

OFFICE OF
APPELLATE COURTS

MAY 4 - 2004

FILED

FILE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend the
Minnesota Rules of Professional Conduct

PETITION OF THE LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD TO AMEND THE
MINNESOTA RULES OF PROFESSIONAL CONDUCT

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE
STATE OF MINNESOTA:

Petitioner Lawyers Professional Responsibility Board (LPRB) respectfully petitions this Court to amend the Minnesota Rules of Professional Conduct (MRPC) as set forth below.

In support of this petition, the LPRB would show the following:

1. Petitioner LPRB is a Board established by this Court to oversee the lawyer discipline system.
2. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.
3. This Court has adopted the MRPC by way of establishing standards of practice for lawyers licensed in the State of Minnesota to practice law. These Rules have been amended from time-to-time.
4. Beginning in 1997, the American Bar Association (ABA) began a comprehensive review of the ABA Model Rules of Professional Conduct. The review culminated in the ABA Ethics 2000 Report and substantial changes to the ABA Model Rules in 2002.

5. In July 2002 the Minnesota State Bar Association (MSBA) established a task force to study the MRPC and recommend appropriate amendments to the MRPC. The LPRB applauds the MSBA for its conscientious and thorough review of the ABA Ethics 2000 recommendations.

6. Throughout the MSBA Task Force review, the LPRB and Office of Lawyers Professional Responsibility (OLPR) were provided with unprecedented opportunity for input. The current LPRB Chair, former OLPR Director and two OLPR Assistant Directors were members of the Task Force. Several recommendations from the LPRB and the current Director are reflected in the Task Force Recommendations. The ongoing colloquy between the LPRB, OLPR and the MSBA has resulted in LPRB support for all but one of the numerous MRPC amendments contained in the MSBA petitions.

7. The LPRB, through its Rules Committee, undertook its own study of issues before the MSBA Task Force. In addition, the LPRB established a committee to review LPRB Opinions in light of the Court's decision in *In re Panel File No. 99-42*, 621 N.W.2d 240 (Minn. 2001). The LPRB ultimately determined that the guidelines and policies enunciated in LPRB Opinions Nos. 2, 5, 6, 9, 12 and 15 were sufficiently important to lawyer regulation that they should be incorporated into the MRPC. These recommendations were adopted by the MSBA and are included in the MSBA's proposed amendments. The explanation for these amendments are explained at pages 7, 8 and 14 in Attachment B to the MSBA's September 19, 2003, Petition.

8. On September 19, 2003, the MSBA filed with this Court a petition to amend the MRPC. On January 26, 2004, the MSBA filed a supplemental and amended petition to amend the MRPC. At its June 12, 2003, September 19, 2003, and January 22, 2004, meetings, the LPRB approved all of the proposed amendments contained in both MSBA petitions except for proposed Rule 3.8(e).

Proposed Rule 3.8(e)

9. The LPRB opposes proposed Rule 3.8(e) and believes it should be omitted from the MRPC. This Rule prohibits prosecutors from subpoenaing lawyers in certain criminal proceedings to present evidence about a client. The Model Rule was adopted nearly a decade ago by the ABA in response to perceived abuses in jurisdictions other than Minnesota. The LPRB is unaware of similar abuses in Minnesota and the Director has yet to receive any ethics complaints alleging abuses of this nature.

10. Beyond its questionable need, the existence of constitutional litigation over various versions of Rule 3.8(e) in other states is another reason to omit Rule 3.8(e). Some challenges to Rule 3.8(e) have been successful. *See, e.g., Baylson v. Disciplinary Bd. & Sup. Ct. of Penn.*, 975 F.2d 102 (3rd Circuit 1992), *affirming*, 764 F. Supp. 328 (E.D. Pa. 1991) (Rule 3.8(e) violated Supremacy Clause); *Whitehouse v. United States Dist. Ct.*, 852 F. Supp. 78 (D.N.H. 1994), *reversed*, 53 F.3d 1349 (1st Cir. 1995). Other jurisdictions, such as Illinois and Louisiana, withdrew their versions of Rule 3.8(e) after constitutional challenges were commenced. Other more recent challenges have produced mixed results. *See, e.g., U.S. v. Colorado Sup. Ct.*, 189 F.3d 1281 (10th Cir. 1999) (Rule 3.8(e) found unconstitutional as to grand jury subpoenas but upheld as to other federal subpoenas); *Stearn v. United States District Court*, 214 F.3d 4 (1st Cir. 2000) (Rule 3.8(e) exceeded federal court's authority to regulate grand jury subpoenas).

