LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NUMBER 26

LAWYER CONFIDENTIALITY OBLIGATIONS WHEN COMMUNICATING ON LISTSERVS®

If a lawyer reasonably believes the disclosure of information that is not protected by the attorney client privilege, would not be embarrassing or likely detrimental to the client, and the client has not asked that the information be held inviolate, it is not a breach of the confidentiality obligations provided for in Rule 1.6(a) of the Minnesota Rules of Professional Conduct to disclose such information on a Listserv®. When the disclosed information falls within Rule 1.6(b)(2), MRPC, practitioners do not need to obtain informed consent from their clients to post about that client's matter on a Listserv®. Practitioners should note that Minnesota's exceptions to an attorney's confidentiality obligation differ from the exceptions in Model Rule 1.6.

Comment

The American Bar Association recently opined in Formal Opinion 511R that, under Model Rule 1.6, informed consent of a client is required when posting questions or comments to a Listserv® relating to a representation of the client. The ABA's opinion is quite broad, prohibiting posts "in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved." (ABA Formal Opinion 511R at 1.)

In view of Rule 1.6(b)(2) of the Minnesota Rules of Professional Conduct, the Minnesota Lawyers Professional Responsibility Board opines that American Bar Association Formal Opinion 511R regarding the confidentiality obligations of lawyers posting to a Listserv® is not applicable to the Minnesota Rules of Professional Conduct.

Rule 1.6, MRPC, first establishes a baseline general obligation of confidentiality. Rule 1.6(a), MRPC, states:

> Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

Rule 1.6(b), MRPC, then provides for qualified exceptions to the general confidentiality obligation where a lawyer may reveal information relating to the representation of a client.

Relevant here is the exception at Rule 1.6(b)(2), MRPC, which states:

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

> (2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

Rule 1.6(b)(2), MRPC, as presented above, was adopted by the Minnesota Supreme Court in 2005. This clause was implemented to remove the previous language of "confidence" and "secret" that was used throughout the rule to describe the scope of information protected under Rule 1.6.

Prior to 2005, Rule 1.6(a), MRPC (2004), stated:

> (a) Except when permitted under paragraph (b), a lawyer shall not knowingly:
> (1) reveal a confidence or secret of a client;
> (2) use a confidence or secret of a client to the disadvantage of the client;
> (3) use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

Prior to 2005, Rule 1.6(d), MRPC (2004), stated:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Prior to 2005, the comment titled "Authorized Disclosure" to Rule 1.6, MRPC (2004), stated in part:

> A lawyer must always be sensitive to the client's rights and wishes and act scrupulously in making decisions which may involve disclosure of information obtained in the professional relationship. Thus, in the absence of the client's consent after consultation, a lawyer should not associate another lawyer in handling a matter; *nor, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the client's identity or confidences or secrets would be revealed to that lawyer.* Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

(emphasis added). Comparing the pre-2005 language with the current language of Rule 1.6, MRPC, shows that the "scope of information" protected under this rule was previously provided for in Rule 1.6(d) (2004) as a definition. This limitation on scope was then amended into Rule 1.6(b)(2) as a qualified exception.

Comment [4] to Rule 1.6, MRPC, states:

> Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. *A*

lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

(emphasis added). What the language of Rule 1.6, as amended, demonstrates, is that Minnesota takes a measured, practical approach to client confidentiality as compared to the more restrictive ABA Model Rule.

Rule 1.6, MRPC, allows a lawyer to reveal certain information relating to the representation of a client if it is not privileged, held inviolate, or reasonably believed to be embarrassing or likely detrimental to the client. The ABA does not have an equivalent clause under Rule 1.6 of the Model Rules of Professional Conduct that allows for the disclosure of this type of information. Therefore, the ABA's guidance in Formal Opinion 511R on the confidentiality obligations of lawyers posting to a Listserv® is overly restrictive compared to what is allowed in Minnesota under Rule 1.6(b)(2), MRPC.

We recognize that other jurisdictions have found ethics violations for lawyers who post on Listservs® or other public forums. *See In re Peshek*, M.R. 23794, 09 CH 89 (May 18, 2010); *Office of Lawyer Regulation v. Peshek,* 334 Wis.2d 373, 798 N.W.2d 879 (2011) (lawyer published a public blog containing confidential information about her clients and for failing to inform a court of a client's misstatement of fact); *In Re Quillinan,* 20 DB Rptr. 288 (2006) (lawyer revealing client confidences on a bar Listserv where two aggravators and three mitigators applied); *In re Tsamis*, No. 2013PR00095, Ill. Att'y Registration & Disciplinary Comm'n (Jan. 15, 2014) (lawyer published adversarial response to negative review); *People v. Isaac*, 470 P.3d 837, 839 (Colo. O.P.D.J. 2016) (lawyer responded to negative review and listed specific client information).

However, in each of those instances, the lawyers would also have violated Rule 1.6(b)(2), MRPC, because the information posted was protected by the attorney client privilege, was embarrassing to the client, or breached other confidentiality obligations. As such, we do not find that those precedents weigh on the proper application of Rule 1.6, MRPC to Listservs®.

Adopted: