

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
MEETING AGENDA**

Friday, January 26, 2018 –1:00 p.m.  
Town & Country Club  
St. Paul, Minnesota

1. Approval of Minutes of September 29, 2017, Lawyers Board Meeting (Attachment 1).
2. Welcome from New Chair, Robin Wolpert; Farewell to retiring Board Member and Vice-Chair Terrie Wheeler; Notice of Reappointment of Shawn Judge, Gail Stremel and Susan Rhode. Welcome to new Board Members Brent Routman (eff. 12/28/17) and Mark Lanterman (eff. 2/1/18) (Attachment 2).
3. Updated Roster and New Panel and Committee Assignments (Attachment 3).
4. Revised Policy and Procedure No. 5 (Attachment 4).
5. Draft Strategic Planning Materials (Attachment 5).
6. Committee Updates:
  - a. Rules Committee
    - (i) Update, Proposed Changes to Rule 5.5, MRPC.
    - (ii) Proposed Changes to Rule 1.6, MRPC (Attachment 6).
    - (iii) ABA Opinion No. 479 (Attachment 7).
  - b. Opinions Committee
    - (i) Opinion 24 (Attachment 8).
  - c. DEC Committee.
    - (i) Membership Statistics (Attachment 9).
    - (ii) May Chairs Symposium, May 18, 2018.
7. Director's Report (Attachment 10).
8. Other Business:
  - a. Next meeting, Friday, April 27, 2018, 1:00 p.m.
  - b. **New June Date, Friday, June 8, 2018, 1:00pm.**

9. 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 Susan Humiston at [lprada@courts.state.mn.us](mailto: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](http://www.mncourts.gov/ADAaccommodation.aspx) for information on how to submit an ADA Grievance form.*

**MINUTES OF THE 181ST MEETING OF THE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**September 29, 2017**

The 181st meeting of the Lawyers Professional Responsibility Board convened at 3:00 p.m. on Friday, September 29, 2017, at the Earle Brown Center, Brooklyn Center, Minnesota. Board members present were: Board Chair Stacy Vinberg, Jeanette Boerner, James Cullen, Thomas J. Evenson, Roger Gilmore, Christopher Grgurich, Gary Hird, Peter Ivy, Virginia Klevorn, Cheryl Prince, Susan Rhode, Gail Stremel, Bruce Williams, Allan Witz, and Robin Wolpert. Present from the Director's Office were Director Susan Humiston and First Assistant Director Timothy Burke.

**1. APPROVAL OF MINUTES**

The minutes of the June 9, 2017, Board meeting, and the minutes of the September 8, 2017, Special Board meeting, were approved.

**2. WELCOME TO BRUCE WILLIAMS**

Stacy Vinberg welcomed Bruce Williams as a new member of the Board and expressed her anticipation of his service on the Board. Ms. Vinberg noted that Mr. Williams has been added to a Panel.

**3. DEC SEMINAR FEEDBACK**

Ms. Vinberg expressed her belief that the seminar was an excellent program as usual. She noted that in particular the final few presentations should be very helpful to district ethics committee members. Susan Humiston reminded Board members to complete an evaluation of the seminar.

**4. COMMITTEE UPDATES**

**a. Rules Committee**

Ms. Humiston stated that the Board had responded to the Minnesota State Bar Association Rules of Professional Conduct Committee's (committee) proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct. Ms. Humiston stated that at the September 26, 2017, committee meeting, the two items on which the committee and the Board agreed were referred to the MSBA Judiciary Committee to put on the agenda for the General Assembly meeting in December. The first item was an additional exception in Rule 5.5 to allow representation of family members. The second

item was the Board's addition of a notification requirement to the committee's proposed change to Rule 5.5 to allow a lawyer residing but not licensed in a jurisdiction to undertake representation of a client on a matter involving the jurisdiction in which the lawyer is licensed. Ms. Humiston reported that the committee tabled discussion of the remaining proposed amendments to Rule 5.5 to its next meeting at the end of October 2017.

Ms. Humiston provided an update on an item, not on the Board's agenda, regarding proposed changes to Rule 1.6(b), MRPC. Ms. Humiston reported that the committee had adopted a proposal to amend Rule 1.6(b) in response to Board Opinion No. 24, which Ms. Humiston summarized. She stated that the committee had a subcommittee which looked at the issue covered by Opinion No. 24, which noted the prevalence of social media and concern about negative on-line comments by clients. The committee adopted a proposal to effectuate changes to Rule 1.6(b), MRPC, and that this proposal was distributed to the Board members today. Ms. Humiston said that although the committee wanted the Board's input, the committee chair wanted the matter on the agenda for the MSBA General Assembly meeting in December, which made the timing tight.

Cheryl Prince reported on the LPRB Rules Committee's initial review of the proposed changes. The LPRB Rules Committee had discussed the matter, but had not reached the point of making a recommendation to the Board yet. Ms. Prince reported that all but one jurisdiction that considered this issue does not allow a lawyer to reveal client confidences in response to a negative social media post by a client. Ms. Prince noted that most LPRB Rules Committee members recognize the issue but believe more discussion is needed, trying to achieve a balance between the fact that social media can impact a lawyer's practice and reputation and concern about traditional notions of client confidentiality and that adopting this proposal may move the profession in a direction regarding client confidences that we as lawyers do not want.

