LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA

Friday, April 27, 2018 –1:00 p.m.
Town & Country Club
St. Paul, Minnesota

1. Welcome to Justice Lillehaug, Liaison Justice.

2. Approval of Minutes of January 26, 2018, Lawyers Board Meeting (Attachment 1).

3. Committee Updates:
   a. Rules Committee
      (i) Update on MSBA April 20, 2018, Assembly actions.
      (ii) Rules Committee's Recommendation on Rule 1.6, MRPC, and Board discussion (Attachment 2).

   b. Opinions Committee.
      (i) Discussion on Opinion No. 24.

   c. DEC Committee.
      (i) May 18, 2018, DEC Chairs Symposium.
      (ii) September 28, 2018, Professional Responsibility Seminar.

4. Strategic Plan Report Draft (Attachment 3).

5. Director's Report (Attachment 4).

6. Other Business:

   a. Next meeting, Friday, **June 8, 2018**, 1:00 p.m.
   b. Board Offsite, Friday, July 27, 2018.
   c. Professional Responsibility Seminar, Friday, September 28, 2018.

7. Quarterly Board Discussion (closed session).

REMINDER: Please contact Tina in the Director's Office at 651-296-3952 if you were confirmed for the Board meeting and are now unable to attend. Thank you.

If you have a disability and anticipate needing an accommodation, please contact the OLPR at lprada@courts.state.mn.us or at 651-296-3952. All requests for accommodation will be given due consideration and may require an interactive process between the requestor and the Office of Lawyers Professional Responsibility to determine the best course of action. If you believe you have been excluded from participating in, or denied benefits of, any Office of Lawyers Professional Responsibility services because of a disability, please visit www.mncourts.gov/ADAAccommodation.aspx for information on how to submit an ADA Grievance form.

MINUTES OF THE 182nd MEETING OF LAWYERS PROFESSIONAL RESPONSIBILITY BOARD JANUARY 26, 2018

The 182nd meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, January 26, 2018, at the Town and Country Club, St. Paul, Minnesota. Board members present were: Board Chair Robin Wolpert, and Board members Joseph Beckman, Jeanette Boerner, James Cullen, Thomas Evenson, Roger Gilmore, Christopher Grgurich, Mary Hilfiker, Gary Hird, Anne Honsa, Peter Ivy, Bentley Jackson, Shawn Judge, Michael Leary, Susan Rhode, Brent Routman, Gail Stremel, Terrie Wheeler, Bruce Williams, and Allan Witz. Present from the Director's Office were Director Susan Humiston, Deputy Director Timothy Burke, Senior Assistant Directors Joshua Brand, Siama Brand and Cassie Hanson, and Assistant Directors Amy Mahowald and Nicole Frank. Also present for portions of the meeting were Justice David Stras, and Frederick Finch on behalf of the Minnesota State Bar Association Rules of Professional Conduct Committee.

1. APPROVAL OF MINUTES.

The Minutes of the September 29, 2017, Board meeting were approved.

2. WELCOMES TO MARK LANTERMAN AND BRENT ROUTMAN.

Robin Wolpert welcomed Brent Routman as a new member of the Board and briefly summarized his resume and experience. Ms. Wolpert also informed the Board that effective February 1, 2018, Mark Laterman will join the Board. Ms. Wolpert recognized and thanked Terrie Wheeler for her service to the Board as a Board and Executive Committee member.

3. UPDATED ROSTER, AND PANEL AND COMMITTEE ASSIGNMENTS.

Ms. Wolpert stated that with the recent departures from and additions to the Board, changes have been made to various Panel and committee assignments. Ms. Wolpert thanked the Board members with whom she spoke for their input regarding these assignments. Ms. Wolpert summarized the new Panel and committee assignments, and noted that Cheryl Prince would become Board Vice Chair and both Ms. Prince and Mr. Beckman would become members of the Executive Committee. Beginning February 1, Anne Honsa will remain Chair of the Opinion Committee, Chris Grgurich will become Chair of the Rules Committee, and Peter Ivy will become Chair of the DEC Committee.

Susan Humiston noted that there are matters presently pending before Panels. Ms. Humiston stated that she would inform the Board members by email as to the status of each particular matter currently assigned to a Panel.

Ms. Humiston also stated that the Office will offer training to Panel Chairs around the end of February 2018. The purpose of the training is to help educate new Panel Chairs, and refresh current Panel Chairs, on the roles, responsibilities, duties, and best practices for Panel Chairs.

Ms. Humiston also stated that the Office is in the process of developing a summary statement for Board members to assist them in their various functions. The summary is intended to provide for each of the various tasks assigned to a Board member a brief guide as to the role, the purpose of the role, and the options for the Board member under the Rules of Lawyers Professional Responsibility. Revisions to the Panel Manual remain in process.

4. **REVISED POLICY & PROCEDURE NO. 5.**

Ms. Humiston introduced the background of this policy and procedure. Policy & Procedure Memorandum No. 5 addresses the procedures for the Board and the Office to use in handling a disciplinary complaint against an attorney Board member. Ms. Humiston reported that she had recently reviewed this policy and procedure memorandum with the Supreme Court Commissioner, and in those discussions a number of updates were recommended.

First, if special counsel in a matter is to be appointed, that appointment should be done by the Supreme Court through the Commissioner's Office. This follows the procedure the Court utilizes to appoint a referee to a lawyer discipline matter.

Second, the Court wants requests for appointment of special counsel to be filed electronically. The Clerk of Appellate Courts has worked with the Commissioner's Office to create a file for electronic filing of these requests.

Third, in making these requests, to identify the respondent lawyer, numbers should be used instead of using random initials.

Fourth, the prior policy was silent on compensation. The revised policy calls for special counsel to be compensated at the same rate as a senior judge acting as a referee in a lawyer discipline matter.

Finally, the policy was revised to eliminate gender-specific pronouns.

Mr. Williams suggested that it should be made clear in sections 1 and 2a that the reference to Rule 8 is to Rule 8 of the Rules on Lawyers Professional Responsibility. Ms. Humiston concurred that this was a good idea.

A motion was made to approve revised Policy and Procedure No. 5 as set forth in attachment 4 to the agenda for the Board meeting, with the clarification suggested by Mr. Williams. The motion was seconded and unanimously approved.

5. STRATEGIC PLANNING.

Ms. Humiston provided a brief background on the Office's strategic planning process. Ms. Wolpert noted that the strategic planning committee has been engaged with the Office since October 2017 in working toward the development of a strategic plan.

The strategic planning committee is comprised of the members of the Executive Committee, various staff attorneys, former Board Chair Judie Rush, and Emily Eschweiler, the Director of various Supreme Court boards. The facilitator is Connie Gackstetter from Judicial Branch Human Resources. Ms. Wolpert recognized the committee was a very engaged group, and that Ms. Gackstetter had done an excellent job facilitating the committee's discussions. The committee obtained a significant amount of information, including hundreds of responses to an electronic survey, and individual interviews with several stakeholders in the lawyer discipline system.

The materials attached to the agenda for the Board meeting constitute the essence of what will likely develop into the strategic plan. Ms. Humiston believes that a tagline, vision, and regulatory objectives should be identified for the Office and incorporated into the plan. Ms. Humiston noted that in April 2016 the American Bar Association adopted model regulatory objectives, and so far three states have adopted such objectives. Ms. Humiston believes it is appropriate to put together strategic priorities, and strategies to implement those priorities, based around the concepts in the ABA model regulatory objectives.

Ms. Humiston noted that at the start of the strategic planning process, Justice David Stras said that the Supreme Court would want to get engaged at the point where the strategic planning committee presently is in its process. Ms. Humiston noted that she had shared the committee's work with the Office staff and received valuable feedback.

Ms. Humiston reported that she is currently working on an action plan to implement the strategic plan. This is to identify the stakeholders who will act on certain items in the plan and a timeline for implementation. Ms. Humiston stated the original goal was to have a three-year strategic plan, but that a more realistic plan would be a three to five year plan, depending on office staffing. Ms. Humiston reported that the committee will be preparing a written report which will set forth the strategic plan, and also discuss the process and survey results. Ms. Humiston reported that the final product of the committee will be developed for presentation to the Board at its April 2018 meeting. Ms. Humiston requested the Board members to email her with any feedback they have toward the strategic planning priorities identified to ensure the strategic plan is consistent with the ideas of the Board members.

Justice Stras briefly summarized the history of the strategic planning process. Justice Stras noted that two to three years ago there was substantial transition with the Board and Office, with the arrival of a new Board Chair and a new Director. At the time, certain goals such as those related to file handling needed to be addressed. As progress has been made toward those goals, over the last year Justice Stras discussed with Ms. Humiston the idea of preparing a strategic plan for the Office. Justice Stras credited Ms. Humison for her work in putting the plan together. Justice Stras noted that the Court takes the Office's strategic planning process and plan very seriously and intends to review the final strategic plan, provide feedback, and ultimately vote on formally approving a strategic plan during a Court meeting.

Ms. Wolpert noted that the Office is the first disciplinary office in the country to do a strategic plan. Ms. Wolpert stated that she, too, valued the feedback received from the stakeholders regarding the challenges before the Office, and identifying where the Office performs well.

Ms. Humiston noted that from responses to an inquiry on a listserv for the directors of lawyer discipline agencies in the United States, it appears that strategic plans for lawyer discipline systems had been done only in states with an integrated bar. Even in those instances, the strategic plan for the discipline office was part of a broader strategic plan for that state's bar association as a whole. Other states have requested the Office's survey questions, which Ms. Humiston has provided, and are interested in receiving the strategic plan when it is complete.

Ms. Wolpert invited the Board members to share their preliminary thoughts, recognizing that a more robust discussion will be conducted at the Board's April 2018 meeting.

Mr. Ivy noted the report on lawyer well-being, and asked if that report could be posted. Ms. Humiston noted that attachment 10 to the Board materials contained an article Ms. Humiston authored in which she summarized the report on lawyer well-being recommendations for regulators. Ms. Humiston also noted that Minnesota has already implemented a large number of those recommendations. She also noted that there is a substantial section of that report on what managing lawyers in law firms should be doing to help improve lawyer well-being, and that a similar section exists for state supreme courts.

Ms. Wolpert noted that a focus this year was on the roles of the discipline system, the state bar association, and law schools, and how they can partner to improve lawyer well-being.

Ms. Humiston stated that her favorite quote from the report on lawyer well-being was that lawyer discipline alone could not make a sick lawyer well.

Mary Hilfiker inquired about the efforts to improve onboarding and training. Ms. Humiston noted that the Office recognizes the substantial amount of information an oncoming Board member needs to learn in a short amount of time, and that the Office has worked on improving the onboarding and training process for incoming Board members. Among other things, the Office has revised the training provided to Board members, is working on improving the Panel Manual, and will be conducting a training and refresher session for Panel Chairs. Mr. Routman noted that he is participating in the Office's current onboarding process and reported that he was pleased with the onboarding to date.

Ms. Wolpert recognized that becoming a Board member can be overwhelming at the start of the Board member's term. There are bodies of rules to learn, various roles performed by a Board member, differing standards of review and/or proof, and the like. Each of these is critical to the Board's mission, and the Board is a working Board which at times acts as a quasi-judicial body. Ms. Wolpert reported that she was glad to hear that a focus of the Deputy Director is enhancing the learning and onboarding experience.

Following up on Ms. Hilfiker's inquiry, Mr. Williams stated that he believes that consideration ought to be given to including Board members in the onboarding

process. Ms. Humiston reported that the Office views the onboarding process as the responsibility of the Office, as the staff is paid to work with the Board and the district ethics committees (DEC) in training for DEC members as well. Ms. Humiston noted that as part of the training for DEC members, the Office intends to produce a series of training videos for DEC members, which will be hosted on a private YouTube channel.

Mr. Burke requested the Board members to provide to him any feedback they have on how to improve the training and onboarding process performed by the Office.

6. **COMMITTEE UPDATES.**

A. Rules Committee

i. Rule 5.5, MRPC.

Ms. Humiston reviewed the history of the proposed changes to Rule 5.5. She reported that she provided the Board's feedback to the MSBA's rules and judiciary committees. The MSBA judiciary committee decided to have a one hour CLE presentation at the December 17 MSBA general assembly regarding Rule 5.5. Ms. Humiston and Eric Cooperstein presented, and Tom Nelson acted as facilitator. The CLE provided attendees with education on the history and substance of the proposed changes to Rule 5.5, MRPC, and various views on each of the recommended changes. Ms. Humiston reported that the feedback she received was uniform in that attendees found the CLE very informative. The MSBA Judiciary Committee hoped and believed that this CLE would allow members of the general assembly to be highly informed when the question is called for consideration at a general assembly meeting. Ms. Wolpert agreed that the CLE was excellent and positioned the general assembly for a well-informed debate.

Mr. Finch reported that the judiciary committee will consider the proposed changes to Rule 5.5 at an upcoming meeting, and that he would inform the Board and Office of that date.

ii. Rule 1.6, MRPC.

Ms. Wolpert provided handouts to the Board members for this discussion and summarized the handouts. She also noted that an

invitation was extended to the MSBA Rules of Professional Conduct Committee to attend this Board meeting, and Mr. Finch was present as Chair of that committee. Ms. Wolpert turned the discussion over to Mr. Grgurich, incoming Chair of the LPRB Rules Committee.

Mr. Grgurich provided an overview of the structure of Rule 1.6(a) and (b), MRPC, a summary of Board Opinion No. 24, and a summary of the issues raised by the current language of Rule 1.6(b)(8), Opinion No. 24, and the MSBA Rules Committee's proposal. Mr. Grgurich then reported on the recent LPRB Rules Committee meeting, the recommendations which flowed from that Committee meeting, and the communications that Cheryl Prince, Chair of the LPRB Rules Committee, and Anne Honsa, Chair of the Opinion Committee, had thereafter.

Ms. Honsa stated that she and Ms. Prince concurred that the Board should table action on whether to repeal Opinion No. 24 until there was an understanding of the Board's position regarding the proposed changes to Rule 1.6(b)(8). Ms. Honsa reported that the Opinion Committee thereafter discussed the matter and concurred.

Ms. Wolpert then invited other members of the Rules Committee to provide any desired input.

Mr. Cullen stated that his position was that the Board needed to consider the fundamental issue, which rests in Opinion No. 24. Mr. Cullen noted that this opinion makes it clear that a lawyer may not disclose client confidential information in response to a negative online client review. However, this opinion may be at odds with the language of Rule 1.6(b)(8). Mr. Cullen stated that if so and if Board opinions alone are not able to be the basis for discipline, then if a client makes a serious or defamatory allegation in an internet post, the issue is whether a lawyer should be allowed to use confidential information to respond. If Rule 1.6(b)(8) by its language would allow a lawyer to do so, then Opinion No. 24 should be amended by deleting the second paragraph of the opinion. Mr. Cullen noted that during the most recent Rules Committee meeting he made a motion to this effect, but the motion did not pass for want of a second.

Mr. Grgurich stated that as a Rules Committee member, he had brought the motion during the Rules Committee meeting to withdraw Opinion No. 24. Mr. Grgurich stated that he made this motion because he was at the Board meeting in which Opinion No. 24 was adopted, he did not recall the opinion being discussed in the context of the specific language of Rule 1.6(b)(8), and he did not believe the opinion could be squared with the language of the rule.

Mr. Burke stated that he concurred with Mr. Cullen that a threshold issue is whether the language of Opinion No. 24 is consistent with the language of Rule 1.6(b)(8). Mr. Burke stated that he believes an additional threshold question exists, whether a lawyer should be allowed to use client confidential information in response to a negative social media post. Once that policy decision is reached, then rule language can be crafted consistent with that policy goal.

Mr. Ivy expressed that the MSBA Rules Committee proposed changes to Rule 1.6(b)(8) has an absence of safeguards surrounding disclosure. Mr. Ivy noted that Minnesota Statute Ch. 595 governs attorney-client privilege in post-conviction proceedings. Mr. Ivy noted that in post-conviction proceedings, allegations of ineffective assistance of counsel are often made. If an evidentiary hearing is ordered on such an allegation, then counsel making the claim will want privileged information from prior defense counsel. Mr. Ivy noted that the process of providing that information is subject to court supervision, with substantial built-in protections including *in camera* review of lawyer files, *in camera* review to determine the scope of permitted disclosures, and that when the matter is concluded, no further disclosure or dissemination or review will exist. Mr. Ivy noted that this supervision of the process sharply contrasts that with the language in the proposed rule. Mr. Ivy noted that lawyers could have vastly different interpretations of terms such as "reasonable" and "necessary" in the proposed changes, so that application of the rule for a practicing lawyer would be extremely difficult.

Mr. Beckman noted that if the Board repealed Opinion No. 24, the Board will in essence state words to the effect of "we changed our mind" on an opinion barely one year old. Mr. Beckman expressed

concern that this was not a quality process to follow and suggested that the Board should decide on Opinion 24 when it made its decision regarding the proposed changes to Rule 1.6(b)(8). Ms. Wolpert responded that what constituted the status quo depended on one's approach. Ms. Wolpert noted that for many years Opinion No. 24 did not exist, so that repeal of Opinion No. 24 could be considered a return to the status quo. Ms. Wolpert also noted the Opinion Committee had recommended the Board not repeal Opinion 24 while the discussion regarding Rule 1.6 went forward, and the Rules Committee had made an opposite recommendation.

Mr. Routman stated his understanding that prior to the adoption of a Board opinion, a proposed opinion is sent out for comment, but this process was not followed before the Board adopted Opinion No. 24, and inquired as to the process surrounding the adoption of Opinion No. 24. Mr. Routman also asked whether as a jurisdictional issue, the Rules of Professional Conduct Committee could make a recommendation on whether the Board should withdraw an opinion.

Ms. Wolpert discussed the process surrounding the adoption of Opinion No. 24. Ms. Wolpert stated that the Board did not specifically decide not to seek comment on the Board opinion. Rather, the Board's normal practice is to seek such comment. Ms. Humiston noted that when the Board adopted Opinion No. 23, which addressed a very unique issue, no comment was solicited, and the process followed with Opinion No. 23 was simply followed for Opinion No. 24. Ms. Humiston concurred that it was an oversight not to request input toward Opinion No. 24, and noted that Opinion No. 24 arose from the Office which was responding to requests for advisory opinions on the topic. Ms. Wolpert concurred that the Board's practice is to seek input regarding proposed Board opinions and agreed with Ms. Humiston that in the context of Opinion No. 24 there was an inadvertent oversight.

Regarding the issue of jurisdiction of various Board committees, Ms. Wolpert noted that each committee had made a recommendation to the Board, but ultimately the Board would

make the final decision in the matter. Ms. Wolpert noted the value of Board committees working together when so warranted.

Ms. Hilfiker stated that she believed the Board should not repeal Opinion No. 24. She believed that allowing a lawyer to reveal confidential information in response to a client's negative review could only make the situation for the lawyer worse, not better. Mr. Williams concurred. He noted that oftentimes client criticisms amount to little more than a character assassination and that lawyers cannot control a person who desires to engage in such conduct.

Mr. Witz concurred with the Deputy Director's definition of the threshold question before the Board. Mr. Witz believes that the Board should decide the policy it wishes to adopt regarding disclosure of confidential client information, and from there determine how a rule should be written.

Ms. Humiston noted that the MSBA proposal is broader than online posts, but applies to any disclosure to a third person not in the lawyer's firm. Mr. Witz reiterated that the Board's discussion should start with a discussion of the Board's policy on this issue.

Mr. Cullen noted that before the most recent LPRB Rules Committee meeting, he had three motions for the committee's consideration. One of these, regarding the addition of the words "actual" or "potential" in 1.6(b)(8), was considered.

Ms. Honsa noted that Opinion No. 24 was designed to caution attorneys not to post confidential client information on the internet in response to critical comments. She noted that the existing Rule 1.6(b)(8) uses the terms "controversy" and "proceedings." Ms. Honsa shares the concern Mr. Williams expressed, that the MSBA's proposal opens the door to lawyers inappropriately revealing client confidential information, which the Board attempted to avoid by adopting Opinion No. 24.

Mr. Beckman concurred, noting that it is an easier position for a lawyer to be in to simply state that the lawyer is ethically barred from substantively responding.

Justice Stras noted that he does not read the Board's Opinion No. 24 as prohibiting all responses, but simply stating that a lawyer may not use client confidential information in responding.
Ms. Humiston agreed. Ms. Humiston also noted that she believes this discussion raised the issue of whether documents available as part of the public record, such as court filings, should be defined as not confidential. Ms. Humiston noted that recently the ABA issued a formal Opinion No. 479, which reiterated that confidentiality under the Rules of Professional Conduct is broader than attorney-client privilege, and client confidentiality is not abrogated simply because a document is filed in a public case. Ms. Humiston noted that as others have said, the last person a client wants talking about the client's case is the client's lawyer. Thus, ABA Formal Opinion 479 states that "publicly available" information is not synonymous with "readily available" information as term is used in Rule 1.9.

Ms. Humiston noted that the recent conversations regarding the effect of Board opinions suggests that this issue should be revisited. Ms. Humiston noted that the Supreme Court had stated that the Board may issue opinions, Board opinions are interpretations of the Rules of Professional Conduct to guide attorney conduct, the Board may not change a rule through the adoption of an opinion, and a lawyer may not be disciplined solely for violation of an opinion. In summary, Ms. Humiston stated that Board opinions are designed to provide guidance and helpful information to the bar.

Mr. Williams stated that he believes that adoption of the MSBA's proposal would create a slippery slope opening a Pandora's Box.

Ms. Judge inquired whether Rule 1.6(b)(8) and Opinion No. 24 are inconsistent. Her concern with the MSBA proposal is that it creates substantial uncertainty and need for education for a lawyer as to when a lawyer could or could not reveal client confidential information. She also is concerned that if a lawyer did reveal client confidential information, the lawyer opens the lawyer up to many potential legal ramifications. She noted that she believes Opinion No. 24 does help attorneys by clarifying their obligation.

Ms. Wolpert then invited Mr. Finch to address the Board.

Mr. Finch stated his opinion that the function of the Board is lawyer discipline and guidance to the Office on how to enforce the Rules of Professional Conduct. Mr. Finch opined that nothing in the Board's charter says the Board must provide opinions on proposed changes to the Rules of Professional Conduct. He opined that the Board was not actively involved in the major overhauls of the professional conduct rules in the early 1980s and in the early 2000s. That said, he noted that the Board and the MSBA have tried to seek the input of the other regarding potential rule changes.

As to substance, Mr. Finch noted that the proposed changes to Rule 1.6(b)(8) are not limited simply to internet or online postings. He also thought the proposal provided an opportunity to resolve the ambiguity in Rule 1.6(b)(8) as to the definition of "controversy" in that rule.

Mr. Finch noted that the MSBA proposal is designed to limit the circumstances in which a lawyer may use client confidential information to specific and public accusations that raise a substantial question as to a lawyer's honesty, trustworthiness, or fitness in other respects, and only when a client used confidential information.

Mr. Finch noted that Rule 1.6(b)(8) already contains many exceptions to the general rule of client confidentiality. Mr. Finch stated that the MSBA Rules of Professional Conduct Committee believes the Court should adopt its proposal to amend Rule 1.6(b)(8), would like the Board to agree with the MSBA's proposal, or at least would like the Board not to disagree. Ms. Humiston noted that the MSBA Rules Committee was divided when it voted on the proposal.

Mr. Grgurich stated that he believed greater clarity in the rule was required. Ms. Humiston concurred.

Mr. Hird expressed concern that adopting the proposed changes to Rule 1.6(b)(8) could have effects that do not reflect at all well on the profession.

A motion was made to adopt a portion of the MSBA proposal to add the words "actual or potential" immediately before the word

"civil" in Rule 1.6(b)(8). The motion was seconded and unanimously approved.

A motion was made to reject the MSBA's proposal to amend Rule 1.6(b)(8), subject to the foregoing motion. Mr. Routman believed that at this time the Board should look at the issue in greater depth. Mr. Routman expressed concern that the rule is ambiguous, the opinion is inconsistent with the rule, and it is therefore hard to see a lawyer disciplined on the rule. The motion was seconded. The motion failed on a vote of 13 to 5, with one abstention.

A motion was made to adopt the recommendation of the LRPB Rules Committee for the Board to table further consideration of the MSBA's proposed changes. The motion was seconded and unanimously approved. The input of Board members on this issue to the Rules and/or Opinions committees was solicited. Mr. Finch stated that the MSBA Rules of Professional Conduct Committee stood willing to assist the Board and its committees in the deliberations.

The sense of the room was that the Board should not repeal Opinion No. 24 at this time.

B. DEC Committee

Ms. Wheeler reported that three of the district ethics committees do not presently have a 20% membership of non-lawyers, and that the DEC Committee has discussed this issue with the Executive Committee. Mr. Ivy reported that he is considering additional methods for recruiting, especially of non-lawyers, and is also considering ways to improve training for DEC members. He believes that the private YouTube channel with training videos presents an intriguing opportunity. Ms. Humiston noted that in some outstate districts, the greater challenge is ensuring that the term limits set forth in Rule 3, RLPR, are observed. Ms. Humiston also reminded Board members that the DEC Chairs symposium will be conducted on May 18, 2018. Ms. Wolpert requested that Board members with ideas for the symposium contact Mr. Ivy and/or Joshua Brand.

7. **DIRECTOR'S REPORT.**

Ms. Humiston noted that ABA Formal Opinion 479 was in the materials attached to the agenda for the meeting. Mr. Cullen noted that this opinion contains distinctions between the use, disclosure, and revelation of client confidential information. Mr. Cullen noted that the discussion had been about disclosure when the Board was discussing Rule 1.6(b)(8). Mr. Cullen asked Ms. Humiston how much she believed ABA Opinion 479 would help the Rules Committee. Ms. Humiston stated that she believed the opinion was helpful because it again reiterated the nature of when information would no longer be considered confidential. Ms. Humiston noted that this issue was answered by Opinion 479 as to former clients.

Ms. Humiston provided a personnel update. Ms. Humiston introduced Nicole Frank, who recently joined the Director's Office as an Assistant Director. Ms. Frank provided a brief summary of her career. Ms. Humiston reported that the Office has hired two attorneys who will start February 20. She provided a brief background of the careers and credentials of Becky Huting and Aaron Sampsel. Ms. Humiston also reported that the Office has hired a new receptionist who will start shortly.

Ms. Humiston announced with regret that Tina Trejo has announced that she will retire from the Office in July 2018. Judicial Branch Human Resources has authorized the Office to have a three-month overlap for the hiring of Ms. Trejo's successor to allow for training and development.

Ms. Humiston provided an overview of statistics, and noted that the Office continues to make good progress toward the Board's targets for case progress, although due to staffing changes the Office is not where it needs to be.

Ms. Humiston reported that the Office is making an effort to have staff attorneys join various MSBA committees so that the Office ensures that it is hearing what lawyers in the community are saying about the profession. Ms. Humiston reported that the Office continues to develop its skills in dealing with lawyers suffering from impairments, and that as part of this effort, will be conducting a training session with staff from Lawyers Concerned for Lawyers.

Ms. Wolpert reminded the Board that the date of the June 2018 meeting has been changed to June 8.

8. **OTHER BUSINESS.**

Mr. Grgurich inquired whether in light of ABA Opinion No. 479 the Board should explore whether publicly available documents should be considered non-confidential. Ms. Humiston stated that she believed it was appropriate to consider this issue at this time.

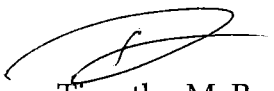
Mr. Leary expressed kudos to Ms. Humiston and the staff at the Office for their progress in achieving the Board's case processing goals. Ms. Humiston thanked Mr. Leary for his praise and noted that the progress was a team effort.

9. **QUARTERLY BOARD DISCUSSION.**

The Board, in a closed session, conducted its quarterly Board discussion.

Thereafter, the meeting adjourned.

Respectfully submitted,



Timothy M. Burke
Deputy Director

[Minutes are in draft form until approved by the Board at its next Board meeting.]

LPRB Consideration of MSBA Proposal to Amend Rule 1.6(b)(8)

Timeline of Events:

September 30, 2016:	LPRB issues Opinion 24
December 6, 2016:	OLPR Pat Burns article in Bench & Bar regarding client confidentiality and client criticisms
September 26, 2017:	MSBA Rules of Professional Conduct Committee proposes amendments to Rule 1.6(b)(8), issues report
September 29, 2017:	LPRB receives and considers MSBA proposal; votes to send the issue to the Rules Committee for evaluation and recommendation
November 20, 2017:	MSBA Judiciary Committee considers MSBA Rules of Professional Conduct Committee recommendation to amend Rule 1.6(b)(8); Judiciary Committee votes to wait for the LPRB recommendation on the proposed amendments
December 13, 2017:	LPRB Rules Committee considers MSBA proposal and decides to hold a second meeting
December 15, 2017:	ABA issues Opinion 479
January 11, 2018:	LPRB Rules Committee considers MSBA proposal and issues recommendations
January 18, 2018:	Chair of LPRB Rules Committee communicates recommendation regarding Opinion 24 to Chair of LPRB Opinion Committee
January 19, 2018:	Tim Burke memo re Rules Committee recommendations regarding MSBA's proposed amendments to Rule 1.6(b)(8) is posted on OLPR website for comment

Materials relevant for evaluation of MSBA Proposed Amendments:

1. Current Rule 1.6
2. MSBA Report and Recommendation Re Amendments to Rule 1.6, including proposed new language and explanation for amendments
3. Opinion 24
4. Tim Burke memo summarizing work of LPRB Rules Committee
5. Bill Wernz response to Burke memo
6. ABA Opinion 479
7. Pat Burns Bench & Bar article

Recommendations of the LPRB Rules Committee:

1. Committee unanimously approved the following MSBA's proposed amendment: "...the lawyer reasonably believes the disclosure is necessary to establish a defense in an actual or potential civil, criminal, or disciplinary proceeding..."
2. Committee voted 3-3 on a motion to reject the MSBA's remaining proposed amendments to Rule 1.6(b)(8)
3. Committee voted 5-1 on a motion for the Rules Committee to table consideration of the MSBA's remaining proposed amendments to Rule 1.6(b)(8) for further evaluation and discussion by the LPRB
4. Committee voted 5-1 on a motion to recommend that the LPRB withdraw Opinion 24 until the Board has completed evaluating Rule 1.6(b)(8)

Comparison of Current and Proposed Rule

RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

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

CURRENT RULE	MSBA PROPOSAL
(8) 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 client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client	(8) the lawyer reasonably believes the disclosure is necessary to respond to a client's specific and public accusation, made outside a legal proceeding, of misconduct by the lawyer, where the accusation (a) raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects and (b) includes the client's disclosure of information or purported information related 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;
	(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense in an actual or potential 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.~~comply with other law or a court order~~;

OPINION 24	BURNS ARTICLE
"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) 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."	Comments posted on the internet or another public form should not be considered a "proceeding" "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."

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
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OPINION NO. 24

Confidentiality of Information

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.

Adopted: September 30, 2016.

Stacy L. Vinberg, Chair
Lawyers Professional Responsibility Board

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

Report and Recommendation to the MSBA Regarding Proposed Amendments to MRPC 1.6, Confidentiality of Information

Rules of Professional Conduct Committee
November 1, 2017

RECOMMENDATION

RESOLVED, that the MSBA petition the Minnesota Supreme Court to adopt proposed amendments to Minnesota Rules of Professional Conduct 1.6(b)(8) and (9), and related comments, as set forth in this report.

