***study***, and other evidence that it introduced at trial. Upon de novo review and due consideration, 'we agree with the district court's analysis and need go no further.'" Falanga, supra, 150 F.3d at 1347 (emphasis added).

The District Court in Falanga found that:

> Defendant presented evidence, through the Georgia Survey, which demonstrates that there is considerable miscomprehension by consumers with respect to lawyer advertising. The results of the survey indicate that those most likely to use legal advertising for selecting an attorney frequently have little or no experience with lawyers or the legal system. These same individuals experienced higher levels of miscomprehension with respect to the content of legal advertising. The court finds that the defendants have demonstrated a substantial likelihood that the use of the word "specialist" could be misleading to consumers and that Standard 18 is a reasonable means for regulating its use to reduce or eliminate consumer confusion.

Falanga v. State Bar of Georgia, 1996 U.S. Dist. Lexis 22216, *33-34 (N. D.Ga.1996)[unpublished] See Appendix D. The language in Georgia's Standard 18 was substantially the same as Connecticut's existing Rule 7.4. The Supreme Court of Georgia has independently upheld the constitutionality, both facially and as applied, of Standard 18. Matter of Robbins, 266 Ga. 681, 469 S.E.2d 191, 193-94 (1996) (finding "a reasonable possibility that a 'significant percentage of the public reading the term 'specialist' in a lawyer's advertisement might be misled into thinking an attorney has been 'certified' or 'designated' or has otherwise met objective standards established by a recognized organization").

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in areas of the law. They do not shed any light on the public's perception of terms a lawyer might use in advertising the lawyer's practice.

The Eleventh Circuit more recently had another occasion to review advertising claims of "specialist", this time in the dental profession, where the state of Florida prohibited "specialist" claims in the absence of certification by an entity approved by the State of Florida. The opinion discusses two studies done in Florida, and quotes at length from a study entitled "Study of Florida's Role in Certifying Dental Specialists" which demonstrated that the public is inherently misled by the term "specialist". Nearly sixty percent of the survey respondents believed that a dentist who advertised as being a "specialist" had been either directly or indirectly certified by the State of Florida. Borgner v. Brooks, 284 F.3d 1204, 1212 (11th Cir. 2002). Significantly, those respondents who believed this assumed that "specialist" dentists had met substantial additional qualifications – 96% believed the dentist had advanced training; 94 % believed the dentist had passed a specialty exam; 83 % believed the dentist had been in practice for a minimum number of years; and 93% believed the dentist was required to take continuing education courses. The results of this Florida survey affirm the general public's perception of what the term "specialist" implies, i.e. formal state certification, minimum years in practice, minimum continuing education courses and passing a specialty exam. These are the typical requirements of certification programs generally.[10] In the public's eye, it appears that 'specialist' and 'certified specialist' are generally considered to be synonymous. If the public generally assumes that a "specialist" has these qualifications, it will be inherently misleading to permit professionals who have not met the qualifications to claim to be a "specialist".

The Supreme Court of Florida also addressed the "specialist" issue in The Florida Bar v. Herrick, 571 So. 2d 1303 (1990) upholding a reprimand for sending solicitation letters claiming to "specialize" which violated a disciplinary rule prohibiting "specialist" claims by lawyers who had not complied with Florida's certification/designation plan. The Florida Supreme Court found the regulation reasonable and constitutional, distinguished the facts of Peel, and rejected Attorney Herrick's claim that to "specialize" means only to "concentrate one's efforts in a special activity or field". The Court found:

> By prohibiting the general use of the term "specialist," the rule seeks to restrain advertising which can be false, deceptive, or misleading. By characterizing himself as a specialist, an attorney does more than merely indicate that he practices within a particular field. The term "specialist" carries with it the implication that the attorney has special competence and expertise in an area of law. We reject Herrick's argument that the word "specialize" carries a different connotation than "specialist." Id. at p. 1307.

The empirical evidence, and the court decisions highlighted above, confirm that the proposed rule will be misleading on its face. The proposal creates a differentiation that the empirical evidence shows does not exist in the minds of the public, or at least a majority of the public – between "specialist" and "certified" specialist. The empirical evidence shows that most people assume that a person who claims to be a "specialist" has in fact satisfied qualifications that include continuing education, advanced training, minimum periods of experience and passing a qualifying exam. But the proposed rule

[10] The requirements for certification as a "specialist" in Workers' Compensation in Connecticut are summarized in Appendix D.

places no such requirement upon the lawyer claiming the non-certified "specialist" label. There are no minimum objective hurdles, quantitative or qualitative, that such a lawyer must satisfy. The public is likely to falsely assume that a "specialist" has met such objective standards, and therefore will be misled.

