

FILE NO. ADM10-8005

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition to Amend the  
Minnesota Rules of Professional Conduct.  
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**COMMENTS REGARDING THE  
MINNESOTA STATE BAR  
ASSOCIATION PETITION TO  
AMEND RULE 1.6(b), MRPC**

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

The Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director) submit these comments regarding the Minnesota State Bar Association (MSBA) proposed amendments to Rule 1.6(b), Minnesota Rules of Professional Conduct (MRPC). The LPRB and the Director oppose the substantive proposed amendment to Rule 1.6(b), MRPC, but do not oppose the minor proposed amendment to Rule 1.6(b)(8), MRPC, which will make the meaning of the rule more clear.

## INTRODUCTION

1. The LPRB is a Board established by this Court to oversee the lawyer discipline system. Rule 3(c), Rules on Lawyers Professional Responsibility (RLPR). The Director is appointed by this Court to administer the lawyer discipline system. Rule 5(b), RLPR.

2. The LPRB embodies a wide diversity of viewpoints reflecting not only the bar, but the public as a whole. The LPRB is comprised of 23 members, nine of whom are non-lawyers. Rule 4(a)(2), RLPR. The non-lawyers include a former naval officer, an education specialist, a retired police sergeant, a public speaking instructor, a business management consultant specializing in alternative dispute resolution, a computer forensics expert, a retired corporate executive, and a retired county human

services director. *See*

<http://lprb.mncourts.gov/AboutUs/Pages/LawyersBoardDirectory.aspx>.

3. The lawyer members of the LPRB also reflect a diversity of practice. Six of the lawyer members are nominated by the MSBA. Rule 4(a)(2), RLPR. Some are sole practitioners, some are in small firms, some are in medium firms, and some are in large firms. Some are from the Twin Cities metropolitan area, others are from out-state Minnesota. These lawyers encompass the wide variety of areas of practice including complex civil litigation, criminal defense, family law, business transactions, professional review matters, insurance defense, law firm ethics counsel, criminal prosecution, intellectual property, estate planning and immigration law.

4. 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.

5. This Court has adopted the MRPC to establish standards of conduct for lawyers licensed to practice law in the State of Minnesota. This Court has amended the MRPC from time-to-time for good cause shown.

## **BACKGROUND**

6. The LPRB considered the MSBA's proposed amendments at its April 27, 2018, meeting. The LPRB and the Director oppose the substantive proposed amendment but support the clarifying amendment to Rule 1.6(b)(8), MRPC, as set forth herein and requests the Court adopt this clarifying amendment.

7. Rule 1.6, MRPC, sets forth the fundamental principle that all information related to a representation is confidential. Rule 1.6(a), MRPC, provides, "Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client."

8. Rule 1.6(b), MRPC, already contains several specific exceptions that allow a lawyer to disclose information related to the representation of a client. For example,

Rule 1.6(b)(2), MRPC, allows a lawyer to disclose information which is not privileged, which the client has not asked the lawyer to hold confidential, and disclosure of which will not embarrass or harm the client. This exception often can encompass a fair amount of the information related to a representation.

**IT IS APPROPRIATE TO REFINE THE LANGUAGE OF RULE 1.6(b)(8), MRPC.**

9. One of the limited exceptions to the confidentiality of client information is contained in Rule 1.6(b)(8), MRPC. This subsection currently provides:

(b) A lawyer may reveal information relating to the representation of a client if: . . .

(8) 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;

10. The MSBA's proposed amendment to Rule 1.6(b)(8), MRPC, reads:

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense ~~by 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;

11. At the heart of reasoning underlying the existing proposals to modify existing Rule 1.6(b)(8), MRPC, is the word "controversy," which is not defined in the MRPC. This proposed amendment to Rule 1.6(b)(8), MRPC, will clarify that this exception to the general principle that client confidentiality in this provision is limited to two realms: Actual or potential civil or criminal litigation, and lawyer discipline proceedings. This amendment preserves the bedrock notion of client confidentiality, is

consistent with the LPRB and Director's long-standing interpretation of this rule, and is consistent with the law of other jurisdictions.

12. This proposed amendment to Rule 1.6(b)(8), MRPC, is the same as the MSBA's proposed new Rule 1.6(b)(9), MRPC. The LPRB and the Director join with the MSBA in recommending this language be adopted, but request it be included in the MRPC as Rule 1.6(b)(8), MRPC.