Rule 1.6(b) A lawyer may reveal information relating to the representation of a client if:

(8) the lawyer reasonably believes the disclosure is necessary to respond to a client's specific and public accusation, made outside a legal proceeding, of misconduct by the lawyer, where the accusation (a) raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects and (b) includes the client's disclosure of information or purported information related 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~~;~~

(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense in an actual or potential 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;

(~~9~~10) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;

(~~10~~11) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or

(~~11~~12) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Comments to Rule 1.6.

[8] ~~Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.~~ Paragraph (b)(8) does not permit disclosure to respond to a client's petty or vague critique, or general opinion, of a lawyer, such as those that are common in online rating services. Specific allegations are those which can be factually verified or corrected. Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm. Paragraphs (b)(8) and (b)(9) recognize the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[9] ~~A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. 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.~~ Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim or charge involving the conduct or representation of a former client. Such a claim or charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(9) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. A lawyer entitled to a fee is permitted by paragraph (b)(9) to prove the services rendered in an action to collect it.

REPORT

Committee History, Mission, Procedures.

The Rule 1.6 subcommittee was appointed on April 25, 2017, by Mike McCarthy, then Chair of the MSBA Committee on the Rules of Professional Conduct (Committee). Initial members of the subcommittee were William J. Wernz, Fred Finch, David Schultz, Tim Baland, Jr., and Patrick R. Burns. On and after September 12, 2017, Timothy Burke replaced Patrick R. Burns.

Appointment of the subcommittee was requested by William J. Wernz in a memo dated April 17, 2017. The memo stated the purposes of the subcommittee would be (a) to study and make recommendations regarding a possible petition to amend Rule 1.6(b)(8), Minn. R. Prof. Conduct; and (b) to consider how the development of electronic social media and other electronic publication modes may affect the issues addressed by Rule 1.6(b)(8). The memo also stated, "The main occasion for this request is the issuance by the Lawyers Professional Responsibility Board (LPRB) of Opinion 24, on September 30, 2016." The memo also identified what Mr. Wernz regarded as serious problems with Opinion 24.

The subcommittee's recommendations were heard and considered at the Committee meeting held on September 26, 2017. At that meeting, the Committee voted to support the recommendations of the subcommittee absent any dissenting comments received from MSBA sections. Following that meeting, the proposed changes and background information were provided to all MSBA section chairs, with notice that comments were due October 27, 2017. The only comment received came from the New Lawyers Section, indicating they had reviewed and discussed the proposed changes to Rule 1.6 and voted to support them.

This information was brought back to the Committee when they met on October 31, 2017. It was noted by representatives of the Office of Lawyers Professional Responsibility (OLPR) that the LRPB would not be formally discussing the proposed amendments until their meeting in January, 2018. As a formality, the Committee again voted to support bringing the proposed changes to the MSBA Assembly at their December meeting. The Committee felt it important that these changes, along with the changes recommended to Rule 5.5, be combined in one petition to the Court.

Sources.

Sources reviewed by the subcommittee included Lawyers Board Opinion 24, the April 17, 2017, memo of Mr. Wernz, Patrick R. Burns, *Client Confidentiality and Client Criticisms,* Bench & B. of Minn., Dec. 2016 ("OLPR article") and William J. Wernz, *Board Forbids Lawyer-Self-Defense in Public Forum – a Further Look – Board Op. 24,*

Minn. Law., April 10, 2017 ("Wernz article"). The subcommittee also reviewed literature related to the advent and influence of electronic social media.

Minnesota and ABA Model Rules 1.6.

Since they were first adopted in 1985, the Minnesota Rules of Professional Conduct have followed the ABA Model Rules of Professional Conduct to a large degree. The 2005 amendments to the Minnesota Rules were generally designed to increase the overlap of the two sets of rules.

Nonetheless, Minnesota Rule 1.6 ("Confidentiality of Information") has always had many variations from Model Rule 1.6. In 1985, the Court rejected ABA Model Rule 1.6 altogether, preferring to carry forward the confidentiality provisions of the Minnesota Code of Professional Responsibility into Minnesota Rule 1.6. From the 1980s to the early part of this century Minnesota adopted amendments to Rule 1.6 which generally enhanced the discretion of lawyers to disclose confidential information when necessary to rectify or respond to client misconduct. These amendments were usually not based on the Model Rules and in some cases the ABA rejected proposals similar to those adopted in Minnesota. Sometimes the Model Rules were later amended to permit disclosures similar to those permitted in Minnesota.

In 2005, Minnesota adopted several variations from Model Rule 1.6. The variations generally permitted more disclosures than the Model Rule. For example, Minnesota Rule 1.6(b) permits eleven types of disclosures, but Model Rule 1.6(b) permits only seven. Even where the Minnesota and Model Rules address the same types of permitted disclosures, the relevant provisions sometimes differ. For example, Minnesota added the words "actual or potential" to "controversy" in Model Rule 1.6(b)(8).

Based on this history, the Committee has not found it important to try to conform to ABA Model Rule 1.6(b).

Lawyers Board Opinion No. 24 and the OLPR Article

On September 30, 2016, the LPRB issued Opinion No. 24. The Board did not follow its customary procedures of seeking comment on a draft of the opinion and including a Board explanatory comment with the opinion. Opinion 24 did not address the meaning of Minnesota's addition of "actual or potential" to "controversy." Opinion 24 did not include any explanation of its conclusion that Rule 1.6(b)(8) does not permit disclosure of information covered by rule 1.6(a), "when responding to comments posted on the internet or other public forum. . .."

It appears that Opinion 24 takes the position that there are no circumstances in which the "actual or potential controversy" provision of Rule 1.6(b)(8) permits disclosures. Mr. Wernz reported that he inquired of the OLPR and of the LPRB whether they believed there were any such circumstances, but did not receive a reply.

The OLPR article appears to take the position that the controversy provision would apply only in public debates, especially on the internet, "that have substantial ramifications for persons other than those engaged in [the debates]." The OLPR article regards such ramifications as "unlikely" in the case of internet ratings of a lawyer. The Committee considered, however, whether such ramifications would include decisions by prospective clients as to retaining lawyers who were the subject of such ratings. A majority of the Committee has concluded that there are circumstances, outside of legal proceedings, in which a lawyer should be permitted to disclose confidential information to respond to a client's serious, specific allegations of the lawyer's misconduct.

A majority of the Committee does not regard the status quo as satisfactory. The meaning of "actual or potential controversy" is debatable. It is not evident that Opinion 24 states the "plain meaning" of Rule 1.6(b)(8). The OLPR article is not consistent with Opinion 24 as to when disclosures are allowed in public controversies – OLPR would allow some disclosures, but Opinion 24 would allow none. A majority of the Committee regards its proposed rule amendments as not expanding disclosure permissions beyond those allowed under current rules.

Electronic Social Media.

Electronic social media (ESM) has developed after 2005. ESM has become a major fact of life. ESM provides important resources for information used in making everyday decisions, including selection of providers of various services. Developments include online rating services in which customers and clients rate the services of various providers, including lawyers. The Committee has reviewed online ratings of lawyers. The Committee has the following observations and conclusions.

Most online ratings of lawyers by clients express general opinions. Where ratings include allegations of fact, they are often fairly general and do not disclose confidential client information. Most factual allegations do not involve serious misconduct, but instead involve such matters as diligence, adequacy of communications, manners and the like. However, ESM postings can involve serious accusations of misconduct by lawyers.

Opinions, Rules and Cases in Other Jurisdictions.

The Committee reviewed ethics opinions from other jurisdictions, including those that were cited in the OLPR article and were apparently relied on by the LPRB in issuing Opinion 24.

The opinions cited in the OLPR article do not address the situation where the client's accusation includes disclosure of confidential information. Three of the cited opinions expressly state that they assume the client has not disclosed confidential information and the other cited opinions expressly rely on these three opinions.[i] Opinion 24 in effect takes a position that is not taken by these opinions, viz. that Rule 1.6(b)(8) does not permit disclosure even when the client's accusation includes disclosures. Insofar as opinions in other jurisdictions take the position that lawyers may not disclose confidential information to respond to critiques outside of legal proceedings when the critiques do not themselves disclose confidential information, the Committee agrees with them.

D.C. Ethics Opinion 370, *Social Media I: Marketing and Personal Use* (Nov. 2016) was issued after LPRB Op. 24 was issued. Op. 370 includes a section, "Attorneys May, With Caution, Respond to Comments or Online Reviews From Clients." This section applies a Rule of Professional Conduct, unique to the District of Columbia, that allows disclosure or use of otherwise protected client information, "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." D.C. Rule 1.6(e). Op. 370 states, "Attorneys may respond to negative online reviews or comments from clients. However, Rule 1.6 does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review or opinion." For further explication, Op. 370 cites Comment 25 to D.C. Rule 1.6.[ii] The committee inquired of D.C. Bar Counsel's office regarding its experience with D.C. Rule 1.6(e). Bar Counsel indicated that it generally advises lawyers to avoid disclosures in responding to online reviews, but did not provide specific information on rule interpretation issues.

Several attorneys in other jurisdictions have been publicly disciplined for disclosing confidential information in response to online reviews.[iii] Violations of confidentiality rules were clear in these cases. The conduct in these cases would violate both the current Minnesota Rule 1.6 and the rule as proposed for amendment.

The Committee believes it will be helpful to the bar and the public to address the situation in which the client has disclosed confidential information or purported information. Proposed Rule 1.6(b)(8) does address this situation.

Committee Comments on Drafting.

The proposed amendments bifurcate current Rule 1.6(b)(8) into proposed Rules 1.6(b)(8) and (9), to make clear when a lawyer may disclose information in legal proceedings and

when disclosure may be made outside legal proceedings. Current Rules 1.6(b)(9), (10), and (11) would be re-numbered 1.6b(10), (11), and (12).

Proposed Rule 1.6(b)(8).

The proposed amendment does not retain the term "controversy," because it has proved ambiguous. The OLPR article takes the position that "public controversy" refers to issues outside legal proceedings, that is, "issues that are debated publicly and that have substantial ramifications for persons other than those engaged in it." A "debate" does not require a "proceeding" and proceedings are not normally called "debates." The OLPR article cites opinions from other jurisdictions as "consistent." However, the opinions in other jurisdictions that construe the term "controversy," conclude that "controversy" requires a legal "proceeding."[iv]

The proposal uses the term "accusation," rather than "actual or potential controversy." The proposal also makes clear that an accusation "made outside a legal proceeding" is covered.[v] "Accuse" and similar terms were used for many decades before 2005. The term "accuse" was used in Rule 1.6(b)(5) from 1985 to 2005, in DR 4-101(C) of the Code of Professional Responsibility before 1985, and in Canon 37 of the ABA Canons that preceded the Code.[vi]

The proposal uses the terms "specific and public" to modify "accusation." The term "specific" is borrowed from D.C. Rule 1.6(e). The proposal includes the phrase "a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." This phrase has been used for over thirty years in Minnesota and Model Rule 8.3, and has a reasonably well-understood meaning.

A client or former client who accuses a lawyer of serious misconduct in a representation will normally disclose confidential information or purported information in making the accusation. If a client made the accusation, "My lawyer stole my settlement proceeds," the proposed rule would permit the lawyer to make disclosures necessary to show that the lawyer properly distributed the settlement proceeds. In contrast, disclosure would not be permitted if the client made the accusation, "Jane Doe is a terrible lawyer."

Proposed Rule 1.6(b)(9).

The proposal associates the terms "actual or potential" with "proceeding," rather than – as in current Rule 1.6(b)(8) - with "controversy." This revision fits better with an important example of permission to disclose regarding a potential proceeding, viz. a lawyer's report to a malpractice carrier of a client "claim," which is not yet an actual lawsuit. Such claims are more accurately characterized as potential proceedings rather than potential controversies.

The proposal permits disclosure in relation to proceedings as necessary "to establish a claim or defense." Current Rule 1.6(b)(8) associates establishment of a claim with a "controversy" only, and associates establishment of a defense with both a "controversy" and a "proceeding." In *Kidwell v. Sybaritic,* 784 N.W.2d 220 (Minn. 2010), four justices associated regarded Kidwell's disclosures to establish a claim as permitted in a proceeding that Kidwell had commenced against his former employer.[vii]

Proposed Comments 8 and 9.

The proposed comments make clear that the disclosure permission of proposed Rule 1.6(b)(8) does not apply to such disclosures as a client's mere expression of opinion, vague critique, and the like. "Specific accusation" is contrasted with "petty or vague critique," and "general opinion." "Public accusation" is defined in the proposed comment in a way that is consistent with the law of defamation.

Fairness, Attorney-Client Privilege, Client Waiver by Disclosure.

Current comment 9 to Rule 1.6 recognizes, as a basis for permission to disclose in connection with a fee dispute, "the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." Because this principle extends beyond a lawyer's contested claim to a fee, proposed comment [8] relates this principle to both Rule 1.6(b)(8) and (9), as amended.

The Committee took note of another application of a principle of fairness - the fact that a client's voluntary disclosure of privileged information operates as a waiver of the attorney-client privilege. "The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication." Restatement of the Law Governing Lawyers § 79. The policy reason for finding waiver in partial disclosure is that it would be "unfair for the client to invoke the privilege thereafter." McCormick on Evidence § 93 (7th ed. 2016), citing 8 Wigmore, Evidence (McNaughton rev.) § 2327 and Imwinkelried, The New Wigmore: Evidentiary Privileges § 6.12.4 (2ed. 2010). A waiver of the privilege would occur if a client disclosed privileged information in accusing a lawyer of misconduct.

Although the law of confidentiality under the Rules of Professional Conduct overlaps with the law of privilege, the two bodies of law are in many ways distinct. Nonetheless, the Committee believes that it would be unfair for a client to disclose, or purport to disclose, confidential information to support serious accusations against a lawyer and thereafter to invoke confidentiality rules to prevent the lawyer's self-defense either in or outside a proceeding. As noted above, some of the opinions of other jurisdictions on which the OLPR article and Opinion 24 rely expressly state that the opinions do not apply where the client's allegation involves a waiver of confidentiality or privilege.

Balancing Moral and Professional Issues.

Issues involving disclosure of confidential information in self-defense give rise to important moral and professional issues. A client's groundless, public accusation of serious professional misconduct, if apparently supported by disclosure of client information, may permanently damage a lawyer's reputation and income. A lawyer's unnecessary disclosure of client information may damage a client.

Electronic Court Filing.

An issue related to issues considered by the Committee arises with electronic court filings. Electronic filing has become standard in recent years in Minnesota court proceedings. Public access to court filings has been greatly enhanced. Under current Rule 1.6(b)(8) and (9), a lawyer may disclose confidential information as reasonably necessary to "establish a claim or defense." Lawyers may sue clients and other parties to establish a claim of defamation per se. If, as Opinion 24 concludes, Rule 1.6(b)(8) does not permit a lawyer to disclose information in self-defense outside a legal proceeding, the rule may create an incentive for a lawyer to defend his or her reputation against serious, false accusations by bringing a claim for defamation per se.

A lawyer may wish to call attention to filings in a defamation per se or other proceeding. The Committee has not attempted to resolve the issue of whether a lawyer Rule 1.6 permits the lawyer to make further public disclosures of information filed online in litigation. The Committee notes: (1) that such disclosure would apparently be permitted under the Restatement of the Law Governing Lawyers; (2) that a Supreme Court referee concluded that a lawyer's public disclosure of court records did not violate Rule 1.6 and OLPR did not appeal this conclusion; and (3) that OLPR does not currently take a position on when further disclosure by a lawyer of information available in court records does or does not violate Rule 1.6.[viii]

The Committee believes that amending Rule 1.6(b)(8) to make clear a lawyer's permission to disclose to respond to serious accusations will reduce the lawyer's incentive to sue the client.

Conclusion.

The Committee believes that the proposed amendments will not broaden the circumstances in which a lawyer may disclose confidential information beyond those provided by current Rule 1.6(b)(8). The current permission to disclose "in an actual or potential controversy" can be interpreted in a very broad way. OLPR interprets "controversy" to include a certain type of "debate." The Committee's proposal requires, for disclosures outside a litigation "proceeding," that the client make an accusation that is specific, serious, and public, and that also discloses confidential information. These requirements will result in very few permissions to disclose. The proposed amendments are also clear enough to reduce or eliminate the uncertainty and controversy resulting from the current rule and from Lawyers Board Opinion 24.

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[i] Los Angeles County Bar Ass'n Op. No. 525 addresses a situation "when the former client has not disclosed any confidential information." San Francisco Bar Ass'n Op. 2014-1 states, "This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege." New York State Bar Ass'n Op. 1032 addresses response to a client statement that "did not refer to any particular communications with the law firm or any other confidential information." Texas State Bar Op. No. 662 and Pennsylvania Bar Ass'n Formal Op. 2014-200 both rely on the Los Angeles, San Francisco and New York opinions.

[ii] Comment 25 to D.C. Rule 16 states, "If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."

[iii] *People v. James C. Underhill Jr.*, 2015 WL 4944102 (Colo. 2015); *In the Matter of Tsamis,* Ill. Att'y Registration and Disciplinary Comm'n, Comm'n No. 2013PR00095 (Ill. 2014); *In the Matter of Margrett A. Skinner,* 295 Ga. 217, 758 S.E.2d 788 (Ga. 2014).

[iv] Texas construes the "controversy" exception to confidentiality as applying, "only in connection with formal actions, proceedings or charges." Texas Op. 662. Pennsylvania relies for its conclusion on a comment that has no Minnesota counterpart. "Comment [14] makes clear that a lawyer's disclosure of confidential information to 'establish a claim or defense' only arises in the context of a . . . proceeding." Pa. Op. 2014-200. The other opinions cited by the OLPR article do not construe the term "controversy." Another cited opinion finds that the term "accusation," as used the governing rule, "suggests that it does not apply to informal complaints, such as this website posting," but instead applies only a formal "charge." NYSBA Ethics Op. 1032.

[v] Definitions chosen from Black's Law Dictionary tend to have narrow meanings associated with legal usages. Definitions from more general dictionaries tend to have more general meanings.

To avoid the issue of which dictionary to prefer, proposed Rule 1.6(b)(8) includes its own definition – a covered "accusation" is one made "outside a legal proceeding."

[vi] Rule 1.6(b)(5) permitted disclosure "to defend the lawyer or employees or associates against an accusation of wrongful conduct." DR 4-101 similarly permitted disclosure of confidential information by a lawyer "to defend himself or his employees or associates against an accusation of wrongful conduct." Canon 37 provided, "If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation."

[vii] The remaining three justices based their opinion on employment law and did not find it necessary to reach ethics issues. *Kidwell* dealt with a whistle-blower claim.

[vii] Restatement Sec. 59 cmt. d; Findings of Fact, Conclusions of Law, and Memorandum of Honorable John C. Lindstrom at 19, *In re Fuller*, 621 N.W.2d 460 (May 23, 2000).

[viii] Restatement Sec. 59 cmt. d; Findings of Fact, Conclusions of Law, and Memorandum of Honorable John C. Lindstrom at 19, *In re Fuller*, 621 N.W.2d 460 (May 23, 2000).

MEMORANDUM

TO: Lawyers Professional Responsibility Board

FROM: Timothy M. Burke

DATE: January 19, 2018

RE: Rule 1.6

INTRODUCTION

I am writing this memorandum on behalf of the LPRB Rules Committee regarding Rule 1.6, Minnesota Rules of Professional Conduct. The Committee was tasked with making a recommendation as to the position the Board should take regarding the MSBA Rules of Professional Conduct Committee proposal to amend Rule 1.6(b)(8). The LPRB Rules Committee has met three times; exchanged additional email communication; and extensively discussed, considered and deliberated both the specific MSBA Rules Committee proposal and additional important issues that the proposal raises. The LPRB Rules Committee intends to deliver its recommendation to the Board regarding the MSBA Rules Committee proposal for the Board's consideration at its April 2018 meeting.

RULE 1.6(b)(8)

This Rule provides:

> (b) A lawyer may reveal information relating to the representation of a client if: . . .
>
> (8) 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 client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client . . . .

MSBA RULES COMMITTEE PROPOSAL

The issues raised by the MSBA Rules Committee proposal are (1) whether Rule 1.6(b)(8) should be amended to allow a lawyer to reveal confidential client information to respond to a negative client accusation in an on-line review, social media or the like and (2) if so, in what circumstances and under what conditions any such disclosure may be made.

In Opinion No. 24, the Board opined that a lawyer may not use confidential client information to respond to a client's negative comments about the lawyer. Opinion No. 24 states in pertinent part, "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."

The MSBA Rules Committee, in contrast, proposes that Rule 1.6(b)(8) be amended to allow a lawyer to do so. A copy of the MSBA Rules Committee proposal is attached. The proposal arises out of a desire to allow a lawyer to respond to a client's negative commentary or review of the lawyer and/or lawyer's services in an on-line review website, blog post, other social media or the like. The concern underlying the proposal is that in today's on-line world, prospective clients increasingly find lawyers by searching on-line, and baseless negative reviews can have an increasingly deleterious effect on the lawyer's ability to obtain business. Therefore, when a client uses confidential information to accuse the lawyer of a specific act of serious misconduct, the lawyer should be allowed to use confidential information if reasonably necessary to rebut the accusation.

All but one of the jurisdictions which have considered this issue have opined that lawyers ought not to be allowed to do so. For example, New York State Bar Assoc. Ethics Op. 1032 (Oct. 30, 2014) in reaching this result states in part:

> This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client—or others—being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is

> disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that [Rule 1.6] should be interpreted in a manner that could chill such discussion.

This position is consistent with the ABA Model Regulatory Objectives for the Provision of Legal Services. One of the objectives is, "Protection of privileged and confidential information." Although there are exceptions, each is narrowly drawn to the minimum disclosure necessary in a given circumstance. Part of the basis for the duty of confidentiality is the duty of loyalty to clients. Clients view lawyers as obligated to preserve client confidences. We as lawyers are professionals, such as others like doctors, psychotherapists and the like. I am not aware that other professions allow for disclosure of otherwise confidential information simply to respond to a negative online review.

During the LPRB Rules Committee's most recent meeting, the Committee defeated on a 3-3 vote a motion to oppose the MSBA Rules Committee proposal to amend Rule 1.6(b)(8). The Committee then passed on a 5-1 vote a motion to (1) table the Committee's consideration of the MSBA Rules Committee's proposal, so that the Rules Committee and then the Board may further consider the issues and deliver a recommendation to the Board for its April 2018 meeting and (2) recommend the Board withdraw LPRB Opinion No. 24 until the Board has completed that process.

ADDITIONAL ISSUES

One of the issues raised by this discussion is the definition of "controversy" in Rule 1.6(b)(8). A basis of the MSBA Rules Committee proposal to amend Rule 1.6(b)(8) is the suggestion that the word "controversy" in this rule is vague and/or ambiguous. The language of the rule and the comment to the rule suggest that the "controversy" envisioned by the rule is a legal controversy between the lawyer and the client. This can be seen in the language preceding controversy, which refers to a claim or defense by the lawyer related to the client. However, the language of the rule is not expressly limited in this way.

The Pennsylvania Bar Association has discussed this issue in the context the Rules Committee is considering:

> A disagreement as to the quality of a lawyer's services might qualify as a "controversy." However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, Comment [14] makes clear that a lawyer's disclosure of confidential information to "establish a claim or defense" only arises in the context of a civil, criminal, disciplinary or other proceeding. Although a genuine disagreement might exist between the lawyer and the client, such a disagreement does not constitute a "controversy" in the sense contemplated by the rules to permit disclosures necessary to establish a "claim or defense."

Pennsylvania Bar Assoc. Formal Op. 2014-200.

The Committee intends to give further consideration to whether "controversy" should be more precisely defined in Rule 1.6, whether by a change in the text of the Rule, LPRB opinion, or otherwise.

Another issue raised by this discussion is whether Rule 1.6 should be amended to define publicly available information as non-confidential. The Committee intends to discuss this issue further.

Attachment

memo

To: Lawyers Professional Responsibility Board

From: William J. Wernz

Date: January 22, 2018

Re: Rule 1.6(b)(8) Proposed Amendment

I am submitting this memo to correct, clarify and respond to the Jan. 19, 2018, Memo of Timothy M. Burke to the Lawyers Board regarding Rule 1.6. This memo draws on the Sept. 26, 2017, MSBA Committee Report appended to Mr. Burke's memo, and on other materials referenced in that Report.

In this memo, "controversy clause" refers to the portion of Rule1.6(b)(8) allowing disclosure of confidential information when, "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, ..." The "Burns article" refers to Patrick R. Burns, *Client Confidentiality and Client Criticisms,* Bench & B. of Minn., Dec. 2016, posted on the LPRB/OLPR website. The Burns article is important because it stands in contradiction to LPRB Op. 24 and to the Burke memo on key points. "MSBA proposal" refers to the amendment to Rule 1.6(b)(8) and (9) proposed by the MSBA Rules of Professional Conduct Committee.

1. *MSBA Committee Concerns for Clients, Public and Lawyers.* Mr. Burke's memo states, "The concern underlying the [MSBA] proposal is that . . . negative reviews can have an increasingly deleterious effect on the lawyer's ability to obtain business." This characterization suggests the Committee was mainly acting out of concern for lawyers' pocketbooks. This is not so. The Committee was also concerned about prospective clients, the public, and lawyers' reputations. Unfounded client accusations affect *both* the criticized lawyer *and* the prospective client who might otherwise have chosen that lawyer. False accusations can also affect election or appointment of lawyers to public positions.

2. *The Burke Memo Inaccurately Describes Other States' Bar Opinions.* The Burke memo states, *accurately*, that the MSBA Committee proposes, "that when a client uses confidential information to accuse a lawyer of a specific act of serious misconduct, the lawyer should be allowed to use confidential information if reasonably necessary to rebut the accusation." The Burke memo then states, *inaccurately*, "All but one of the jurisdictions which have considered this issue have opined that lawyers ought not to be allowed to do so." In fact, three of the five bar opinions referenced state that – unlike the MSBA proposal - they are *not* considering client critiques that disclose confidential information.[1] N.Y. State Bar Op 1032, which the Burke memo cites to

[1] Los Angeles County Bar Op. 525 states, "This Opinion assumes that no confidential information is disclosed in the [client's] message. . .." Similarly, San Francisco Bar Op. 2014-1

exemplify disagreement with the MSBA proposal, states (at footnote 1), "New York State Bar Ass'n Op. 1032 addresses response to a client statement that 'did not refer to any particular communications with the law firm or any other confidential information'."

3. *Confidentiality in Historical Perspective – The MSBA Proposal Limits Disclosure More Than The Current Rule or The Rule From 1908-2005.* Mr. Burke's memo frames the issue as one of how highly confidentiality is valued in the legal and other professions. If confidentiality were the only value, LPRB and MSBA would not have recommended, and the Minnesota Supreme Court would not have adopted, the disclosure permissions found in Rule 1.6(b)(1)-(11). These disclosure permissions carefully balance confidentiality and other values, adopted over many years. We can all agree confidentiality and loyalty are fundamental values, without denying that there are other values, including the public good and the truth.

In any event, the MSBA proposal protects confidentiality more than current Rule 1.6(b)(8) and more than predecessor rules. From 1908 until 2005, first the ABA, then the Minnesota Supreme Court, adopted rules allowing lawyers to disclose confidential information to respond to a client's "accusation of wrongful conduct." Note well that the MSBA proposal is more limited than the century-long rule because, for example, the proposal would permit disclosure only when the client's serious accusation includes confidential information.

In 2005, the Court – on the recommendation of MSBA, OLPR and LPRB – adopted the "controversy clause" as a restatement of the "accusation of wrongful conduct" provision. There was no *new* type of disclosure permission intended in 2005. The MSBA proposal intends to restate - in a more limited and clearly-defined way - a 110 year old permission to disclose.

4. *Do Current Standards or the MSBA Proposal Better Protect Confidentiality?* Any valuation of confidentiality must take account of the present enforcement situation. As the MSBA Report notes, current enforcement is extremely problematic. Contradictions arise even between LPRB and OLPR, and between OLPR and itself – i.e. in the Burke memo and the Burns article.

Does the controversy clause refer broadly to a "debate," or narrowly to a legal "proceeding?" The Burns article adopts the definition of "controversy" as, "issues that are debated publicly." OLPR and LPRB have posted the Burns article on their website for 13 months, without qualification or retraction. In contrast, the Burke memo states that Rule 1.6 and its comment suggest that the controversy clause requires a legal "proceeding," and cites a Pennsylvania opinion to the same effect. Because Mr. Burns and Mr. Burke disagree on whether the controversy clause has the broad meaning of "debate," or the narrow meaning of "proceeding," OLPR could not effectively argue in a discipline proceeding for either meaning.

Does the controversy clause ever permit a lawyer to disclose confidential information to respond to client accusations? LPRB Op. 24 responds (without explanation), "never." In another contradiction, the Burns article responds, "sometimes,"

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states, "This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege." It is unknown whether these authorities would agree with the MSBA proposal if it was assumed that the client disclosed confidential information, but it is clear that they do not disagree with the proposal because they do not address the facts that are in the proposal.

i.e. when a lawyer-client public debate has "substantial ramifications" for third parties. Although the Burns article finds such debates "unlikely," a respondent attorney could well argue that choice of counsel is so important that it often or always involves "substantial ramifications" for that lawyer's clients. Again, with such a contradiction manifest from different documents posted on the LPRB/OLPR website, OLPR could not argue in a discipline proceeding that the controversy clause *never* permitted disclosure.

Rule 1.6(b)(8) itself has two sets of tensions. First, in the controversy clause the words "establish a claim or defense" suggest a legal proceeding, while the words "actual or potential controversy" suggest a mere debate. Second, the controversy clause is immediately followed in Rule 1.6(b)(8) by a clause providing for disclosures permissible in a "proceeding." The Burke memo does not attempt to explain why a rule would have two clauses, both purportedly referring only to a "proceeding," but using "controversy" and "proceeding" for the same thing. Rule amendment is required for clarification. Clarification cannot be achieved by a Board opinion, because Board opinions may state only the "plain meaning" of a rule.

The Lawyers Board should ask whether the MSBA proposal or current standards – Rule 1.6(b)(8), Op. 24, the Burns article, and the Burke memo – better protect confidentiality. The MSBA proposal allows disclosure only in extremely limited and clearly defined circumstances. In contrast, current standards are rife with ambiguities, uncertainties and even contradictions. Clearly, the MSBA proposal better protects confidentiality.

To be enforced, the MPRC must clearly apply to the facts at hand. When OLPR disagrees both with LPRB and with itself, on fundamental points, and when Rule 1.6(b)(8) has multiple ambiguities, there can be no clarity or enforcement.

5. *Incomplete Characterizations.* The Burke memo frames the issue as one of whether and when a lawyer should be permitted to disclose confidential information in response to negative client statements "in an on-line review, social media and the like." It is true that the development of social media provides the occasion and main context for this consideration. However, LPRB Op. 24 expressly applies to any "public forum." One of the hypotheticals the MSBA considered arises when false client accusations are made in a town hall debate between candidates for County Attorney.

The Burke memo characterizes the MSBA proposal as a permission to disclose, "simply to respond to a negative online review." The proposal is not at all that simple. It has several demanding requirements before it permits disclosure. The former client accusation must: (1) be specific and public; (2) raise a substantial question concerning the lawyer's honesty, trustworthiness or fitness; and (3) include confidential information from the representation. The proposed comment makes clear that the vast majority of online critiques would not meet these requirements.

6. *For Self-Defense Should a Lawyer Have to Sue a Former Client?* The Board should consider the MSBA proposal in relation to a lawyer's undisputed permission to disclose confidential information as necessary in a defamation per se suit against a former client. In this context, the Board will understand both how limited confidentiality protection is and how prohibiting disclosures for self-defense in the court of public opinion gives lawyers a strong incentive to sue former clients.