Ms. Prince summarized the changes set forth in the committee's proposal. She noted that proposed Rule 1.6(b)(9), MRPC, is largely similar, but not identical, to current Rule 1.6(b)(8), MRPC. Ms. Prince reported that the committee appears to believe that the proposed Rule 1.6(b)(9) is an improvement to the current Rule 1.6(b)(8) language. However, as to the proposed 1.6(b)(8) from the committee, the Board's Rules Committee had no consensus yet.

Ms. Humiston asked about the timing of any rules committee response. Ms. Prince inquired whether the Board should request the MSBA to defer its consideration of these changes so that the Board would have time to respond. Ms. Humiston stated that it was her understanding that the MSBA committee did not wish to delay. Ms.

Prince stated that given the timing, she did not believe the Board would be able to give the matter full consideration, and noted that the Board could comment during any public comment period requested by the Supreme Court after the MSBA filed a petition to amend the rules.

Robin Wolpert said that she believed the Court wants to hear from the Board, and that the MSBA had incentive to get the best proposal in front of the Court and the maximum possible consensus on a proposal. She stated that she believed the Court would want full input from the Board to get a complete sense of the views of the legal community and of those involved with protection of the public. That said, Ms. Wolpert was not urging the Board to have a special meeting, and recommended the Board consider this issue at its January 2018 meeting.

Ms. Humiston inquired whether the Board's Rules Committee could have a recommendation for the full Board to consider at its January 2018 meeting. Ms. Prince stated she saw no reason why that would not be possible.

Ms. Humiston reported that she has asked to be allowed to attend the MSBA's Judiciary Committee meeting regarding the proposed changes to Rule 5.5, MRPC, and that at that time she could inform the Judiciary Committee that the Board has not had a chance yet to consider the proposed changes to Rule 1.6(b), MRPC, and would be able to do so at its January 2018 Board meeting. From there, the MSBA Judiciary Committee could decide whether to put the matter on the agenda for the General Assembly's December 2017 meeting or to defer consideration to a later date. There was consensus that this was a good idea, and that the Board should not rush its consideration.

Ms. Vinberg inquired whether Ms. Wolpert would be willing to make such a request to the MSBA on behalf of the Board, as she is the incoming Board Chair and has a working relationship with the Chair of the committee. Ms. Wolpert agreed to do so.

James Cullen stated his belief that the timing should be close on the consideration of the proposed changes to both Rule 1.6(b) and Rule 5.5. Gary Hird agreed but noted that the timing is different because the calendars of the MSBA and the Board do not connect well. Mr. Cullen stated that he believed that the Board should inform the MSBA that the Board is interested in the 1.6(b) issue, but is limited on timing until 2018.

**b. Opinions Committee**

There was no report from the Opinions Committee.

c. **DEC Committee**

Ms. Humiston reported that there was no formal report from the DEC Committee. Ms. Humiston said that the Committee is working on the idea of a standardized application for DEC members and the idea of standardized due diligence for applicants to become DEC members. The Committee is considering this issue because of the varying approaches of the various DEC's to appointing new members. Ms. Humiston also noted that Josh Brand is now the Director's Office liaison to the DEC Committee.

5. **DIRECTOR'S REPORT**

Ms. Humiston reported that the rate of complaints filed with the Director's Office is on track year-over-year. She further reported that the total number of files being handled is less than 500, even though the statistics state the number is slightly greater than 500, because 24 of those files are summary dismissals in the process of being drafted and finalized.

Ms. Humiston noted that there are a number of public and Panel matters pending, and that the number of disciplines is shaping up to be a high average year, comparable to last year.

Ms. Humiston reported that the Office pushed to get all cases under investigation for more than one year completed (that is, no longer under investigation) by September 1, but was unsuccessful. Ms. Humiston stated that much had been accomplished and much had been learned about bottlenecks and where she could help to allow files to move more quickly. Ms. Humiston noted that there are certain types of files that simply will not be able to have the investigation completed within one year, such as matters involving serial complaints against lawyers, files involving noncooperation, and files involving multiple requests for extensions. The Office is down to a small percentage of files under investigation for greater than one year, which the Office is working through. Overall, Ms. Humiston is pleased with the progress and liked how all staff members embraced the challenge of this goal.

Ms. Humiston reported that Tim Burke will become the Deputy Director upon the retirement of Pat Burns. Cassie Hanson will supervise the junior hires, to allow her to ease into management. There are a number of new assignments: Josh Brand will become the Office's liaison to the Board's DEC Committee, Siama Brand will become the Office liaison to the Second DEC after Craig Klausing retires, Jennifer Bovitz is now the Office liaison to the First and Sixth DEC's, and Ms. Hanson is now the Office liaison to the Fourth DEC.

Ms. Humiston reported that the Office is investing substantially in training. Recently the lawyers and paralegals in the Office attended a two-hour training on frequent issues in immigration practice, a presentation which was excellent and interesting and made clear some challenges unique to the practice of immigration law. Ms. Humiston wants to offer additional training where there is not substantial in-house expertise, such as in the areas of real estate and probate law.

Three lawyers from the Office, Kevin Slator, Megan Engelhardt, and Ms. Hanson, will attend the COLAP conference in October 2017 in Kansas City. Ms. Humiston attended the COLAP conference in 2016 and found it very beneficial. These lawyers are attending as they are the lawyers who work with probationers, and many probations involve issues of substance use and/or mental health.

