



NEW JERSEY STATE BAR ASSOCIATION

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Hon. Glenn A. Grant
Acting Administrative Director of the Courts
Rules Comments – PRRC Report
Hughes Justice Complex/P.O. Box 037
Trenton, NJ 08625-0037

RE: Supreme Court Professional Responsibility Rules Committee Report
(2018-2024)

Dear Judge Grant:

Thank you for the opportunity for the New Jersey State Bar Association (NJSBA) to submit comments on the Supreme Court Professional Responsibility Rules Committee (PRRC) Report. We are grateful for the short extension of time to submit comments to ensure a thorough review of the issues contained in the report.

The NJSBA recognizes the time and efforts of the PRRC in reviewing the issues presented and commends the Committee members for working toward the betterment of the profession. Upon reflection, the NJSBA agrees with a majority of the Committee's recommendations, and appreciates the thoughtful analysis presented in connection with each issue addressed in the report.

Below are the NSBA's comments, listed in the order in which they appear in the PRRC Report.

(1) RPC 8.4(g) - Misconduct

The PRRC's consideration of amendments to RPC 8.4(g) to mirror language in ABA Model Rule 8.4(g) was sparked, in part, by a letter from the NJSBA emphasizing support for the Model Rule language. Seven years after conveying that support, the NJSBA considered the PRRC analysis comparing the current New Jersey language to the ABA model language and is persuaded that the best course at this time is to update the New Jersey rule as suggested by the PRRC, without full adoption of the ABA model language. The NJSBA acknowledges that, unlike the situation in several other states at the time of ABA adoption of the Model Rule, New Jersey's rules already prohibit discriminatory and harassing conduct. We agree that adding the proposed ABA changes would not increase the protections provided by the existing rule but might create increased uncertainty for lawyers about how any new language might be interpreted. Based upon those considerations, the NJSBA supports the PRRC's proposal to (1) amend RPC 8.4(g) to mirror the protected characteristics contained in the New Jersey Law Against Discrimination (2) clarify in the comments that harassment is covered by the Rule, and (3) not adopt the ABA model language.

(2) RPC 1.5(B) – Basis and Rate of Fee

The NJSBA wholeheartedly agrees with the PRRC's recommendation to add language to RPC 1.5 to require that any changes in the basis or rate of fee charged to an existing client for representation in a new matter be communicated to the client in writing. We also agree that, where a new representation for an existing client is undertaken and the fee structure is the same, no such writing is required. We believe this is a best practice that both keeps clients informed and protects attorneys.

(3) RPC 1.7 – Waiver of Conflict of Interest by Public Entities

The NJSBA supports the PRRC's proposal to begin a pilot program in which the New Jersey Attorney General can waive conflicts of interest on behalf of public entities. The NJSBA believes that New Jersey is the only state where such conflicts cannot be waived, so it is appropriate for New Jersey to join the rest of the nation in allowing waiver in appropriate circumstances. On a practical basis, we are advised that private firms are often conflicted out of representation of public entities,

resulting in the Attorney General's Office encountering difficulty finding effective representation. The proposed pilot program will permit the Attorney General's Office to exercise discretion and have flexibility. It will also allow the Court to assess the impact of such a rule change before it is made permanent.

(4) RPC 1.6(D)(2) – Responding to Online Negative Reviews

The NJSBA carefully considered the PRRC's weighing a lawyer's obligation to maintain confidentiality against the significant issues created by false information published by clients online. NJSBA members take confidentiality obligations very seriously. The PRRC's suggested response to egregious allegations made by former clients does not suffice to defend a lawyer's hard-earned good reputation. We strongly believe that, if a client takes the first step of publicly disclosing information, that opens the door for a lawyer to respond in a measured way to appropriately address any false statements in that disclosure.

The NJSBA reaffirms support for its previous recommendation to provide guidance to attorneys about how to respond in an ethical and reasonable manner to online attacks on their integrity and reputation. The NJSBA once again asks the Judiciary to consider adopting a modified approach to the issue by combining the conclusion of the ACPE in Opinion 738 with the following parameters for an additional, limited response that maintains client protections as much as possible but allows attorneys to correct misinformation:

A lawyer should generally limit a response to negative online reviews in a restrained manner, as noted in ACPE Opinion 738, citing the following recommended response contained in Pennsylvania Bar Association Formal Opinion 2014-200:

A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.

To the extent that lawyers wish to provide more information in a response to a negative online review posted by a client, however, including confidential client information, lawyers are permitted to do so in limited situations and subject to the following criteria:

1. Only where an objectively inaccurate factual statement directly impugns the lawyer's ability to represent clients, including honesty, competency, integrity, knowledge of the law and similar legal attributes, may a lawyer utilize confidential client information to respond.
2. Before a lawyer is permitted to utilize confidential client information, a written, thirty (30) day warning must be sent to the former client by certified mail, email with delivery receipt, or guaranteed overnight delivery capable of being tracked, identifying the objectively inaccurate information, explaining (and documenting, where feasible) why such information is inaccurate, requesting that the former client remove the online post, and warning that if the post is not removed within thirty (30) days, the former client may be subject to legal action and/or the release of the client's confidential information in order to rebut the online post.
3. The disclosure of confidential information must be narrowly tailored and limited to what is reasonably necessary in order to rebut the objectively inaccurate claim(s).
4. Lawyers can indicate their disagreement with the post only if it contains objectively inaccurate facts. More generalized comments or opinions about the lawyer would not constitute objectively inaccurate factual statements.

As always, the NJSBA offers these comments in the spirit of cooperation, with the shared goal of improving the practice of law in New Jersey while maintaining public confidence in the judicial system.

Thank you again for the additional time provided to allow for the submission of comments on this proposal, and the opportunity to participate in this important process.

Sincerely,



William H. Mergner Jr., Esq.
President

cc: Christine A. Amalfe, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director