If a former client publicly and falsely accuses a professional, including a lawyer, of serious, wrongful conduct, the professional may sue the client for the tort of "defamation per se." "Per se" means that to recover money the lawyer does not have to prove actual damages, but instead the court presumes damages. A professional may not commence such a suit may for petty or vague criticisms.

With the advent of the internet and of courthouse file viewing terminals, documents filed in litigation are readily available to the public. The lawyer-plaintiff may file documents disclosing such confidential information as is reasonably necessary for the suit, including information relating to damages.

The lawyer-plaintiff may disclose, "I have commenced suit, for defamation per se, against [former client's name] in Hennepin County District Court." This is not information from the representation, but is instead information from a post-representation event. The lawyer may make this disclosure online, or in another public forum, in response to a former client's serious, false accusation of misconduct. The effect of this disclosure may well be that interested parties will access the filings and learn the previously confidential information. The issue of whether a lawyer may disclose confidential information in self-defense in the court of public opinion will be mooted in some cases, because disclosures in a court of law will become publicly known.

7. *Confidentiality and Disclosure Regulations for Lawyers, Doctors, Psychologists.* The Burke memo indicates that other professions do not permit disclosure to respond to client accusations, citing "doctors, psychotherapists and the like." This statement raises many more questions than it answers. The answers are obviously negative, and thereby fatal to the "other professions" argument.

- From 1908 to 2005, did other professions have rules permitting disclosure that were parallel to the ABA and Minnesota "accusation of wrongful conduct" disclosure rules for lawyers? If not, were the lawyer rules wrong? Did the rules cause clients to distrust lawyers?

- Do other professions have disclosure permissions parallel to those in Rule 1.6(b)(1)-(11)? If not, should Minnesota repeal the non-parallel disclosure permissions?

- Turn the question around. Should lawyers adopt rules of doctors and psychologists that *require* disclosure to legal authorities when a patient or client has been an abuser or is apt to harm others? Should lawyers be subject to medical records confidentiality laws, including HIPAA? Does the *informed* public expect that lawyers and other professionals should have one common confidentiality regime?

8. *Conclusion.* I am sorry not to be able to attend the January 26 Board meeting. I would be glad to have the opportunity to respond to questions and comments. I appreciate whatever consideration the Board may give these written comments.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 479 **December 15, 2017**

The "Generally Known" Exception to Former-Client Confidentiality

A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

Introduction

Confidentiality is essential to the attorney-client relationship. The duty to protect the confidentiality of client information has been enforced in rules governing lawyers since the Canons of Ethics were adopted in 1908.

The focus of this opinion is a lawyer's duty of confidentiality to former clients under Model Rule of Professional Conduct 1.9(c). More particularly, this opinion explains when information relating to the representation of a former client has become generally known, such that the lawyer may use it to the disadvantage of the former client without violating Model Rule 1.9(c)(1).

The Relevant Model Rules of Professional Conduct

Model Rule 1.6(a) prohibits a lawyer from revealing information related to a client's representation unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Model Rule 1.6(b).[1] Model Rule 1.9 extends lawyers' duty of confidentiality to former clients. Model Rules 1.9(a) and (b) govern situations in which a lawyer's knowledge of a former client's confidential information would create a conflict of interest in a subsequent representation. Model Rule 1.9(c) "separately regulates the use and disclosure of confidential information" regardless of "whether or not a subsequent

[1] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2017) [hereinafter MODEL RULES].

representation is involved."[2]

Model Rule 1.9(c)(2) governs the *revelation* of former client confidential information. Under Model Rule 1.9(c)(2), a lawyer who formerly represented a client in a matter, or whose present or former firm formerly represented a client in a matter, may not reveal information relating to the representation except as the Model Rules "would permit or require with respect to a [current] client." Lawyers thus have the same duties not to *reveal* former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.

In contrast, Model Rule 1.9(c)(1) addresses the *use* of former client confidential information. Model Rule 1.9(c)(1) provides that a lawyer shall not use information relating to a former client's representation "to the disadvantage of the former client except as [the Model] Rules would permit or require with respect to a [current] client, or when the information has become *generally known*."[3] The terms "reveal" or "disclose" on the one hand and "use" on the other describe different activities or types of conduct even though they may—but need not—occur at the same time. The generally known exception applies only to the "use" of former client confidential information. This opinion provides guidance on when information is generally known within the meaning of Model Rule 1.9(c)(1).[4]

The Generally Known Exception

The generally known exception to the use of former-client information was introduced in the 1983 Model Rules.[5] The term is not defined in Model Rule 1.0 or in official Comments to Model Rule 1.9. A number of courts and other authorities conclude that information is *not* generally known merely because it is publicly available or might qualify as a public record or as a matter of public record.[6] Agreement on when information *is* generally known has been harder to achieve.

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[2] ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 190 (8th ed. 2015).

[3] MODEL RULES R. 1.9(c)(1) (2017) (emphasis added).

[4] *See id.* at cmt. 9 (explaining that "[t]he provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent").

[5] *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.9, at 534 (2017–2018) (explaining that the language was originally part of Model Rule 1.9(b), and was moved to Model Rule 1.9(c) in 1989).

[6] *See, e.g.*, Pallon v. Roggio, Civ. A. Nos. 04-3625(JAP), 06-1068(FLW), 2006 WL 2466854, at *7 (D. N.J. Aug. 24, 2006) ("'Generally known' does not only mean that the information is of public record. . . . The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information 'generally known' within the meaning of Rule 1.9(c)." (citations omitted)); Steel v. Gen. Motors Corp., 912 F. Supp. 724, 739 (D. N.J. 1995) (in a discussion of Rule 1.9(c)(2), stating that the fact that information is publicly available does not make it 'generally known'); *In re* Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) ("'Generally known' does not mean information that someone can find."); *In re* Anonymous, 932 N.E.2d 671, 674 (Ind. 2010) (stating in connection with a discussion of Rule 1.9(c)(2) that "the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources" (footnote omitted); *In re* Tennant, 392 P.3d 143, 148 (Mont. 2017) (explaining that with respect to the Rule 1.9(c) analysis of

A leading dictionary suggests that information is generally known when it is "popularly" or "widely" known.[7] Commentators have essentially endorsed this understanding of generally known by analogizing to an original comment in New York's version of Rule 1.6(a) governing the protection of a client's confidential information. The original comment distinguished "generally known" from "publicly available."[8] Commentators find this construct "a good and valid guide"[9] to when information is generally known for Rule 1.9(c)(1) purposes:

> [T]he phrase "generally known" means much more than publicly available or accessible. It means that the information has already received widespread publicity. For example, a lawyer working on a merger with a Fortune 500 company could not whisper a word about it during the pre-offer stages, but once the offer is made—for example, once AOL and Time Warner have announced their merger, and the Wall Street Journal has reported it on the

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when information is considered to be generally known, the fact that "the information at issue is generally available does not suffice; the information must be within the basic knowledge and understanding of the public;" protection of the client's information "'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources'") (citations omitted)); Turner v. Commonwealth, 726 S.E.2d 325, 333 (Va. 2012) (Lemons, J., concurring) ("While testimony in a court proceeding may become a matter of public record even in a court denominated as a 'court not of record,' and may have been within the knowledge of anyone at the preliminary hearing, it does not mean that such testimony is 'generally known.' There is a significant difference between something being a public record and it also being 'generally known.'"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1125, 2017 WL 2639716, at *1 (2017) (discussing lawyers' duty of confidentiality and stating that "information is not 'generally known' simply because it is in the public domain or available in a public file" (reference omitted)); Tex. Comm. on Prof'l Ethics Op. 595, 2010 WL 2480777, at *1 (2010) ("Information that is a matter of public record may not be information that is 'generally known.' A matter may be of public record simply by being included in a government record . . . whether or not there is any general public awareness of the matter. Information that 'has become generally known' is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found."); ROTUNDA & DZIENKOWSKI, *supra* note 5, § 1.9-3, at 554 (stating that Model Rule 1.9 "deals with what has become generally known, not what is publicly available if you know exactly where to look"); *see also* Dougherty v. Pepper Hamilton LLP, 133 A.3d 792, 800 (Pa. Super. Ct. 2016) (questioning whether an FBI affidavit that was accidentally attached to a document in an unrelated proceeding and was thus publicly available through PACER was "actually 'generally known,'" since "a person interested in the FBI affidavit 'could obtain it only by means of special knowledge'" (citing Restatement (Third) of the Law Governing Lawyers § 59, cmt. d). *But see* State v. Mark, 231 P.3d 478, 511 (Haw. 2010) (treating a former client's criminal conviction as "generally known" when discussing a former client conflict and whether matters were related); Jamaica Pub. Serv. Co. v. AIU Ins. Co., 707 N.E.2d 414, 417 (N.Y. 1998) (applying former DR 5-108(a)(2) and stating that because information regarding the defendant's relationship with its sister companies "was readily available in such public materials as trade periodicals and filings with State and Federal regulators," it was "generally known"); State ex rel. Youngblood v. Sanders, 575 S.E.2d 864, 872 (W. Va. 2002) (stating that because information was contained in police reports it was "generally known" for Rule 1.9 purposes); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000) ("Information contained in books or records in public libraries, public-record depositories such as government offices, or publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access.").

[7] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 732 (4th ed. 2009).

[8] *See* ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017) (discussing former comment 4A to New York Rule 1.6).

[9] *Id.*

> front page, and the client has become a former client—then the lawyer may tell the world. After all, most of the world already knows. . . .
>
> [O]nly if an event gained considerable public notoriety should information about it ordinarily be considered "generally known."[10]

Similarly, in discussing confidentiality issues under Rules 1.6 and 1.9, the New York State Bar Association's Committee on Professional Ethics ("NYSBA Committee") opined that "information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.'"[11] By contrast, "[I]nformation is not 'generally known' simply because it is in the public domain or available in a public file."[12] The Illinois State Bar Association likewise reasoned that information is generally known within the meaning of Rule 1.9 if it constitutes "'common knowledge in the community.'"[13]

As the NYSBA Committee concluded, information should be treated differently if it is widely recognized in a client's industry, trade, or profession even if it is not known to the public at large. For example, under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect "confidential information relating to the representation of a client."[14] Confidential information, however, does not ordinarily include "information that is generally known in the local community or in the trade, field or profession to which the information relates."[15] Similarly, under New York Rule of Professional Conduct 1.6(a), a lawyer generally cannot "knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person,"[16] but "confidential information" does not include "information that is generally known in the local community or in the trade, field or profession to which the information relates."[17] Returning to Model Rule 1.9(c)(1), allowing information that is generally known in the former client's industry, profession, or trade to be used pursuant to Model Rule 1.9(c)(1) makes sense if, as some scholars have urged, the drafters of the rule contemplated that situation.[18]

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[10] *Id.*

[11] N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 991, at ¶ 20 (2013).

[12] *Id.* at ¶ 17.

[13] Ill. State Bar Ass'n. Advisory Op. 05-01, 2006 WL 4584283, at *3 (2006) (quoting RESTATEMENT (SECOND) OF AGENCY § 395 cmt. b (1958)). The Illinois State Bar borrowed this definition from section 395 of the Restatement (Second) of Agency, which excludes such information from confidential information belonging to a principal that an agent may not use "in violation of his duties as agent, in competition with or to the injury of the principal," whether "on his own account or on behalf of another." RESTATEMENT (SECOND) OF AGENCY § 395 & cmt. b (1958).

[14] MASS. RULES OF PROF'L CONDUCT R. 1.6(a) (2017).

[15] *Id.* at cmt. 3A.

[16] N.Y. RULES OF PROF'L CONDUCT R. 1.6(a) (2017).

[17] *Id.* at cmt. [4A] ("Information is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not 'generally known' simply because it is in the public domain or available in a public file").

[18] *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 14.16, at 14-48 (2016) (discussing generally known and saying, "It seems likely that both the Kutak Commission and the Ethics 2000 Commission . . .

A Workable Definition of Generally Known under Model Rule 1.9(c)(1)

Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes.[19] Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1).[20]

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had in mind situations in which a lawyer has worked with a company in various legal contexts, learned considerable information about its products and practices, and later seeks to use this information in connection with [the] representation of an adverse party in an unrelated lawsuit or transaction of some kind").

[19] *See In re* Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) ("'Generally known' does not mean information that someone can find. It means information that is already generally known. For example, a lawyer may have drafted a property settlement agreement in a divorce case and it may [be] in a case file in the courthouse where anyone could go, find it and read it. It is not 'generally known.' In some divorce cases, the property settlement agreement may become generally known, for example, in a case involving a celebrity, because the terms appear on the front page of the tabloids. 'Generally known' does not require publication on the front page of a tabloid, but it is more than merely sitting in a file in the courthouse."); *In re* Tennant, 392 P.3d 143, 148 (Mont. 2017) (holding that a lawyer who learned the information in question during his former clients' representation could not take advantage of his former clients "by retroactively relying on public records of their information for self-dealing"); ROTUNDA & DZIENKOWSKI, *supra* note 5, § 1.9-3, at 554 (explaining that Model Rule 1.9(c)(1) "deals with what has become generally known, not what is publicly available if you know exactly where to look"); *see also supra* note 6 (citing additional cases and materials).

[20] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000) (stating, *inter alia*, that information is not generally known "when a person interested in knowing the information could obtain it only by means of special knowledge").

Conclusion

A lawyer may use information that is generally known to a former client's disadvantage without the former client's informed consent. Information is generally known within the meaning of Model Rule 1.9(c)(1) if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client's industry, profession, or trade. For information to be generally known it must previously have been revealed by some source other than the lawyer or the lawyer's agents. Information that is publicly available is not necessarily generally known.

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 525
December 6, 2012

ETHICAL DUTIES OF LAWYERS IN CONNECTION WITH ADVERSE COMMENTS PUBLISHED BY A FORMER CLIENT

SUMMARY

This Opinion addresses whether, and if so how, an attorney may respond to a former client's adverse public comments about the attorney, when the former client has not disclosed any confidential information and there is no litigation or arbitration pending between the attorney and the former client. The Committee concludes that the attorney may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

TABLE OF AUTHORITIES

Cases

Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725

County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839

In the Matter of Dixon (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23

General Dynamics Corp. v. Superior Ct. (1994) 7 Cal.4th 1164

Oasis West Realty v. Goldman (2011) 51 Cal.4th 811

Oxy Res. California LLC v. Superior Court (2004) 115 Cal.App.4th 875

Styles v. Mumbert (2008) 164 Cal.App.4th 1163

Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564

Statutes

California Business and Professions Code section 6068(e)

California Evidence Code section 912

California Evidence Code section 950, *et seq.*

Opinions

Los Angeles County Bar Ass'n Form. Opn. No. 396 (1982)

Los Angeles County Bar Ass'n Form. Opn. No. 452 (1982)

Los Angeles County Bar Ass'n Form. Opn. No. 498 (1999)

Los Angeles County Bar Ass'n Form. Opn. No. 519 (2007)

Cal. State Bar Form. Opn. 1983-71 (1983)

Rules

California Rules of Professional Conduct, Rule 3-100(A)

ABA Model Rules of Professional Conduct, Rule 1.6(b)(5)

Other Authorities

Restatement (Third) of the Law Governing Lawyers, section 64, comment e

FACTS

Attorney previously represented Former Client in a civil proceeding. Attorney no longer represents Former Client in any respect. Subsequent to the conclusion of the representation, Former Client posts a message on a website discussing lawyers, stating that Attorney was incompetent and over-charged him, and others should refrain from using Attorney. This Opinion assumes that no confidential information is disclosed in the message[1] and Former Client's conduct does not constitute a waiver of confidentiality or the attorney-client privilege.[2] There is no litigation or arbitration pending between Attorney and Former Client.

ISSUE

In what manner, if any, may Attorney publicly respond to disparaging public comments by Former Client, whether of malpractice or otherwise?

DISCUSSION

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[1] For purposes of this Opinion, "confidential information" is defined to include both privileged information and information which, while not privileged, is nevertheless considered to be confidential under California Business and Professions Code section 6068(e)(1).

[2] This Opinion also assumes that the person making the website posting is a former client. The Opinion does not address those situations where the disparaging comment is posted by an unknown author.

An attorney "may not do anything which will injuriously affect [a] former client in any matter in which [the attorney] formerly represented [the client] ...." *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574. *See also Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811, 821; *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167 ("an attorney is forever forbidden from ... acting in a way which will injure the former client in matters involving such former representation." [Citation omitted.]).[3]

An attorney also owes a duty of confidentiality to former clients as well as to current clients. California Business & Professions Code section 6068(e)(1) (it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of, his or her client."); *see also* CRPC, Rule 3-100(A); *Wutchumna Water Co. v. Bailey, supra,* 216 Cal. at 573-574 ("nor may [the attorney] at any time use against [the] former client knowledge or information acquired by virtue of the previous relationship"); *Oasis West Realty v. Goldman, supra,* 51 Cal.4th at 821; *Styles v. Mumbert, supra,* 164 Cal.App.4th at 1167.

The attorney-client privilege under California Evidence Code section 950, *et seq.*, is not subject to the creation of exceptions other than as specified by statute. *See, e.g., Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739; *OXY Res. California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889 (courts may not "imply unwritten exceptions to existing statutory privileges." [Internal citations omitted.] "The area of privilege ' "is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme." ' " [Citation omitted.])

In the absence of waiver of confidentiality and the attorney-client privilege by Former Client (*see, e.g.*, Cal. Evid. Code § 912), there is no statutory exception to the duty of confidentiality under Business & Professions Code section 6068(e)(1) or the attorney-client privilege under Evidence Code section 950, *et seq.*, that would permit an attorney to defend himself or herself by disclosing confidences or privileged information.[4] *See General Dynamics Corp. v. Superior Ct.* (1994) 7 Cal.4th 1164, 1190 ("Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client"); *see also* Los Angeles County Bar Ass'n Form. Opn. No. 519 (there is no self-defense exception to the lawyer's duty of confidentiality under Business & Professions Code section 6068(e) that would allow an attorney to disclose confidential client information to defend against a lawsuit brought by a non-client against the attorney).

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[3] It should be noted that, while instructive concerning the duties owed to a former client, none of the holdings of these three cases was based on facts involving an attorney's response to a former client's adverse public comments about the lawyer.

[4] This Committee's opinion in Los Angeles County Bar Ass'n Form. Opn. No. 396 (1982) is not to the contrary. In that opinion, the Committee opined that a lawyer, in a formal legal proceeding involving alleged malpractice by him, could provide a declaration disclosing certain privileged communications in order to rebut claims being made by a former client against the attorney. Unlike the factual scenario underpinning Opn. No. 396, this Opinion does not involve a judicial proceeding based upon a claim of malpractice or otherwise.

This Opinion assumes there has been no waiver of any confidential information Former Client provided to Attorney while Attorney represented Former Client. Thus, absent a statutory exception allowing Attorney to reveal confidential communications in response to Former Client's public statement, Attorney remains obligated to preserve Former Client's confidential information, and Attorney cannot disclose such information in response to that public statement unless authorized to do so by a court's ruling in a judicial proceeding.[5]

The bar on Attorney revealing confidential information in responding to Former Client's internet posting does not mean Attorney cannot respond at all. If Attorney does not disclose confidential or attorney-client privileged information, and does not act in a way that will injure Former Client in a matter involving the prior representation, he/she may respond.

However, the Attorney's response also must be proportionate and restrained. *See* Restatement (Third) of the Law Governing Lawyers, section 64, comment e (referencing a "proportionate and restrained" public response). In other words, not only must Attorney refrain from revealing any confidential information (because it is assumed that there has been no waiver by Former Client), and avoid saying anything that would injure Former Client in a matter related to the prior representation, he/she may say no more than is necessary to rebut the public statement made by Former Client. This rule has been recognized in other contexts where the extent of an attorney's ability to respond to a statement made by a former client has been considered. *See, e.g.*, Los Angeles County Bar Ass'n Form. Opn. No. 498 (1999) (lawyer may disclose confidential information in a fee dispute with a former client only if relevant to the dispute, if reasonably necessary due to an issue raised by the former client, and if the lawyer avoids unnecessary disclosure); Los Angeles County Bar Ass'n. Form. Opinion No. 452 (1988) (lawyer may file a creditor's claim in former client's bankruptcy proceeding but may not prosecute objections to discharge); *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 58-59 (former client's malpractice suit against lawyer does not wholly waive lawyer's duties under the lawyer-client privilege, but constitutes waiver only to the extent necessary to resolve the suit; attorney may not disclose more than is essential to preserve the attorney's rights.)

Therefore, under these circumstances, Attorney may respond to Former Client's internet posting, so long as:

(1) Attorney's response does not disclose confidential information;

(2) Attorney does not respond in a manner that will injure Former Client in a matter involving the former representation; and

(3) Attorney's response is proportionate and restrained.

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[5] There are some authorities from outside California that suggest an exemption to an attorney's duties of loyalty and confidentiality may exist in certain circumstances when necessary in "self-defense." *See, e.g.*, Rule 1.6(b)(5) of the ABA Model Rules of Professional Conduct. It is important to bear in mind, however, that California has not adopted the ABA Model Rules, and they may be consulted for guidance only when there is no California rule directly applicable. *See, e.g., County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852; Cal. State Bar Formal Opn. 1983-71.

This Opinion is advisory only. The Committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.

Ethics Opinion 370

Social Media I: Marketing and Personal Use

Introduction

Social media and social networking websites are online communities that allow users to share information, messages, and other content, including photographs and videos. The Committee defines social media as follows:

> Social media include any electronic platform through which people may communicate or interact in a public, semi-private or private way. Through blogs, public and private chat rooms, listservs, other online locations, social networks and websites such as Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo and Lawyers.com, users of social media can share information, messages, e-mail, instant messages, photographs, video, voice or videoconferencing content.[1] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn1) This definition includes social networks, public and private chat rooms, listservs, and other online locations where attorneys communicate with the public, other attorneys, or clients. Varying degrees of privacy may exist in these online communities as users may have the ability to limit who may see their posted content and who may post content to their pages.[2] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn2)

Increasingly, attorneys are using social media for business and personal reasons. The Committee wants to raise awareness of the benefits and pitfalls of the use of social media within the practice of law and to emphasize that the District of Columbia Rules of Professional Conduct (the "Rules") apply to attorneys in the District of Columbia (the "District") who use, or may use, social media for business or personal reasons.[3] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn3) This Opinion applies to all attorneys who use social media, regardless of practice area or employer and applies regardless of whether the attorney engages in advertising or client communications via social media. The Committee notes that any social media presence, even a personal page, could be considered advertising or marketing, and lawyers are cautioned to consider the Rules applicable to attorney advertising, even if not explicitly discussed below. Lawyers reviewing this Opinion may also wish to review Opinion 371 (Social Media II), which addresses use of social media by lawyers in providing legal services.

Social networking websites provide an online community for people to share daily activities, their interests in various topics, or to increase their circle of personal or business acquaintances. There are sites with primarily business purposes, some that are primarily for personal use and some that offer a variety of different uses. According to the 2014 ABA Legal Technology Survey, among attorneys and law firms, in addition to blogs, LinkedIn, Facebook and Twitter are among the more widely used social networks.[4] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn4) On these sites, members create online "profiles," which may include biographical data, pictures and other information that they wish to post. These services permit members to locate and invite other members of the network into their personal networks (to "connect" or "friend" them) or to invite the friends or contacts of others to connect with them.

Members of these online social networking communities communicate in a number of ways, publicly or privately. Members of these online social networking communities may have the ability, in many instances, to control who may see their posted content, or who may post content to their pages. Varying degrees of privacy exist. These privacy settings allow users to restrict or limit access of information to certain groups, such as "friends," "connections" or the "public."

Social media sites, postings or activities that mention, promote or highlight a lawyer or a law firm are subject to and must comply with the Rules.[5] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn5) Attorneys who choose to use social media must adhere to the Rules in the same way that they would if using more traditional forms of communication.

The Rules, as well as previous Opinions of this Committee, apply to a number of different social media or social networking activities that an attorney or law firm may be engaged in, including:

1. Connecting and communicating with clients, former clients or other lawyers on social networking sites;
2. Writing about an attorney's own cases on social media sites, blogs or other internet-publishing based websites;
3. Commenting on or responding to online reviews or comments;
4. Self-identification by attorneys of their own "specialties," "skills" and "expertise" on social media sites;
5. Reviewing third-party endorsements received by attorneys on their personal or law firm pages; and,
6. Making endorsements of other attorneys on social networking sites.

The Committee concludes that, generally, each of the activities identified above are permissible under the Rules; but not without caution, as discussed in greater detail below. Consistent with our mandate, we consider only the applicability of the D.C. Rules of Professional Conduct. Given that social media does not stop at state boundaries, we remind members of the District of Columbia Bar that their social media presence may be subject to regulation in other jurisdictions, either because the District applies another state's rules through its choice-of-law rule,[6] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn6) or because other states assert jurisdiction over attorney conduct without regard to whether the attorney is admitted in other states.[7] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn7)

Lawyers must be aware of the ethical rules regarding social media in the principal jurisdiction where they practice, consistent with Rule 8.5. However, adherence to the ethical rules in the jurisdiction of one's principal practice may not insulate an attorney from discipline. There is considerable variation in choice of law rules across jurisdictions. We specifically wish to caution lawyers that the disciplinary rules of other jurisdictions, including our neighboring jurisdictions of Maryland and Virginia, allow for the imposition of discipline upon attorneys who are not admitted in that jurisdiction, if the lawyer provides or offers to provide any legal services in the jurisdiction. ABA Model Rule 8.5(b)(2) provides a limited safe-harbor to this provision, by stating that "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." We note, however, that not every state has adopted this safe harbor. This Committee undertook a detailed evaluation of choice of law rules in non-judicial proceedings in Opinion 311.[8] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn8)

We explicitly note that this Opinion is limited to the use of social media as a communications device. This Opinion does not address issues related to the ethical use of social media in litigation or other proceedings, or with regard to issues related to advising clients on the use of social media. Those issues are addressed in Opinion 371 (Social Media II).

Applicable Rules

The Rules that are potentially implicated by social media include:

Rule 1.1 (Competence)
Rule 1.6 (Confidentiality of Information)
Rule 1.7 (Conflict of Interest: General)
Rule 1.18 (Duties to Prospective Client)
Rule 3.3 (Candor to Tribunal)
Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistants)
Rule 7.1 (Communications Concerning a Lawyer's Services)
Rule 8.4 (Misconduct)
Rule 8.5 (Disciplinary Authority; Choice of Law)

Discussion

I. Social Media In General

The guiding principle for lawyers with regard to the use of any social network site is that they must be conversant in how the site works. Lawyers must understand the functionality of the social networking site, including its privacy policies. Lawyers must understand the manner in which postings on social media sites are made and whether such postings are public or private. Indeed, comment [6] to Rule 1.1 (Competence) provides:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.

As discussed in more detail herein, lawyers must be cognizant of the benefits and risks of the use of social media and their postings on social media sites. Social networking sites, and social media in general, make it easier to blur the distinctions between communications that are business and those that are personal. Communications via social media are inherently less formal than more traditional or established forms of communication. Lawyers and law firm employees must be reminded of the need to maintain confidentiality with regard to clients and client matters in all communications. It is recommended that all law firms have a policy in place regarding employees' use of social networks. Lawyers in law firms have an ethical duty to supervise subordinate lawyers and non-lawyer staff to ensure that their conduct complies with the applicable Rules, including the duty of confidentiality. *See* Rules 5.1 and 5.3.

Content contained on a lawyer's social media pages must be truthful and not misleading. Statements on social media could expose an attorney to charges of dishonesty under Rule 8.4 or lack of candor under Rule 3.3, if the social media statements conflict with statements made to courts, clients or other third parties, including employers. Similarly, statements on social media could expose a lawyer to civil liability for defamation, libel or other torts.

II. Permissible Uses of Social Media

A. Attorneys may connect with and communicate with clients, former clients or other lawyers on social networking sites, but not without caution.

There are no provisions of the Rules that preclude a lawyer from participating in social media or other online activities. However, if an attorney connects with, or otherwise communicates with clients on social networking sites, then the attorney must continue to adhere to the Rules and maintain an appropriate relationship with clients. Lawyers must also be aware that, if they are connected to clients or former clients on social media, then content made by others and then placed on the attorney's page and content made by the attorney may be viewed by these clients and former clients. Attorneys should be mindful of their obligations under Rule 1.6 to maintain client confidences and secrets.

Some social networking sites, like Facebook, offer users the option to restrict what some people may see on a user's page. These options also allow a user to determine who may post content publicly on the lawyer's page. It is advisable for lawyers to periodically review these settings and adjust them as needed to manage the content appearing publicly on the lawyer's social media pages. Attorneys should be aware of changes to the policies of the sites that they utilize, as privacy policies are frequently changed and networks may globally apply changes, pursuant to the updated policies.

I. Avoiding the formation of an inadvertent attorney-client relationship

As we opined in Opinion 316, it is permissible for lawyers to participate in online chat rooms and similar arrangements through which attorneys could engage in real time, or nearly real time communications with internet users. However, that permission was caveated with the caution to avoid the provision of specific legal advice in order to prevent the formation of an attorney-client relationship. In Opinion 302, we provided "best practices" guidance on internet communications, with the intent of avoiding the inadvertent formation of an attorney-client relationship. One of the suggested "best practices" included the use of a prominent disclaimer. *Id.* However, we have reiterated "that even the use of a disclaimer may not prevent the formation of an attorney-client relationship if the parties' subsequent conduct is inconsistent with the disclaimer." D.C. Ethics Op. 316.

These same principles are applicable to the use of social media. Disclaimers are advisable on social media sites, especially if the lawyer is posting legal content or if the lawyer may be engaged in sending or receiving messages from "friends," whether those friends are other attorneys, family or unknown visitors to the lawyer's social media page, when those messages relate, or may relate, to legal issues.[9] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#fn9)

Rule 1.18 imposes a duty of confidentiality with regard to a prospective client, who is defined in Rule 1.18(a) as "a person who discusses ... the possibility of forming a client-lawyer relationship with respect to a matter." However, comment [2] to Rule 1.18 notes that "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of [the Rule]." The guidance of Rule 1.18 is of particular importance in social networking, where lawyers may self-identify themselves as attorneys and where, most likely, those "connected" to the lawyer will be aware that the user is an attorney; however, without more, the mere knowledge that a friend is an attorney does not give rise to a reasonable expectation that interactions with that attorney would create a prospective or actual client relationship, or its attendant duty of confidentiality.

II. Avoiding the creation of conflicts of interest

Consideration must also be given to avoid the acquisition of uninvited information through social media sites that could create actual or perceived conflicts of interest for the lawyer or the lawyer's firm. Caution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict. Rule 1.7(b)(4) states that an attorney shall not represent a client with respect to a matter if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property or personal interests," unless the conflict is resolved in accordance with Rule 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts.

Moreover, online communications and interactions with people who are unknown to the lawyer may unintentionally cause the development of relationships with persons or parties who may have interests that are adverse to those of existing clients.

III. Protecting client confidences and secrets

Protecting client information is of the utmost importance when using social media. Most attorneys are aware of the importance of protecting attorney-client communications, attorney work-product or other privileged information. The obligation to protect this information extends beyond the termination of the attorney-client relationship.

Rule 1.6 distinguishes between information that is "confidential" and that which is a "secret," and requires attorneys to protect both kinds of information. In the District of Columbia,

> "Confidence" refers to information protected by the attorney-client privilege under applicable law. "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.

Rule 1.6(b). Comment [8] to Rule 1.6 makes clear that the Rule potentially applies to all information gained in the course of the professional relationship, and exists without regard to the nature or source of the information, or the fact that others share the knowledge.