In October 2017, Amy Mahowald and Binh Tuong will attend the NOBC/NITA training, an intense one week litigation training seminar.

Ms. Hanson will present at an upcoming National Organization of Bar Counsel conference on the topic of trust account books and records.

The Office is working on in-house training, and also training for persons not in the Office. The Office has a plan for creating a series of DEC training videos. The Office is working on breaking down topics and scripting various videos. These videos will be taped and available to DEC members on a private YouTube channel. Likely topics include but are not limited to an overview of the system, the life cycle of a complaint, how to deal with a non-cooperative respondent, the definition of "isolated and non-serious" misconduct, what constitutes a lack of diligence, and what constitutes a fee agreement which complies with Rule 1.5, MRPC.

The Office also will be investing more in Board member training. Mr. Burke will take over training of incoming Board members and is working on ideas to help with the onboarding of new Board members. Also, the Panel Manual is in the process of being updated.

Ms. Humiston reported that the strategic planning process is about to commence. Her idea of a tagline for the Office is "Protecting the Public and the Legal Profession." As part of the strategic planning process, a survey has been put together, Board members will be interviewed either by phone or through Survey Monkey, and a broad group of other stakeholders will be surveyed. Among other things, the Committee will look at the five drivers of change and develop a three-year plan for the Office. The strategic planning process is expected to occur over the next four months.

Finally, Ms. Humiston reported that the Supreme Court approved the Board's proposed budget for the Office without change.

Mr. Williams inquired about the status of outstanding judgments entered in favor of the Office. Ms. Humiston reported that many judgments are turned over to Revenue Recapture for collection. Ms. Humiston noted that although on one level the amount of outstanding judgments may seem large, it is but a small fraction of the outstanding debt owed to the Client Security Board (although much of that debt is uncollectible). Ms. Humiston noted that Revenue Recapture is the best method for collecting against people in Minnesota who pay Minnesota taxes and seek to collect Minnesota tax refunds. Ms. Humiston also noted that historically many of the debts may not be collectable, but that the Office did plan to review best practices regarding its collection efforts.

6. **OTHER BUSINESS**

a. **Noteworthy Decisions**

Ms. Vinberg noted that Mr. Burns and Justice David Stras talked during the seminar about *In re Panel No. 41310*. Ms. Humiston noted that the case brings out nuances between what the DEC saw as a violation as opposed to what the Panel saw as a violation, and then the Court also expressed its opinion as to the conduct which constituted a violation.

Ms. Humiston noted the two main procedural takeaways from that case. First, if a Board member reviews a determination that discipline is not warranted which has been appealed by a complainant, by rule the Board member must state the reasons for the Board member's decision that discipline is warranted. Second, if a Panel issues an admonition after hearing, the Panel must make findings of fact and conclusions of law, but is not required to do any analysis or memorandum.

Ms. Vinberg noted that there had been an issue since the last regular Board meeting involving an admonition, as to whether the actual finding was of both isolated and non-serious misconduct. Ms. Vinberg noted that if the Panel is issuing an admonition, then the Panel should clearly state on the record that the misconduct was both isolated and non-serious.

b. **Scanning of Wills**

Ms. Humiston reported back on an inquiry made previously by the Board. As part of its trusteeship responsibility, the Office has thousands of wills, some of which go back as far as 1960. It would cost several thousands of dollars to have the wills scanned.



The Office does not have the labor resources to do so, and therefore an outside vendor would have to be retained. As a result, the Director's Office determined to do as the Supreme Court order requires. The Office will make every effort to find and track down involved people, would keep the originals as long as possible, and then beyond that, the documents would be destroyed pursuant to court order.

c. Panel Protocol

Ms. Vinberg identified a couple of issues arising in Panel matters.

First, Ms. Vinberg reminded Panel members that all communications regarding a matter before a Panel must be with both parties. Substantive issues must be discussed with both parties; there may not be *ex parte* communications. Ms. Vinberg encouraged Panel members that, if there was any doubt as to procedural questions, to contact their Panel Chair and that, if questions remained, to call Ms. Humiston or Mr. Burke.

Second, Ms. Humiston also reminded Board members that, if communicating with a represented party, then communication must be through and with counsel. In a recent matter involving a complainant appeal, one of the parties had counsel on the appeal, but the Board member directed the determination to the represented party.

Chris Grgurich noted that in a Panel matter recently assigned to his Panel, which was withdrawn before hearing, the respondent lawyer provided a submission to the Panel, but the Panel was unable to determine if the lawyer had also provided that submission to the Director. Mr. Grgurich wrote to the respondent, asking about the issue, and sent a copy of that communication to the Director. The Director's Office confirmed that the respondent lawyer had originally copied the Director's Office on the submission to the Panel. Mr. Grgurich inquired whether he needed to copy other Panel members on such correspondence he writes. Ms. Vinberg stated that it was the responsibility of the Panel Chair to handle such preliminary and procedural issues, and Ms. Humiston expressed her appreciation for how Mr. Grgurich handled the situation.

Thomas Evenson inquired whether a way existed to be sure all Panel members received documents such as a respondent's answer to charges. Ms. Humiston stated that the Director's Office upon receiving a respondent's answer would review it to see if it could be determined whether the respondent had submitted the answer to all Panel members or just the Chair, and to ensure that the respondent sent the answer and other materials or filings to all Panel members.

