

A COMMENTARY ON THE COMMENTS

By

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Reprinted from *Bench & Bar of Minnesota* (May /June 2015)

The Minnesota Rules of Professional Conduct (MRPC) consist of “black letter” rules that establish the standards with which lawyers must comply or face discipline. The rules have comments attached to them, usually those adopted by the ABA as part of its Model Rules of Professional Conduct, upon which the MRPC is based.

What is the status of the comments to the Minnesota Rules of Professional Conduct? Have they been adopted? No. Acknowledged?[Ftn 1](#) No. Recognized as guidance for practicing in compliance with the Rules?[Ftn 2](#) Not officially. Are they simple, clear, consistent?[Ftn 3](#) Perhaps not.

Officially, the comments are included in the MRPC for convenience.[Ftn 4](#) And they are most certainly convenient in its common meaning: useful, easy, and suitable. In my opinion, the comments should have the following status: “read,” “considered,” and “followed.”

The comments generally reflect the interpretation and enforcement position of the Office of Lawyers Professional Responsibility (OLPR).[Ftn 5](#) The OLPR has referred to the comments to provide guidance and safe harbor to the lawyers of Minnesota.[Ftn 6](#) The Lawyers Professional Responsibility Board (LPRB) has cited comments in its opinions, which are themselves another guide to lawyer conduct.[Ftn 7](#) And although it has not adopted or officially acknowledged the comments, the Supreme Court has referred to and used comments in its analysis on several occasions.[Ftn 8](#)

Lawyers are well-advised to pay attention to the comments—not because they have the force and effect of the rules, but because they are integral to understanding the rules. The comments provide practical guidance on how to analyze common situations and conduct oneself in a professional and ethical manner. And with good reason—they reflect a consensus among experienced lawyers at the ABA who care enough about the legal profession to provide some practical advice on the black letter rules that precede them.

The comments are currently a hot topic, because the Supreme Court recently approved the amendments to the rules, and included many of the revised comments, albeit only for convenience.[Ftn 9](#) The revised comments address a variety of important matters, among them the impact of technology on the obligations of competence, diligence, confidentiality, and

communications;[Ftn 10](#) balancing confidentiality with determining conflicts of interests in hiring or firm mergers;[Ftn 11](#) and ensuring that non-lawyer assistants provide services compatible with the lawyer's obligations.[Ftn 12](#) They are certainly worth reading, considering, and following.[Ftn 13](#)

Practical guidance

I'm clearly taking a practical rather than a scholarly approach. The comments are grounded in practical applicability to the practice of law and have served me well over the years. I volunteered for the Second District Ethics Committee as a young lawyer for practical reasons—I wanted to learn about how the rules worked in practice and how to be “one of the good ones.”[Ftn 14](#)

The comments helped guide me in my practice of law and my 17-plus years of volunteer work in the discipline system. They were incredibly useful as I investigated cases and made recommendations as a DEC investigator. They guided my work on the LPRB Rules committee. They allowed me to teach the practical lessons that my law students needed and the lawyers at CLEs I've given have benefitted from, and were the basis for an expert opinion or two. My respect and appreciation for the MRPC's comments compel me to share them in what will perhaps be the last article I write as chair of the LPRB (my terms expires January 31, 2016).

While the plain language of the MRPC's 58 black letter rules *govern* the conduct of lawyers, they are not sufficient, standing alone, to *guide* the conduct of lawyers. They spell out obligations and prohibited conduct, yet every rule, save one,[Ftn 15](#) is accompanied by comments that analyze, explain, and guide. Allow me to share a few favorite and important gems from the more than 400 comments:

- **“Informed” consent.** Rule 1.0, (f) defines informed consent, yet comment [6] at length gives guidance on the type of communications that may be appropriate to ensure the client is informed.
- **Got competence?** Rule 1.1, that essential, straightforward rule setting forth a lawyer's obligation of competence, is complemented by comment [1], which supplies factors to consider in determining whether one has the requisite knowledge or skill, and [8], suggesting the practical need to keep abreast of changes in technology.
- **Where's the “zeal”?** Rule 1.3, nearly universally understood yet frequently violated, provides practical insight as to what diligence means. It is here that one can find the only reference in the rules to zeal in advocacy, the need for a lawyer to control his or her workload, and even the practical suggestion of how a solo practitioner may avoid neglect of client matters in the event of disability.[Ftn 16](#)
- **More than just reasonable fees.** While the touchstone of “reasonableness” of fees and the factors in Rule 1.5 govern, comment [5] issues a practical reminder of whose interests a lawyer has to protect, warning not to enter into agreements that may result in curtailed services, services contrary to the client's interest, or force a client to bargain for fees midstream in the representation.
- **Client conflicts?** Comment [2] to Rule 1.7 provides an excellent framework to analyze Rule 1.7's prohibition of conflicts of interest. While all 35 comments to Rule 1.7 are incredibly useful, comments [29]-[31] are essential to analyzing common representation.