No less critical are considerations of the level of confidentiality available on the social media sites themselves. If an attorney uses social media to communicate with potential or actual clients or co-counsel, then careful attention must be paid to issues of privacy and confidentiality. It is critically important that lawyers review the policies of the social media sites that they frequent, particularly policies related to data collection. Privacy settings on social media are not the equivalent of a guarantee of confidentiality.

Particular consideration must be given to the issue of maintaining and protecting the confidentiality of communications on social networking sites.[10] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#fn10) Messaging and electronic mail services provided by social networking sites may lack safeguards sufficient for communicating with clients or prospective clients. Moreover, the messaging and electronic mail services provided by these sites should not be assumed to be confidential or private. Therefore, when appropriate, clients or potential clients should be advised by lawyers of the existence of more secure means of communicating confidential, privileged, sensitive or otherwise protected information. Messages with clients that are sent or received via social networks must be treated with the same degree of reasonable care as messages sent or received via electronic mail or other traditional means of communication. Social media sites may not permanently retain messages or other communications; therefore care should be taken to preserve these communications outside of the social media site, in order to ensure that the communications are maintained as part of the client file. It is advisable that communications regarding on-going representations or pending legal matters be made through secured office e-mail, and not through social media sites.

Certain social media sites collect information about the people and groups that the user is connected to and the interactions with that group or person. The information collected is gathered from both the lawyer and the person communicating with the lawyer and can include content, information and frequency of contact.[11] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn11) These sites also collect information about uses of their partner products and/or websites, allowing the social media service to collect and integrate information about its users, which can be used for targeted advertising and/or research purposes.[12] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn12) Thus, depending on the intended use of the social media site, it is advisable for a lawyer to give careful consideration to which social media sites, if any, may be more appropriate for business-related uses or for communications with potential or actual clients.

When inviting others to view a lawyer's social media site, or profile, a lawyer must be mindful of the ethical restrictions relating to solicitations and other communications. Most social networking sites require an e-mail address from the user as part of the registration process. Then, once the social networking site is accessed by a lawyer, the site may access the entire address book (or contacts list) of the user. Aside from any data collection purposes, this access allows the social media site to suggest potential connections with people the lawyer may know who are already members of the social network, to send requests or other invitations to have these contacts connect with the lawyer on that social network, or to invite non-members of the social network to join it and connect with the lawyer.

However, in many instances, the people contained in a lawyer's address book or contact list are a blend of personal and professional contacts. Contact lists frequently include clients, opposing counsel, judges and others whom it may be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site. The connection services provided by many social networks can be a good marketing and networking tool, but for attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure. Accordingly, great caution should be exercised whenever a social networking site requests permission to access e-mail contacts or to send e-mail to the people in the lawyer's address book or contact list and care should be taken to avoid inadvertently agreeing to allow a third-party service access to a lawyer's address book or contacts.

B. Attorneys may write about their own cases on social media sites, blogs or other internet-based publications, with the informed consent of their clients.

The scope of the protections provided in Rule 1.6 militates in favor of prudence when it comes to disclosing information regarding clients and cases. While lawyers may ethically write about their cases on social media, lawyers must take care not to disclose confidential or secret client information in social media posts. Rule 1.6(e)(1) states that a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the attorney has obtained the client's informed consent to the use in question. Because Rule 1.6 extends to even information that may be known to other people, the prudent lawyer will obtain client consent before sharing any information regarding a representation or disclosing the identity of a client. Even if the attorney is reasonably sure that the information being disclosed would not be subject to Rule 1.6, it is prudent to obtain explicit informed client consent before making such posts. With or without client consent, attorneys should exercise good judgment and great caution in determining the appropriateness of such posts. Consideration should be given to the identity of the client and the sensitivity of the subject matter, even if the client is not overtly identified. It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client consent in a written form.

Consideration must also be given to ensure that such disclosures on social media are compliant with Rule 7.1. Rule 7.1 governs all communications about a lawyer's services, including advertising. These Rules extend to online writings, whether on social media, a blog or other internet-based publication, regarding a lawyer's own cases. Such communications are subject to the Rules because they have the capacity to mislead by creating the unjustified expectation that similar results can be obtained for others. Care must be taken to avoid material misrepresentations of law or fact, or the omission of facts necessary to make the statement considered as a whole not materially misleading. Accordingly, social media posts regarding a lawyer's own cases should contain a prominent disclaimer making clear that past results are not a guarantee that similar results can be obtained for others.

Law firms that have blogs or social media sites or that allow their lawyers to maintain their own legal blogs or social media pages should take appropriate steps to ensure that such content is compliant with the Rules, consistent with the duties set forth in Rule 5.1. Non-attorney employees who create content for their own or their employers' social media sites should be educated regarding the protection of client information and, if appropriate, be supervised by their employing law firm or lawyer, as required by Rule 5.3.[13] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn13)

As noted above, all social media postings for law firms or lawyers, including blogs, should contain disclaimers and privacy statements sufficient to convey to prospective clients and visitors that the social media posts are not intended to convey legal advice and do not create an attorney-client relationship.

C. Attorneys may, with caution, respond to comments or online reviews from clients.

The ability for clients to place reviews and opinions of the services provided by their counsel on the internet can present challenges for attorneys. An attorney must monitor his or her own social networking websites, verify the accuracy of information posted by others on the site, and correct or remove inaccurate information displayed on their social media page(s). As set forth in comment [1] to Rule 7.1, client reviews that may be contained on social media posts or webpages must be reviewed for compliance with Rule 7.1(a) to ensure that they do not create the "unjustified expectation that similar results can be obtained for others."[14] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn14)

Attorneys may respond to negative online reviews or comments from clients. However, Rule 1.6 does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review or opinion. Rule 1.6(e) states that:

> A lawyer may use or reveal client confidences or secrets:
>
> (3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, ***or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client [emphasis added].***

Thus, the lawyer's ability to reveal confidences under Rule 1.6(e)(3) is limited to only "specific" allegations by the client concerning the lawyer's representation of the client. Comment [25] to Rule 1.6 specifically excludes general criticisms of an attorney from the kinds of allegations to which an attorney may respond using information otherwise protected by Rule 1.6. However, even when the lawyer is operating within the scope of the Rule 1.6(e)(3) exception, the comments to Rule 1.6 caution that disclosures should be no greater than the lawyer reasonably believes are necessary. There is no exception in Rule 1.6 that allows an attorney to disclose client confidences or secrets in response to specific or general allegations regarding an attorney's conduct contained in an online review from a third party, such as opposing counsel or a non-client.[15] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn15)

Other jurisdictions have taken a more restrictive view of responding to comments or reviews on lawyer-rating websites. For example, the New York State Bar Association Committee on Professional Ethics, in its Opinion 1032 (2014), held 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]." The New York analysis turned on the language contained in New York's Rule 1.6, which requires "accusations," rather than allegations, in order to trigger the "self-defense" exception of N.Y. Rule 1.6. Attorneys licensed in the District of Columbia who are admitted to practice in multiple jurisdictions are cautioned that they may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct. Under the District's choice of law rule, Rule 8.5(b)(2)(ii),

> the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

See notes 6 and 7, *infra*.[16] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn16)

We recognize that there are limitations on the control that any individual can assert over his or her presence on the internet. That is why we recognize that an attorney's ethical obligations to review and regulate content on social media extends only to those social media sites or webpages for which the attorney maintains control of the content, such as the ability to delete posted content, block users from posting, or block users from viewing. However, notwithstanding the scope of the attorney's affirmative obligations, it is highly advisable for attorneys to be aware of content regarding them on the Internet.

D. An attorney or law firm may identify "specialties," "skills" and "expertise" on social media, provided that the representations are not false or misleading.

Many social media sites, like LinkedIn, allow attorneys to identify skills and areas of practice. The District of Columbia does not prohibit statements regarding specialization or expertise. Accordingly, District of Columbia attorneys are ethically permitted to identify their skills, expertise and areas of practice, subject to Rule 7.1 (a).[17] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn17)

As we previously opined in Opinion 249, "Rule 7.1(a) permits truthful claims of lawyer specialization so long as they can be substantiated." Rule 7.1(a) states that an attorney is prohibited from making a "false or misleading communication about the lawyer or the lawyer's services." The relevant comment [1] to this Rule states that "[i]t is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters." Accordingly, we conclude that social media profiles or pages that include statements by the attorney setting forth an attorney's skills, areas of specialization or expertise are subject to Rule 7.1(a) and, therefore, cannot be false or misleading.

E. Attorneys must review their social media presence for accuracy.

Consistent with the goals of networking, marketing and making connections, some social networking sites permit members of the site to recommend fellow members or to endorse a fellow member's skills. Users may also request that others endorse the lawyer for specified skills that the lawyer has indicated he or she possesses. LinkedIn and other sites also allow clients or others to submit written reviews or recommendations of the lawyer. Other legal-specific social networking sites focus exclusively on endorsements or recommendations. It is our view that a lawyer is ethically permitted, with caution, to recommend other attorneys, and to accept endorsements, written reviews and recommendations, subject to the Rules.

As noted above, it is our opinion that lawyers in the District of Columbia have a duty to monitor their social network sites. If a lawyer controls or maintains the content contained on a social media page, then the lawyer has an affirmative obligation to review the content on that page. A lawyer must remove endorsements, recommendations or other content that are false or misleading. Lawyers are advised that it is appropriate to reject or refuse endorsements from people who lack the knowledge necessary for making the recommendation. It would be misleading for an attorney to display recommendations or endorsements of skills that are received from people who do not have a factual basis to evaluate the lawyer's skills. Lawyers must reject or refuse endorsements that indicate that the lawyer possesses skills or expertise that the lawyer does not possess. It would be misleading for an attorney to display a recommendation that contained incorrect information. The operative questions asked by the lawyer when reviewing endorsements or recommendations received on their social media pages should be whether the person making the endorsement knows the lawyer and whether the person can fairly comment on the lawyer's skills.

We recommend that lawyers who are using social media sites that allow for the review of posts, recommendations or endorsements prior to publication avail themselves of the settings that allow review and approval of such information before it is publicized on the lawyer's social media page. Some sites, like LinkedIn, provide settings that allow the user to review and approve endorsements that are received before the endorsements are posted publicly. Users may also choose to keep endorsements hidden so that they are not seen by others.[18] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn18) Other social networking sites, like Facebook, allow users to adjust their privacy settings to require user approval before certain content, such as photos, can be displayed on a user's home page. Some social media sites allow users to adjust their privacy settings to require approval before a user can be "tagged," a practice that allows content on another person's page to be displayed on the user's page.

It is suggested that lawyers, particularly those who do not frequently monitor their social media pages, those who may not know everyone in their networks well, or those who wish to have an added layer of protection, utilize these heightened privacy settings. Aside from the potential ethical issues discussed herein, there are many good reasons for a lawyer to want to maintain a higher level of control over what content others may place on a lawyer's social media page(s).

It is permissible under the Rules for a lawyer to make an endorsement or recommendation of another attorney on a social networking site, provided that the endorsement or recommendation is not false or misleading. Such endorsements and recommendations must be based upon the belief that the recipient of the endorsement does in fact possess said skills or legal acumen. Rule 8.4(c) prohibits an attorney from being dishonest, or engaging in fraud, deceit or misrepresentation. Therefore, a lawyer must only provide an endorsement or recommendation of someone on social media that the endorsing lawyer believes to be justified.

Rule 8.4(a) states that it is misconduct for a lawyer to violate or to attempt to violate ethics rules through the acts of others. Thus, clients and colleagues cannot say things about the lawyer that the lawyer cannot say. The lawyer's obligation to monitor, review and correct content on social media sites for which they maintain control exists regardless of whether the information was posted by the attorney, a client or a third party.

We reiterate that, for websites or social media sites where the attorney does not have editorial control over content or the postings of others, we do not believe that the Rules impose an affirmative duty on a lawyer to monitor the content of the sites; however, under certain circumstances, it may be appropriate for the attorney to request that the poster remove the content, to request that the social networking site remove the content, or for the attorney to post a curative response addressing the inaccurate content.

Conclusion

Social media is a constantly changing area of technology. Social media can be an effective tool for providing information to the public, for networking and for communications. However, using such tools requires that the lawyer maintain and update his or her social media pages or profiles in order to ensure that information is accurate and adequately protected.

Accordingly, this Committee concludes that a lawyer who chooses to maintain a presence on social media, for personal or professional reasons, must take affirmative steps to remain competent regarding the technology being used and to ensure compliance with the applicable Rules of Professional Conduct.

The world of social media is a nascent area that continues to change as new technology is introduced into the marketplace. Best practices and ethical guidelines will, as a result, continue to evolve to keep pace with such developments.

[1] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref1) "Content" means any communications, whether for personal or business purposes, disseminated through websites, social media sites, blogs, chat rooms, listservs, instant messaging, or other internet presences, and any attachments or links related thereto.

[2] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref2) The Merriam-Webster Dictionary defines "social media" as "forms of electronic communication ... through which users create online communities to share information, ideas, personal messages, and other content...." More specifically to the legal profession, the New York State Bar Association Committee on Professional Ethics, in its Formal Opinion No. 2012-2 (May 30, 2012), stated:

> We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives.

[3] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref3) We have previously addressed issues related to attorneys' participation in certain kinds of internet and electronic communications, but have not yet addressed the broader uses of social media. In Opinion 316, we concluded that attorneys could take part in online chat rooms and similar arrangements through which they could engage in communications in real time or nearly real time, with internet users seeking legal information. D.C. Legal Ethics Op. 316 (2002). In Opinion 281, we addressed issues related to the use of unencrypted electronic mail. D.C. Legal Ethics Op. 281 (1998). In Opinion 302, we stated that lawyers could use websites to advertise for plaintiffs for class action lawsuits and use websites that offer opportunities to bid competitively on legal projects. D.C. Legal Ethics Op. 302 (2000).

[4] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref4) www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html ([javascript:HandleLink ('cps_0_0','CPNEWWIN: blank^top=10,left=10,width=300,height=300,toolbar=1,location=1,directories=1,status=1,menubar=1,scrollbars=1,resizable=1@http://wy and-social-media.html');] (last visited Oct. 26, 2016).

[5] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref5) The Committee further notes that even social media profiles that are used exclusively for personal purposes might be viewed by clients or other third parties, and that information contained on those social media websites may be subject to the Rules of Professional Conduct. The Rules extend to purely private conduct of a lawyer, in areas such as truthfulness and compliance with the law. *See* Rule 8.4.

[6] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref6) In accordance with D.C. Rule 8.5(b), the Office of Disciplinary Counsel will apply the rules of another jurisdiction to an attorney's conduct in two circumstances:

> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
>
> (2) For any other conduct. . . .
>
> > (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Note that, in contrast to ABA Model Rule 8.5 (*see infra* note 7), D.C. Rule 8.5 does not provide for jurisdiction over attorneys not admitted to practice in the District and does not apply the rules of another jurisdiction unless the attorney is either practicing before a tribunal in another jurisdiction, or is licensed to practice in another jurisdiction.

[7] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref7) In contrast to D.C. Rule 8.5 (discussed *supra* in note 6), ABA Model Rule 8.5(a) states that "[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." Moreover, ABA Model Rule 8.5(b)(2) states that for conduct not in connection with a matter pending before a tribunal, the rules to be applied are "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." Accordingly, Model Rule 8.5(b)(2), unlike D.C. Rule 8.5(b)(2), may result in the application of rules of jurisdictions to which the lawyer is not admitted.

[8] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref8) D.C. Legal Ethics Op. 311 (2002). The revisions to Rule 8.5(b)(1) that became effective on February 1, 2007 have modified Opinion 311 to the extent that the Opinion now applies more broadly to conduct in connection with a "matter pending before a tribunal" rather than only in connection with a "proceeding in a court before which a lawyer has been admitted to practice." These revisions, however, do not change this Committee's analysis in Opinion 311 as to "other conduct" under Rule 8.5(b)(2).

[9] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref9) As we discussed in Opinion 302, in the District of Columbia, the question of what conduct gives rise to an attorney-client relationship is a matter of substantive law. Neither a retainer nor a formal agreement is required in order to establish an attorney-client relationship in the District of Columbia. *See, e.g. In re Lieber*, 442 A.2d 153 (D.C. 1982) (attorney-client relationship formed where attorney failed to indicate lack of consent to accept a court appointed client after receiving notification of appointment by mail). Further, even casual legal advice can give rise to an attorney-client relationship if the putative client relies upon it. *See, e.g., Togstad v. Vesely, Otto, Miller & Keffe*, 291 N.W.2d 686 (Minn. 1980) (finding an attorney-client relationship where the attorney stated that he did not think a prospective client had a cause of action but would discuss it with his partner, did not call prospective client back, and prospective client relied on attorney's assessment and did not continue to seek legal representation).

[10] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref10) *See also* D.C. Legal Ethics Op. 281.

[11] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref11) An example is contained in Facebook's data policy. (https://www.facebook.com/about/privacy/ (javascript:HandleLink('cpe_0_0','CPNEWWIN;_blank^@https://www.facebook.com/about/privacy/');)) (last visited Oct. 26, 2016).

[12] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref12) Miller, C., *The Plus in Google Plus? It's Mostly for Google*, Feb. 14, 2014 http://www.nytimes.com/2014/02/15/technology/the-plus-in-google-plus-its-mostly-for-google.html?_r=0 (javascript:HandleLink ('cpe_0_0','CPNEWWIN;_blank^@http://www.nytimes.com/2014/02/15/technology/the-plus-in-google-plus-its-mostly-for-google.html?_r=0');) (last visited Oct. 26, 2016).

[13] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref13) *See, e.g.*, Gene Shipp, *Bar Counsel: 20/20: The Future of the Rules of Professional Conduct*, WASHINGTON LAWYER (June 2013), sharing the example that our world is changing so fast that "a high-profile celebrity, who comes to your office on a highly confidential matter and graciously pauses to allow a picture with your receptionist, may be unhappy with your staff's violation of Rule 1.6 when their picture appears on the Internet even before you have had a chance to say hello."

[14] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref14) The Committee does not distinguish between client comments that are solicited and those that are unsolicited. Rule 7.1 governs all communications about a lawyer's services.

[15] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref15) Although beyond the scope of this Opinion, the Committee notes that the Rule 1.6(e)(3) exception allows an attorney to respond to wrongs alleged by a third party, but only if the third party has formally instituted a civil, criminal or disciplinary action against the lawyer. *See* comments [23] and [24] to Rule 1.6.

[16] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref16) Other jurisdictions have sanctioned attorneys for disclosures of client confidences or secrets on social media or other websites. In 2013, the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission held, in the *Matter of Betty Tsamis*, that it was a violation of Rule 1.6(a) for an attorney to respond to an unfavorable review on the legal referral website AVVO with a response that revealed confidential information about the client's case. In *Tsamis*, the attorney first requested that the client remove the posting from the website, which is also a permissible response in the District of Columbia. The client responded that he would remove the post, but only if the attorney returned his files and refunded his fees. Thereafter, AVVO removed the posting from its online client reviews. The client then posted a second negative client review to the same website, which the attorney responded to, disclosing client information. The Hearing Board found that the response exceeded what was necessary to respond to the client's accusations and a reprimand was recommended.

[17] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref17) Prudent attorneys should consider the most restrictive rules applicable to them when using self-promotional features on social media. We note that other jurisdictions, like New York, do not permit lawyers to identify themselves as "specialists" unless they have been certified as such by an appropriate organization. They are, however, permitted to detail their skills and experience. *See* N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 748 (Mar. 10, 2015).

[18] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref18) Lawyers are advised to review the guidance provided by other jurisdictions in which they are admitted to practice regarding the use of endorsements or the skills and expertise sections in a LinkedIn profile. *See, e.g.*, Maryland State Bar Ass'n, Comm. on Ethics, Ethics Docket No. 2014-05;Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. 2012-8 (Nov. 2012); South Carolina Ethics Advisory Comm., Op. 09-10; *see also* note 17.

November 2016

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 529
August 23, 2017

ETHICAL RISKS IN USING SOCIAL MEDIA

SUMMARY

Every lawyer must act competently to protect confidential client information against inadvertent or other unauthorized disclosure. While lawyers always should be cautious about disclosing any information related to a client, on-line communications present particular risks. One example of such a risk arises when someone attempts to elicit information from a lawyer via social media pretexting. A lawyer's unguarded disclosure of client information might result in violations of the duties of competence and confidentiality and might cause the loss of the lawyer-client privilege and work product protection.

AUTHORITIES CITED

Cases

In re Jordan (1972) 7 Cal.3d 930
McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal. App. 5th 1083
Lenz v. Universal Music Corp. (N.D. Cal. Oct. 22, 2010) 2010 U.S. Dist. LEXIS 119271
Kintera, Inc. v. Convio, Inc. (S.D. Cal. 2003) 219 F.R.D. 503

Statutes

Bus. & Prof. C. § 6068(e)(1)
Code Civ. Proc. §§ 2018.010, *et seq.*
Evid. C. §§ 912(a) and 950, *et seq.*

Rules of Professional Conduct

California Rules of Professional Conduct, Rules 3-100 and 3-110

Ethics Opinions

Cal. State Bar Formal Opns. 2016-195, 2010-179, 2004-165, 2003-161, 1999-154, 1993-133, 1981-58, and 1980-52
L.A. County Bar Assoc. Opns. 524, 456, 436, and 386

Other Authorities

Fed. R. Evid., Rule 502

Statement of Facts

Attorney is active on an Internet website that permits interactive communications with other visitors to the website. Attorney begins corresponding through the website with an Individual unknown to Attorney. Neither Attorney nor Individual uses his actual name. Attorney reveals that Attorney is a litigator. Individual states that Individual works in a non-legal capacity in a non-legal industry. Attorney is not aware that Individual is actually associated with the opposing side of a pending case in which Attorney represents Client and is "catfishing," i.e., assuming a false on-line identity to obtain information by pretext.[1]

During their correspondence, Attorney tells Individual about Attorney's upcoming interviews with Lay Witness and Expert Witness, both of whom are potential witnesses in Client's matter. Attorney communicates to Individual the general geographic location of Lay Witness and the general subject matter of Expert Witness's expected testimony. Attorney does not reveal the name of Client or of either witness.

Attorney also maintains a blog associated with his law firm website and comments on both the blog and a legal industry on-line discussion board that in a matter Attorney is handling there is a lay witness whose "memory is weak" and who is "an older gentleman." Attorney also notes on the blog and discussion board that in the same matter he has retained an expert witness whose opinion is "very supportive" of the client's position and Attorney now estimates damages in the matter "greater than" what Attorney originally calculated.

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[1] Merriam-Webster Dictionary defines "catfish" as "[A] person who sets up a false personal profile on a social networking site for fraudulent or deceptive purposes" (available at: https://www.merriam-webster.com/dictionary/catfish).

This Opinion does not address the ethical implications for the lawyer or law office associated with the individual perpetrating the catfishing referenced in this Opinion.

Attorney believes the revealed information is innocuous, in part because Attorney has not identified by name Client, Lay Witness, or Expert Witness. However, Attorney has revealed sufficient information so that a person familiar with aspects of Client's litigation would be able to identify the witnesses and the significance of Attorney's disclosures.

Issue

What are the ethical implications of an Attorney's disclosure of client-related information through social media to the public and to a person whose identity is unknown to Attorney where the cumulative effect of Attorney's use of social media can allow readers to aggregate and study information so that a Client's confidential information may be deduced or discovered from it, and the information includes Attorney's personal impressions, opinions or assessments related to the representation?

Discussion

Business and Professions Code § 6068(e)(1) obligates each attorney to preserve the "secrets" of the client. Client "secrets", often referred to as confidential client information, includes all information obtained by a lawyer as a result of a lawyer-client relationship, the disclosure of which likely would be harmful or embarrassing to the client or that the client has directed the lawyer not to disclose. *See, e.g.*, California Rules of Professional Conduct, Rule 3-100, Discussion ¶ [1];[2] *In re Jordan* (1972) 7 Cal.3d 930, 940-41; Cal. State Bar Formal Opns. 2016-195, 2004-165, 2003-161, 1999-154, 1993-133, 1981-58, and 1980-52; and L.A. County Bar Assoc. Formal Opns. 456, 436, and 386.

Confidential client information is a broad category that encompasses information protected by the lawyer-client privilege and the work product doctrine. In addition to not intentionally disclosing confidential client information, a lawyer's duty of competence under California Rule 3-110 requires that the lawyer take reasonable precautions to safeguard against its unintended disclosure. *See* Cal. State Bar Assoc. Formal Opn. 2010-179 ("An attorney's duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client's representation does not subject confidential client information to an undue risk of unauthorized

[2] Unless otherwise indicated, all references to rules are to the California Rules of Professional Conduct.

disclosure.").[3] A lawyer's failure to take reasonable precautions to protect the information could have serious adverse repercussions for the client's interests. Although this opinion focuses on potential adverse repercussions that can result from an incautious use of social media, the principles discussed apply with equal force to all interactions in which a lawyer might engage in the lawyer's professional or personal life.

Lawyer-Client Privileged Information. As noted, within the broad range of information protected by Business and Professions Code § 6068(e)(1) is the narrower category of lawyer-client communications that are protected by the evidentiary lawyer-client privilege under Evidence Code §§ 950, *et seq.* Although inadvertent disclosure might not waive the lawyer-client privilege,[4] a lawyer's disclosure of confidential client information, including that which is privileged, nevertheless makes that information available for use by others and could cause the client harm. For example, assume that during a conference with the lawyer, the client had revealed facts that were detrimental to the client or the client's matter. Further assume that the lawyer then disclosed those same facts on-line when discussing a "client" whose name the lawyer did not reveal. Although the lawyer might believe that those facts could not be associated with the particular client, it is possible that an opposing party or third person might be able to infer the client's identity from the context of the disclosure. Although the disclosure by the lawyer would likely not constitute a waiver of the privilege, the opposing party would be able to use the underlying facts disclosed during the lawyer-client communication to the client's detriment or embarrassment.

Work Product. It also is possible that a lawyer's disclosure would waive work product protection otherwise available under Code of Civil Procedure §§ 2018.010, *et seq.* For example, in *Lenz v. Universal Music Corp.* (N.D. Cal. Oct. 22, 2010) 2010 U.S. Dist. LEXIS 119271, the "YouTube 'dancing baby' case", the court determined that work product protection had been waived by the client's blog posts, gmail chat posts, and e-mails discussing the lawyer's strategy. In addition, in *Kintera, Inc. v. Convio, Inc.* (S.D. Cal. 2003) 219 F.R.D. 503, the court ordered

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[3] Formal Opn. 2010-179 addressed the duty to guard against the kind of eavesdropping and interception that might be possible when a lawyer communicates electronically, such as when using a public wireless connection. The current opinion discusses the situation in which a lawyer discloses information intentionally but with the belief that confidential client information is not being revealed.

[4] Under Evid. C. § 912(a), only the holder of a privilege can waive its protections, either by disclosing a significant part of the protected communication or by consenting to its disclosure by another person. See also *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal. App. 5th 1083, 1101.

production over the plaintiff's work product objection after plaintiff had posted to its website allegations of misappropriation of trade secrets and said it possessed employee affidavits signed under penalty of perjury.[5] Although *Lenz* and *Kintera* both involved the clients' disclosures of the lawyer's work product, the same result would follow a lawyer's disclosure on social media of the lawyer's own work product. Under the facts presented, Attorney has disclosed to Individual, a person working with the opposing party in Client's case, general information about Client and both witnesses in Client's matter. Attorney has also disclosed on both his blog and the on-line discussion board Attorney's potentially damaging impression of Lay Witness's memory that the other side might be able to use to impeach the witness's testimony. Further, Attorney's disclosed opinion on those same social media sites regarding Expert Witness's anticipated damages testimony will alert the other side to countermeasures they will need to take in the damages phase of the case. The general information Attorney relayed to Individual in their one-on-one communication, in concert with Attorney's disclosures about the two witnesses on the blog and discussion board, can provide the opposing side with information to develop strategies that are detrimental to Client's interests.[6]

Lawyers should always protect client information carefully; discretion is essential to client protection and a hallmark of professionalism. Further, communication through social media carries enhanced risks, not only because, as in this situation, the recipient of an electronic communication might not be the person whom she or he purports to be, but also because the recipient has the ability to share the information with others easily. In addition, information distributed electronically has a continuing life, and it might be possible for recipients to aggregate, mine, and analyze electronic communications made to different people at different times and through different social media. These dangers are enhanced by the casual, informal, and spontaneous nature of some Internet communications: a lawyer who is part of an on-line community must comply with all of the duties with regard to confidential client information that lawyers have in every other circumstance.

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[5] Federal Rules of Evidence, Rule 502 controls waiver of the lawyer-client privilege and work product protection in the federal courts.

[6] It is possible that Attorney's disclosures about the two witnesses on the blog and discussion board may alone, without the one-on-one communication with Individual, provide sufficient information so as to be detrimental to Client's interests (e.g., if Attorney's case load is relatively small such that the disclosures likely relate to Client's matter). In any event, the cumulative effect of the disclosures and the communication make such detrimental effect much more likely.

Conclusions

Lawyers are required to be sensitive to the interplay of advancing technology and the lawyer's professional responsibilities. A lawyer who communicates on-line regarding professional activities must guard against doing so in a way that discloses confidential client information. A lawyer's failure to recognize the risks inherent in the use of on-line social media could result in client injury and the possibility of professional discipline under Business and Professions Code § 6068(e)(1) and Rules of Professional Conduct 3-100 and 3-110.

This Opinion is advisory only.

BAR ASSOCIATION OF NASSAU COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

BAR ASSOCIATION OF NASSAU COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 2016-01
(Inquiry No. 2016- 005)

Archive of Ethics Opinions

Topic:
Responding to online criticism pertaining to the lawyer's services posted by former client's relative.

Digest:
A lawyer may not disclose confidential information to respond to online criticism.

Rule Provisions:
1.6(a); 1.6 (b); 1.9 (c)

Facts Presented:
The inquirer, a Nassau County law firm, was retained by a husband in connection with a family offense petition as well as in the divorce commenced by the wife. Within weeks, the husband was arrested for an alleged violation of the stay away order of protection. The inquirer did not handle criminal matters and so advised client. The client became upset; hired another attorney to handle the criminal matter as well as replacing inquirer as to the divorce proceeding. The Inquirer then received a telephone call from an individual identifying himself as the brother of the former client requesting a refund of unearned fees.

Inquirer advised the gentleman that no refund was due and provided a breakdown of charges with respect to the divorce proceeding. The "brother" then posted several internet reviews criticizing the Nassau County firm for hiring inquirer and calling inquirer a "thief".

The inquirer wishes to respond to the posting of the criticisms on the Internet by including potential confidential communications with the former client in order to tell "his side".

Question:
When a lawyer's former client, or someone ostensibly on their behalf, posts negative comments and criticism of the lawyer on the Internet, may the lawyer post a response on the Internet/Website that tends to rebut the comments and criticisms by including confidential information relating to that former client?

Analysis
The Internet and social media provide numerous sites that ask visitors to state their views of and experience with lawyers, presumably to provide other visitors with information on which to base their choice of counsel. As with our inquirer, he was only partially successful in obtaining the removal of some, but not all, of the critical comments made against him on this particular website.

The inquirer believes that certain information about his representation of that client would tend to rebut the posted criticisms. The information in question constitutes "Confidential Information" as defined by Rule 1.6 (a) of the Rules of Professional Conducts (the "Rules"):

"confidential information" consists of information gained during or relating to the representation of a client, whatever its sources, that is (a) protected by the attorney- client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

Under Rule 1.9, Duties to Former Clients, a lawyer shall not:
Rule 1.9(c)

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client...; or
(2) reveal confidential information of the former client protected by Rule 1.6....