**IT IS NOT APPROPRIATE TO SUBSTANTIVELY MODIFY RULE 1.6(b), MRPC.**

13. In contrast, the LPRB and the Director believe that the MSBA petition to amend to add a new Rule 1.6(b)(9), MRPC, would unnecessarily create a broad exception inconsistent with the notion of client confidentiality, the LPRB's and the Director's interpretation of Rule 1.6, MRPC, and the law of other jurisdictions. As drafted, this proposal would add a new exception to Rule 1.6(b), MRPC, to allow a lawyer to disclose client confidential information in response to a client's negative assertions about the lawyer.

14. The MSBA's proposal arises out of a desire to allow a lawyer to respond to a client's negative commentary or review of the lawyer and/or lawyer's services in an online review website, blog post, or other social media. The LPRB and the Director recognize the important concern underlying the proposal is that in today's online world, prospective clients increasingly find lawyers by searching online, and baseless negative reviews can have an increasingly deleterious effect on the lawyer's ability to obtain business. Therefore, when a client uses confidential information to accuse the lawyer of a specific act of serious misconduct, a desire may exist to allow the lawyer to use confidential information if reasonably necessary to rebut the accusation.

15. However, confidentiality is a core tenet of the attorney-client relationship, and is integral to the fiduciary duties that attorneys owe to their clients. And it should also be remembered that confidentiality as defined under the MRPC is much broader than attorney-client privilege. Privilege applies to private communications between a

client and a lawyer in which legal advice is sought or obtained; confidentiality applies to all information related to a representation.

16. Rule 1.6(b), MRPC, already contains many exceptions to the general principle of confidentiality of client information. Each is tailored to a critical, overriding public interest. For example, a lawyer may disclose client confidential information “to prevent reasonably certain death or substantial bodily harm” (Rule 1.6(b)(6), MRPC); to prevent the commission of a crime or of a serious fraud in which the client has used or is using the lawyer’s services (Rule 1.6(b)(4), MRPC); or to prevent or rectify criminal or fraudulent conduct in an adjudicative proceeding (Rule 3.3(b) and (c), MRPC). No such overriding interest of critical importance exists here.

17. In Opinion No. 24, the LPRB articulated that a lawyer may not use confidential client information to respond to a client’s negative public comments about the lawyer. LPRB Opinion No. 24, adopted September 30, 2016, states in pertinent part, “When responding to comments, negative or otherwise, posted on the internet (or any other public forum) concerning the lawyer’s representation of a client, Rule 1.6(b)(8), MRPC, does not permit the lawyer to reveal information relating to the representation of a client.”

18. The LPRB and the Director believe their position to be consistent with interpretations nationally. All but one of the jurisdictions which have considered this issue have opined that lawyers ought not to be allowed to do so. For example, New York State Bar Assoc. Ethics Op. 1032 (Oct. 30, 2014), in reaching this result states in part:

This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client—or others—being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments

on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that [Rule 1.6] should be interpreted in a manner that could chill such discussion.

Other jurisdictions reaching the same result include Los Angeles Cnty. Bar Assoc. Op. 525 (December 6, 2012); Penn. Bar Assoc. Comm. on Legal Ethics and Prof. Resp. Formal Op. 2014-200 (2014); Bar Assoc. of San Francisco Op. 2014-1 (Jan. 2014); Prof. Ethics Comm. for the State Bar of Texas Op. 662 (Aug. 2016); and Bar Assoc. of Nassau Cnty. Comm. on Prof. Ethics Op. 2016-1 (May 9, 2016). The only exception, District of Columbia Bar Ethics Op. 370 (Nov. 2016), is based on a rule which is substantially different from Rule 1.6, MRPC.

19. The LPRB and Director's position is also consistent with the ABA Model Regulatory Objectives for the Provision of Legal Services. One of the objectives is "Protection of privileged and confidential information." Although there are exceptions, each is narrowly drawn to the minimum disclosure necessary in a given circumstance. Part of the basis for the duty of confidentiality is the duty of loyalty to clients. Clients view lawyers as obligated to preserve client confidences. We as lawyers are professionals, like doctors and psychotherapists. The LPRB and the Director are not aware of other professions allowing for disclosure of otherwise confidential information simply to respond to a negative online review.

20. The ABA has recently and consistently reiterated the importance of client confidentiality. ABA Formal Opinion 479 (issued December 15, 2017) addresses the "generally known" exception to former client-confidentiality under Rule 1.9(c). The ABA opined that, "Information is not generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information." Instead, information is only considered generally known if it is "(a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession or trade."

21. The ABA again recognized the importance of client confidentiality in Formal Opinion 480, issued March 6, 2018. That opinion states, “Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules [of Professional Conduct].”