The framework of the proposed rule virtually guarantees confusion and misunderstanding by the public because it permits both certified and non-certified lawyers to claim the same label, "specialist", implying to the public that the only difference is the certification label - which to the majority of people is a distinction without a difference anyway. The public may logically expect the credentials, the skill level, education and experience of both groups of "specialists" to be the same, but that one group's qualifications have simply been independently authenticated by "certification". In fact, the standards applied to the "specialist" and "certified specialist" are entirely different - the "certified" lawyer will be able to use the term "certified specialist" only after satisfying the explicit and objective standards of a court approved and monitored certification program while the non-certified "specialist" must satisfy only the "false or misleading" standard of Rule 7.1 without satisfying any objective requirements or minimum qualifications. By permitting a non-certified lawyer to use the label "specialist" the proposed rule will naturally foster misunderstanding and confusion in the public mind and violates Rule 7.1 because it is misleading, it omits important facts and it permits an implied comparison (i.e. relative equality) between lawyers' services that is generally false in light of the very different standards applied to each group.

Other States

A survey of other states' regulation of the term "specialist" by non-certified attorneys seems to put Connecticut's current rule in the majority.[11] Twenty-five states prohibit the use of the word "specialist" unless the lawyer is certified by an approved organization. Of these, all but two[12] have a method in place for recognizing certified specialists.[13] Four states prohibit the use of the term "specialist" by anyone and do not have a method of recognizing certification.[14] Sixteen states allow the use of the term specialist by non-certified attorneys, provided the communication is not false or misleading.[15] Two states permit a lawyer to use the term specialist provided it is not false or misleading but only if accompanied by a disclaimer. (Wyoming and Missouri). Indiana recently considered the ABA Model Rule and rejected it. Idaho, Louisiana Michigan and Minnesota are currently considering the ABA Model Rule. We understand

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[11] Unfortunately, given the time and "volunteer" constraints we have been operating under, we cannot vouch 100% for the accuracy of our information on 50 states. We have, however, made every attempt to be as accurate and thorough as we can be, and believe the information outlined and summarized herein to be current and accurate.

[12] Kansas and Utah.

[13] Alabama, Alaska, Arizona, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin.

[14] Maryland, Rhode Island, Nebraska, West Virginia.

[15] Arkansas, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Maine, Massachusetts, Montana, Nevada, New Mexico, Oklahoma, Oregon, Vermont, and Virginia.

that a section of the Minnesota State Bar is scheduled to conduct its own survey in the coming weeks to address the issue of whether the public would likely be misled by the use of the term "specialist" by non-certified attorneys.

While there is apparently disagreement among the states on this issue, a majority seems to accept the premise that "specialist" and related terms should be used only by lawyers who have successfully completed a bona fide and verifiable certification process. Further evidence that there is not a consensus among the states in regulating the use of the term "specialist" in lawyer advertising is the fact that the ABA apparently revisited the issue as recently as 2000. When commenting on the proposed 2000 ABA Model Rule 7.4, the ABA's Standing Committee on Specialization apparently recommended an amendment to the Rule 7.4 Comment which would have taken a more neutral position and acknowledged the split of opinion among the states with regard to the "specialist" label.. The Specialization Committee recommended that the comment section be amended to delete the blanket permission to use "specialist" terms in the absence of certification, substituting the following:

> In many jurisdictions a lawyer is permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields of law. Some jurisdictions, however, limit the use of such terms to lawyers who are certified by bona fide certifying entities. (See Appendix E, excerpts from the Reporter's Comments concerning ABA's Ethics 2000 proposed changes)

While this change was apparently rejected, it highlights the fact that this issue continues to be debated, not just within the states, but within the ABA as well. It may portend further changes in coming years, and counsels against precipitous or premature action.

Restriction of the designation "specialist" to certified specialists does not violate the first amendment

The Justices of the United States Supreme Court are not entirely in agreement on the scope of legitimate constitutional regulation of "specialist" claims. In Peel[16] they could not come up with more than a plurality opinion, with no more than four Justices agreeing on any particular rationale. A majority, however, found even the truthful claim of certification by NBTA[17] to be either inherently misleading (3 dissenters), or at least potentially misleading (2 concurrers), clearly justifying state regulation of some kind. The only firm limitation one can come to from reading the various divergent opinions in Peel is that claims of bona fide "certification" that are truthful and verifiable[18], though

[16] Peel v. Attorney Disciplinary Commission of Illinois, 496 U.S. 91 (1990).
[17] In Peel the petitioner had claimed certification as a Civil Trial Advocate by the National Board of Trial Advocacy (NBTA), which was true but absolutely prohibited by the Illinois Rules of Conduct, regardless of clarifying or disclaiming language.
[18] Several Justices quarreled with the idea that the National Board of Trial Advocacy Certification as a Trial Specialist actually qualified as "verifiable".

potentially misleading, cannot be banned outright. Reasonable regulation to avoid misunderstanding is, however, permissible.[19] The basic focus of the Court is that a state cannot constitutionally prohibit communication of relevant facts concerning an attorney that are truthful and verifiable unless they are potentially misleading, and regulation of truthful communications that have the potential to mislead can be no broader than necessary to prevent the perceived evil. Even the plurality of the Court acknowledged that the bar has a role in protecting the public from misleading communications, specifically suggesting that screening committees and disclaimers are entirely appropriate tools to prevent potentially misleading claims of specialization from confusing the public.[20] Several justices also made reference to the value of encouraging bona fide certification programs.