However, there is a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6, which as to former clients is incorporated by Rule 1.9 (c). Rule 1.6 (b) (5) (i) states:
a. A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

...
(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct.
(emphasis added)

Comment [10] to Rule 1.6 provides the following guidance: Where a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extend the lawyer reasonably believes necessary to establish a defense. Such a claim can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client...
(emphasis added)

Such disclosure, if permitted, is limited to the extent that the lawyer reasonably believes the disclosure is necessary to accomplish the purpose of Rule 1.6 (5) (b) (i); wholesale disclosure is not permitted.

The language of the exception, and the comments thereto, suggest that it does not apply to informal complaints such as posting criticisms on the Internet. The key word is "accusation" defined in Black's Law Dictionary 21 (5th ed. 1979) as a "formal charge against a person to the effect that he is guilty of a punishable offense" or a "charge of wrongdoing, delinquency, or fault" Webster's third International Dictionary Unabridged 22 (2002). See also, Roy D. Simons, Simon's New York Rules of Professional Conduct Annotated 230 (2013 ed.) ("An accusation means something more than just casual venting.") The proposition that an attorney may disclose privileged information if necessary to defend against pending civil or criminal charges appears to have general support in the case law. see cases cited in First Federal Sav. & Loan Asso. v Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986) Disclosure of the confidential information can not be used by a lawyer in a wrongful discharge case, Wise v Consol. Edison Co. of N.Y 282 A.D. 2d 335 (1st Dep't 2001) or in a lawyer's defamation complaint against his former employee. Eckhaus v Alfa-Laval Inc. 764 F. Supp. 34 (S.D.N.Y. 1991) Further, there may be circumstances in which the material threat of a proceeding would give rise to the right to disclose confidential information. see NYSBA opinion 1032 (10/30/2014) citing N.Y. City 1986-7 (in-house lawyer may disclose confidential information to government prosecution who have identified the lawyer as the subject of a grand jury investigation in which other witnesses have made incriminating statements about the lawyer.)

The New York State Bar Association addressed a similar inquiry in Ethics Opinion 1032, where the inquirer asked to respond to a former client's critical commentary on a website. As we find here, in 1032, the New York State Bar Association similarly concluded that a lawyer may not disclose a former client's confidential information solely to respond to a former client's criticism of the lawyer posted on a lawyer – rating website.

We note that in this inquiry, we are not asked to consider whether the negative website posting constitutes a waiver by the client of the attorney-client privilege and of other kinds of confidentiality under Rule 1.6(a). For our analysis, we have assumed that confidentiality has not been waived. The mere fact that the brother of a former client (or perhaps the former client himself) has posted critical comments on the Internet or a website is insufficient to permit a lawyer to respond to the negative commentary with disclosure of the former client's confidential Information. Our conclusion properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception,

Rule 1.6 (b) (5) (i), which applies to a charge of wrongdoing against the attorney, i.e. the "accusation". Critical but less formal comments on the skills of lawyers and his law firm, whether in the coffee shop, a newspaper account, a blog, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice.

Conclusion

A lawyer may not disclose a former client's confidential information solely to respond to criticism of the lawyer posted on the Internet or a website by a relative of the former client or by the former client himself.

(Approved by the Full Committee on May 9, 2016)

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

ETHICS OPINION 1032

New York State Bar Association
Committee on Professional Ethics

Opinion 1032 (10/30/2014)

Topic: Responding to a former client's critical commentary on a website

Digest: 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.

Rules: 1.6(a); 1.6(b); 1.9(c)

FACTS

1. The inquirer, a New York law firm, believes that a "disgruntled" former client has unfairly characterized the firm's representation of the former client on a website that provides reviews of lawyers. A note posted by the former client said that the former client regretted the decision to retain the firm, and it asserted that the law firm provided inadequate services, communicated inadequately with the client, and did not achieve the client's goals. The note said nothing about the merits of the underlying matter, and it did not refer to any particular communications with the law firm or any other confidential information. The former client has not filed or threatened a civil or disciplinary complaint or made any other application for civil or criminal relief.

2. The law firm disagrees with its erstwhile client's depiction of its services and asserts that the firm achieved as good a result for the client as possible under the difficult circumstances presented. The firm wishes to respond to the former client's criticism by telling its side of the story if it may do so consistently with its continuing duties to preserve a former client's confidential information.

QUESTION

3. When a lawyer's former client posts accusations about the lawyer's services on a website, may the lawyer post a response on the website that tends to rebut the accusations by including confidential information relating to that client?

OPINION

4. The Internet and social media today provide a number of sites that ask visitors to state their views of and experiences with lawyers, presumably to provide other visitors with information on which to base their choice of counsel. Our survey of a few of these sites did not reveal any protocols to monitor the accuracy of the commentary, except to assure that the very lawyers being reviewed are not the source. In this respect, the sites differ from other lawyer-rating agencies – Chambers, Super Lawyers, Best Lawyers in America, Martindale-Hubbell and the like – which claim to base their ratings on a canvass of clients and other members of the bar.

5. The inquiry concerns a negative posting on such a site by a former client. The inquiring firm believes that certain information about its representation of that client would tend to rebut the posted allegations. The information in question constitutes "Confidential information" as defined by Rule 1.6(a) of the Rules of Professional Conduct (the "Rules"). Under Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client.

6. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6, which as to former clients is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) says that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct." When applicable, this exception permits, but does not require, disclosure of confidential information, and only to the extent the lawyer reasonably believes necessary to serve the purpose of self-defense. See Rule 1.6, Cmts. [12] & [14].

7. The inquiry raises the question whether a lawyer may rely on this exception to disclose a former client's confidential information in response to a negative web posting, even though there is no actual or threatened proceeding against the lawyer. We do not believe that a lawyer may do so.

8. The language of the exception suggests that it does not apply to informal complaints such as this website posting. The key word is "accusation," which has been defined as "[a] formal charge against a person, to the effect that he is guilty of a punishable offense," Black's Law Dictionary 21 (5th ed. 1979), or a "charge of wrongdoing, delinquency, or fault," Webster's Third International Dictionary Unabridged 22 (2002). See Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 230 (2013 ed.) ("An accusation means something more than just casual venting.")

9. Comment [10] to Rule 1.6 supports this conclusion. It says that "[w]here a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense." In the context of a set of legal standards, the words "claim" and "charge" typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction. Comment [10] continues by saying: "Such a claim may arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone." Each of these examples involves a formal proceeding in which the lawyer's conduct has been placed in issue.

10. Case law supports our conclusion. New York cases permitting disclosure of confidential information under Rule 1.6(b)(5)(i) and its nearly identical predecessor DR 4-101(C)(4) have invariably involved allegations of lawyer wrongdoing in formal proceedings such as legal malpractice or other civil actions, disqualification proceedings, or sanctions motions.[1] Those cases stand in contrast to those in which lawyers have not been permitted to use a client's confidential information to initiate actions against former clients (other than lawsuits to collect legal fees, for which Rule 1.6(b)(5)(ii) provides a different exception to confidentiality).[2] Thus under the case law, a lawyer is not authorized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding.[3]

11. In at least one case, discipline has been imposed for the kind of conduct in question here. In re Tsamis, Joint Stipulation and Recommendation ¶¶ 4-10 & Reprimand ¶ 1, No. 2013PR00095 (Hearing Board, Ill. Att'y Reg. & Disc. Comm. 2014) (reprimanding lawyer for revealing confidential information about her former client in response to client's negative review on AVVO legal referral website). Ethics opinions from other jurisdictions have reached varying results on the question facing us, but their relevance is limited by differences in the ethical rules in force in those jurisdictions.[4]

12. We note a New York opinion that addressed the predecessor to Rule 1.6(b)(5)(i), though in a different context. In N.Y. County 732 (2004), a client threatened to file a disciplinary complaint against a lawyer if the lawyer did not release funds in an IOLA account, the proper disposition of which was a part of the lawyer's inquiry to the Committee. The Committee opined that in the event of such a complaint, "the law firm would be entitled to disclose confidences or secrets necessary to defend itself against the client's accusations." The Committee concluded that the "rules permitting disclosure of client confidences should be read restrictively" but that the law firm may disclose protected client information "if the client files a complaint or claim against the law firm."

13. We do not mean to say that a formal proceeding must be actually commenced to trigger the authorization of disclosure by Rule 1.6(b)(5)(i). There may be circumstances in which the material threat of a proceeding would give rise to that right. See N.Y. City 1986-7 (in-house lawyer may disclose confidential information to government prosecutors who have identified the lawyer as the subject of a grand jury investigation in which other witnesses have made incriminating statements about the lawyer). We do not need to reach that question here because no material threat of a proceeding has been made on the website posting that is the subject of this inquiry.

14. Nor do we consider the question of whether and when a negative website posting may effect a waiver of a client's right to confidentiality, because that question is not raised by the facts as presented in the inquiry. If there were facts raising the question of waiver, it would be necessary to consider separately the possible waivers of attorney-client privilege and of other kinds of confidentiality under Rule 1.6(a). Waiver of attorney-client privilege turns on questions of law beyond our jurisdiction. See, e.g., 1050 Tenants Corp. v. Lapidus, 12 Misc. 3d 1118, 1123-25 (Civ. Ct. N.Y.C. 2006). Given the facts as presented, we need not consider whether a negative website posting might waive other kinds of confidentiality. Rather, we assume for present purposes that confidentiality has not been waived. It suffices to say that the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client's confidential information.

15. This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client – or others – being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion.

CONCLUSION

16. A lawyer may not disclose client confidential information solely to respond to a former client's criticism of the lawyer posted on a website that includes client reviews of lawyers.

(1-14)

[1] See, e.g., Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190, 1195 (2nd Cir.), cert. denied, 419 U.S. 998 (1974); First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 567-68 (S.D.N.Y. 1986); Creditanstalt Inv. Bank AG v. Chadbourne & Parke LLP, 39 A.D.3d 201, 201 (1st Dep't 2007); Nesenoff v. Dinerstein & Lesser, P.C., 12 A.D.3d 427, 429 (2nd Dep't 2004); In the Matter of Koeppel, 32 Misc.3d 1245(A) (Surr. Co. N.Y. Co. 2011); General Realty Assoc. v. Walters, 136 Misc. 2d 1027, 1029 (Civ. Ct. N.Y.C. 1987).

[2] See, e.g., Eckhaus v. Alfa-Laval, Inc., 764 F. Supp. 34, 37-38 (S.D.N.Y. 1991) (defamation); Wise v. Con. Edison Co. of N.Y., Inc., 282 A.D.2d 335, 336 (1st Dep't 2001) (wrongful discharge). See also D.C. Opinion 363 (2012) (in-house lawyer may not disclose confidential information in retaliatory discharge claim).

[3] See N.Y. City 2005-03 (noting recognition by courts that "an attorney may use client confidences or secrets to defend himself or herself from a claim or counterclaim brought by the client, or as evidence in a fee collection dispute, but may not necessarily be permitted to use that same information affirmatively in a different type of claim against a client"); Restatement (Third) of the Law Governing Lawyers § 64, comment (c) (2000) (noting that a lawyer may act under the Restatement's self-defense provision "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").

[4] In California there is no ethical counterpart to New York Rule 1.6(b)(5)(i), but the Evidence Code contains a self-defense exception to attorney-client privilege. Opinions interpreting that exception have concluded that California law does not permit a lawyer "to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver." San Francisco Opinion 2014-1; see Los Angeles County Opinion 525 (2012) (attorney may respond to former client's internet posting if (1) "response does not disclose confidential information"; (2) response will not injure former client in matter involving the former representation; and (3) response is proportionate and restrained). An Arizona opinion concluded that the right to disclose was not limited to "a pending or imminent legal proceeding," relying on a provision found in the Arizona rule (and in the ABA Model Rule) but not in the New York rule. Arizona Opinion 93-02 (reasoning that one category of cases within the exception, for a claim or defense "in a controversy" between the lawyer and the client, would include cases not covered by another category within the exception, for "allegations in any proceedings").

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LAWYER'S RESPONSE TO CLIENT'S NEGATIVE ONLINE REVIEW

FORMAL OPINION 2014-200

The PBA Legal Ethics and Professional Responsibility Committee has been asked whether the Pennsylvania Rules of Professional Conduct ("PA RPC") impose restrictions upon a lawyer who wishes to publicly respond to a client's adverse comments on the internet about the lawyer's representation of the client. The Committee concludes that the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, constrains the lawyer. We conclude, therefore, that a lawyer cannot reveal client confidential information in response to a negative online review without the client's informed consent.

We further believe that any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review. Any response should be proportional and restrained. For example, a response could be, "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."

Applicable Ethics Rules

PA RPC 1.6 provides, in pertinent part:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

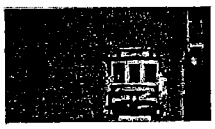
. . .

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

. . .

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the

THE BAR ASSOCIATION OF SAN FRANCISCO



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OPINION 2014-1

[Issue date: January 2014]

ISSUE:

May an attorney respond to a negative online review by a former client alleging incompetence but not disclosing any confidential information where the former client's matter has concluded? If so, may the attorney reveal confidential information in providing such a response? Does the analysis change if the former client's matter has not concluded?

DIGEST:

An attorney is not ethically barred from responding generally to an online review by a former client where the former client's matter has concluded. However, the duty of confidentiality prevents the attorney from disclosing confidential information about the prior representation absent the former client's informed consent or waiver of confidentiality. This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege.[1] While the online review could have an impact on the attorney's reputation, absent a consent or waiver, disclosure of otherwise confidential information is not ethically permitted in California unless there is a formal complaint by the client, or an inquiry from a disciplinary authority based on a complaint by the client. Even in situations where disclosure is permitted, disclosure should occur only in the context of the formal proceeding or inquiry, and should be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, depending on the circumstances, it may be inappropriate for the attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

AUTHORITIES INTERPRETED:

Business & Professions Code §6068(e); Rules of Professional Conduct, Rule 3-100; Evidence Code §§955, 958; ABA Model Rules, Rule 1.6.

STATEMENT OF FACTS

A former client has posted a review on a free public online forum that rates attorneys. The review does not disclose any confidential information but is negative and contains a discussion in which the former client makes general statements that Attorney mismanaged the client's case, did not communicate appropriately with the former client, provided sub-standard advice and was incompetent. Attorney wishes to respond to the negative review by posting a reply in the electronic forum; and, if permitted, discuss the details of Attorney's management of the case, the frequency and content of communications Attorney had with the former client and the advice Attorney provided to the former client and why Attorney believes the advice was appropriate under the circumstances.

DISCUSSION [2]

A. Duty of Loyalty

As fiduciaries, attorneys owe a duty of loyalty to their clients. *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289. After conclusion of the attorney-client relationship, an attorney continues to owe a residual duty of loyalty to a former client, which is narrow in scope, *See Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (the duty of loyalty continues after termination of the attorney-client relationship to the extent that a lawyer may not act in a manner that will injure the former client with respect to the matter involved in the prior representation); *see also Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574 ("[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.").

If the matter Attorney previously handled has concluded, responding to the former client's review through statements that do not disclose any confidential information would not typically constitute a breach of loyalty, even though Attorney's response might be deemed "adverse" to the former client. Simply responding to the review and denying the veracity or merit of the former client's assertions (without disclosing confidential information) would not be likely to injure the former client with respect to any work Attorney previously did, or to undermine such work. Attorney would not be attacking his or her prior work. To the contrary, Attorney would be supporting the merit of such work.

If, on the other hand, the matter Attorney previously handled has *not* concluded, a response, even one that does not involve the disclosure of any confidential information, may be inappropriate. Attorney should conduct a fact specific analysis, taking into consideration: (1) the status and nature of the on-going proceedings, (2) the content of the Attorney's contemplated response, and (3) any negative impact the response could have on the on-going proceedings. The Committee can foresee the possibility that, at least in some situations, a response, even one not containing confidential information, could potentially undermine the attorney's prior work. For example, a statement by Attorney that his management of the case was reasonable given the former client's likelihood of success (while not disclosing confidential facts) could suggest weakness in the former client's position, and could negatively influence the opposing party's willingness to settle or litigation strategy.

B. The Duty of Confidentiality

The scenario presented also implicates Attorney's duty of confidentiality to his former client. "'One of the principal obligations which bind an attorney is that of fidelity ... maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client .... This obligation is a very high and stringent one.'" *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289, *quoting Anderson v. Eaton* (1930) 211 Cal. 113, 116.

In California, the duty of confidentiality is codified in the State Bar Act (Cal. Bus. & Prof. C. §6000 et seq.) and embodied in the California Rules of Professional Conduct ("CRPC"), Rule 3-100. Pursuant to Bus. & Prof.C. §6068(e) an attorney must "maintain inviolate the confidence, and at every peril to himself or herself [] preserve the secrets, of his or her client." *See also* Rule 3-100(A) ("A member shall not reveal information protected from disclosure by Business & Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.").

Maintaining a client's "confidence" means the lawyer may not do anything to breach the trust reposed in him or her by the client. It is "not confined merely to non communication of facts learned in the course of professional employment; for the section separately imposes the duty to 'preserve the secrets of his client.'" *In re Soale* (1916) 31 Cal. 144, 153; *see also* Cal. State Bar Form. Opns. 1993-133, 1988-96, 1986-87 & 1981-58. "Secrets" refers to other information gained in the professional relationship the client has requested be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client. Cal. State Bar Form. Opns. 1993-133; Los Angeles Bar Ass'n Form Opns. 452 (1988). The duty to protect client secrets applies to all information relating to client representation, whatever its source. Los Angeles Bar Ass'n Form.Opn. 436 (1985). It even encompasses matters of public record communicated in confidence that might cause a client or former client public embarrassment. *Matter of Johnson* (Rev.Dept. 2000) 4 Cal. State Bar Ct.Rptr. 179, 189.

"Confidence" also refers to information protected by the attorney-client privilege. *See* Los Angeles Bar Ass'n Form. Opns. 386 (1980), 466 (1991); Cal. State Bar Form. Opns. 1980-52 & 1976-37. However, the duty of confidentiality prohibits disclosure of a much broader body of information than that protected by the attorney-client privilege. *See Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *Industrial Indemnity Co. v. Great American Ins. Co.* (1977) 73 Cal.App.3d 529, 536; Cal. State Bar Form. Opns. 2003-161, 1993-133; *see also* CRPC 3-100, Discussion [2] ("The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy."). Thus, in California, whether information is privileged is not dispositive as to whether it is confidential and whether an attorney may voluntarily disclose such information.

The duty of confidentiality survives the conclusion of the attorney-client relationship. *See Wutchumna, supra*,216 Cal. 564, 571 ("The relation of attorney and client is one of highest confidence and as to professional information gained while this relation exists, the attorney's lips are forever sealed, and this is true notwithstanding his subsequent discharge by his client."); *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891.

The factual information Attorney would like to disclose is information obtained during the course of the prior representation. It includes details regarding the management of the case, the frequency and content of communications with the former client, and advice provided by Attorney. Such information falls within the definition of a "confidence." It also falls within the definition of "secrets," as the former client would not likely want the information publicly disclosed. The proposed disclosure could be particularly detrimental to the client if the former client's action is ongoing.

Attorney's duty of confidentiality to the former client would therefore apply to all information Attorney possesses by virtue of the former representation including, but not limited to, privileged attorney-client communications and attorney work product. Absent consent of the former client, waiver or an exception to the duty of confidentiality and/or attorney-client privilege, Attorney has an affirmative obligation not to disclose otherwise confidential information,[3] and to assert the attorney-client privilege on behalf of the former client. *See* Ev.C. §955; *Glade v. Sup.Ct. (Russell)* (1978) 76 Cal.App.3d 738, 743. Whether an applicable exception to the duty of confidentiality and/or attorney-client privilege exists is discussed in detail below.

C. The Self-Defense Exception

Whether Attorney may disclose otherwise confidential information turns on whether there is an applicable exception to the duty of confidentiality or attorney-client privilege that would permit such disclosure. Unlike the ABA Model Rules of Professional Conduct, and the numerous jurisdictions that have adopted versions of the ABA Model Rules, California's rules of professional conduct do not have an express exception to the duty of confidentiality that permits a lawyer to disclose otherwise confidential information in disputes with a client or former client. *See, e.g.*, ABA Model Rule 1.6(b)(5) (a lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to

a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client"); *see also* Los Angeles Bar Ass'n Form. Opn. 525 (2012) (absent the client's waiver of confidentiality or privilege, there is no statutory exception to the duty of confidentiality or the attorney-client privilege that would permit an attorney to counter client accusations by disclosing confidential information where no litigation or arbitration is pending between the attorney and former client); Restatement (Third) the Law Governing Lawyers, §64 ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charges by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.").

1. Cal. Evidence Code Section 958

To the extent there is a "self-defense" exception in California, it is statutory and its scope and application are defined by case law. California Evidence Code §958 provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." California courts have generally applied this exception to situations where a client or former client asserts a legal claim against a lawyer, or the lawyer asserts a fee claim against the former client. *See, e.g., Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 228 (action for fees brought by lawyer); *Smith, Smith & Kring v. Sup. Ct. (Oliver)* (1997) 60 Cal.App.4th 573, 580 (malpractice action by client); *Schlumberger Ltd. v. Sup.Ct. (Kindel & Anderson)* (1981) 115 Cal.App.3d 386, 392 (malpractice action by client); *see also Styles v. Mumbert* (2008) 164 Cal.App.4th

1163, 1168 (refusing to apply exception where no malpractice claim or fee dispute existed).
The rationale behind the "exception" is that when a client or attorney claims the other breached a duty arising out of the professional relationship, it would be "unjust" to allow the claimant to invoke the privilege so as to prevent the other from producing evidence in defense of the claim. *See* Cal. Ev. C. §958, Law Revision Commission Comments; *Glade, supra*,76 Cal.App.3d at 746.
In this situation, the former client has made assertions in a public forum suggesting Attorney violated his duty of communication, did not competently handle the case and provided services that were below the standard of care. Although the former client alleged Attorney breached professional duties to the former client, a formal legal claim or proceeding has not been brought against Attorney
The rationale supporting the exception arguably has merit even outside the presentation of a formal legal claim or proceeding. It is possible, for example, that the harm to Attorney from the online review could be as damaging to Attorney as a formal claim by the client (which might be refuted, dismissed, etc., on substantive legal grounds). The Committee notes that because Ev.C. §958 relates to the admissibility of evidence in the context of a legal proceeding, it is doubtful it would have any lawful application outside a formal legal or administrative proceeding.

2. Model Rule 1.6

The Model Rules, which are instructive, especially where the California rules of professional conduct are silent on a matter, suggest disclosure of otherwise confidential information may be appropriate in certain circumstances outside a formal legal proceeding. *See, e.g.*, ABA Model Rule 1.6, Comment [10] (the exception "does not require the lawyer to await commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."). [4]

At least one federal district court in California has adopted the Model Rule's self-defense exception (1.6(b)(5)) based on the premise that the California Rules of Professional Conduct contain no provision specifically governing self-defense and therefore the Model Rules are an "an appropriate standard to guide the conduct of members of its bar." *See In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 FRD 687, 690-91 (C.D. Cal. 1988). The *National Mortgage* decision, however, decided whether a self-defense exception existed based on federal common law.

California state courts have rejected the argument that a privilege exception can exist outside the specific parameters of the Evidence Code. *See McDermott, Will & Emery v. Sup. Ct.*, 83 Cal.App.4th 378, 385 (2000) (rejecting privilege exception for shareholder derivative actions: "longstanding California case authority has rejected this application of the federal doctrine, noting it contravenes the strict principles set forth in the Evidence Code of California which precludes any judicially created exceptions to the attorney-client privilege."); Ev. C. §911 ("Except as otherwise provided by statute ... (b) No person has a privilege to refuse to disclose any matter or refuse to produce any writing, object or other thing."). Accordingly, the Committee does not find *In re Nat'l Mortg.* and Model Rule 1.6 dispositive on the issue of whether a disclosure of otherwise confidential information would be permitted in California in a public online forum.

Moreover, comment [10] to Rule 1.6 (even if applicable) implicates a situation in which a "third party" claims an attorney is complicit in the wrongdoing of a client. As explained in detail in Los Angeles Bar Ass'n Form.Opn. 519 (2007), neither California case law nor Ev.C. §958 recognize a self-defense exception for claims made by third parties. Model Rule 1.6(b)(5) is broader than any self-defense exception recognized under California law. Moreover, the

comment to Rule 1.6 has been applied only to those situations in which the third party has the authority to take action against the attorney and there is an imminent threat of such action with serious consequences. Here, no third party has made any inquiry, and it is not clear that a formal claim or disciplinary inquiry is imminent.

3. Application of Exception to Ineffective Assistance of Counsel Claims

Section 958 has been held applicable to a criminal defendant's claim of ineffective assistance of counsel in a habeas proceeding: "[a] trial attorney whose competence is assailed by his former client must be able to adequately defend his professional reputation, even if by doing so he relates confidences revealed to him by the client." *In re Gray* (1981) 123 Cal.App.3d 614, 616. This holding tends to support the proposition that Ev.C. §958 could apply outside a formal or direct action between the former client and attorney. However, in *Grey* the claim was still being made by the client in a formal legal proceeding, albeit not a civil or disciplinary proceeding against the attorney himself. Thus, *Grey* is not dispositive as to the issue of whether Ev.C. §958 can be applied outside the context of a formal legal proceeding.

The ABA Standing Committee on Ethics and Professional Responsibility suggests that under Model Rule 1.6(b)(5), disclosure of otherwise confidential information may not be appropriate outside a formal legal proceeding, or an inquiry from a regulatory or disciplinary authority, absent the informed consent of the client. ABA Form. Opn. 10-456. The Committee opines that Comment [10] to Rule 1.6 should be construed narrowly. The Committee addresses whether a former lawyer of a client claiming ineffective assistance of counsel can disclose otherwise confidential information in response to a prosecution request *prior* to a court supervised response by way of testimony or otherwise. The Committee concludes that under Rule 1.6(b)(5), a lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel, but it is highly unlikely that a "non-supervised" disclosure in response to a prosecution request would be justified. ABA Form. Opn. 10-456, p. 1.

The Committee emphasizes:
Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent .... *A client's express or implied waiver of the attorney-client privilege has the legal effect of foregoing the right to bar disclosure of the client's prior confidential information in a judicial or similar proceeding. Standing alone, however, it does not constitute 'informed consent' to the lawyer's voluntary disclosure of client information outside such a proceeding.*

ABA Form. Opn. 10-456, p. 2 (emphasis added).
The Committee approves of disclosure reasonably necessary in advance of an actual proceeding in response to a party who credibly threatens to bring a civil, criminal or disciplinary claim against the lawyer, such as a prosecuting, regulatory or disciplinary authority, to try to persuade the party not to do so. The Committee cautions, however, that although the self-defense exception has broadened over time, it is a limited exception because "it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation." ABA Form. Opn. 10-456, p. 3. Thus, a lawyer may only act in self-defense under the exception to defend against charges that *imminently* threaten the lawyer with *serious* consequences. *Id.*; *see also* Restatement (Third) of the Law Governing Lawyers §64 cmt. c. A habeas proceeding is not a controversy between the client and lawyer, and the lawyer's disclosure is not necessary to establish a defense to a criminal charge or civil claim against the lawyer. ABA Form. Opn. 10-456, pp. 3-4; *see also* Model Rule 1.6(b)(5).

The Committee further acknowledges that the language of Rule 1.6(b)(5), permitting disclosure "to respond to allegations in any proceeding concerning the lawyer's representation of the client," permits a lawyer to defend him or herself as reasonably necessary against allegations of misconduct in proceedings "comparable to those involving criminal or civil claims against a lawyer." ABA Form. Opn. 10-456, p. 4. The Committee concludes that a voluntary disclosure to the prosecution outside a court-supervised proceeding would not be reasonably necessary: "It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable." *Id.* Here, although Attorney has an interest in his or her reputation, a disclosure of confidential information is not necessary to establish a claim against the former client or to prevent the imposition of liability or some restriction on the Attorney's conduct.

As the Committee notes, the self-defense exception is tempered by a lawyer's obligation to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements ... to the fullest extent practicable." Model Rule 1.6.(b)(5), cmt. 14. That obligation is undermined if the disclosure is made in a public forum where there is no adjudicatory oversight: "[T]here would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers." ABA Form. Opn. 10-456, p. 5. A disclosure by Attorney in the online forum, raises similar concerns.

Here, Attorney's disclosure in a public online forum has no judicial supervision and is accessible to anyone. Although the former client's assertion could impact Attorney's reputation, it is the Committee's opinion that such potential impact, by itself, is not of a nature that reasonably requires Attorney to disclose in a public forum what would otherwise be confidential information. Attorney may seek to mitigate any potential impact from the negative review by submitting a response that generally disagrees with the former client's assertions and notes that Attorney is not at liberty to discuss details regarding confidential client matters unless the information comes within Bus. & Prof. C. §6068(e)(2). This approach strikes an appropriate balance between the rationale for the self-defense exception, the need to limit disclosures to information reasonably necessary to defend the lawyer, and the importance of maintaining a client's confidential information and promoting full and candid disclosure of information by clients to their attorneys.

4. The Restatement Approach

We believe this conclusion is also commensurate with the approach recommended in the Restatement (Third) of the Law Governing Lawyers. The Restatement looks to the concepts of "necessity" and "reasonableness" in determining what disclosure may be appropriate. Section 64, comment e, states:
Use or disclosure of confidential client information ... is warranted only if and to the extent that the disclosing lawyer reasonably believes it necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy.

Comment c to section 64 states:
A lawyer may act in self defense ... 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. Imminent threat arises not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant.
Here, although the former client has asserted that Attorney's conduct fell below the standard of care, the former client has not manifested an affirmative intent to bring a formal claim against Attorney. Even if such a claim were directly threatened, a response in the online forum would not be reasonably necessary to establish a defense or claim on behalf of Attorney. Attorney would have the ability to make an appropriate disclosure in the context of the impending legal proceeding. An additional online disclosure would not have any substantive impact on the issue of the lawyer's potential liability in the legal proceeding.

While comment f to section 64 provides that an attorney may, in appropriate circumstances, respond to an informal but "public" accusation, it appears limited to the context of responding to a letter of grievance to a disciplinary authority. In that context, the charge (albeit informal) has been made to a body that clearly has the authority to formalize and prosecute the charge. It is not clear the Restatement would permit disclosure in response to a public accusation that is not made to or before a body with some ability to impose liability or otherwise restrict the attorney's conduct. Notably, comment e of section 64 provides: "[t]he lawyer may divulge confidential client information only to those persons with whom the lawyer must deal in order to obtain exoneration or mitigation of the charges."

5. Application of Exception to Facts Presented

Here, the assertions against Attorney, albeit general in nature, go beyond casual charges not likely to be taken seriously by others. They have been posted on a forum that is publicly available and dedicated to providing reviews of attorneys. Absent a response from Attorney, it is possible that a party might give the review credence and question Attorney's professional skills, thus impacting his or her potential retention. Notwithstanding this fact, Attorney's proposed response would be in a public forum that has no ability to impose any restriction or liability on Attorney. The Committee does not believe applicable California law permits a lawyer to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver.[5]

Disclosure is not, in the Committee's view, reasonably necessary, or sufficiently tailored to establishing a self-defense. The absence of the inclusion of any self-defense exception in California's Rules of Professional Conduct, the longstanding policy in California that precludes judicial exceptions to the attorney-client privilege, and the breadth of California's duty of confidentiality (which goes beyond the evidentiary privilege) is further support for the conclusion that Ev.C. § 958 would not apply under the facts presented.[6]

525. That opinion considered the situation of a former client posting adverse comments about a lawyer, where the client did not disclose any confidential information and no litigation or arbitration was pending between the lawyer and former client. The committee concluded that the attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is "proportionate and restrained."

