

The Rule Change that Changed Nothing

by

**Craig D. Klausning, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility**

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In October 2005, the Minnesota Supreme Court updated the Minnesota Rules of Professional Conduct. More than two years after that update most, if not all, of the significant changes have been extensively discussed in these pages and at various continuing legal education seminars.

Nevertheless, the Director's Office still receives questions about the impact of certain of the smaller changes to the rules. One example is the change to Rule 1.6, dealing with a lawyer's ability to disclose confidential information to collect a fee.

Prior to October 2005, Rule 1.6(b)(5) provided that "a lawyer may reveal confidences or secrets necessary to establish or collect a fee or to defend the lawyer or employees or associates against an accusation of wrongful conduct."

Because of the explicit language regarding disclosure necessary to "establish or collect a fee," the director was comfortable advising attorneys that certain confidential information could be disclosed, including to collection agencies, as part of the lawyer's collection efforts.

The disclosure, of course, was limited to information "necessary" to collecting the debt, and lawyers were disciplined when the disclosures went beyond that.

In one example, a lawyer received an admonition for disclosing to his minor daughter that, in his words, he was working for "deadbeat clients" who refused to pay their bills. The lawyer identified one client and the daughter wrote to the client lamenting that while most of her friends were packing their bags and flying on a plane to visit some wonderful vacation resort, she would be forced to stay at home over spring break because of his failure to pay her father's bill. The lawyer then mailed this letter to the client. The lawyer received an admonition because the disclosure to his daughter and the letter were not a necessary means of establishing or collecting the fee.

With the 2005 changes to the rules, Minnesota's Rule 1.6 was changed extensively. The provisions previously contained in Rule 1.6(b)(5) were moved to Rule 1.6(b)(8). The new language provided that the lawyer could release such information 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 lawyer was involved, or to respond in any proceeding to

allegations by the client concerning the lawyer's representation of the client."

Gone, however, from the new rule was the specific language concerning the ability of a lawyer to disclose information necessary "to collect a fee." In addition to the elimination of the "collect a fee" language, Rule 1.6 contains a new advisory comment stating that "a lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered *in an action to collect it.*" (Comment 9, emphasis added.)

Several attorneys have asked about the significance of these changes. Did this change mean that they were no longer able to disclose confidential information to third parties if the only purpose for the disclosure was to establish or collect a fee? What if the lawyer has no intention of commencing an action to collect the fee? What if the lawyer simply wants a collection agency to explore collection activities short of litigation? Did this change signify that they would no longer be able to disclose confidential information in such a situation?

The short answer to these concerns is no, the change to the rule has not created new restrictions on the lawyer's ability to disclose information for the purpose of collecting a debt.

It appears there was no discussion regarding the removal of this phrase on the part of the Minnesota State Bar Association task force that looked into the proposed rule changes. It is unlikely that such would be the case if this had been viewed as a significant change.

In addition, the balance of Comment 9 appears to support the notion that lawyers ought to be able to disclose information relating to the representation for the purposes of establishing or collecting a fee. In the context of discussing the disclosure of information in an action to collect a fee, the comment continues, "This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." That concept should apply with equal force to situations where the lawyer is attempting to collect a debt, short of commencing a legal action. Disclosures still should be limited to those that are necessary.

As part of the 2005 update to the Minnesota Rules of Professional Conduct there were many changes to the rules that significantly affected what lawyers could and could not ethically do. However, this change to Rule 1.6 changed nothing.