22. Unfortunately, it is not difficult to envision potential problems created by the MSBA’s proposal. Take for example a criminal defense lawyer. The client may post a negative online comment about the criminal defense lawyer, accusing that lawyer of specific serious wrongdoing which the client believes is causing the client to be found guilty of an offense which the client states the client did not commit. Under the MSBA proposal, a lawyer would be allowed to reveal client confidential information, including information which could bear on the guilt or innocence of the accused. This could implicate the client’s right to receive a fair trial and undercut the client’s Fifth Amendment rights, and could ease the burden on the prosecution to prove the elements of the offense.

23. The principle purpose or rationale underlying the MSBA proposal appears to be based on the concept of waiver, which a client can do even unknowingly. The Rules of Professional Conduct, however, do not operate on the basis of waiver. Instead, disclosure based on client permission requires a client’s informed consent. Rule 1.6(b)(1), MRPC. Stated differently, the proposition that a client unfamiliar with the Rules of Professional Conduct effectively provides informed consent to disclosure of confidential information by counsel in retaliation for the client having posted information online is a stretch too far.

24. Already circumstances exist when a lawyer may well want to make disclosure but the Rules of Professional Conduct prohibit such disclosure, even when the circumstances in these matters would seem to have a greater public interest in favor of disclosure than the interest in responding to criticism. Indeed, in the anonymous world of online postings, it may well be that a lawyer cannot be certain that the person

who authored a post in the name of a client is, in fact, the client. The MSBA proposal does not address this important issue.

25. The proposed amendment brings additional concerns. It creates a broad exception to the general rule of confidentiality. Although the inspiration for the proposed amendment is concern about negative commentary in an online review website, blog post, or other social media, the proposed amendment allows disclosure in response to any “allegations by the client.” As noted in proposed comment 8, “Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm.” In other words, any criticism of a lawyer by a client to any person would allow a lawyer to bring out confidential client information to respond. This is overly broad. Moreover, the proposed amendment does not limit the lawyer’s response to the website or other forum where the negative commentary occurred.

26. Additionally, the proposed language could cause lawyers acting in good faith to unwittingly violate the rule. The proposed amendment purports to limit responses to a situation in which the accusation “raises a substantial question as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer . . . .” It is true that this standard is used elsewhere in the Rules of Professional Conduct in connection with a lawyer’s duty to report. *See* Rule 8.3, MRPC. To the practicing bar, however, what constitutes an accusation involving the lawyer’s “fitness as a lawyer” can be interpreted quite broadly. Many lawyers may interpret allegations that a lawyer failed to return calls or failed to act diligently as involving a lawyer’s “fitness.” The proposed amendment and comment thereto suggest there is a bright line between a “substantial question as to the lawyer’s honesty, trustworthiness, or fitness” and a “petty or vague critique.” In fact, the difference can be an area involving multiple shades of gray. A goal of the Rules of Professional Conduct should be to give clear direction to the practicing bar. In addition, the Director and the Board must be able to consistently enforce the Rules of Professional Conduct. This proposed amendment is inconsistent with these goals.



27. The LPRB and the Director recognize that the significant client protection concerns over duty of loyalty and confidentiality vis-à-vis the concern for protection of lawyer reputation and the profession at large, particularly in today's social media driven society, presents a close call of public policy. Accordingly, this is why the LPRB and the Director, in response to the MSBA proposal, considered voluminous materials over a period of many months during which time members also engaged in significant dialogue with each other and sought out the opinions of others in the legal community, including the MSBA.

28. Ultimately, a majority of the LPRB's lawyer and non-lawyer members voted to reject the MSBA's proposed additional exception, recognizing that while lawyer protection from spurious and inflammatory public allegations by a client is an important concern to be given serious consideration, the potential harm to the reputation of the legal profession coupled with the erosion of the duty of confidentiality and potential for abuse could not be overcome by the MSBA's proposal as drafted.

29. Further tipping the scales in the LPRB's and the Director's reasoning was the fact lawyers seeking recourse from negative posts or client commentary would remain free as they have always been to disclose confidential client information when the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential civil, criminal, or disciplinary proceeding 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. In addition, a lawyer seeking recourse from negative posts or client commentary may respond by (1) stating that the lawyer has a duty of confidentiality to the client and will not respond online, and (2) inviting the client to constructively address the dispute in private. This kind of response upholds the core of the attorney-client relationship and does so in a manner that promotes a public trust and confidence in the profession.

**CONCLUSION**

For the foregoing reasons, the Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility oppose the substantive amendment to Rule 1.6(b), MRPC, proposed by the Minnesota State Bar Association, and do not oppose the minor proposed amendment to make the existing meaning of the rule more clear.

Dated: November 20, 2018.

Respectfully submitted,

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