6. Any Permissible Response Must Be Narrowly Tailored to the Issues Raised by the Former Client

Even where the self-defense exception applies and a response is reasonably necessary to establish a defense or claim on behalf of the attorney, the disclosure of any confidential information must be narrowly tailored to respond to the specific issues raised by the former client. In such situations, disclosure is therefore limited to relevant communications between the client and the attorney whose services gave rise to the breach of duty claim. *See Schlumberger Ltd., supra*, 115 Cal.App.3d at 392; Los Angeles Bar Ass'n Form.Opn. 452 (1988) (on collecting a fee or defending against a malpractice action an attorney may disclose both confidential information and client secrets, but only to the extent necessary to the action"); *In re Rindlisbacher* (9th Cir. BP 1998) 225 B.R. 180, 183 (exception did not permit attorney to disclose in discharge proceeding client's admission that he had lied at dissolution trial; the attorney's disclosure was not relevant to the attorney's protection of his own rights against a breach of a duty by the debtor); *see also* Los Angeles Bar Ass'n Form.Opn. 519 (2007) (disclosure under section 958 must comply with the "relevancy" requirement of the section and the ethical directive that an attorney's disclosure pursuant to the exception be limited to the necessities of the case and its issues). Indeed, in California, disclosing confidential information not bearing on the issues of breach can subject a lawyer to discipline. *See Dixon v. State Bar* (1982) 32 Cal.3d 728, 735 (lawyer's declaration, in response to client lawsuit, that included gratuitous and embarrassing information about the client that "was irrelevant to any issues then pending before the court" and was found to have been made for the purposes of "harassing and embarrassing" the former client was grounds for discipline).

Even assuming Ev.C. §958 could apply in a public, non-legal forum, Attorney would have to limit any response to the general issues raised by the former client. In the Committee's view, disclosing the details and content of communications, the advice provided to the client, and the rationale for such advice, is not reasonably necessary to respond to and defend oneself from generalized assertions of malfeasance.

CONCLUSION

Attorney is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty owed to the former client does not prohibit a response, Attorney's on-going duty of confidentiality prohibits Attorney from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about an attorney), or by an attorney against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, it may be inappropriate under the circumstances for Attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

Footnotes

1. For purposes of this Opinion, "confidential information" is understood to include both attorney-client privileged information and information which, although not privileged, is nonetheless considered confidential under California Business & Professions Code section 6068(e)(1).

2. The Committee recognizes there are First Amendment implications with regard to the scenario presented in this Opinion. The First Amendment's application to this scenario is beyond the purview of this Committee. While not opining on the issue, the Committee does note that California case law has recognized the potential for limitations on an attorney's speech where such speech implicates the attorney's duties of loyalty or confidentiality to an existing or former client. *See, e.g., Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811.

The Committee also recognizes that the scenario presented could raise tort issues with regard to the former client's or Attorney's speech. The Committee does not opine on such issues.

3.The Committee assumes the exception in Bus. & Prof. C. §6068(e) does not apply for the purpose of this opinion.

4. *See also* CRPC 1-100(A) ("Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."); *General Dynamics Corp. v. Sup. Ct.* (1994) 7 Cal 4th 1164, 1190, fn. 6; *Cho v. Sup. Ct.* (1995) 39 Cal.App.4th 113, 121, fn. 2.

5. The Los Angeles County Bar Association Professional Responsibility and Ethics Committee reached similar conclusions in Los Angeles Bar Ass'n Form. Opn. 525. That opinion considered the situation of a former client posting adverse comments about a lawyer, where the client did not disclose any confidential information and no litigation or arbitration was pending between the lawyer and former client. The committee concluded that the attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is "proportionate and restrained."

6. The Committee does not find L.A. County Bar Assoc. Formal Opinion 397 (1982) or State Bar of Arizona Opinion 93-02 dispositive.

L.A. County Bar Assoc. Formal Opinion 397 opines that where a former client has indicated that a malpractice action is being contemplated, an attorney may provide opposing counsel with a declaration that includes otherwise confidential information about the former client's knowledge regarding matters affecting a default judgment entered against the former client. The opinion, however, contains little substantive analysis,

and is distinguishable since the disclosure was made in the context of a supervised legal proceeding in which the former client was asserting that it was "uninformed" with regard to the legal affairs being handled by the attorney. A finding by the court that the client was not appropriately informed could have a tangible effect on the attorney's potential exposure to the malpractice claim the former client affirmatively indicated he was contemplating.

State Bar of Arizona Opinion 93-02 concludes that an attorney can disclose otherwise confidential and privileged information to the author of a book regarding the murder trial of a former client, in response to assertions made by the former client to the author that the attorney had acted incompetently. The Arizona opinion involved an ethics rule patterned after Model Rule 1.6(d), which has not been adopted in California. The State Bar of Arizona concludes that limiting the exception's application to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(d) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely "superfluous." Although Arizona's rule is patterned on Model Rule 1.6, its opinion is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer's self-defense which states: "Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information except in response to a formal client charge of wrongdoing with a tribunal or similar agency. *When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer.*" State Bar of Arizona Opn. 93-02, pp. 4-5 (Emphasis added). This language is *not* part of the Restatement as presently adopted.

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THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 662

August 2016

QUESTIONS PRESENTED

May a Texas lawyer respond publicly to a former client's adverse comments on the internet? If so, what information may the lawyer disclose?

STATEMENT OF FACTS

A former client posted negative comments about a Texas lawyer on an internet review site. The lawyer believes that the client's comments are false. The lawyer is considering posting a public response that reveals only enough information to rebut the allegedly false statements.

DISCUSSION

The internet allows consumers to publish instant reviews and comments about goods or services. Once posted, consumer reviews are usually searchable, easily accessible to other potential consumers, and effectively permanent. With the internet becoming an increasingly common source of referrals for legal services, consumer reviews on various sites have assumed a greater importance for attorneys in recent years.

Vendors of commercial goods or services are relatively free to respond to negative reviews as they see fit. But when a former client posts a negative review about a lawyer, the lawyer's duty of confidentiality limits the information the lawyer may reveal in a public response.

In general, Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct defines the scope and extent of a Texas lawyer's duty of confidentiality. Rule 1.05(a) broadly defines "confidential information" to include not only information protected by the lawyer-client privilege but also "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client."

A lawyer may not publicly reveal the confidential information of a former client unless expressly permitted by an exception stated in Rule 1.05. Absent an applicable exception found in Rule 1.05, a lawyer may not post a response to a negative review that

reveals any information protected by the lawyer-client privilege, or otherwise relating to a client or furnished by the client, or acquired by the lawyer during the course of or by reason of the representation of the client. This is true even though the information may have become generally known. Compare Rule 1.05(b)(3) (allowing lawyer to use confidential information to the disadvantage of a former client after the information has become generally known) with Rule 1.05(b)(1) (generally prohibiting revelation of confidential information absent an applicable execption).

No exception in Rule 1.05 allows a lawyer to reveal information in a public forum in response to a former client's negative review. The only exceptions potentially applicable to the facts presented in this opinion appear in Rule 1.05(c) and (d):

> "(c) A lawyer may reveal confidential information:
> * * *
> (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
> (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
> * * *
> (d) A lawyer also may reveal unprivileged client information:
> * * *
> (2) When the lawyer has reason to believe it is necessary to do so in order to:
> * * *
> (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
> (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client."

It is the opinion of the Committee that each of the exceptions stated above applies only in connection with formal actions, proceedings or charges. The exceptions to Rule 1.05 cannot reasonably be interpreted to allow public disclosure of a former client's confidences just because a former client has chosen to make negative comments about the lawyer on the internet. This approach is consistent with the guidance issued by the ethics authorities in other jurisdictions. *See, e.g.*, Los Angeles County Bar Association Professional Responsibility and Ethics Committee Formal Opinion No. 525 (Feb. 2013); Bar Association of San Francisco Ethics Opinion 2014-1 (Jan. 2014); New York State Bar Association Ethics Opinion 1032 (Oct. 2014); and Pennsylvania Bar Association Formal Ethics Opinion 2014-200 (2014).

Accordingly, a lawyer may not reveal confidential information, as that term is defined in Rule 1.05, merely to respond to a former client's negative review on the internet. A lawyer may, however, post a response to a former client's negative review so long as the response is proportional and restrained and does not reveal confidential information or violate any other provision of the Texas Disciplinary Rules. For example, posting the following response, suggested in Pennsylvania Bar Association Formal Ethics Opinion 2014-200 (2014), would not violate the Texas Disciplinary Rules:

> "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."

Nothing in this opinion is intended to suggest that a lawyer may not seek judicial relief against a former client who commits defamation or other actionable misconduct through an internet publication.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, 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, i.e., information protected by the lawyer-client privilege, or otherwise relating to a client or furnished by the client, or acquired by the lawyer during the course of or by reason of the representation of the client. The lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct.

- to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

- to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved; or

- to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Oxford Dictionaries Online defines "controversy" as a "disagreement, typically when prolonged, public, and heated." http://www.oxforddictionaries.com. A disagreement as to the quality of a lawyer's services might qualify as a "controversy." However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, Comment [14] makes clear that a lawyer's disclosure of confidential information to "establish a claim or defense" only arises in the context of a civil, criminal, disciplinary or other proceeding. Although a genuine disagreement might exist between the lawyer and the client, such a disagreement does not constitute a "controversy" in the sense contemplated by the rules to permit disclosures necessary to establish a "claim or defense." The literal language of Rule 1.6(c)(4) (the self-defense exception) does not authorize responding on the internet to criticism.

The Right to Defend Before an Action is Commenced

> Comment [14] to Rule 1.6 states, in part:
>
> Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.

While comment [14] provides that "[p]aragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity" (wrongdoing in which the client's conduct is implicated), there must be an action or proceeding in contemplation.

The Restatement (Third) of the Law Governing Lawyers, Section 64 is the functional equivalent of PA RPC 1.6(c)(4). Comment c states: "A lawyer may act in self defense ... 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. Imminent threats arise not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant."

The Restatement (Third) of the Law Governing Lawyers, Section 64, comment e states: "Use or disclosure of confidential client information ... is warranted only if and to the extent that

the disclosing lawyer reasonably believes necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy."

State Bar of Arizona Opinion 93-02 concluded that an attorney could disclose otherwise confidential information to the author of a book about the murder trial of a former client in response to assertions made by the former client that the attorney had acted incompetently. The opinion concluded that limiting the exception to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(c)(4) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely superfluous.

In Opinion 2014-1, the San Francisco Bar Association commented:

> [The Arizona opinion] is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer's self-defense which states: "Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information, except in response to a formal client charge of wrongdoing with a tribunal or similar agency. *When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer."* State Bar of Arizona Op. 93-02, pp. 4-5 (Emphasis added). This language is not part of the Restatement as adopted.

ABA Formal Opinion 10-456 states:

> In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. The confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."
>
> . . .
>
> The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no

basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages full and frank disclosure necessary to an effective representation. Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences. . . ."

Ethics Opinions

The New Hampshire Bar Association Ethics Committee was asked whether a lawyer could post a detailed response to a client's online comment that the lawyer took the client's money for a hearing that he knew he could not win. The Committee advised that "while you may be permitted to make some sort of limited response to your client's postings, you are not authorized to make the disclosures that you propose." NH Bar News, Feb. 19, 2014.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued Opinion 525 on December 6, 2012 on Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client. It concluded:

> The lawyer may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

The San Francisco Bar Association opined:

> Lawyer is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty to the former client does not prohibit a response, Lawyer's on-going duty of confidentiality prohibits Lawyer from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about a lawyer), or by an lawyer against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. San Francisco Bar Association Op. 2014-1.

Disciplinary Actions

In December 2006, the Supreme Court of Oregon approved a stipulation for discipline suspending a lawyer for 90 days for sending an email message to members of a bar listserv in which the lawyer disclosed confidential information about a former client who had fired the lawyer in an effort to warn colleagues that the former client was "attorney shopping." *In re Quillinan*, 20 DB Rptr 288 (Or. 2006).

The Supreme Court of Wisconsin, in June 2011, suspended the license of a lawyer who wrote and published an Internet blog in which the lawyer revealed confidential information about current and former clients that was sufficiently detailed to identify those clients using public sources. *Office of Lawyer Regulation v. Peshek*, 798 N.W.2d 879 (Wis. 2011).

The Georgia Supreme Court in a March 2013 ruling rejected as inadequate a recommendation of the Georgia State Bar General Counsel seeking a review panel reprimand for lawyer for violating Rule 1.6. The lawyer admitted to posting on the internet confidential information about the lawyer's former client in response to negative reviews about the lawyer the client had posted on consumer websites. *In re Skinner*, 740 S.E.2d 171 (Ga. 2013).

A Chicago lawyer was reprimanded by the Illinois Lawyer Registration and Disciplinary Commission for revealing client communications in response to a former client who posted a negative review of the lawyer on Avvo. The parties' stipulated that the lawyer exceeded what was necessary to respond to the client's accusations by revealing in her response to a negative review that the client had beaten up a co-worker. *In re Tsamis,* Commission File No. 2013PR00095 (Ill. 2013).

Conclusion

While it is understandable that a lawyer would want to respond to a client's negative online review about the lawyer's representation, the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer. We conclude that a lawyer cannot reveal client confidential information in a response to a client's negative online review absent the client's informed consent.

OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

MEMORANDUM

TO: Minnesota State Bar Association
Judiciary Committee

FROM: Susan M. Humiston
Director

DATE: November 9, 2017

RE: Rule 1.6, Minnesota Rules of Professional Conduct

Thank you for the opportunity to present my concerns with the proposed amendments to Rule 1.6 recommended by the MSBA's Rules of Professional Conduct Committee. Please note these concerns are my own as the Lawyers Professional Responsibility Board (Board) has not had an opportunity to review and formulate its position on the proposed amendments.

I understand the impulse to respond in kind to allegations of incompetence or malfeasance, and that this desire is heightened when these kinds of allegations are posted online for third persons to see given the number of legal consumers who use the internet to locate counsel. This impulse, however, should not lead us to adopt professional conduct rules that undermine a lawyer's duties of loyalty and confidence and that are too vague for most practitioners to easily understand and apply.

1. Confidentiality is a Fundamental Duty of Lawyers.

   The duty of confidentiality works to ensure client trust and encourages a full and free disclosure in aid of effective representation. Given its importance to the practice, one of the American Bar Association Model Regulatory Objectives is, "Protection of privileged and confidential information." The ABA "urges that each state's highest court . . . be guided by the ABA Model Regulatory Objectives for the provision of legal services when they assess the court's existing regulatory framework. . . ." The proposed amendments do not promote the objective of protecting attorney-client privilege and confidential information, and in fact would constitute a substantial erosion of our duty as lawyers to observe confidentiality and privilege.

2. The Proposed Amendments Undercut Lawyers' Duty of Loyalty.

Lawyers have a duty of confidentiality to their clients. This duty is embodied in multiple rules, including the confidentiality and conflict of interest rules. "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Rule 1.7, MRPC, Comment 1. This is part of why we are considered professionals, rather than simply operators of businesses. Because of its importance, the majority of jurisdictions who have opinioned on this topic have concluded that their state's confidentiality rules (including any self-defense exception) do not extend to criticisms in online forums. Conversely, only one jurisdiction, D.C., has suggested it is permissible.

3. The Proposed Amendments are Vague and Overbroad.

The stated rationale for the proposed amendments is to allow a lawyer to respond to online grievances, such as those in sites providing the opportunity to review a lawyer's services. The proposed amendments, however, are not limited to online reviews, and expansively apply whenever a client has made criticisms to a third party not in the lawyer's firm.

Further, although the proponents of the proposed amendments state that they are meant to cover only factually specific allegations of very serious misconduct, the language used, however, is not so limited. What constitutes a "substantial question" as to a lawyer's fitness may vary depending upon whom is interpreting this rule. Many lawyers may see allegations of neglect, non-communication, and the like to raise a "substantial question," even though that is not (arguably) encompassed by the proposed rule. The proposed amendments do not give good notice to lawyers of situations in which they may or may not reveal client confidential information, or of what information may or may not be revealed in such a situation. Nor do the proposed additional comments fix this fact.

4. Other Professionals Do Not Allow Use of Client Confidential Information to Respond.

Other professions, such as doctors and psychologists, have confidentiality restrictions on their use of client information. To my knowledge, no other

> profession allows a professional to use otherwise confidential information to respond to a negative online review. No one disputes the legitimate ability of a lawyer to make disclosures reasonably necessary in connection with an actual or threatened claim of malpractice or ineffective assistance or in responding to a lawyer discipline complaint. There is nothing so unique about the practice of law, or allegations that the lawyer committed malpractice or misconduct, or us as lawyers, which should allow lawyers to dishonor their confidentiality obligations. As professionals, we should honor those obligations in the same manner as other professionals.

I look forward to the opportunity to discuss these proposed amendments, and the concerns with them, with the MBSA Judiciary Committee.

Thank you.

jmc
cc: Frederick E. Finch, Chair, MSBA Rules of Professional Conduct Committee

Attachment 3

Lawyers Professional Responsibility Board and Office of Lawyers Professional Responsibility

Strategic Plan
(July 2018-June 2023)

Protecting the Public, Strengthening the Profession

Strategic Planning Committee:

Jennifer Bovitz
Timothy Burke
Emily Eschweiler
Connie Gackstetter
Roger Gilmore
Susan Humiston
Bentley Jackson
Cheryl M. Prince
Judith Rush
Terrie Wheeler
Robin Wolpert

I. OVERVIEW

A. Purpose

It is the responsibility of the Office of Lawyers Professional Responsibility (OLPR) to protect the public and to promote the ethical practice of law through prompt investigation and disposition of alleged misconduct, and promotion of the highest ethical standards. It is the responsibility of the Lawyers Professional Responsibility Board (LPRB) to generally supervise the OLPR among other rule-based obligations. Given the complexities of our changing world, the law and practitioner diversity in the legal community, the OLPR and LPRB must be responsive to ensure lawyer compliance with rules, and proactive in assisting lawyers to understand the issues they may encounter and how to take action to protect against misconduct.

The purpose of this strategic plan is to provide a blueprint for the future by anticipating and specifying OLPR's key strategies to meet the needs of the public and legal profession, and to ensure the execution of the OLPR's core functions. With clearly articulated objectives, the LPRB can more effectively exercise its general supervisory authority over the administration of the OLPR.

The initial objective was to develop a three-year plan. Due to staffing changes, the full capabilities of the OLPR are not yet known, so the plan has been expanded to a five-year plan. After the first year of implementation, the OLPR will have more clarity regarding the ability to accomplish all priorities.

B. Components

The components of the OLPR's Strategic Plan are: the vision statement, the mission statement and regulatory objectives; a current and future state analysis; and OLPR priorities and objectives. As a future-oriented statement, the OLPR vision articulates what OLPR strives for. It conveys the core purpose of OLPR and its commitment to its stakeholders. The OLPR mission addresses what OLPR does, for whom, as well as how and why. It is a statement of what can be done today. The OLPR regulatory objectives provide guidelines and illustrate the values by which OLPR performs its responsibilities; they are the OLPR's North Star and they help orient and prioritize OLPR work.

To envision the future, the current and future state analysis provided the perspectives of OLPR constituents and experts to assess where OLPR is today and the strengths that can be leveraged to accomplish future needs and opportunities. Finally, OLPR priorities and objectives provide the road map that identifies the direction and focus

for achieving future results. It shapes the use of resources and efforts, ensuring a longer-term focus. Specific objectives illustrate how priorities will be accomplished. From there, specific action plans will be developed to specify individual tasks necessary to achieve the objectives.

Overall, the Strategic Plan is a tool to identify and support alignment between OLPR's vision, mission and regulatory objectives and OLPR's work to ensure continued effectiveness as the agency strives to protect the public and to promote the ethical practice of law.

C. The Vision and Mission of the OLPR

Protecting the Public, Strengthening the Profession.

Vision:

> Through effective, efficient and accountable regulation, the Office of Lawyers Professional Responsibility promotes the public interest and inspires confidence in the legal profession.

Mission:

> Protecting the public and serving the legal profession through the fair and efficient enforcement of the Minnesota Rules of Professional Conduct, and effective educational resources.

D. OLPR Regulatory Authority

As part of its plenary authority to regulate the legal profession, the Minnesota Supreme Court created the Lawyers Professional Responsibility Board in 1971, and the first director took office January 4, 1971. The OLPR is responsible for upholding the rules regulating the legal profession which include the Minnesota Rules of Professional Conduct (MRPC) (effective September 1, 1985, replacing the 1970 Minnesota Code of Professional Responsibility), and the Rules on Lawyers Professional Responsibility (RLPR) (effective January 1, 1977).

There have been 11 directors of the OLPR and 11 chairs of the LPRB. The OLPR is assisted in its work by district ethics committees throughout the state, comprised of lawyers and nonlawyers, who volunteer their valuable time to investigate complaints. The Minnesota Supreme Court created the Client Security Fund in 1987 to compensate victims of attorney dishonest conduct. The OLPR also provides staffing to support the Client Security Board and its work.

In regulating the practice of law in Minnesota in the public interest, the regulatory objectives of the OLPR and LPRB are:

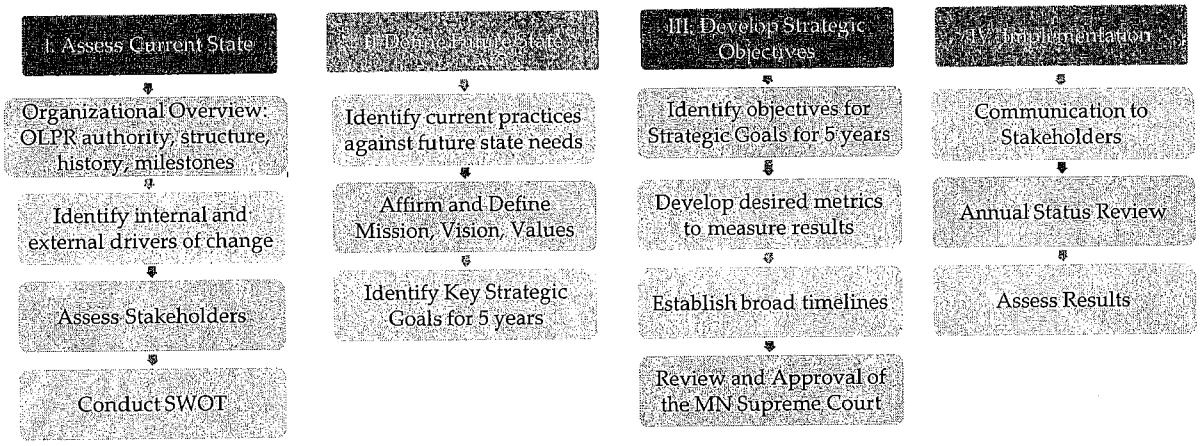
Regulatory Objectives:

1. Enhance client protection and promote public confidence;
2. Ensure compliance with the Rules of Professional Conduct in a manner that is fair, efficient, transparent, effective, targeted and proportionate;
3. Proactively assist lawyers in maintaining competence, well-being and professionalism;
4. Promote access to justice and public choice in the availability and affordability of competent legal services;
5. Safeguard the rule of law and ensure judicial and attorney independence sufficient to allow for a robust system of justice;
6. Promote diversity, inclusion, equality and freedom from discrimination in the delivery of legal services and the administration of justice; and
7. Protect confidential client and other legally protected information.

II. STRATEGIC PLANNING PROCESS

A. Overview

The OLPR Strategic Planning committee membership included individuals with deep, yet varied, perspectives on the work of OLPR. The committee included members of the LPRB Executive committee, including three public members, the OLPR Director and two current OLPR attorneys, a former chair of the LPRB, the Professional Services Director (a regulatory agency partner) and an organizational development professional to guide the process. Development of the 2019-2023 OLPR strategic plan followed the process illustrated in the diagram below:



B. Current State Analysis

The Strategic Planning committee took a three-pronged approach to assessing the current state of OLPR to inform the strategic plan. First, the committee identified issues based on five drivers of change that are most likely to influence the future success of the OLPR. The five drivers assessed were technology, demographics, internal and external governance, resources and the legal community. Second, stakeholder feedback processes were developed to inform strategic priorities through themes development and to capture issues of importance to particular constituencies.

Key informant interviews were conducted with a diverse group of individual stakeholders to provide insights from their areas of expertise about the role, effectiveness and opportunities for new or enhanced services by the OLPR. In addition, an anonymous electronic survey solicited feedback from over 800 individuals. Themes from the interviews and the survey provided clear and consistent information across subject areas, while highlighting issues of more importance to particular constituents.

Additionally, the Strategic Planning committee conducted a SWOT analysis to identify OLPR strengths, weaknesses, opportunities and threats. Key themes from the SWOT analysis and stakeholder feedback were:

STRENGTHS:

FUNDING/ RESOURCES	• Dedicated funding sufficient to perform core functions.
	• High quality educational materials.
EXPERTISE	• A reputation as knowledgeable, competent and dedicated to achieving the OLPR mission.
	• Strong, effective leadership in the Director and a committed Board.

PROCESS	• Responsiveness through the availability of staff to take questions and provide advisory opinions.
	• Statewide presence though Board membership and regional DECs; and public participation at the board and DEC levels.
	• Case management processes are clearly defined and regularly measured against performance metrics.
	• Outreach is established and responsive to trends and changing needs of the public and legal community.
LEGAL COMMUNITY	• The support and confidence of the Minnesota Supreme Court.
	• Good relationships with partner agencies and the MSBA.
PUBLIC	• Public support through participation in the process.
	• A strong reputation in the legal community; well-regarded nationally.

CHALLENGES:

FUNDING/ RESOURCES	• Funding impacted by fewer attorneys entering profession and attorney retirements, and insufficient resources to expand proactive outreach. • Structure is dependent on widespread use of volunteers.
PROCESS	• The changing technological environment and cybersecurity.
	• Balancing pro-active initiatives with maintaining case clearance rates; meeting timelines for case processing.
	• Change resistance.
LEGAL COMMUNITY	• Diverse legal community with diverse concerns and needs.
	• Size and range of attorney services and service areas; no central source of information and support given declining MSBA membership.
	• Ability of attorneys to adapt practices to the impacts from technology and well-being challenges.
PUBLIC	• Increased numbers of self-represented litigants.
	• Increase in non-attorney legal service providers that are not regulated.

C. Future State Analysis

Like other organizations, the work and effectiveness of OLPR and OLPR stakeholders is affected by the increased integration of technology into managing, processing and storing work content and financial resources. Shifting demographics have affected the number of new and retiring attorneys, their skills and resources and overall state bar

membership. Similarly, technology and the economic environment have created both benefits and barriers for litigants in need of legal services, affecting the types of issues the OLPR sees.

OPPORTUNITIES:

FUNDING	• Little opportunity to diversify funding streams to offset potential funding gaps but strong ability to increase awareness of and value proposition to support continued funding needs.
EXPERTISE	• Diversify OLPR personnel reflective of the demographics of the legal community and state through anticipated retirements.
	• Provide staff development and education and outreach to increase legal and technical competencies, and expand the breadth of OLPR attorney expertise.
	• Increase outreach to strengthen staff connections to the legal community.
	• Leverage DEC expertise to enhance sustainability and support.
PROCESS	• Further leverage technology to increase case processing speed and efficiency.
	• Continue to streamline processes, moving toward a paperless environment.
	• Use of social media for communication and as a resource repository; expand forms of communication outreach.
LEGAL COMMUNITY	• Achieve mutual goals through cross-organization partnerships.
	• Be a leader for attorney "Well-Being."
	• Continue to provide substantive education and educational resources that meet public and professional needs in a changing technological and legal environment.
	• Expand methodologies to match education content and delivery methods to target audiences.
PUBLIC	• Expand websites and community outreach to provide complainants and the public with information and resources.

III. OLPR Strategic Priorities, Fiscal Years 2019-2023 (July 2018-June 2023)

To protect the public and meet the future needs of the Minnesota legal community, OLPR has identified four strategic priorities: demonstrate leadership within the

profession, support operational excellence, promote trust and confidence in the regulatory process, and support organizational competence and efficiency.

Strategic Priority 1:

Partner with the Board and legal community to provide proactive, educational resources designed to promote competence, ethical practices, professionalism, and well-being in the legal profession.

In order to inspire public confidence in the legal profession, it is incumbent upon OLPR to identify the changing issues and dynamics of the legal profession, develop, and provide easily accessible resources that attorneys can rely upon for guidance and information to help them avoid known pitfalls and promote their professional success.

Specific strategies include:

a. Collaborate with the Court and other stakeholders to study and implement, as appropriate, recommendations from *The Path to Lawyer Well-Being* task force report, including but not limited to the advisability of a diversion program;

b. Expand online resources to provide guidance on most frequently violated rules such as retainer agreements, ethical withdrawal and return of client files, as well as transition of practice upon death, disability or retirement;

c. Expand touch points with attorneys through the creation of an online newsletter or other avenues of communication; and

d. Amend Rule 2, RLPR, to ensure core responsibility of office includes proactive outreach, adoption of regulatory objectives, and address resource limitations (staffing) relating to same.

Strategic Priority 2:

Maintain operational excellence to ensure ability to execute mission of the Office.

Increasingly diverse and complex caseloads pose a daily challenge to OLPR as professionals expand their legal expertise and ensure the timely, effective resolution of cases. OLPR supports creating a clear, positive work environment where professionals utilize their skills and knowledge as they support one another to achieve the OLPR mission to promote the public interest and inspire confidence in the legal profession.

Specific strategies include:

a. Remain focused on active case management strategies to ensure timely processing of complaints in accordance with Board-established targets;

b. Support employee engagement by offering continuous learning opportunities, quality training, advancement opportunities and active mentoring; and

c. Promote employee well-being by facilitating a healthy, collegial, and productive work environment.

Strategic Priority 3:

Strengthen awareness of and confidence in the attorney regulation system.

The public and attorneys must understand and be able to rely on the efficacy of the regulatory process to ensure OLPR's credibility, sustainability and effectiveness. To strengthen its visibility and value, OLPR must continue to utilize a variety of outreach methods and products and explore innovative solutions that meet the needs of stakeholders and support the OLPR mission.

Specific strategies include:

a. Promotion of advisory opinion service and potential rebranding as hotline, as well as communicating tagline, mission and regulatory objectives for the Office;

b. Educate the public regarding the role of the Office, processes and limits of same, including clearer communication around what the Office cannot do, case stages and timelines;

c. Promote legal community visibility of staff attorneys' qualifications, processes and accessibility; and

d. Promote and maintain case processing standards, ensuring the Office meets Board-established standards on case management.

Strategic Priority 4:

Strengthen organizational competence and efficiency by ensuring OLPR staff and DEC volunteers have the skills and support necessary to tackle forthcoming challenges within the legal profession.

At its most productive, an organization must understand its constituency and stakeholders and have the knowledge and skills to exercise their responsibilities effectively. The changing demographic composition of society and the aging workforce provides both an opportunity and a challenge as OLPR looks to its future workforce. To maximize workforce effectiveness, OLPR will deliberately expand the perspectives and skill set of the organization as positions become available while continuing to dedicate time and resources for professional development and organizational efficiencies.