Mr. Cullen noted that earlier this year, his Panel had changed how it operates so that all Panel members were involved in all communications that Mr. Cullen as Chair

had with parties, and that the Director's Office seemed to routinely ensure that all of a respondent's submissions were submitted to all Panel members.

**d. 2018 Meeting Dates**

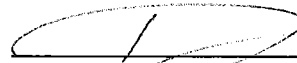
Ms. Humiston noted that the date of the June 2018 Board meeting had been changed. Ms. Vinberg stated that the next meeting would be conducted on January 26, 2018, at 1:00 p.m. and that, because Ms. Vinberg is resigning as Board Chair, Ms. Wolpert would chair that meeting. Ms. Vinberg congratulated Ms. Wolpert on her appointment by the Supreme Court as Board Chair.

**7. QUARTERLY BOARD DISCUSSION**

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

Thereafter, the meeting adjourned.

Respectfully submitted,



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Timothy M. Burke  
First Assistant Director

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

**FILED**

December 28, 2017

**OFFICE OF  
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042

**RECEIVED**

DEC 28 2017

OFFICE OF LAWYERS  
PROF. RESP.

**IN RE APPOINTMENTS TO THE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**ORDER**

IT IS HEREBY ORDERED that Mark Lanterman is appointed as a public member of the Lawyers Professional Responsibility Board, for a three-year term that is effective as of February 1, 2018 and ends on January 31, 2021.

IT IS FURTHER ORDERED that Shawn Judge, Gail Stremel, and Susan Rhode are re-appointed to the Lawyers Professional Responsibility Board, each for a three-year term that is effective as of February 1, 2018 and ends on January 31, 2021.

IT IS FURTHER ORDERED that Brent Routman is appointed to the Lawyers Professional Responsibility Board as a nominee of the Minnesota State Bar Association, for partial term that is effective immediately and ends on January 31, 2019.

Dated: December 28, 2017

BY THE COURT:



Lorie S. Gildea  
Chief Justice

LAWYERS BOARD PANELSLAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(e), Rules on Lawyers Professional Responsibility, provides,

The Chair shall divide the Board into Panels, each consisting of not less than three Board members and at least one of whom is a nonlawyer, and shall designate a Chair and a Vice-Chair for each Panel.

The following Panels are appointed effective February 1, 2018. Those with a single asterisk after their names are appointed Chair, and those with a double asterisk are appointed Vice-Chair.

Panel No. 1.

- \* Thomas J. Evenson
- \*\* Peter Ivy
- Norina Jo Dove (p)

Panel No. 4.

- \* Gary M. Hird
- \*\* Brent Routman
- Gail Stremel (p)

Panel No. 2.

- \* Susan C. Rhode
- \*\* Bruce R. Williams
- Shawn Judge (p)

Panel No. 5.

- \* Anne M. Honsa
- \*\* Allan Witz
- Mary L. Hilfiker (p)

Panel No. 3.

- \* James P. Cullen
- \*\* Jeanette Boerner
- Michael J. Leary (p)

Panel No. 6.

- \* Christopher Grgurich
- \*\* Virginia Klevorn (p)
- Mark Lanterman (p)

Effective February 1, 2018.

Romi M. Wolpert

Robin M. Wolpert, Chair  
Lawyers Professional  
Responsibility Board

\* Chair

\*\* Vice Chair

(p) Public member

EXECUTIVE COMMITTEE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(d), Rules on Lawyers Professional Responsibility, provides:

The Executive Committee, consisting of the Chair, and two lawyers  
and two nonlawyers designated annually by the Chair.

The following members of the Lawyers Professional Responsibility Board are appointed to the Executive Committee for the period February 1, 2018, through January 31, 2019.

Robin M. Wolpert, Chair  
Cheryl M. Prince, Vice-Chair  
Joseph P. Beckman  
Roger Gilmore  
Bentley R. Jackson

**Cheryl Prince**, Vice Chair, shall receive reports from the Director's Office of tardy complainant appeals on behalf of the Chair in accord with Executive Committee Policy & Procedure No. 10; shall be responsible for reviewing dispositions by the Director that vary from the recommendations of a District Ethics Committee; and, shall be responsible for review of complaints against LPRB and Client Security Board members, the Director, members of the Director's staff or DEC members based solely upon their participation in the resolution of a complaint, pursuant to Section 4, Executive Committee Policy & Procedure No. 5.

**Bentley Jackson** shall act as personnel liaison in accord with Executive Committee Policy & Procedure No. 12.

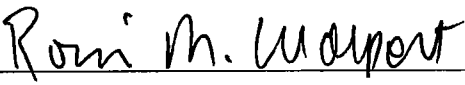
**Roger Gilmore** will oversee the Executive Committee process for reviewing file statistics and the aging of disciplinary files.

**Joe Beckman** will consider former employee disqualification matters in accord with Executive Committee Policy & Procedure No. 3.

**Robin Wolpert**, in addition to the Chair's responsibility for oversight of the Board and OLPR as provided by the RLPR, will handle Panel Assignment matters in accord with

Rule 4(f) and Executive Committee Policy & Procedure No. 2, and complaints against the Director or staff members in accord with Executive Committee Policy & Procedure No. 5.

Effective February 1, 2018.