- **Lawyer/client conflicts.** Comment [6] to Rule 1.8 reminds us of the joy of appreciative clients, but also considerations in accepting gifts.
- **Former client conflicts.** Comment [3] to Rule 1.9 provides the essential (and court-approved) analysis to determine whether a subsequent representation is “substantially related” to a representation of a former client.
- **Helping troubled clients.** Comment [5] to Rule 1.14 suggests protective actions for clients with diminished capacity, and important considerations for a lawyer facing this tough situation.
- **The best cure for withdrawal.** True wisdom is found in Rule 1.16’s comment [1]: The best way to avoid withdrawal is to not accept representation if a matter cannot be performed competently, promptly, without conflict, and to completion. Beautiful.
- **Ex parte disclosures.** Comment [14] to Rule 3.3 explains the rationale for requiring a lawyer to disclose *all* of the relevant facts when appearing ex parte before a tribunal.
- **Pesky inadvertent information.** Rule 4.4 lays out the obligation to point out to the sender the mistake of sending inadvertent information, but Comment [3] adds practical guidance on what to do with that document or electronic information that really should not have been sent.
- **Evils of in-person solicitation.** Finally, a bit of poetry from comment [2] to Rule 7.3: The potential for abuse in direct communication to solicit clients is “fraught with the possibility of undue influence, intimidation, and over-reaching.”

These are all good, practical words to live by, or at least practice by. Whether official or not, the comments to the MRPC deserve the respect of attorneys who desire to practice ethically, as we all should.

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Notes

¹ See Joint Petition of Minnesota Lawyers Professional Responsibility Board and MSBA Task Force requesting that the Court acknowledge the comments. See <http://www.mnbar.org/docs/default-source/judiciary-committee/joint-msba-lprb-2014-petition-to-amend-the-mn-rules-of-professional-conduct.pdf?sfvrsn=0>

² See “Preamble/Scope” section of the Minnesota Rules of Professional Conduct [1]. The drafters of the Model Rules drafted the comments to provide guidance for practicing in compliance with the rules.

³ William J. Wernz, *Minnesota Legal Ethics: A Treatise* (4th edition revised) at 33 available at [http://www.mnbar.org/docs/default-source/ethics/minnesota-legal-ethics-\(fourth-edition-revised\).pdf](http://www.mnbar.org/docs/default-source/ethics/minnesota-legal-ethics-(fourth-edition-revised).pdf)

⁴ See Order Regarding Proposed Amendments to the Minnesota Rules of Professional Conduct dated 2/24/2015 available at

<http://lprb.mncourts.gov/Documents/Amendments%20to%20MRPC%202015.pdf>

⁵ Timothy M. Burke, “Comparing Services can Be Dicey,” (Minnesota Lawyer July 3, 2006) available at

<http://lprb.mncourts.gov/articles/Articles/Comparing%20Services%20Can%20Be%20Dicey.pdf>

⁶ Id.

⁷ See, e.g. LPRB Opinion No. 22, adopted 3/26/2010, available at

<http://lprb.mncourts.gov/rules/LPRBOpinions/Opinion%2022.pdf>

⁸ See, e.g., *State v. 3M Company*, 845 N.W.2d 808, 816 (Minn. 2014) (reversing decision of the district court and remanding to consider the “substantially related” analysis in MRPC 1.9, comment [3]).

⁹ Amended Order Regarding Proposed Amendments to the Minnesota Rules of Professional Conduct, dated 2/27/2015, found at

<http://lprb.mncourts.gov/Pages/Amendment%20to%20MRPC%202015.pdf> (designating effective date of 4/1/2015).

¹⁰ MRPC 1.1, cmt. [8]; MRPC 1.4, cmt. [4]; MRPC 1.6, cmt. [15][16].

¹¹ MRPC 1.6, cmt. [12][13].

¹² MRPC 5.3, cmt. [1] [3].

¹³ A redlined version of the Amended Rules and the comments is available on the LPRB website:

<http://lprb.mncourts.gov/Documents/Amendments%20to%20MRPC%202015.pdf>

¹⁴ Justice Paul H. Anderson (ret.) oral comment. While the phrase may not be credited to him in Bartlett’s Famous Quotations, it is his just the same.

¹⁵ MRPC 5.8 (Employment of Disbarred, Suspended, or Involuntarily Inactive Lawyers), a Minnesota rule not based on the ABA Model Rules.

¹⁶ MRPC 1.3 cmt. [1][2][5].