Specific strategies include:

a. Ensure OLPR hirers and Board appointments reflect a diversity of perspectives, backgrounds and skill sets;

b. Expand training of OLPR attorneys to broaden subject matter knowledge of specific areas of law, and, in partnership with LCL, strengthen skill sets in addressing how stress and other issues impact ability to effectively participate in the process;

c. Expand training for DEC volunteers on frequent rule violations and investigation process, and improve Board member on-boarding and training;

d. Elevate OLPR knowledge of technology challenges facing legal profession around privacy, data security and the unauthorized practice of law by non-lawyers and technology companies; and

e. Maximize the use of technology in case processing and communication including implementation of a new file management database (in process), a paperless case management process (step two), and updated websites.

IV. RESOURCES

1. ABA Model Regulatory Objectives for the Provision of Legal Services (February 8, 2016);

2. Colorado Supreme Court Rules Governing the Practice of Law, Chapters 18-20 (Adopted April 7, 2016);
3. National Organization of Bar Counsel Proactive Regulation FAQs (May 19, 2017);
4. *The Path to Lawyer Well-Being*, the Report of the National Task Force on Lawyer Well-Being (August 2017).

V. APPENDIX

1. Strategic Planning Process Overview;
2. Key Informant Interview Questions;
3. Survey Questions;
4. Executive Summary; and
5. Draft Action Plan for Strategic Priorities.

OLPR STRATEGIC PLANNING PROCESS OVERVIEW

OBJECTIVE:
Develop a three-year strategic plan that positions the Office of Lawyers Professional Responsibility for continued success in achieving its mission.

Process	Responsible Stakeholder	Timeline
I. PRE-WORK	Director, HRD-OD	**Create and send to Committee 9-29, prior to Meeting 1 (10-6)**
a. Draft OLPR organizational overview that includes the authority for OLPR, current structure and core responsibilities.	Director – Develop Committee-review & approve	**Draft; review and adjust Meeting 1 (10-6)**
b. Draft historical organizational milestones, successes and known challenges from prior reviews.	Director drafts; Committee expands during Meeting 1 (10-6), final draft reviewed and approved	**Draft; review and adjust Meeting 1 (10-6)**
c. Create preliminary list of strategic plan resources.	Director	**By 9-29, prior to Meeting 1 (10-6)**
d. Create Draft OLPR mission, vision, regulatory objectives and tagline for committee feedback. Tagline: "Protecting the Public and the Legal Profession."	Director; Committee expands during Meeting 1 (10-6), final draft reviewed and approved	**Prior to Meeting 1 (10-6) review and adjust Meeting 1 (10-6)**
e. Create Strategic Plan template.	HRD-OD	**By 9-29, prior to Meeting 1 (10-6)**
f. Create DRAFT Plan Timeline.	HRD-OD with Director	**By 9-29, prior to Meeting 1 (10-6)**
g. Create DRAFT questionnaire for key informant interviews and DRAFT survey for stakeholder surveys, with email invitations.	HRD-OD with Director	**By 9-29, prior to Meeting 1 (10-6)**
II. INFORMING THE PLAN		
a. Comment/additions on OLPR organizational overview (includes the authority for OLPR, current structure, core responsibilities, milestones).	Committee	**Meeting 1 (10-6)**

Process	Responsible Stakeholder	Timeline
b. Discuss the draft OLPR mission, vision, regulatory objectives; check against stakeholder interests. Redraft. (Review again after information gathering - Meeting 2 (11-17).)	Committee	**Meeting 1 (10-6); update for review Meeting 2 (11-17)**
c. Identify and assess future drivers for OLPR based on fundamental shifts in technology, demographics, resources, governance and legal environment.	Committee	**Meeting 1 (10-6); update for review Meeting 2 (11-17)**
d. Identify what success would mean in achieving the mission, meeting stakeholder needs, delivering services, ensure effective operations.	Committee	**Meeting 1 (10-6)**
e. Review stakeholders for key informant interviews and for the survey to assess stakeholder perspectives on future issues that impact OLPR effectiveness.	Committee	**Meeting 1 (10-6)**
f. Review interview and survey questions for additions and changes after committee consideration of drivers and exploration of OLPR future "success."	Committee	**Meeting 1 (10-6)**
g. Deploy survey (stakeholders, users of services, staff) three weeks to respond.	Director	**Deploy by 10-16; responses due by 11-3**
h. Conduct Key Informant interviews for external stakeholders and focus groups or interviews for internal stakeholders. Submit responses electronically by deadline.	Interview Committee	**Conduct interviews; submit findings 11-3 prior to Meeting 2 (11-17)**
i. Synthesize Informant Interview information into key themes.	HRD-OD with Director	**By 11-10, prior to Meeting 2 (11-17)**
j. Review Informant Interview information data and key themes	Committee	**Meeting 2 (11-17)**
k. Conduct SWOT Analysis. Reference future drivers, data and themes from key informant interviews.	Committee	**Meeting 2 (11-17)**
l. Identify OLPR priorities by urgency and value.	Committee	**Meeting 2 (11-17)**
III. DEVELOP THE STRATEGIC PLAN GOALS AND OBJECTIVES	Strategic Planning Committee, Board and Sponsor feedback and approval	
a. Create a draft of potential OLPR strategic priorities (3-7) that reflect the mission and vision of OLPR that would be consistent over time for committee review and modification in Meeting 3 (12-14).	HRD-OD with Director	**Between Meeting 2 (11-17) and Meeting 3 (12-14). Distribute by 12-7, prior to Meeting 3 (12-14)**

Process	Responsible Stakeholder	Timeline
b. Provide final review and feedback on the draft OLPR mission, vision, regulatory objectives; based on stakeholder feedback and interests and future needs. Redraft.	Committee	**Meeting 3 (12-14); redraft and send out by 1-4, for Meeting 4 (1-11)**
c. Review key themes and integrated SWOT; record additional insights. Assess for success in achieving the mission, meeting stakeholder needs, delivering services, ensure effective operations.	Committee	**Meeting 3 (12-14)**
d. Review a draft of potential OLPR strategic priorities (3-7) that reflect the mission and vision of OLPR that would be consistent over time. Revise.	Committee	**Meeting 3 (12-14)**
e. Assess revised draft for internal – external balance, congruence with allied professional organizations' responsibilities and alignment with MN Judicial Branch mission and strategic priorities. Prioritize critical accountabilities and future needs. Revise.	Committee	**Meeting 3 (12-14)**
f. Identify desired outcomes for strategic priorities.	Committee	**Meeting 3 (12-14)**
g. Identify potential options for implementing.	Committee	**Meeting 3 (12-14)**
IV. DRAFT WRITTEN STRATEGIC PLAN REPORT		
a. Finalize written report sections I-IV for Introduction, Purpose, Methodology and Assessment.	Director, HRD-OD	**Circulated 1-4, prior to Meeting 4 (1-11), approved Meeting 4 (1-11).**
b. Integrate final goals, objectives and details into written plan.	Director, HRD-OD, Board Chair; Committee Review	**Circulated 1-4, prior to Meeting 4 (1-11), approved Meeting 4 (1-11).**
c. Develop description of OLPR Strategic Plan accountability for report inclusion.	Director, Board Chair	**Drafted 12-7, prior to Meeting 3 (12-14), Reviewed and finalized Meeting 4 (1-11).**
d. Create final Resources list.	Director	**Completed by Meeting 4 (1-11)**
e. Update full OLPR Board and Judicial Liaison on progress to date. Solicit comments.	Director/Board Chair	**January Board meeting (1-26)**

Process	Responsible Stakeholder	Timeline
V. CREATE A COMMUNICATION PLAN	Drafted by Director with HRD-OD, reviewed and refined by Strategic Planning committee	
a. Specify the purpose and objectives for the communication plan.	HRD-OD with Director	**By 9/29, pre-Meeting 1 (10-6), review Meeting 1 (10-6), update Meeting 4 (1-11)**
b. The plan includes communication for: plan initiation, information gathering and feedback, dissemination and reporting.	Template draft HRD-OD, Director, approved by Committee	**Complete Template by 9/29, pre-Meeting 1 (10-6), updated by 11-7, between Meeting 1 (10-6) and Meeting 2 (11-17)**
c. Identify communication needs for critical stakeholders. Specify the methods and timing to meet those needs.	Director with Board Chair, approved by Committee; HRD-OD reviews for change management effectiveness	**Pre-Meeting 2 (11-17), review and approve meetings 2- 3 based on type of communication**
d. Identify communication roles and responsibilities.	Director with Board Chair	**Meeting 3 (12-14)**
e. Implement communication plan.	Director with Board Chair	**Following Meeting 2 (11-17), Meeting 3 (12-14) and Meeting 4 (1-11)**
VI. IMPLEMENT PLAN	OLPR Management Team; LPRB	**FY18-21**

ESTIMATED COMMITTEE TIME:

Meeting 1 (10-6): 3 hours (in-person attendance preferred) (II. INFORMING THE PLAN a-e and IV. DRAFT WRITTEN STRATEGIC PLAN REPORT a- b)

Pre- Meeting preparation: 1 hour

Documents: Review prior to Meeting 1

- Agenda
- Strategic Plan process
- OLPR organizational overview
- OLPR historical organizational milestones, successes and known challenges
- Strategic Plan Resource List (preliminary) (include select secondary sources)
- DRAFT Key Informant interview questions, DRAFT stakeholder survey and invitation letters

Meeting 2 (11-17): 2 hours (in-person attendance preferred) (II. INFORMING THE PLAN f-j and IV. DRAFT WRITTEN STRATEGIC PLAN REPORT b- c)

Pre- Meeting preparation: 1 hour

Documents: Review documents prior to Meeting 2

- Agenda
- Revised documents from Meeting 1
- OLPR Drivers of Change
- Stakeholder Interview and Survey Synthesis

Meeting 3 (12-14): 3 hours (phone attendance optional) (III. DEVELOP THE STRATEGIC PLAN GOALS AND OBJECTIVES a-h and IV. DRAFT WRITTEN STRATEGIC PLAN REPORT c-d)

Pre- Meeting preparation: 1 hour

Documents: Review and comment on documents prior to Meeting 3

- Draft Strategic Priorities and Objectives

Meeting 4 (1-11): 1 hour (phone attendance optional) (IV: DRAFT WRITTEN STRATEGIC PLAN REPORT a-d) and IV. DRAFT WRITTEN STRATEGIC PLAN REPORT e)

Pre- Meeting preparation: 1 hour

Documents: Review Documents prior to Meeting 4

- Review DRAFT Strategic Plan report
- Review Communications Plan

PLAN TIMELINE:

PHASE	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.
I. PRE-WORK. Materials due 9-29						
II. INFORMING THE PLAN. Materials due 9-29; 11-7		**6** Mtg 1- 9 AM	**17** Mtg 2 9 AM			
III. DEVELOP THE STRATEGIC PLAN GOALS AND OBJECTIVES.				**14** Mtg 3 9 AM		
IV: DRAFT & REVIEW WRITTEN STRATEGIC PLAN REPORT. Materials due 11-7; 12-4					**11** Mtg 4 9 AM	
V. CREATE A COMMUNICATION PLAN: Materials due 1-11						
BOARD AND JUDICIAL LIAISON REVIEW & APPROVAL. Materials due 1-19						
VII. IMPLEMENT PLAN						

Date

Dear _____

The Office of Lawyers Professional Responsibility (OLPR) is in the process of developing a three-year strategic plan.

As a part of our process, we are soliciting information from our stakeholders through surveys and interviews to help understand our strengths and challenges from multiple perspectives and ensure that we have complete information to help inform our plan.

We would like to invite you to participate in a telephone interview about your perceptions, needs and ideas about the OLPR. The interview will take approximately 30 minutes. Your responses will be used cumulatively to develop themes and understand outliers. Individual responses will remain confidential.

Please simply respond to this email and let us know if you would be willing to participate in this process. After we hear from you, we will contact you to schedule a convenient time for your interview.

We look forward to hearing from you!

Sincerely,

Susan M. Humiston, Director
Office of Lawyers Professional Responsibility

Robin Wolpert, Chair
Lawyers Professional Responsibility Board

Optional:

To prepare for the call, the questions we will be exploring are below.

As you know, the OLPR is a consumer protection agency (regulatory body) with the purpose of protecting the public and the legal profession.

Interview Questions:

1. When we asked you to participate in this interview, what were the most important issues you thought about that you wanted to be sure to include?

2. What do you believe to be the OLPR's purpose?

3. If you were to rate the OLPR's reputation from 1-5, where 1 is very weak, 3 is neutral and 5 is very strong, what rating would you give the OLPR? What are its strengths and weaknesses?

4. If the OLPR could do two to three things (to start or stop doing) to increase effectiveness, what would you recommend?

5. How can the OLPR increase its outreach? Are there groups or organizations that are critical for outreach that you think are not very familiar with the OLPR?

6. What challenges do you see before the legal profession that the OLPR may have or should be considering for the future?

7. What does a "very successful" OLPR look like to you?

8. Let's go back to the issues you identified at the beginning of the interview (list them here). Tell me more about what you are thinking about them that we have not yet discussed.

9. What other comments or observations would you like to add before we close?

OLPR STRATEGIC PLANNING SURVEY

Survey Overview

Thank you for taking time to take this survey! As the Office of Lawyers Professional Responsibility (OLPR) and Lawyers Professional Responsibility Board (LPRB) develop a strategic plan for the next three years, your feedback will help us develop a plan that is comprehensive and reflective of the needs of our stakeholders.

Cumulative feedback will help us identify themes and the issues we will address in the years ahead. All individual responses will be confidential. Thank you in advance for your time and your perspective!

Survey Questions:

1. What is your primary relationship to the OLPR:
   a. Judge
   b. Respondent's Counsel
   c. LPRB Current or Past Board Member
      ☐ Lawyer ☐ Public Member
   d. Current or Past District Ethics Committee Volunteer
      ☐ Lawyer ☐ Public Member
   e. OLPR Current or Past Staff
   f. Director/Chair/Member of other legally focused organization/association
   g. An attorney not identified in a-f
   h. Other (identify)

The OLPR is a regulatory agency with the purpose of protecting the public and the legal profession.

2. How successful is the OPLR in achieving the purpose of "protecting the public?"
   a. Not successful
   b. Partially successful
   c. Adequately successful
   d. Usually successful
   e. Extremely successful

Comment:

3. How successful is the OLPR in achieving the purpose of "protecting the legal profession?"

   a. Not successful
   b. Partially successful
   c. Adequately successful
   d. Usually successful
   e. Extremely successful

Comment:

4. How would you rate OLPR's reputation?

   a. Very weak
   b. Weak
   c. Average
   d. Strong
   e. Very Strong

5. What do you see as the OLPR's strengths?

Comment:

6. What do you see as the OLPR's weaknesses?

Comment:

7. What challenges do you see before the legal profession that the OLPR should be considering for the future?

Comment:

8. What additional observations would you like the OLPR to consider during its strategic planning process?

Comment:

Thank you for taking the time to provide your perspective and help us inform the OLPR/LPRB strategic plan.

Strategic Planning

Tagline: Protecting the Public, Strengthening the Profession.

Mission: Protecting the public and serving the legal profession through the fair and efficient enforcement of the Minnesota Rules of Professional Conduct, and effective educational resources.

Vision: Through effective, efficient and accountable regulation, the Office of Lawyers Professional Responsibility promotes the public interest and inspires confidence in the legal profession.

Regulatory Objectives:

1. Enhance client protection and promote public confidence;
2. Ensure compliance with the rules of professional conduct in a manner that is fair, efficient, transparent, effective, targeted and proportionate;
3. Proactively assist lawyers in maintaining competence, well-being and professionalism;
4. Promote access to justice and public choice in the availability and affordability of competent legal services;
5. Safeguard the rule of law and ensure judicial and attorney independence sufficient to allow for a robust system of justice;
6. Promote diversity, inclusion, equality and freedom from discrimination in the delivery of legal services and the administration of justice; and
7. Protect confidential client and other legally-protected information.

OLPR Strategic Priorities

Partner with the Board and legal community to provide proactive, educational resources designed to promote competence, ethical practices, professionalism, and well-being in the legal profession.

Strategies include:

a. Collaborate with the Court and other stakeholders to study and implement recommendations from *The Path to Lawyer Well-Being* task force report, including but not limited to the advisability of a diversion program;
b. Expand on-line resources to provide guidance on most frequently violated rules such as retainer agreements, ethical withdrawal and return of client files, as well as transition of practice upon death, disability or retirement;
c. Expand touch points with attorneys through the creation of an on-line newsletter or other avenues of communication; and
d. Amend Rule 2 to ensure core responsibility of office includes proactive outreach, adoption of regulatory objectives, and address resource limitations (staffing) relating to same.

Maintain operational excellence to ensure ability to execute mission of the Office.

Strategies include:

a. Remain focused on active case management strategies to ensure timely processing of complaints in accordance with Board-established targets.
b. Support employee engagement by offering continuous learning opportunities, quality training, advancement opportunities and active mentoring; and
c. Promote employee well-being by facilitating a healthy, collegial, and productive work environment.

Strengthen awareness of and confidence in the attorney regulation system.

Strategies include:

a. Promotion of advisory opinion service and potential rebranding as hotline, as well as communicating tagline, mission and vision for Office;

b. Educate the public regarding the role of the Office, processes and limits of same, including clearer communication around what the Office cannot do, case stages and timelines;
c. Promote legal community visibility of staff attorneys' qualifications, processes and accessibility; and
d. Promote and maintain case processing standards, ensuring the Office meets Board-established standards on case management.

Strengthen organizational competence and efficiency by ensuring OLPR staff and DEC volunteers have the skills and support necessary to tackle forthcoming challenges within the legal profession.

Strategies include:

a. Ensure OLPR hirers and Board appointments reflect a diversity of perspectives, backgrounds and skill sets;
b. Expand training of OLPR attorneys to broaden subject matter knowledge of specific areas of law, and, in partnership with LCL, strengthen skill sets in addressing how stress and other issues impact ability to effectively participate in the process;
c. Expand training for DEC volunteers on frequent rule violations and investigation process, and improve Board member on-boarding and training;
d. Elevate OLPR knowledge of technology challenges facing legal profession around privacy, data security and the unauthorized practice of law by non-lawyers; and
e. Maximize the use of technology in case processing and communication including implementation of a new file management database (in process), a paperless case management process (step two), and updated website.

ACTION PLAN (DRAFT)

1. Partner with the Board and legal community to provide proactive, educational resources designed to promote competence, ethical practices, professionalism, and well-being in the legal profession.

a. Work with the Court and other stakeholders to study and implement, as appropriate, recommendations from *The Path to Lawyer Well-Being* task force report, including the advisability of a diversion program. Owner: CBH Also interested, NSF, JSB Actions include: Supporting Justice Lillehaug's 2019 Year of Lawyer Well-Being Programming; studying centralized intake systems from other systems and diversionary programs from other jurisdictions; revise Rule 20, RLPR, to facilitate one-way sharing of information with LCL (TMB/LPRB Rules Committee); Identify proactive programs with well-being components.	b. Expand online resources to provide guidance on most frequently violated rules such as retainer agreements, ethical withdrawal and return of client files, as well as transition of practice upon death, disability or retirement. Owner: JHB Also interested, AMM, CBH. Retainer Agreement FAQs (almost finalized); Remaining order of priority: Succession planning resources; Ethical Withdrawals. Explore proactive practice management resources being implemented in Illinois and Colorado. With probation department, expand resources and training for probation supervisors.	c. Expand touch points with attorneys through the creation of an online newsletter or other avenues of communication. Owner: SMH & MJC Comms Dept.; Action items: adding press releases to website, coordinate enhanced lawyer look up information with BLE, collect emails and develop format for practice pointers newsletter to be issued periodically, create a social media plan for Office.	d. Amend Rule 2 to ensure core responsibility of Office includes proactive outreach, adoption of regulatory objectives, and address resource limitations (staffing) relating to same. Owner: SMH/TMB (for rule change). Work with Court for adoption of Plan and Regulatory Objectives. Include funding proposals in next biennium budget for proactive programs. Evaluate staffing needs over course of plan.

ACTION PLAN (DRAFT)

2. Maintain operational excellence to ensure ability to execute mission of the Office.

a. Support employee engagement by offering continuous learning opportunities, quality training, advancement opportunities and active mentoring. Owner: JSB/SCB, also interested Office Manager; Paralegal Supervisor. JSB: Establish attorney mentoring program for new hires and support same; coordinate substantive and skills training program with SCB. SMH: Support Attorney/Paralegal Classification Review to ensure opportunities for advancement for personnel. Office Manager/Paralegal Supervisor: Create continuous learning program for paralegals (additive to joint attorney learning opportunities) and staff; Ensure employees feel able to take time needed to engage in learning while balancing work responsibilities.	b. Promote employee well-being by facilitating a healthy, collegial, and productive work environment. Owner: SMH/Office Administrator, also interested, NSF. Establish well-being committee; explore areas of needed improvement in Office; suggest proactive initiatives for improvement.	c. Remain focused on active case management strategies to ensure timely processing of complaints in accordance with Board-established targets. Owner: SMH/TMB/CBH Initial improvements enacted include additional attorney managers. Priority: Continue to teach direct reports active case management skills and project management techniques; continue to improve management skills of supervisors.

ACTION PLAN (DRAFT)

3. Strengthen awareness of and confidence in the attorney regulation system.

a. Promotion of advisory opinion service and potential rebranding as hotline, as well as tagline, mission and vision for Office. Owner: SMH/MJC Comm Staff/Board; ADS Secure approval of strategic plan from Court; Develop communications plan for office, and ways to highlight hotline, mission, vision and regulatory objectives; Create branded materials for Office with use of tag line.	b. Educate the public regarding the role of the Office, processes and limits of same, including clearer communication around what the Office cannot do, case stages and timelines. Owner: BTT/RLH Also interested, PJ, JS. Research best practices from other jurisdictions, update materials such as brochures, complaint forms; create additional collateral materials; provide design input into public section of the website; identify resource centers and connect with law libraries to distribute information for public more widely; include and update CSB materials in process.	c. Promote legal community visibility of staff attorneys' qualifications, processes and accessibility. Owner: JSB Add information and qualifications to website; ensure contact information readily available; update materials describing processes; create materials helpful for attorney's responding to complaints.	d. Promote and maintain case processing standards, ensuring the Office meets Board-established standards on case management. Owner: SMH/TMB/CBH Continue monthly case management meetings by direct supervisors; continue quarterly case management meetings with Director; implement monthly process to review as a group cases approaching one year old (or generally challenging cases) to brainstorm past roadblocks and ensure forward movement and guidance.

ACTION PLAN (DRAFT)

4. Strengthen organizational competence and efficiency by ensuring OLPR staff and DEC volunteers have the skills and support necessary to tackle forthcoming challenges within the legal profession.

a. Ensure OLPR hirers and Board appointments reflect a diversity of perspectives, backgrounds and skill sets. Owner: SMH/Board Chair (ongoing) Significant successes already accomplished by adding criminal prosecution and defense experience to Board, adding criminal prosecution and defense attorneys to OLPR staff; expanding new lawyer representation in Office with public sector and small firm experience, as well as adding big firm experience to staff. Focus needed on increasing diversity of public members.	b. Expand training of OLPR attorneys to broaden subject matter knowledge of specific areas of law, and, in partnership with LCL, strengthen skill sets in addressing how stress and other issues impact ability to effectively participate in the process. Owner: SCB, also interested, JSB. Develop training plan to expand on training already conducted, which has included immigration law training and LCL training. Additional topics include technology, probate law, real estate, oral argument and trial skills.	c. Expand training for DEC volunteers on frequent rule violations and investigation process, and improve Board member on-boarding and training. Owner: JHB Also interested, CBH, TMB, NSF, ADS, CB. Improvements to Board training in-process (TMB) including addition of Panel Chair training; Rewrite Panel Manual (TMB); Create DEC training video library on private YouTube channel (CBH/NSF/ADS); Update DEC training materials (CBH/NSF/CB).	d. Elevate OLPR knowledge of technology challenges facing legal profession around privacy, data security and the unauthorized practice of law by non-lawyers. Owner: SCB (to be included in attorney training program). Also interested, NSF.	e. Maximize the use of technology in case processing and communication including implementation of a new file management database (in process), a paperless case management process (step two), and updated websites. Owner: SMH/TMB, also interested, JSB. Paperless process: SMH/TMB/BTT. Website redos: SMH, JSB, RLH; BTT; AMM

Attachment 4

OLPR Dashboard

4/20/2018

	Total Files	Total Lawyers
Total Open Matters	515	375
New Files YTD	337	
Closed Files YTD	340	
Files Opened in March 2018	92	
Files Closed in March 2018	106	
Public Matters Pending	22	
Panel Matters Pending	0	
Matters Pending with the DECs	84	
Files On Hold	20	
Advisory Opinion Requests YTD	619	
Advisory Opinion Requests Declined YTD	52	
Total Files Over 1 Year Old	139	86
Matters Pending Over 1 Year Old w/o Charges	66	55
Matters Pending Over 2 Years Old w/o Charges	6	3

Discipline YTD	Total # Lawyers
Disbarred	5
Suspended	7
Reprimand & Probation	1
Reprimand	2
	Total # Files
Private Probation	7
Admonition	31

All Files Pending as of 4/20/18

Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PROB	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2015-01								1							1
2015-03								1	1						2
2015-04									1						1
2015-05				2											2
2015-06														1	1
2015-07									1						1
2015-08				1											1
2015-10									1						1
2015-11								2	1						3
2015-12								1		1					2
2016-02				2					3						5
2016-03				1					3	1					5
2016-04				2					1						3
2016-05				1		1		1	1						4
2016-06				2		1		2	1						6
2016-07				3											3
2016-08				6				3	1	2					12
2016-09				6					3	2					11
2016-10				4				2		2					8
2016-11				8					1						9
2016-12				6					2	1					9
2017-01				9	1			1	2						13
2017-02				4			1		2	6					13
2017-03				10				2	3	1					16
2017-04				10					3		1			1	15
2017-05				9					2			2		1	14
2017-06				15					1		2				18
2017-07				19										1	20
2017-08		1		22				2	1	2					28
2017-09		3		33			1		1						38
2017-10		4		24				1						1	30
2017-11		1		20				1							22
2017-12		7	1	20			1					1			30
2018-01		14	2	20					2			1			39
2018-02		15		15								1			31
2018-03	3	21		12								1			37
2018-04	25	18		16								1	1		61
Total	**28**	**84**	**3**	**302**	**1**	**2**	**3**	**20**	**38**	**18**	**3**	**7**	**1**	**5**	**515**

Files Over One Year Old as of 4/20/18

Year/Month	OLPR	AD	ADAP	PROB	HOLD	SUP	S12C	SCUA	TRUS	Total
2015-01					1					**1**
2015-03					1	1				**2**
2015-04						1				**1**
2015-05	2									**2**
2015-06									1	**1**
2015-07						1				**1**
2015-08	1									**1**
2015-10						1				**1**
2015-11					2	1				**3**
2015-12					1		1			**2**
2016-02	2					3				**5**
2016-03	1					3	1			**5**
2016-04	2					1				**3**
2016-05	1		1		1	1				**4**
2016-06	2		1		2	1				**6**
2016-07	3									**3**
2016-08	6				3	1	2			**12**
2016-09	6					3	2			**11**
2016-10	4				2		2			**8**
2016-11	8					1				**9**
2016-12	6					2	1			**9**
2017-01	9	1			1	2				**13**
2017-02	4			1		2	6			**13**
2017-03	10				2	3	1			**16**
2017-04	5					2		0	0	**7**
Total	**72**	**1**	**2**	**1**	**16**	**30**	**16**	**0**	**1**	**139**

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	47	47
Total Cases Under Advisement	0	0
Total Cases Over One Year Old	**47**	**47**

ALL FILES PENDING & FILES OVER 1 YR. OLD REPORTS STATUS KEY	
SD	Summary Dismissal
DEC	District Ethics Committees
REV	Being reviewed by OLPR attorney after DEC report received
OLPR	Under Investigation at Director's Office
AD	Admonition issued
ADAP	Admonition Appealed by Respondent
PROB	Probation Stipulation Issued
PAN	Charges Issued
HOLD	On Hold
SUP	Petition has been filed.
S12C	Respondent cannot be found
SCUA	Under Advisement by the Supreme Court
REIN	Reinstatement
RESG	Resignation
TRUS	Trusteeship

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042

REAPPOINTMENT OF DIRECTOR OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY AND THE CLIENT SECURITY FUND

ORDER

Pursuant to Rule 5 of the Rules on Lawyers Professional Responsibility, the Lawyers Professional Responsibility Board reviewed the performance of the Director over the past two years and has recommended to the court that Susan M. Humiston be continued as Director of the Office of Lawyers Professional Responsibility for a period of two years, effective March 7, 2018.

IT IS HEREBY ORDERED that Susan M. Humiston is reappointed as Director of the Office of Lawyers Professional Responsibility for a period of two years, effective March 7, 2018.

IT IS FURTHER HEREBY ORDERED that Susan M. Humiston is reappointed as Director of the Client Security Fund for a period of two years, effective March 7, 2018.

Dated: February 28, 2018

BY THE COURT:

Lorie S. Gildea
Chief Justice

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 481 **April 17, 2018**

A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.

Introduction

Even the best lawyers may err in the course of clients' representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error.[1] Recognizing that errors

[1] A lawyer's duty to inform a current client of a material error has been variously explained or grounded. For malpractice and breach of fiduciary decisions, *see, e.g.*, Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629 (8th Cir. 2009) (predicting Minnesota law and concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that [his] representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability" (internal quotation marks omitted)); Beal Bank, SSB v. Arter & Hadden, LLP, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); RFF Family P'ship, LP v. Burns & Levinson, LP, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news"); *In re* Tallon, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.").

For disciplinary decisions, *see, e.g.*, Fla. Bar v. Morse, 587 So. 2d 1120, 1120–21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re* Hoffman, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b)). *See also* Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C., 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy was "against public policy, since it may operate to limit an attorney's disclosure [of his potential malpractice] to his clients").

For ethics opinions, *see, e.g.*, Cal. State Bar Comm. on Prof'l Responsibility & Conduct Op. 2009-178, 2009 WL 3270875, at *4 (2009) [hereinafter Cal. Eth. Op. 2009-178] ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation. . . . Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'" (citation omitted)); Colo. Bar Ass'n, Ethics Comm., Formal Op. 113, at 3 (2005) [hereinafter Colo. Op. 113] ("Whether a particular error gives rise to an ethical duty to disclose [under Rule 1.4] depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); Minn. Lawyers Prof'l Responsibility Bd. Op. 21, 2009 WL 8396588, at *1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's

occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.

The Duty to Inform a Current Client of a Material Error

A lawyer's responsibility to communicate with a client is governed by Model Rule 1.4.[2] Several parts of Model Rule 1.4(a) potentially apply where a lawyer may have erred in the course of a current client's representation. For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter." Model Rule 1.4(a)(4), which obliges a lawyer to promptly comply with reasonable requests for information, may be implicated if the client asks about the lawyer's conduct or performance of the representation. In addition, Model Rule 1.4(b) requires a lawyer to "explain a

interests"); 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2 (2015) [hereinafter 2015 N.C. Eth. Op. 4] (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 684, 1998 WL 35985928, at *1 (1998) [hereinafter N.J. Eth. Op. 684] (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op. 734, 2000 WL 33347720, at *3 (2000) [hereinafter N.Y. Eth. Op. 734] (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); Sup. Ct. of Prof'l Ethics Comm. Op. 593, 2010 WL 1026287, at *1 (2010) [Tex. Eth. Op. 593] (opining that the lawyer must also terminate the representation and applying Texas Rules 1.15(d), 2.01, and 8.04(a)(3)). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring disclosure where the conduct "gives the client a substantial malpractice claim against the lawyer").