  
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Robin M. Wolpert, Chair  
Lawyers Professional Responsibility Board

BOARD MEMBERS REVIEWING COMPLAINANT APPEALS

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Pursuant to Rule 8(e), Rules on Lawyers Professional Responsibility, the Chair appoints members of the Board, other than Executive Committee members, to review appeals by complainants who are not satisfied with the Director's disposition of complaints.

The reviewing Board members appointed for the period February 1, 2018, through January 31, 2019, are:

JEANETTE M. BOERNER

JAMES P. CULLEN

NORINA JO DOVE

THOMAS J. EVENSON

CHRISTOPHER GRGURICH

MARY L. HILFIKER

GARY M. HIRD

ANNE M. HONSA

PETER IVY

SHAWN JUDGE

VIRGINIA KLEVORN

MARK LANTERMAN

MICHAEL J. LEARY

SUSAN C. RHODE

BRENT ROUTMAN

GAIL STREMEL

BRUCE R. WILLIAMS

ALLAN WITZ

If Board members are unavailable for periods of time the Board Chair may instruct the Director not to assign further appeals to such members until they become available.

Effective February 1, 2018.

Roni M. Wolpert

Robin M. Wolpert, Chair  
Lawyers Professional  
Responsibility Board



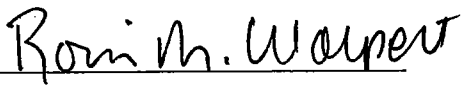
OPINION COMMITTEE

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee for making recommendations regarding the Board's issuance of opinions on questions of professional conduct, pursuant to Rule 4(c), Rules on Lawyers Professional Responsibility, shall be constituted with the following members:

Anne M. Honsa, Chair  
Joseph Beckman  
Norina Jo Dove

Effective February 1, 2018

  
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Robin M. Wolpert, Chair  
Lawyers Professional  
Responsibility Board

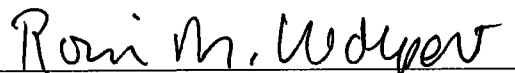
RULES COMMITTEE

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee for making recommendations regarding the Board's positions on possible amendments to the Minnesota Rules of Professional Conduct and the Minnesota Rules on Lawyers Professional Responsibility, shall be constituted with the following members:

Christopher Grgurich, Chair  
James P. Cullen  
Gary M. Hird  
Cheryl Prince  
Brent Routman  
Gail Stremel

Effective February 1, 2018.



Robin Wolpert, Chair  
Lawyers Professional  
Responsibility Board

DEC COMMITTEE

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee charged with working with the District Ethics Committees (DECs) to facilitate prompt and thorough consideration of complaints assigned to them and to assist the DECs in recruitment and training of volunteers, shall be constituted with the following members:

Peter Ivy  
Roger Gilmore  
Mary L. Hilfiker  
Michael J. Leary  
Allan Witz

Effective February 1, 2018.

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Robin M. Wolpert, Chair  
Lawyers Professional  
Responsibility Board

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Until January 31, 2019, or Further Order of the Court (orig. appt. 10/17/17)

Chair – Robin M. Wolpert

Terms Expiring January 31, 2019

*† Dove, Norina Jo	(orig. appt. 2/1/13)
Grgurich, Christopher A. (Nominated by MSBA)	(orig. appt. 2/1/16)
† Honsa, Anne M.	(orig. appt. 2/1/13)
*† Leary, Michael	(orig. appt. 2/1/13)
† Prince, Cheryl M. Routman, Brent E. (Nominated by MSBA)	(orig. appt. 7/1/12) (orig. appt. 12/28/17)
Williams, Bruce R.	(orig. appt. 7/1/17)

Terms Expiring January 31, 2020

† Beckman, Joseph P. (Nominated by MSBA)	(orig. appt. 2/1/14)
Boerner, Jeanette M.	(orig. appt. 2/1/17)
† Cullen, James P. (Nominated by MSBA)	(orig. appt. 2/1/14)
*† Gilmore, Roger	(orig. appt. 2/1/14)
*† Hilfiker, Mary L. Ivy, Peter	(orig. appt. 2/1/14) (orig. appt. 2/1/17)
*† Jackson, Bentley R.	(orig. appt. 2/1/14)
* Klevorn, Virginia Witz, Allan <sup>1</sup>	(orig. appt. 2/1/17) (orig. appt. 5/1/16)

Terms Expiring January 31, 2021

Evenson, Thomas J. (Nominated by MSBA)	(orig. appt. 2/1/15)
Hird, Gary M. (Nominated by MSBA)	(orig. appt. 5/22/14)
* Judge, Shawn	(orig. appt. 2/1/15)
* Lanterman, Mark Rhode, Susan C.	(orig. appt. 2/1/18) (orig. appt. 3/16/17)
* Stremel, Gail	(orig. appt. 2/1/15)

\* Public Members

† Not eligible for reappointment

<sup>1</sup> Eligible for reappointment to one more term

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
EXECUTIVE COMMITTEE  
POLICY AND PROCEDURE NO. 5

RE: Approval of Procedures for Handling Complaints Against LPRB and CSB Board Members, Director, Director's Staff, and DEC Members.