11. Because federal courts by local rule typically adopt the state ethics rules where the federal court is located, state ethics rules apply to federal prosecutors when issuing federal grand jury subpoenas. *See e.g., Rule 83.6(d)(2), Local Rules of the U.S. Dist. Ct. for the Dist. of MN* (2004). The constitutional criticism of Rule 3.8(e) is that it infringes upon the federal grand jury process and improperly attempts to regulate federal criminal procedure.

12. The need for Rule 3.8(e) is not readily apparent. Further study and input from the criminal bar is needed to determine the reality or potential for such abuses.

Moreover, if regulation of this conduct is necessary, it could be accomplished through amendments to the Minnesota Rules of Criminal Procedure and thereby avoid the federal concerns.

Rule 7.4(d)

13. The LPRB urges the Court to adopt the version of Rule 7.4(d) recommended in the MSBA's January 26, 2004, supplemental petition. This version prohibits use of the term "certified specialist" unless the lawyer is certified by an organization accredited by the Minnesota Board of Legal Certification (MBLC) or the communication includes a disclaimer stating that the advertised certification is not approved by the MBLC. In addition, the MBLC would retain sole authority for accrediting certification organizations in Minnesota.

14. The disclaimer language requirement is necessary because of the increase in multi-state law practice. There are a number of certifying organizations from other jurisdictions that decline to seek Minnesota accreditation, usually for economic reasons. When Minnesota lawyers who are licensed elsewhere advertise their non-accredited certification from another jurisdiction, the disclaimer is necessary to prevent confusion that the certification has MBLC approval.

15. Some Minnesota certified specialists and certification organizations criticize proposed Rule 7.4(d). They advocate retention of the current regulatory scheme prohibiting use of the more general term "specialist" by non-certified lawyers as opposed to the narrower "certified specialist" nomenclature in the proposed rule.

16. In 1992, Rule 7.4 of the ABA Model Rules was amended to permit non-certified lawyers to identify themselves as "specialists" provided the claim did not violate the false and misleading standard of Rule 7.1. The Comment to the current ABA Rule states:

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.

The impetus for the ABA rule change was *Peel v. Illinois Attorney Reg. Committee*, 496 U.S. 91 (1990). In striking down Illinois Rule 7.4(d) which prohibited non-certified lawyers from using the term "specialist" the Supreme Court held:

Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public. *In re R. M. J.*, 455 U.S. at 203.

17. Retention of a rule attempting to limit use of the more general term "specialist" is problematic and may again give rise to litigation over the constitutionality of the rule. *See e.g., In re Johnson*, 341 N.W.2d 282 (Minn. 1983), where the Court determined that its prior rule governing specialization advertising was unconstitutional. This is especially true where the Minnesota rule would be much more restrictive than the ABA Model Rule in limiting commercial speech.

18. At present the MBLC has accredited certifying organizations in only nine areas of the law. There remain a number of specialized practice areas in which certification is not available in Minnesota (e.g., Tax law, Trust & Estates, Pension law and Intellectual Property law). Prohibiting the many lawyers who specialize their practice in these non-certifiable areas from identifying themselves as "specialists," arguably constitutes a categorical ban on disseminating truthful information that is beneficial to the public. Moreover, constitutionally requiring these lawyers to include a disclaimer with their specialist claim may be problematic due the inability to obtain certification in Minnesota.

19. The LPRB also agrees with the MSBA that extending Minnesota specialty accreditation authority to the ABA rule is imprudent at this time. Anecdotal information from the MBLC suggests that some certifying organizations accredited by

the ABA do not meet the existing certification standards established by MBLC. Before extending accreditation authority to the ABA, further study is needed to determine whether granting such authority could erode Minnesota's certification standards.


Formal Adoption of Rule Comments

20. The LPRB concurs with the MSBA request that the Comments to the MRPC be adopted by the Court. Most jurisdictions adopt the Comments as well as the Rules. Unlike other court rules, the MRPC Comments do more than provide drafter intent and history. Many MRPC Comments not only explain, but apply the Rules in order to provide better guidance. The expansion of the Comments in the 2002 ABA Model Rules underlies the need to give the Comments formal or official status.


21. Based upon the foregoing, petitioner Lawyers Professional Responsibility Board respectfully requests and recommends this Honorable Court to amend the Minnesota Rules of Professional Conduct as set forth above.

Dated: May 3, 2004.

Respectfully submitted,


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