[2] MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) ("Communication") [hereinafter MODEL RULES].

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." More broadly, the "guiding principle" undergirding Model Rule 1.4 is that "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[3] A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience.[4]

Determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum. An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client. Model Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Where a lawyer's error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest. At the other extreme, an error may be minor or easily correctable with no risk of harm or prejudice to the client.

Several state bars have addressed lawyers' duty to disclose errors to clients.[5] For example, in discussing the spectrum of errors that may arise in clients' representations, the North Carolina State Bar observed that "material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs."[6] At the other end of the spectrum are "nonsubstantive typographical errors" or "missing a deadline that causes nothing more than delay."[7] "Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests."[8] With respect to the middle ground:

> Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error.[9]

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[3] *Id.* cmt. 5.
[4] *Id.* cmt. 7.
[5] *See supra* note 1 (listing authorities).
[6] 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *2.
[7] *Id.*
[8] *Id.*
[9] *Id.*

Another example is contained in the Colorado Bar Association's Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyers' duty of disclosure. In doing so, it identified errors ranging from those plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal) to those "that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice."[10] Errors by lawyers between these two extremes must be analyzed individually. For example, disclosure is not required where the law on an issue is unsettled and a lawyer makes a tactical decision among "equally viable alternatives."[11] On the other hand, "potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute."[12] Ultimately, the Colorado Bar concluded that whether a particular error gives rise to an ethical obligation to disclose depends on whether the error is "material," which further "depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim."[13]

These opinions provide helpful guidance to lawyers, but they do not—just as we do not—purport to precisely define the scope of a lawyer's disclosure obligations. Still, the Committee believes that lawyers deserve more specific guidance in evaluating their duty to disclose errors to current clients than has previously been available.

In attempting to define the boundaries of this obligation under Model Rule 1.4, it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice. At the same time, a lawyer should not necessarily be able to avoid disclosure of an error absent apparent harm to the client because the lawyer's error may be of such a nature that it would cause a reasonable client to lose confidence in the lawyer's ability to perform the representation competently, diligently, or loyally despite the absence of clear harm. Finally, client protection and the purposes of legal representation dictate that the standard for imposing an obligation to disclose must be objective.

With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

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[10] Colo. Op. 113, *supra* note 1, at 3.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1, 3.

A lawyer must notify a current client of a material error promptly under the circumstances.[14] Whether notification is prompt will be a case- and fact-specific inquiry. Greater urgency is required where the client could be harmed by any delay in notification. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error.[15] Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.

When a Current Client Becomes a Former Client

As indicated earlier, whether a lawyer must reveal a material error depends on whether the affected person or entity is a current or former client. Substantive law, rather than rules of professional conduct, controls whether an attorney-client relationship exists, or once established, whether it is ongoing or has been concluded.[16] Generally speaking, a current client becomes a former client (a) at the time specified by the lawyer for the conclusion of the representation, and acknowledged by the client, such as where the lawyer's engagement letter states that the representation will conclude upon the lawyer sending a final invoice, or the lawyer sends a disengagement letter upon the completion of the matter (and thereafter acts consistently with the letter);[17] (b) when the lawyer withdraws from the representation pursuant to Model Rule of Professional Conduct 1.16; (c) when the client terminates the representation;[18] or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the

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[14] *See* N.J. Eth. Op. 684, *supra* note 1, 1998 WL 35985928, at *1 ("Clearly, RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted."); 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *4 ("The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required."); Tex. Eth. Op. 593, *supra* note 1, 2010 WL 1026287, at *1 (requiring disclosure "as promptly as reasonably possible").

[15] *See* MODEL RULES R. 1.6(b)(4) (2018) (permitting a lawyer to reveal information related to a client's representation "to secure legal advice about the lawyer's compliance with these Rules").

[16] United States v. Williams, 720 F.3d 674, 686 (8th Cir. 2013); Rozmus v. West, 13 Vet. App. 386, 387 (U.S. App. Vet. Cl. 2000); *see also* MODEL RULES Scope cmt. 17 (2018) (explaining that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

[17] *See* Artromick Int'l, Inc. v. Drustar Inc., 134 F.R.D. 226, 229 (S.D. Ohio 1991) (observing that "the simplest way for either the attorney or client to end the relationship is by expressly saying so"); *see also, e.g.*, Rusk v. Harstad, 393 P.3d 341, 344 (Utah Ct. App. 2017) (concluding that a would-be client could not have reasonably believed that the law firm represented him where the lawyer had clearly stated in multiple e-mails that the law firm would not represent him).

[18] A client may discharge a lawyer at any time for any reason, or for no reason. White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 689 (7th Cir. 2011); Nabi v. Sells, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES R. 1.16 cmt. 4; *see also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 77 (11th ed. 2018) ("Clients, it is said, may fire their lawyers for any reason or no reason.") (citations omitted).

relationship has ended.[19] If a lawyer represents a client in more than one matter, the client is a current client if any of those matters is active or open; in other words, the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters.

Absent express statements or overt acts by either party, an attorney-client relationship also may be terminated when it would be objectively unreasonable to continue to bind the parties to each other.[20] In such cases, the parties' reasonable expectations often hinge on the scope of the lawyer's representation.[21] In that regard, the court in *National Medical Care, Inc. v. Home Medical of America, Inc.*,[22] suggested that the scope of a lawyer's representation loosely falls into one of three categories: (1) the lawyer is retained as general counsel to handle all of the client's legal matters; (2) the lawyer is retained for all matters in a specific practice area; or (3) the lawyer is retained to represent the client in a discrete matter.[23]

For all three categories identified by the *National Medical Care* court, unless the client or lawyer terminates the representation, the attorney-client relationship continues as long as the lawyer is responsible for a pending matter.[24] With respect to categories one and two above, an attorney-client relationship continues even when the lawyer has no pending matter for the client because the parties reasonably expect that the lawyer will handle all matters for the client in the future as they arise.[25] In the third category, where a lawyer agrees to undertake a specific matter, the attorney-client relationship ends once the matter is concluded.[26]

Although not identified by the *National Medical Care* court, another type of client is what might be called an episodic client, meaning a client who engages the lawyer whenever the client requires legal representation, but whose legal needs are not constant or continuous. In many such

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[19] *See, e.g.*, Artromick Int'l, Inc., 134 F.R.D. at 230–31 (determining that a man was a former client because he refused to pay the lawyer's bill and then retained other lawyers to replace the first lawyer); Waterbury Garment Corp. v. Strata Prods., 554 F. Supp. 63, 66 (S.D.N.Y. 1982) (concluding that a person was a former client because the law firm represented him only in discrete transactions that had concluded and the person had subsequently retained different counsel).

[20] Artromick Int'l, Inc., 134 F.R.D. at 229.

[21] *Id.* at 229–30.

[22] No. 00-1225, 2002 WL 31068413 (Mass. Super. Ct. Sept. 12, 2002).

[23] *Id.* at *4.

[24] *Id.*; *see also* MODEL RULES R. 1.3 cmt. 4 (2018) (stating that unless the relationship is terminated under Model Rule 1.16, the lawyer "should carry through to conclusion all matters undertaken for a client").

[25] *See* Berry v. McFarland, 278 P.3d 407, 411 (Idaho 2012) (explaining that "[i]f the attorney agrees to handle any matters the client may have, the relationship continues until the attorney or client terminates the relationship"); *see also* MODEL RULES R. 1.3 cmt. 4 (2018) (advising that "[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal").

[26] Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990); Berry, 278 P.3d at 411; *see also* Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc., 687 F. Supp. 2d 381, 389–90 (S.D.N.Y. 2010) (noting that an attorney-client relationship is ordinarily terminated by the accomplishment of the purpose for which it was formed); Thayer v. Fuller & Henry Ltd., 503 F. Supp. 2d 887, 892 (N.D. Ohio 2007) (observing that an attorney-client relationship may terminate when the underlying action has concluded or when the attorney has exhausted all remedies and declined to provide additional legal services); MODEL RULES R. 1.16 cmt. 1 ("Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.").

instances, the client reasonably expects that the professional relationship will span any intervals and that the lawyer will be available when the client next needs representation.[27] If so, the client should be considered a current client. In other instances, it is possible that the attorney-client relationship ended when the most recent matter concluded.[28] Whether an episodic client is a current or former client will thus depend on the facts of the case.

The Former Client Analysis Under the Model Rules

As explained above, a lawyer must inform a current client of a material error under Model Rule 1.4. Rule 1.4 imposes no similar duty to former clients.

Four of the five subparts in Model Rule 1.4(a) expressly refer to "the client" and the one that does not—Model Rule 1.4(a), governing lawyers' duty to respond to reasonable requests for information—is aimed at responding to requests from a current client. Model Rule 1.4(b) refers to "the client" when describing a lawyer's obligations. Nowhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients. The comments to Model Rule 1.4 are likewise focused on current clients and are silent with respect to communications with former clients. There is nothing in the legislative history of Model Rule 1.4 to suggest that the drafters meant the duties expressed there to apply to former clients.[29] Had the drafters of the Model Rules intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule. They did neither despite knowing how to distinguish duties owed to current clients from duties owed to former clients when appropriate, as reflected in the Model Rules regulating conflicts of interest.[30]

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[27] *See, e.g.*, Parallel Iron, LLC v. Adobe Sys. Inc., C.A. No. 12-874-RGA, 2013 WL 789207, at *2–3 (D. Del. Mar. 4, 2013) (concluding that Adobe was a current client in July 2012 when the law firm was doing no work for it; the firm had served as patent counsel to Adobe intermittently between 2006 and February 2012, and had not made clear to Adobe that its representation was terminated); Jones v. Rabanco, Ltd., No. C03-3195P, 2006 WL 2237708, at *3 (W.D. Wash. Aug. 3, 2006) (reasoning that the law firm's inclusion as a contact under a contract, the law firm's work for the client after the contract was finalized, and the fact that the client matter was still open in the law firm's files all indicated an existing attorney-client relationship); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 78-79 (11th ed. 2018) ("Lawyers might believe that a client is no longer a client if they are doing no work for it at the moment and haven't for a while. . . . [A] firm may have done work for a client two or three times a year for the past five years, creating a reasonable client expectation that the professional relationship continues during the intervals and that the lawyer will be available the next time the client needs her.").

[28] *See, e.g.*, Calamar Enters., Inc. v. Blue Forest Land Grp., Inc., 222 F. Supp. 3d 257, 264–65 (W.D.N.Y. 2016) (rejecting the client's claim of an attorney-client relationship where the relationship between the law firm and the client had been dormant for three years; despite the fact that the attorney-client relationship had not been formally terminated, it ended when the purpose of the parties' retainer agreement had been completed).

[29] AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, 71–78 (Arthur H. Garwin ed., 2013).

[30] *Compare* MODEL RULES R. 1.7 (2018) (addressing current client conflicts of interest), *with* MODEL RULES R. 1.9 (2018) (governing former client conflicts of interest).

Because Model Rule 1.4 does not impose on lawyers a duty to communicate with former clients,[31] it is no basis for requiring lawyers to disclose material errors to former clients.

The California State Bar's Committee on Professional Responsibility and Conduct reached a similar conclusion with respect to California Rule of Professional Conduct 3-500, which states that "[a] member [of the State Bar of California] shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." In concluding that a lawyer had no duty to keep a former client informed of significant developments in the representation, and specifically the former client's possible malpractice claim against the lawyer, the Committee focused on the fact that the lawyer and the former client had "terminated their attorney-client relationship" and on Rule 3-500's reference to a "client," meaning a current client.[32]

Finally, in terms of possible sources of an obligation to disclose material errors to former clients, Model Rule 1.16(d) provides in pertinent part that, upon termination of a representation, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee[s] or expense[s] that has not been earned or incurred." This provision does not create a duty to inform former clients of material errors for at least two reasons. First, the wording of the rule demonstrates that the error would have to be discovered while the client was a current client, thereby pushing any duty to disclose back into the current client communication regime. Second, Model Rule 1.16(d) is by its terms limited to actions that may be taken upon termination of the representation or soon thereafter; it cannot reasonably be construed to apply to material errors discovered months or years after termination of the representation.

Conclusion

The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer

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[31] *See* Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline Adv. Op. 2010-2, 2010 WL 1541844, at *2 (2010) (explaining that Rule 1.4 "applies to ethical duties regarding communication *during a representation*" (emphasis added)); Va. State Bar Comm. on Legal Ethics Eth. Op. 1789, 2004 WL 436386, at *1 (2004) (stating that "*[d]uring the course of the representation*, an attorney's duty to provide information to his client is governed by Rule 1.4(a)") (emphasis added)).

[32] Cal. Eth. Op. 2009-178, *supra* note 1, 2009 WL 3270875, at *6.

must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry.

No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation.

By Susan Humiston

2017 year in review: Public discipline

Public discipline in professional responsibility cases is imposed not to punish the attorney, but to protect the public, the profession, and the judicial system, and to deter future misconduct by the attorney and others. In 2017, 40 attorneys were publicly disciplined, with discipline ranging from a reprimand to disbarment. This number is slightly down from 2016, when 44 attorneys were publicly disciplined, and remains below 2015's record-breaking year, when 65 attorneys were publicly disciplined. While I'm not sure that this constitutes a trend, it is always good to see fewer public discipline cases.

Disbarments

Five attorneys were disbarred in 2017. This number is consistent with the annual average. The attorneys disbarred were:

- Terri Lynn Fahrenholtz, who was disbarred in Minnesota following her disbarment in North Dakota for misappropriation of a modest client retainer in a bankruptcy case and abandoning at least eight open client matters;

- Diane Lynn Kroupa, who pleaded guilty to one count of felony conspiracy to defraud the United States and was sentenced to 32 months in prison and ordered to pay restitution in the amount of $532,000. Ms. Kroupa was a United States Tax Court judge who was indicted on several felony charges of federal tax evasion, conspiracy to defraud the U.S., making and submitting a false tax return, and obstructing an IRS audit;

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- Jesse David Matson, who misappropriated a $550 filing fee, made false statements to clients, fabricated a document, neglected and abandoned numerous client files, failed to return unearned fees, used improper fee agreements, failed to cooperate with the disciplinary investigation, and also committed misconduct in North Dakota, where he was subsequently disbarred as well;

- Steven Michael O'Brien, who misappropriated more than $300,000 from a trust for which he was appointed the trustee (the Order of St. Benedict at St. John's Abbey was the trust beneficiary); and

- Geoffrey R. Saltzstein, who misappropriated approximately $68,000 from two clients, made false statements to clients, failed to diligently pursue client matters or communicate with his clients, used improper fee agreements, and failed to cooperate with the disciplinary investigation.

The common thread, obviously, is misappropriation of client funds. Abusing your trust account responsibilities by converting client funds to your own use will always lead to serious discipline, whether or not you have paid the client back. Conviction for a serious felony will also generally lead to disbarment. One unusual fact about the attorneys disbarred in 2017 is that three of the five attorneys had been in practice less than 10 years: Matson was admitted in 2008, and O'Brien and Saltzstein were admitted in 2009.

Suspension

Twenty-six attorneys were suspended for periods ranging from 30 days to five years. This number continues the trend of higher than normal numbers of suspensions. 2017 involved some particularly troubling conduct, such as the misconduct of William Keith Bulmer II. Mr. Bulmer was suspended for three years for having sex with his client's wife while Mr. Bulmer was representing his client on a first degree murder charge. Mr. Bulmer also had sex with a different client, and had previously been admonished for having sex with a client. In addition, Mr. Bulmer made a false statement to the county attorney who was investigating Mr. Bulmer's sex with his client's wife. While on its face this misconduct is serious, prior court cases in Minnesota and elsewhere had not generally imposed such lengthy suspensions for sex with clients and witnesses. Given the confluence of events in Mr. Bulmer's case, the Court imposed twice the level of discipline recommended by the Director.

Another troubling case was that of Shawn Patrick Siders. Mr. Siders pleaded guilty to soliciting a minor to engage in prostitution, and was suspended for a minimum of two years. Other suspensions ran the gamut. They included a 30-day suspension for Patrick Chinedu Nwaneri for filing an untimely brief, making a false statement under oath by signing and filing an affidavit containing false information, and lying about the reason for the late filing during the disciplinary investigation; and a two-year suspension for Randall D. Tigue for failing to maintain trust account books and records while on probation for past trust account books and records violations, negligently misappropriating client funds through poor recordkeeping, and intentional misappropriation of a $400 filing fee from a client. Notably, two justices dissented from the Court's *per curiam* opinion, and would have disbarred Mr. Tigue given his disciplinary history and other factors.

While it is always disheartening to see the number of attorneys who engage in serious professional misconduct, it is important to keep these numbers in context. Currently, Minnesota has approximately 28,000 licensed attorneys, with approximately 25,000 attorneys engaged in active practice.

Public reprimands

Nine attorneys received public reprimands (four reprimands only, five reprimands and probation). A public reprimand is the least severe public sanction the court generally imposes. Reprimands are appropriate for rule violations that are more than "isolated and non-serious" (conduct that would warrant a private admonition) but not so serious that suspension is needed to protect the public and deter future misconduct.

Conduct that resulted in public reprimands included instructing non-lawyer assistants to use a notary stamp and sign the attorney's name on two occasions, notarizing a signature not witnessed, and inaccurately attesting to witnessing a signature on a prior date (Kelly Moore Sater), agreeing to settle a case without client consent, failing to communicate the settlement agreement to a client, providing financial assistance to a client, and making an inaccurate statement to the court (Michael Padden), and, for several attorneys, failing to maintain the required trust account books and records, negligently misappropriating client funds, and commingling client funds with personal funds (Eric Chiadikobi Anunobi, Anthony J. Elfelt, Terrance James Hislop, Brent Schafer, and Joanna M. Wiegert).

The OLPR maintains on its website (*lprb.mncourts.gov*) a list of disbarred and currently suspended attorneys. You can also check the public disciplinary history of any Minnesota attorney by using the "Lawyer Search" function on the first page of the OLPR website. While it is always disheartening to see the number of attorneys who engage in serious professional misconduct, it is important to keep these numbers in context. Currently, Minnesota has approximately 28,000 licensed attorneys, with approximately 25,000 attorneys engaged in active practice. Once again, thank you to the thousands of Minnesota lawyers who uphold the integrity of the legal profession every day. ▲

Private discipline in 2017

In 2017, 90 files were closed by the Office of Lawyers Professional Responsibility (OLPR) with the issuance of an admonition, a form of private discipline issued for professional misconduct that is isolated and non-serious.[1] This number is down markedly from the 115 admonitions issued in 2016 and, coincidentally, 2015. Additionally, 14 files were closed with a private probation. Private probations, which must be approved by the board chair, are generally appropriate for attorneys with multiple non-serious violations who may benefit from supervision.

Having now worked at the OLPR for two years, I've seen obvious trends in the types of conduct that result in private discipline. This sampling is offered to highlight common issues to avoid.

Fee arrangements

Every year attorneys are disciplined for improper fee agreements. Since 2011, it has been unethical to describe an advance fee as "nonrefundable."[2] Notwithstanding this fact, attorneys continue to receive discipline for describing their fee as nonrefundable or "earned upon receipt," though this number went down last year, so perhaps this column has helped spread the word to practitioners. Variations on this claim also subject attorneys to discipline. For example, claiming "All flat fees will be nonrefundable once substantial services have been performed" also violates the rules.

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The single most common mistake we see regarding fee agreements involves flat fees. The ethics rules *require* that in order for a flat fee to be considered an attorney's property upon payment (rather than placed in trust until earned), a written fee agreement meeting the requirements of Rule 1.5(b)(1) must be in place.[3] While most attorneys who received discipline had some form of written fee agreement for their flat fees, the agreements often failed to include all five notice provisions required by the rule, and accordingly, admonitions were issued. Perhaps more common is the problem of accepting flat fees for services without any retainer agreement at all. You can do this, but remember, all fees received in advance of being earned must be placed into trust.[4] You do not fully earn a flat fee until you have completed the representation—so unless you have a compliant fee agreement in place, flat fees must go into trust until earned.

Every year attorneys are disciplined for improper fee agreements. Since 2011, it has been unethical to describe an advance fee as "nonrefundable."

"Availability" fees can also lead to discipline. The ethics rules allow an attorney to charge "a fee to ensure the lawyer's availability to the client during a specified period or on a specified matter in addition to and apart from any compensation for legal services performed."[5] Instead of treating the availability fee as separate from legal services, attorneys will sometimes try to designate a portion of their flat fee services for "availability." The OLPR views this as an impermissible attempt to charge a nonrefundable fee, and disciplined attorneys accordingly in 2017. You must also remember that once you have been hired, you have ethically agreed to be available for that representation, and should not be charging a separate availability fee absent specific and justifiable circumstances. Availability fees are typically and correctly used to secure counsel when you do not know if counsel will be needed but want to ensure your counsel of choice is available on demand in the event you need to call upon them.

Confidentiality

An important ethics obligation is the duty of confidentiality. It is not just attorney advice that must be kept confidential: The rules prohibit an attorney from knowingly revealing any "information relating to the representation of a client" unless disclosure is permitted by a specific ethics exception.[6] Each year, attorneys are disciplined for disclosing information related to a representation that does not fall within a permitted exception. In 2017, for example, an attorney was privately disciplined for sharing sensitive pictures of personal injury clients with a third party not involved in the litigation. While an attorney can discuss generic issues relating to a representation with a third party, they can only do so as "long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."[7]

Further, one attorney was disciplined for disclosing confidential information about a former client to an insurance adjuster after the attorney was terminated. The attorney appealed his admonition to the Minnesota Supreme Court, which upheld it.[8] The details of the case are a good reminder about the ways we must take care in discussing our clients with others. Separately, an attorney was disciplined for disclosing non-public data that was subject to a protective order in a case in a second but related matter. Violating a protective order may present an issue for the court but it also implicates the ethics rules, namely the prohibition against knowingly disobeying an obligation under the rules of a tribunal or interfering with the administration of justice.[9]

Recently, the ABA issued Opinion 479, relating to the "generally known" exception for former-client confidentiality.[10] A lawyer's duty of confidentiality extends to former clients, and a lawyer may not use information related to the representation of a former client to the former

client's disadvantage without informed consent, as permitted by Rule 1.6(b), or unless the information has become "generally known." This opinion states the ABA position that "Information is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information." This is a cautionary tale for lawyers who think that because a former client's information is in a "public record" somewhere, they are free to use that information, and likewise a good reminder about the importance of keeping confidential all information relating to your representation unless a specific exception allows you to disclose such information.

Conclusion

Private discipline is just that—private.[11] Only the complainant and respondent attorney will know of the disposition. Unless an attorney provides written authorization, the Office does not disclose private discipline to third parties. Fortunately, most attorneys who receive admonitions have no further disciplinary issues. If an attorney does engage in further misconduct, please note that prior private discipline may be relevant to the determination of appropriate discipline for subsequent conduct, and may be disclosed if future complaints result in public proceedings.[12] I'm pleased to report the number of admonitions in 2017 was down substantially year over year, accounting for only 8 percent of closed files, and I am also pleased to report that the number of advisory opinions given by our office rose substantially in 2017, to more than 2000 opinions. As always, if you are unsure of your ethical obligations in a particular situation, call and ask us at 651-296-3952, or get in touch through our website at *www.lprb.mncourts.gov*.

Notes

[1] Rule 8(d)(2), Rules of Lawyers Professional Responsibility (RLPR).

[2] Rule 1.5(b)(3), MRPC ("Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance fee payment as the lawyer's property subject to refund.").

[3] Rule 1.5(b)(1) requires that written fee agreements notify the client: (i) of the nature and scope of the services to be provided; (ii) of the total amount of the fee and the terms of payment; (iii) that the fee will not be held in a trust account until earned; (iv) that the client has the right to terminate the client-lawyer relationship; and (v) that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided. Rule 1.5(b)(1)(i)-(v), MRPC. The OLPR recommends attorneys use the language of the rule without modification to ensure their flat fee agreement is compliant.

[4] Rule 1.15(c)(5), MRPC, provides that, except as specified in Rule 1.5(b)(1) and (2), a lawyer shall "deposit all fees received in advance of the legal services being performed into a trust account and withdraw the fees as earned."

[5] Rule 1.5(b)(2), MRPC.

[6] Rule 1.6(a), MRPC.

[7] Rule 1.6, Cmt. 4, MRPC.

[8] *In re Charges of Unprofessional Conduct in Panel No. 41310*, 899 N.W.2d 821 (Minn. 2017).

[9] Rule 3.4(c), MRPC; Rule 8.4(d), MRPC.

[10] ABA Formal Opinion 479 (12/15/2017), located at *https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_479.authcheckdam.pdf*.

[11] Rule 20(a), RLPR. Note, Rule 20 addresses in detail the circumstances under which the OLPR may disclose information to third parties and others involved in the lawyer regulation system.

[12] Rule 19(b)(4), RLPR.

Spring trust account cleanup

Spring cleaning is something I always aspire to do but never get around to doing. Even so, I enjoy thinking about all of the ways I could and should get my life together each spring, and I usually manage one or two small projects. Although I have written about trust accounts previously, a string of discipline cases we are handling has inspired me to write again on this important topic. I would like to encourage everyone who is responsible for a trust account (or a partner in a firm who has delegated trust account responsibilities to someone else) to take time this spring to make sure your trust account books and records are in good order.

The basics

One of the most important duties we have as lawyers is to handle the property of others "with the care required of a professional fiduciary."[1] Minnesota departs substantially from the ABA model rules regarding the safekeeping of property, primarily with regard to the level of specificity in our rule versus the model rule.[2] The details in our rule and the appendix provide useful information to help lawyers keep their records in good order; the main requirements, however, are largely the same whether you are looking at the model rule or Minnesota's rule.

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All funds of clients or third parties held by a lawyer in connection with a representation must be deposited into an approved IOLTA account.[3] This is not negotiable. For example, if a client pays you an advance to cover expenses to be incurred in the matter, those funds must go into trust. If a client provides you with funds to use to pay a third party in settlement of a dispute, those funds must go into trust. If you receive funds in settlement of a client's dispute, those funds must go into trust. Failure to place and maintain those funds in trust will lead to discipline.

The only exception to the above is the circumstance where a client pays an expense by credit card. Many credit agreements require you to agree that charges can be reversed under certain circumstances. That can be dangerous in a trust account (such as where a credit card company backs out a charge months later), so it is permissible to initially deposit credit card payments in your business account, but then you must immediately transfer the required funds into trust.[4] That way, if the charge is later reversed, the money is taken from your business account, and does not result in the inadvertent misappropriation of funds from the trust account if you have already disbursed the original sum.

All fees received in advance of legal services being performed must be placed in trust and not withdrawn until earned, with one exception.[5] Again, this is a bright line requirement and non-negotiable. Placing advanced, unearned fees into your business account (absent a compliant flat or availability fee agreement as discussed below) means you are failing to safe-keep property of your client, a violation of Rule 1.15(a). And worse, if you then spend those funds before they are earned, you have misappropriated the funds of others.

The only exception to this requirement is found in Rule 1.5 (fees). If you charge a flat fee or an availability fee under circumstances compliant with the rule, you may put that fee into your business account, and treat it as your property subject to refund.[6] The Office enforces strict compliance with the requirements of Rule 1.5 given that it is an exception to an important safekeeping requirement. If you use flat fees or availability fees, read carefully the requirements of Rule 1.5 to ensure you have a written, signed agreement consistent with the ethics rules before placing fees not yet earned into your business account. Too many people receive discipline each year for violations of this requirement.

Books and records

Now that the very important basics are covered, let's review the books and records requirements. Many of these requirements are set forth in Appendix 1 to the MRPC, and are in place to make sure lawyers on a monthly basis are keeping good track of client funds to prevent the mishandling of those funds. Some highlights include:

Lawyers must sign every trust account check and direct every electronic transfer.[7] Do not delegate signing trust account checks to office staff or your accountant. Withdrawals by electronic transfer should also be documented by written memorandum signed by the attorney responsible for the transfer.[8]

Earned funds must be withdrawn within a reasonable time of being earned, and a written accounting of all such withdrawals must be provided to the client.[9] Do not commingle earned funds in trust. You can and should keep a nominal amount of your own funds in trust (no more than $200) to cover unexpected bank charges, but do not otherwise leave earned fees in trust longer than the next billing cycle.

Make sure you or someone who knows the rules well is performing a monthly *three-way* reconciliation of your trust account.[10] You need to reconcile your trial balance report, your check register, and your bank statement balance—adjusted for outstanding deposits and withdrawals—every month. This is not how accountants or bookkeepers typically think about reconciliation, because generally accepted accounting principles do not require client subsidiary ledgers or monthly trial balance reports, but trust accounts do.[11] Do this every month, and maintain a copy of your work.[12] Doing this monthly helps you catch mistakes. Mistakes happen, and as long as you catch them within the next month, you are unlikely to have an issue with discipline. Where issues arise is where attorneys do not do this monthly, a mistake happens, and it persists for months on end because they are not doing the required work.

If you accept cash, make sure you provide a receipt countersigned by the client and keep a copy.[13] A lot of disputes are easily avoided by this simple act.

Retain your books and records for six years following the tax year to which they relate.[14] Make sure you have effectively backed up all of your records as well, so that you can satisfy this rule.

Do not disburse funds until they have cleared the issuing bank.[15] This is materially different from the date the funds post to your account and are available for disbursement. You put other people's money at risk when you do this, and it is one of the reasons we get several overdraft notices a month from banks.

Make sure your firm has in place effective measures to ensure compliance with these rules. Every lawyer is ethically responsible for the correct handling of his or her own client's funds, whether they are in solo practice or a firm. You can delegate some of these duties, but it is then your responsibility to ensure that those to whom the task has been delegated perform the work correctly.[16]

Recently, we have seen a number of cases where lawyers in small firms relied upon a bookkeeper or other designated individual to handle their trust account records, and thought everything was fine when it was not. As the licensed attorney, you are responsible.

Resources

The Office has several resources available on its website to assist lawyers to meet their trust account obligations, including a brochure, *Other People's Money: Operating Lawyer Trust Accounts* (2015), and a list of frequently asked questions about trust accounts. We have also added new links at our website to two MSBA resources, *IOLTA Guide, QuickBooks Online* (2017) and *IOLTA Guide—CosmoLex* (2016), with the MSBA's permission. And remember you can always call the OLPR for an advisory opinion (651-296-3952 or 1-800-657-3601) on specific trust account questions. We want you to get this right, so please let us know how we can assist. Good luck with your spring trust account cleanup! ▲

Notes

Rule 1.15(a), Minnesota Rules of Professional Conduct (MRPC), Comment [1].
[2] Rule 1.15, MRPC, and Appendix 1, MRPC, compare ABA Model Rule 1.15.
[3] Rule 1.15(a), MRPC.
[4] Appendix 1, MRPC, I(10).
[5] Rule 1.15(c)(5), MRPC.
[6] Rule 1.5(b)(1), MRPC; Rule 1.5(b)(2), MRPC.
[7] Rule 1.15(j), MRPC.
[8] Rule 1.15(h), MRPC, Appendix 1 I(6).
[9] Rule 1.15(b), MRPC.
[10] Appendix 1, MRPC, I(5).
[11] Appendix 1, MRPC, I(3)(a), I(4).
[12] Appendix 1, MRPC, I(7).
[13] Appendix 1, MRPC, II(2).
[14] Rule 1.15(h), MRPC.
[15] Appendix 1, MRPC, I(11).
[16] Rules 5.1, 5.2 and 5.3, MRPC.