

Client confidentiality and client criticisms

The Lawyers Professional Responsibility Board (LPRB), at its September 30, 2016, meeting, voted to adopt Opinion 24. The Opinion provides:

Rule 1.6(a), Minnesota Rules of Professional Conduct (MRPC), generally prohibits a lawyer from knowingly revealing information relating to the representation of a client. Contained within the subsections of Rule 1.6(b), MRPC, however, are eleven enumerated exceptions to that general prohibition. Amongst those exceptions is Rule 1.6(b)(8), MRPC, which permits a lawyer to reveal information relating to the representation of a client provided:

[T]he 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 . . .

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.

Lawyers are cautioned that, when responding to comments posted on the internet or other public forum which are critical of the lawyer's work, professionalism, or other conduct, any such response should be restrained and should not, under Rule 1.6(b)(8), reveal information subject to Rule 1.6(a), MRPC.

What are LPRB Opinions?

Rule 4(c), Rules on Lawyers Professional Responsibility (RLPR), authorizes the LPRB to "from time to time, issue opinions on questions of professional conduct." LPRB Opinion 1 acknowledges, "The Board and the Supreme Court consider these opinions as rule interpretations that guide attorneys' professional conduct even though they are not binding on the Court." In *In re Admonition Issued in Panel File No. 99-42*, 621 N.W.2d 240, 245 (Minn. 2001), the Court discussed the effect of LPRB Opinions, stating:

We therefore recognize Board opinions as rule interpretations that guide attorneys' professional conduct even though they are not binding on this court. Pursuant to Rule 4(c), RLPR, Board opinions that interpret preexisting rules without either effectively creating new rules of professional conduct or exceeding the scope or plain meaning of the rules are entitled to careful consideration. However, an attorney will not be subject to discipline unless there is clear and convincing evidence of conduct that violates the Minnesota Rules of Professional Conduct.

Thus, while you cannot be disciplined for violating Opinion 24—or any LPRB Opinion—you should take it as the Board's interpretation of Rule 1.6, MRPC, and give it careful consideration in guiding your actions.

Rule 1.6, MRPC

Rule 1.6(a), MRPC, sets out the general rule of confidentiality, "Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client." The obligation of confidentiality is broader than attorney-client privilege, which, in general terms, only protects communications between a lawyer and client for the purpose of giving or receiving legal advice.

The universe of information covered by the confidentiality rule is quite large—any information relating to the representation, regardless of how or from whom the lawyer obtained that information.

As noted in Opinion 24, one of the exceptions to the general rule of confidentiality is the "self-defense" exception in Rule 1.6(b)(8), MRPC, that permits disclosure of client confidential information under certain limited circumstances. In looking at that exception and applying it to the context of responding to, for instance, an internet review critical of an attorney, it is necessary to determine whether such a review is an "actual or potential controversy" or whether an internet review is a "proceeding."

It seems evident that comments regarding a lawyer posted on the internet or another public forum should not be considered a "proceeding." Black's Law Dictionary, 7th Edition, defines the term "proceeding" as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment" or "Any procedural means for seeking redress from a tribunal or agency."

The term "controversy" is not so clearly limited as to plainly preclude the conclusion that a posting critical of a lawyer is not included in the definition. The Board's Opinion is consistent with the weight of authority, which indicates that for purposes of attorney/client confidentiality, the term ought not to be so broadly defined.

Looking again to Black's Law Dictionary, the first two definitions of controversy are, "A disagreement or a dispute, esp. in public" and "[a] justiciable dispute." Black's goes on to define a "public controversy" as "[a] controversy involving issues that are debated publicly and that have substantial ramifications for persons other than those engaged in it." A public posting of a comment critical of a lawyer's services seems unlikely to have substantial ramifications for persons

other than the lawyer and the poster of the comment. Thus, it ought not to be considered a controversy, public or otherwise, warranting application of the self-defense exception to Rule 1.6, MRPC.

This interpretation is consistent with other jurisdictions that have opined on the matter:

■ The Los Angeles County Bar Association opined that an attorney may publicly respond to a former client's adverse public comments so long as the response does not disclose any confidential information; does not injure the former client in any matter involving the prior representation; and is proportionate and restrained.¹

■ The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility concluded that a lawyer cannot reveal confidential information in response to a negative online review without the client's informed consent.²

■ The Bar Association of San Francisco opined that a lawyer may respond to an online review by a former client but may not disclose confidential information about the prior representation absent the former client's informed consent.³

■ The New York State Bar Association opined that a lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a lawyer-rating website.⁴

■ The Professional Ethics Committee for the State Bar of Texas opined that a Texas lawyer may not publish a response to a former client's negative review on the internet if the response reveals any confidential information, but may post a proportional and restrained response.⁵

■ The Bar Association of Nassau County Committee on Professional Ethics opined that a lawyer may not disclose confidential information to respond to online criticism.⁶

All of this is also consistent with the Restatement of the Law Governing Lawyers. Section 64 of the Restatement addresses the "self-defense" exception to

the general rule of client confidentiality. That section provides, in pertinent part, "A lawyer may use or disclose confidential information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer... against a charge or threatened charge by any person that the lawyer... acted wrongfully in the course of representing a client."

Comment c to section 64 talks about the kind of charges within the exception: "A lawyer may act in self-defense under this Section only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification." A negative online review does not seem to fall within the Restatement's definition of what constitutes a "charge."

In closing, be cautious in responding to negative online reviews and avoid disclosing information relating to the representation of a client when you respond. If you are tempted to disclose confidential information online, carefully analyze Rule 1.6(b), MRPC, to see if you may be permitted to disclose that information under an exception other than Rule 1.6(b)(8). ▲

Notes

¹ Los Angeles County Bar Association Opinion 525 (December 6, 2012).

² Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2014-200.

³ Bar Association of San Francisco Opinion 2014-1 (January 2014).

⁴ New York State Bar Association Opinion 1032 (October 30, 2014).

⁵ Professional Ethics Committee for the State Bar of Texas Opinion 662 (August 2016).

⁶ Bar Association of Nassau County Committee on Professional Ethics Opinion 2016-1 (May 9, 2016).



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