**Section 1. Complaints against the Director or Staff Members.**

Upon receipt of a complaint against the Director or staff members, the Director will forward the complaint to the Chair of the Lawyers Board unless the allegations fall within the criteria established in Section 4 of this policy. The Chair will submit the complaint to a Lawyers Board Panel appointed in rotation, which will determine whether the matter can be summarily dismissed. If the complaint cannot be dismissed, the Panel will submit the complaint to the Supreme Court for assignment to special counsel for investigation. Special counsel shall have the authority to dispose of the matter under Rule 8(d)(1), (2) or (3). If special counsel determines the matter should be presented to a panel (Rule 8(d)(4)), it will be presented to a special panel as provided below.

**Section 2a. Complaints against Lawyers Professional Responsibility Board and Client Security Board Members.**

The initial handling of complaints against Board members will be handled within the normal channels of the discipline system unless the allegations fall within the criteria established in Section 4 of this policy. The Director will receive the complaint and determine whether it can be summarily dismissed. If it cannot, and it is of a routine nature and normally assigned to a District Ethics Committee for investigation, the Director will do so. If the District Ethics Committee recommends a dismissal and the Director agrees, ~~he~~ the Director will do so. If the District Ethics Committee recommends further investigation or that the lawyer be disciplined, the matter will be assigned to special counsel. If the District Ethics Committee recommends dismissal but the Director determines further investigation is necessary, the matter will be assigned to special counsel for investigation. Special counsel shall have the authority to dispose of the matter under Rule 8(d)(1), (2) or (3), or if necessary, may present charges to a special panel (Rule 8(d)(4)).

**Section 2b. Complaints by Lawyers Professional Responsibility Board and Client Security Board Members.**

Complaints made by a current Lawyers Board or Client Security Board member may present special problems. As above, initial handling of such complaints can be handled within the normal channels of the discipline system. The Director will receive the complaint and determine whether it can be summarily dismissed. If it cannot, and it is of a routine nature and normally assigned to a District Ethics Committee for investigation, the Director will do so. If the District Ethics Committee recommends a dismissal and the Director agrees, ~~he or she~~ the Director will do so. If the District Ethics Committee recommends discipline or further investigation, and if in the Director's determination the credibility of the Board member is at issue, or other circumstances exist that the Director believes indicate that the Director or any of his or her staff should not handle the matter, then special counsel may be requested.

If the complaining Board member is dissatisfied with the determination of the Director or special counsel, normally such an appeal would be reviewed by a Board member selected in rotation. Since the impartiality of the Board member may be subject to question in such situations, the Chair shall designate at least two former Board members to be available to act in rotation as a special reviewing Board member. If the reviewing Board member directs that the matter be further investigated or sent to a panel, then special counsel or a special panel shall be appointed.

**Section 3. Special Counsel or Special Panels.**

Special counsel should be appointed by the Supreme Court, through its ~~Commissioner court administrator~~, as referees are appointed in public matters. The Director shall ~~submit to the court administrator~~ file a written request for appointment of special counsel in a file specifically denoted by the Clerk of Appellate Court for that purpose, along with a list, which shall include of at least 20 past and present District Ethics Committee members and all persons who in the last ten years completed service as Lawyers Board members, as well as any Director, or Assistant Directors who have not been employed in the Director's Office within the past year. The Director shall use the Office case number to designate the matter in order to maintain the confidentiality of parties involved. The Court may also want to consider the appointment of retired

judges as special counsel. ~~The list should be reviewed periodically, at least every two years.~~ Special panels may be appointed from the same pool of members.

Compensation for special counsel shall be the same as provided to senior judges who serve as referees within the disciplinary system. Special Panels shall serve without compensation, but reasonable expenses will be reimbursed consistent with judicial policies.

If a complaint against a Client Security Board member, Lawyers Board member, the Director or an Assistant Director results in a dismissal, admonition or stipulated private probation, and no hearing under Rule 9 was held, and the complainant is not satisfied with the disposition, the complainant may appeal to a Lawyers Board member (other than a member of a Panel that may have issued the disposition) chosen in rotation, as provided by Rule 8(e). If a hearing was held under Rule 9, the complainant may petition for review or appeal to the Supreme Court as provided by Rule 9(l).

**Section 4. Complaints Against LPRB and CSB Board Members, Director, Director's Staff or DEC Members Based Solely Upon Their Participation in the Resolution of a Complaint.**

After complaint decisions have been issued and appeal rights have been exhausted, dissatisfied parties occasionally file ethics complaints against Board members, the Director, the Director's staff, or District Ethics Committee (DEC) members where the only misconduct alleged is the participation of the Board member, Director, Director's staff or DEC member in the decision. These complaints constitute an improper attempt to obtain further review not authorized by the RLPR and a waste of limited available lawyer discipline resources if formally processed as ethics complaints. It is the policy of the Board that such submissions not be formally processed as ethics complaints where the only alleged misconduct by the Board, Director, Director's staff or DEC member is the exercise of a function properly within the scope of his or her duties.

Complaints against Board members, Director, the Director's staff, and DEC members that are based solely upon dissatisfaction with the disposition of a prior complaint and that allege no substantive misconduct other than the Board, Director, Director's staff, or DEC member's participation in the disposition of a complaint shall be forwarded to the Executive Committee Delegate to determine whether they are appropriate for

resolution pursuant to this policy. If the Executive Committee Delegate determines that the submission contains no factual assertions in support of the allegations of misconduct beyond the fact that the Board member, Director, Director's staff, or DEC member participated in the resolution of a prior complaint(s), the Delegate shall return the submission to the Director with the direction that the complaining party be notified that no action will be taken regarding their submission. If the Delegate determines that the complaint includes allegations that fall outside the scope of Section 4 of this policy, the complaint shall be processed in accordance with Sections 1 or 2 of this policy. The decision of the Executive Committee Delegate shall be final and is not subject to further appeal or review.

