XXXX, J., Concurring.

The Bar alleges that Respondent has committed misconduct in three ways: I. Failing to conform his conduct to the requirements of the law, *Complaint*, at 2, II. Failing to demonstrate respect for the legal system and its officials, *Id.* at 3, and III. Threatening to disclose confidential information. *Id.*, at 4. Respondent is entitled to due process, which includes the right to notice of the charges and the opportunity to respond. American Bar Association, *Model Rules for Disciplinary Enforcement* 18, Commentary ¶ 1. I therefore only address the charges pleaded by the Bar. The Bar bears the burden of proving by clear and convincing evidence that a lawyer committed misconduct. *Model Rules for Disciplinary Enforcement* 18(3)-(4); Restatement (Third) of the Law Governing Lawyers, Ch. 1-2-C Intro Note (2000). The Bar's proof in this case is unclear, and it is certainly not convincing. I therefore join in the judgment.

I.

The Bar's first argument fails on two points. The Bar quotes (but does not give citation to) a "rule" from the Minnesota Rules of Professional Conduct, which says in part, "A lawyer's conduct should conform to the requirements of the law . . .". Complaint, at 2; *Minn. R. Prof. Cond., Preamble* cls. 5. The Respondent aptly points out that even though the Michigan Rules of Professional Conduct contain identical language, *Mich. R. Prof. Cond., Preamble* ¶ 5, the language is in the preamble to the Rules, and is not a rule itself. *Response*, at 1-2; *Mich. R. Prof. Cond. Preamble* ¶ 1 (stating that the preamble is a comment to Rule 1.0).

The text of the Rules is authoritative. *Mich. R. Prof. Cond.* 1.0(c). The comments to the rules are helpful in interpretation, but "[do] not expand or limit the scope of the obligations, prohibitions, and counsel found in the text of the rule." *Id.*; *See generally* A. Scalia & B. Garner, *Reading Law*, § 34 (West 2012). It follows from this that a charge of misconduct cannot be based on a comment to the rule when the acts would not constitute misconduct under the rule itself. *See Mich. R. Prof. Cond.* 1.0(b).

However, the charge fails on a second level as well. Assuming, for the sake of argument, that the above text is a rule, the Bar has not presented any convincing evidence that it was violated. The only

argument of any substance is that Respondent used the letter to "intimidate" and "coerce" the tribe to settle with him. *Complaint*, at 3.

But this falls short of the mark. The legal system is founded on the theory that the presence of the law and the threat of punishment will intimidate and coerce individuals into compliance, or, if they have disobeyed, to settle before the law punishes them. In this sense, attorneys are professional "intimidators", since their job is to use the force of the law to their client's advantage. Only unlawful intimidation is forbidden. *See Mich. R. Prof. Cond., Preamble*, ¶ 6 (a lawyer should use the law for *legitimate* purposes). The reason for this distinction is clear: Since attorneys have specialized knowledge of the law, it would be easy for them to trick a reasonable person into believing that something is the law, even if it was not. If this behavior were tolerated, there would soon be no public trust in any lawyers, since no one would know if they were getting sound legal advice or if the lawyer was pulling the wool over their eyes while reaching into their bank accounts.

While Respondent is blunt and direct in his letter, states that a lawsuit would be "damaging" to the tribe, and makes a non-negotiable request for a $225,000 settlement, *Demand letter*, at 6-7, none of this is as heinous as the bar makes it out to be. Respondent's letter appears to be a firm and final effort to resolve issues with the Tribe before bringing a lawsuit in Federal court, *Demand Letter*, at 1, by detailing the strength of the legal claim he had against it. Neither the Bar's arguments nor the contents of the letter provide clear and convincing evidence that this was not lawful.

II.

The Bar's second argument is based on the same source as their first argument, and it suffers from the same basic lack of authority. However, assuming again, for the sake of argument, that it is binding, the Bar's evidence is still inadequate to support a violation.

The rule cited by the Bar states, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." *Mich. R. Prof. Cond., Preamble* ¶ 6. The Bar argues that Respondent is guilty of misconduct because he has accused Tribal

judges of bias, accused a tribal lawyer of malpractice, and said that the tribal courts are "dysfunctional and illegal". *Complaint*, at 1, 3-4.

These allegations would demonstrate disrespect for the officers of the legal system if they were baseless. The inevitable result of such accusations would be a precipitous drop in the public's trust of the legal system. However, another critical component of the legal system's integrity is the obligation of a lawyer to report the misconduct of other lawyers. *See Mich. R. Prof. Cond.* 8.3. Therefore, as long as an attorney's allegations are grounded in facts and law, they do not lack respect for the legal system.