Thus, if use of the word "specialist" has a potential to mislead, it can be regulated to the extent reasonably necessary to minimize that potential. From the discussion above it seems fairly apparent that it does have that potential. The conclusions of the 1986 Bar Foundation study and the Georgia and Florida studies strongly suggest that the term "specialist" is potentially misleading. We believe that a state may choose to limit the use of the word "specialist" to lawyers who have completed the certifying process in order to reduce the likelihood of misleading the public. Many other states have such restrictions. We know of no case holding that limiting "specialist" claims to those who have qualified through a formal certification process would be unconstitutional. Indeed the Eleventh Circuit upheld limitations essentially the same as Connecticut's in Falanga, supra, in 1998. The Supreme Court of Florida found that a similar rule did not violate the first amendment in Florida Bar v Herrick, discussed above. Both Falanga and Florida Bar were decided after Peel and refer to the Peel decision.

Use of practice descriptions of "limited to" and "concentrated in" require some clarification of the terms and appropriate disclaimers of certification/specialist

While the Standing Committee on Workers' Compensation Certification has concerns about the use of the terms "practice limited to" and "concentrated in" particular fields of law, this amendment to the Comment to 7.4 is not as troublesome as the use of the term "specialist" by non-certified attorneys. The primary concern is the risk that such communications will be misleading to consumers of legal services. A substantial part of the public may infer that the lawyer has been formally certified or recognized. In the Florida survey nearly 60% of survey respondents believed that a dentist who advertises as having her practice "limited to" a certain area has been either directly or indirectly certified by the state of Florida. Borgner at 1212. Without a threshold definition or some other clarification, it is also difficult to predict what level of involvement may be inferred from the phrase "concentrated in" – some might interpret it as meaning exclusive practice in that area, but others might legitimately consider that focusing 20 to

[19] Possible alternatives to an outright ban were identified, such as disclaimers that the certification was not State sanctioned, that the certification claim does not necessarily indicate higher quality and the providing of the actual criteria for certification, or reasonable means by which the reader could find those criteria, within the statement of certification itself.

[20] Peel, supra, at 496 U.S. 91, 110.

25% of time in an area is enough to claim a "concentration". A lawyer might have different letterheads, cards or the like that claim a "concentration" in different areas of the law, but the public might easily believe that a lawyer that "concentrates in an area practices exclusively in that area. Similarly, the phrase "limited to" might imply that the lawyer only works in one area of the law, but it might be used to list five or six areas that a lawyer works in. The proposal provides no guidance on how to deal with these issues, and therefore has a substantial risk of misleading the public.

Other states have addressed these concerns in a variety of ways. For example, New Jersey permits a lawyer to describe a practice as "limited to" or concentrated in" a particular field except where the Supreme Court of New Jersey has designated specialty certification in that area. In designated areas, only certified attorneys may indicate their practice is "limited to" the specialty. Iowa places quantifiable restrictions on the use of these terms. Lawyers are permitted to use "practice limited to" or "concentrated in" only if the lawyer has devoted the greater of 400 hours or 40% of the lawyers' time in the practice of a particular field of law in the preceding year and has completed at least 15 hours of continuing legal education in that field in the preceding year. Both regulatory schemes attempt to place some reasonable restrictions on the use of the terms in an effort to avoid misleading the public about the qualifications and type of practice of the lawyers using these terms.

With no definitions, and no guidance, we see much potential for confusion and misunderstanding even under the best of circumstances, and with the best of intentions. The surveys suggest that these terms are likely to be understood as indicating some kind of state sponsored certification, directly or indirectly, which clearly would be misleading under this proposal. It is one thing to simply state the areas of practice that the lawyer engages in, which is entirely permissible; but the terms "limited", "concentrated", "specialist" and the like imply some qualitative judgment that is open to great opportunity for misunderstanding. Thus we would reject the proposal without some effort to clarify the basic parameters of what it means to "limit" a practice or "concentrate" in an area of law, and a disclaimer clarifying that "limited to" and "concentrated in" do not imply any state approval or certification.