Formal lawyer disciplinary action is not an option with respect to a nonlawyer. Therefore, with respect to complaints against nonlawyer Board members and DEC members that are based solely upon dissatisfaction with the disposition of a prior complaint and that allege no substantive misconduct other than the Board or DEC member's participation in the disposition of a complaint, the Director may make the determination that no substantive misconduct has occurred and notify the complaining party that no action will be taken with respect to their complaint. Copies of the Director's determination shall be provided to the Board member or DEC member involved and to the Board Chair or DEC Chair as appropriate.

#### History of Amendments

##### January 20, 1989, Amendment.

On October 28, 1988, the Supreme Court approved the portions of the policies that were before it for consideration. *Kennedy v. L.D., et al.*, 430 N.W.2d 833 (Minn. 1988). Before Kennedy petitioned the Supreme Court for review, it was decided on an *ad hoc* basis that complainant appeals against Board members and the Director's staff, like other complainant appeals, should proceed pursuant to Rule 8(d), RLPR. The Court's approval was incorporated in the January 20, 1989, Board amendment.



**June 15, 1989, Amendment.**

The Director of the Office of Lawyers Professional Responsibility has also been appointed Director for the Client Security Board. Amendment to this policy appears appropriate to cover attorney members of the Client Security Board in the same fashion as attorneys on the Lawyers Professional Responsibility Board.

**September 19, 2003, Amendment.**

Section 4 of the policy was added to address ethics complaints filed against participants in the lawyer discipline process merely to obtain further review not authorized by the RLPR.

**June 26, 2015, Amendment.**

Section 2b was added to address complaints by current Lawyers Professional Responsibility Board or Client Security Board members and to provide for former Board members to be designated to hear such appeals.

The last full paragraph of Section 4 was added to address the process for addressing complaints against non-lawyer members of the Lawyers Professional Responsibility Board or Client Security Board.

**January 26, 2018, Amendment.**

The policy was updated to eliminate gender pronouns for the Director. Pursuant to the request of the Supreme Court Commissioner, the policy was revised to reflect that requests for special counsel shall go to the Commissioner rather than the State Court Administrator by electronically filing a letter request in a specifically-designated file, and to set forth the provision for payment of special counsel consistent with payment provided to discipline referees.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its ~~June 26, 2015~~ January 26, 2018 meeting.

EXECUTIVE COMMITTEE  
POLICY AND PROCEDURE NO. 5  
Page 6

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ROBIN WOLPERT, JUDITH M. RUSH	KENNETH S. ENGEL
CHAIR, LAWYERS PROFESSIONAL	VICE-CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD	RESPONSIBILITY BOARD

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## 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.

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

*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;

(40)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

(H12) 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.<sup>i</sup> 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.<sup>ii</sup> 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.<sup>iii</sup> 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.”<sup>iv</sup>

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.<sup>v</sup> “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.<sup>vi</sup>

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.<sup>vii</sup>

#### 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 (7<sup>th</sup> 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.<sup>viii</sup>

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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<sup>i</sup> 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.

<sup>ii</sup> 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.”

<sup>iii</sup> *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).

<sup>iv</sup> 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.

<sup>v</sup> 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.

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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.”

<sup>vi</sup> 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.”

<sup>vii</sup> 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.

<sup>vii</sup> 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).

<sup>viii</sup> 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).

# 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).<sup>1</sup> 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

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<sup>1</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2017) [hereinafter MODEL RULES].

representation is involved.”<sup>2</sup>

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*.”<sup>3</sup> 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).<sup>4</sup>

### The Generally Known Exception

The generally known exception to the use of former-client information was introduced in the 1983 Model Rules.<sup>5</sup> 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.<sup>6</sup> Agreement on when information *is* generally known has been harder to achieve.

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<sup>2</sup> ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 190 (8th ed. 2015).

<sup>3</sup> MODEL RULES R. 1.9(c)(1) (2017) (emphasis added).

<sup>4</sup> 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”).

<sup>5</sup> 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).

<sup>6</sup> 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.<sup>7</sup> 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.”<sup>8</sup> Commentators find this construct “a good and valid guide”<sup>9</sup> 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.”).

<sup>7</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 732 (4th ed. 2009).

<sup>8</sup> *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).

<sup>9</sup> *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.”<sup>10</sup>

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.’”<sup>11</sup> By contrast, “[I]nformation is not ‘generally known’ simply because it is in the public domain or available in a public file.”<sup>12</sup> 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.’”<sup>13</sup>

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.”<sup>14</sup> 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.”<sup>15</sup> 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,”<sup>16</sup> 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.”<sup>17</sup> 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.<sup>18</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 991, at ¶ 20 (2013).

<sup>12</sup> *Id.* at ¶ 17.

<sup>13</sup> 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).

<sup>14</sup> MASS. RULES OF PROF’L CONDUCT R. 1.6(a) (2017).

<sup>15</sup> *Id.* at cmt. 3A.

<sup>16</sup> N.Y. RULES OF PROF’L CONDUCT R. 1.6(a) (2017).

<sup>17</sup> *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”).

<sup>18</sup> 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.<sup>19</sup> 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).<sup>20</sup>

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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").