The allegations in the letter appear to be grounded in fact and law. Respondent accuses two trial judges of bias because one of them is a party to his lawsuit and the other refuses to recognize that conflict of interest. *Demand letter*, at 2; *See* American Bar Association, *Model Code of Judicial Conduct*, Rule 2.4(B). He accuses Mr. Giampetroni of misconduct because Mr. Giampetroni engaged in *ex parte* communication with the court, which is misconduct for both attorneys and judges. *Demand letter*, at 3; *Mich. R. Prof. Cond.* 3.5(b); *Model Code of Judicial Cond.*, Rule 2.9(A). Finally, respondent accuses the tribal court system of dysfunction because the council opposed the removal of one of the appellate court Justices, even though he had been convicted of fraud. *Demand Letter*, at 2. Respondent makes these allegations in the letter to illustrate how he will respond to a Federal District Judge who asks him why he has not exhausted his tribal court remedies, *Id.*, which is a perfectly legitimate purpose.

The Bar has not advanced any arguments that these accusations are not credible or not founded in fact. Instead, the bar relies on the sweeping assumption that if a lawyer accuses an attorney, judge, or a judicial system of bias, prejudice, misconduct, or dysfunction, he or she automatically disrespects the legal system. *Rebuttal*, at 2; *Complaint*, at 4.

The irony of this argument is amusing, since the Bar is engaging in the precise behavior they ask us to brand as misconduct. If we were to adopt this perspective, the Bar's disciplinary arm would face immediate dissolution (as its only function is to investigate and accuse). Furthermore, no attorney would report misconduct to the bar, since to do so would be misconduct. The profession of law is self-

regulating, which requires that its members report factual misconduct to the Bar. It is only when a lawyer makes baseless allegations that they may be disciplined for accusing their colleagues of malpractice.

III.

Finally, the Bar argues that Respondent has violated Rule 1.6(a) of the Model Rules of Professional Conduct, which states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." The authority and the prudence of this rule is clear, as clients must be able to trust their attorney with sensitive, embarrassing, or incriminating information without fear that the attorney will disclose it to others without a good reason.

However, the Bar has not argued that Respondent has revealed confidential information, only that he has threatened to reveal confidential information and is therefore "preemptively" in violation of the Rule. *Complaint*, at 4. It is worth noting that, while the Model Rules do prohibit attempted violations of a Rule, *Model R. Prof. Cond.* 8.4(a), a threat is not an attempt. A threat may be a part of an attempt, but it is not an attempt in and of itself.

The Bar's "preemptive violation" theory is untenable. The rule prohibits the disclosure of confidential and privileged information, and until an attorney discloses or attempts to disclose the information, they have not violated the rule. Any system of rules would be disfigured beyond recognition if a defendant could violate a rule by threatening to do what is prohibited. No one can recover for breach of contract if the defendant merely threatens to withhold delivery of a shipment of widgets, and no one can sue in tort for battery if the defendant has only threatened to hit him. A threatened violation is no violation at all.

However, even if a threat were a violation for the purposes of the rule, the Rules provide seven clear-cut exceptions, including that an attorney may disclose confidential information in order to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client". *Model R. Prof. Cond.* 1.6(b)(5). This is exactly the case here, *Demand letter*, at 3, and so even actual disclosure would be permissible, as long as it was in furtherance of Respondent's claim.

Interestingly, the Michigan Rules of Professional Conduct do not parallel the ABA's language, but also prohibit the "use of a confidence or secret of a client to the disadvantage of the client", *Mich. R. Prof. Cond.* 1.6(b), with certain exceptions. *Id*. at 1.6(c). This rule does not require actual or attempted disclosure, but only that the lawyer use it in a way that is detrimental to the client. However, the Bar has not brought charges under this rule, and so due process prevents us from considering it as a basis for discipline.

IV.

The Bar's arguments provide no grounds for discipline. However, Respondent concedes that "his brash wording was unnecessarily aggressive", *Response*, at 4, and that he allowed "his frustration cloud his personal judgment when writing the letter". *Id.* at 1. For the purposes of this case, I treat Respondent's statements as an admission that he carelessly crossed the line set by Rule 6.5(a) of the Michigan Rules of Professional Conduct. Rule 6.5(a) requires that lawyers be courteous to everyone involved in litigation, and the commentary on the rule parallels the situation before us:

> The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. *Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude.* A lawyer's professional judgment must be employed here with care and discretion. *Mich. R. Prof. Cond.* 6.5(a), Comment 2 (Emphasis added)

I believe that Respondent has admitted to being “impermissibly rude”. Because the violation was careless and freely admitted, I concur that a private reprimand is sufficient.