Impact on attorneys competence and certification programs

The plurality opinion in Peel notes the value of encouraging "the development and utilization of meritorious certification programs for attorneys". It seems to be generally accepted that rigorous certification programs foster increased competency of lawyers and a higher quality of legal services across the board. Certification and the process of obtaining and maintaining certified status has, we believe, substantially increased the level of competence and professionalism of the Workers' Compensation Bar within the State of Connecticut, and continues to do so.[21] Certification requires substantial formalized continuing legal education in the specialty area. Maintaining certification

[21] There are currently forty-four certified Workers' Compensation Specialists in Connecticut, seven years after the Rules Committee approved the program.

requires ongoing formalized continuing legal education after certification. Certified lawyers must be recertified every five years.[22] Since Connecticut does not require any continuing legal education for lawyers generally, the certification process significantly raises the level of commitment to producing and attending continuing legal education courses. Anything that discourages the certification process is not good for the quality of our legal resources, which is not good for the public.

The proposed changes will substantially reduce the interest of attorneys in obtaining formal certification in any specialty recognized by the rules. The surveys suggest the majority of the public considers a person who claims to be a "specialist" to have the qualifications generally required for certification. The framework of the proposed Rule logically implies that the only difference between a "certified" and non-certified "specialist" is some independent affirmation of the specialists qualifications, not that the qualifications are any different. Why would an attorney bother going through the rigorous process necessary to become "certified"? The certification label is not likely to give the attorney any competitive advantage in the marketplace. If the public does not perceive a difference, there is no meaningful market distinction, and there is no advantage. The framework of the proposed Rule implies equality more than difference. We know from our experience that an effective certification program requires the full and energetic support of that section of the bar involved in a particular specialty. If attorneys become free to claim the label "specialist" without satisfying any independent standards, minimum levels of experience or verification of a reasonably high threshold level of specialized knowledge, it is doubtful that there will be enough support for certification to gain a stronger foothold and expand in other areas of specialty. Without strong support from attorneys, the certification program may simply disappear.

Conclusions

We believe that the proposed changes will make the use of the term "specialist" inherently misleading. Surveys show that much of the public is likely to assume that a "specialist" has satisfied the objective requirements that are generally required by certification programs, and that the state has approved of the claim, directly or indirectly. This will not be true. Further, it is logical for the public to assume that certification only affirms the existence of the qualifications of a "specialist", not that the qualifications are entirely different. Yet the proposed rule applies very different standards to the "certified" and non-certified "specialist". This framework is misleading on its face. The public certainly has no reason to suspect that the legal community has created two very different groups of "specialist" lawyers. Limiting the use of "specialist" terms to certified lawyers will communicate accurate information.

The only limitation upon claiming non-certified "specialist" status is the "false or misleading" prohibition of Rule 7.1. It is difficult to see how the use of this label can be effectively regulated using only that standard, with no definitions or requirements clarifying what the minimum qualifications are to claim to be a non-certified "specialist". This approach encourages lawyers to use "specialist" terms based upon their own

[22] Re-certification every five years is required of all certified specialists by Connecticut Rule 7.4A(a)(3).

personal definition. Once a few lawyers do so other lawyers will be pressured to do likewise or suffer substantial competitive disadvantage in that market.

Adopting the proposed changes will have a substantial adverse impact on the formal specialization process, which will weaken the available legal resources for the public. Since the public tends to see a "specialist" as having satisfied the advance requirements that the proposed rule only requires for "certification", there will be little value to becoming "certified". We believe that few, if any, additional certification programs will blossom if the word "specialist" can be used by anyone who believes they can pass muster under the "false or misleading" standard. Certification programs are in their relative infancy in the State of Connecticut. This change will make certification programs much less attractive and perhaps superfluous. It is not in the interest of this Bar or the State of Connecticut to adopt a rule that will reduce the quality of the legal resources in Connecticut, or the public's ability to accurately evaluate and access the available legal resources.

Certainly we must regulate the practice of law in a constitutional way, but it seems apparent from the Supreme Court cases that its goal is the dissemination of reliable information to the public upon which it can make informed decisions in utilizing legal resources, while minimizing or prohibiting communications that have a likely tendency to mislead, and encouraging the members of the bar to increase their individual levels of competence. We see the certification program as a key element working towards all of those goals, and the Supreme Court, while attuned to the constitutional limitations, has clearly encouraged experimentation and meaningful but reasonable regulation by individual states in this arena. We have not found anything in the existing case law to require these proposed changes. The Eleventh Circuit and the Florida Supreme Court have upheld "specialist" rules essentially the same as the existing Connecticut Rule in the face of first amendment challenges.

We suggest that the proposed change be voted down in its entirety. At the very least, the "specialist" terms should remain reserved to certified lawyers. Use of the "limited to" and "concentrated in" labels are less troublesome, but without some definitions and clarifications they too carry a substantial risk of misleading the public. We thank you for considering these thoughts, and stand ready to provide any additional insight, assistance or comments that may be useful to your committee, in writing or in person.

Very truly yours,

Frank A. May
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