<sup>19</sup> 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).

<sup>20</sup> 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.

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**AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

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**CENTER FOR PROFESSIONAL RESPONSIBILITY:** Dennis A. Rendleman, Ethics Counsel; Mary McDermott, Associate Ethics Counsel

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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.



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Stacy L. Vinberg, Chair  
Lawyers Professional Responsibility Board

## January 2018 DEC Term Statistics

DEC #	OLPR Liaison	Total Members	Attorney	Public	Percentage Public Members	Terms Expiring in 2018	
1	Jennifer S. Bovitz	13		10	3	23	8
2	Siama C. Brand	29		25	4	13	3
3	Susan M. Humiston	8		6	2	25	0
4	Cassie Hanson	104		84	20	19	16
5	Joshua H. Brand	9		6	3	33	1
6	Jennifer S. Bovitz	8		6	2	25	1
7	Siama C. Brand	18		13	5	27	6
8	Amy M. Mahowald	10		7	3	30	2
9	Susan M. Humiston	5		4	1	20	2
10	Amy M. Mahowald	6		6	0	0	3
11	Megan Engelhardt	8		6	2	25	2
12	Siama C. Brand	7		5	2	28	0
13	Joshua H. Brand	7		5	2	28	2
14	Megan Engelhardt	5		4	1	20	2
15	Megan Engelhardt	5		4	1	20	0
16	Siama C. Brand	7		4	3	42	0
17	Amy M. Mahowald	3		2	1	33	2
18	Timothy M. Burke	7		5	2	28	0
19	Binh T. Tuong	7		5	2	28	2
20	Megan Engelhardt	7		5	2	28	0
21	Timothy M. Burke	12		10	2	16	3
<b>Total:</b>		<b>285</b>		<b>222</b>	<b>63</b>		

## OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

## 2017 Year in Review Numbers—Year over Year

New Complaints:	1110	(1216)
Closings:	1069	(1264)
Advisory Opinions:	2051	(1890)
Public Discipline:	40	(44)
Disbarred:	5	(6)
Suspended:	26	(28)
Reprimand/Prob:	5	(4)
Reprimand:	4	(6)
Private Discipline (files):		
Probation:	14	(27)
Admonitions:	90	(115)
Open Files:	517	(479)
Year Old:	149	(108)
With Office:	71	(47)
With Court:	78	(61)
Oldest File:	1/2014	(12/2011)

# OLPR Dashboard

**1/19/2018**

	Total Files	Total Lawyers	
<b>Total Open Matters</b>	528	389	
<b>New Files YTD</b>	59		
<b>Closed Files YTD</b>	48		
<b>Files Opened in December 2017</b>	77		
<b>Files Closed in December 2017</b>	91		
<b>Public Matters Pending</b>	26		
<b>Panel Matters Pending</b>	6		
<b>Matters Pending with the DEC's</b>	79		
<b>Advisory Opinion Requests YTD</b>	113		
<b>Advisory Opinion Requests Declined YTD</b>	7		
<b>Total Files Over 1 Year Old</b>	148	97	
<b>Matters Pending Over 1 Year Old w/o Charges</b>	68	61	
<b>Matters Pending Over 2 Years Old w/o Charges</b>	4	3	

Discipline YTD	Total # Lawyers
<b>Disbarred</b>	1
<b>Suspended</b>	4
<b>Reprimand &amp; Probation</b>	0
<b>Reprimand</b>	0
	<b>Total # Files</b>
<b>Private Probation</b>	3
<b>Admonition</b>	7

## All Pending Files as of 1/19/18

Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2014-07										1						1
2014-08												1				1
2014-09												1				1
2014-11												1				1
2015-01									1	3						4
2015-03									1	1						2
2015-04										1						1
2015-05				2								1				3
2015-06				1											1	2
2015-07										1						1
2015-08				1												1
2015-09										1		1				2
2015-10										2						2
2015-11									2	2						4
2015-12									1		1					2
2016-02				3						4					1	8
2016-03				1				1		3	1					6
2016-04				2						1						3
2016-05				1		1			1	1					1	5
2016-06				3		1			1	4						9
2016-07				6				1		2						9
2016-08				7					4	1	2					14
2016-09				7						3	2					12
2016-10				8					2	1	2					13
2016-11				11	1			1		2						15
2016-12				11				1		4	1					17
2017-01				14					1	4						19
2017-02				9						2	6					17
2017-03				18				1	2		1					22
2017-04				16						2	1				1	20
2017-05				14					1	1			2		1	19
2017-06		1	1	15			1			1	1		1			21
2017-07				19											1	20
2017-08		13	3	20	1				2		2					41
2017-09		10	4	34	1											49
2017-10		17	3	20									1		1	42
2017-11		13		18												31
2017-12	3	15		18									1			37
2018-01	26	10		12										3		51
<b>Total</b>	<b>29</b>	<b>79</b>	<b>11</b>	<b>291</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>5</b>	<b>19</b>	<b>48</b>	<b>20</b>	<b>5</b>	<b>5</b>	<b>3</b>	<b>7</b>	<b>528</b>



## Files Over One Year Old as of 1/19/18

Year/Month	OLPR	AD	ADAP	PAN	HOLD	SUP	S12C	SCUA	TRUS	Total
2014-07						1				1
2014-08								1		1
2014-09								1		1
2014-11								1		1
2015-01					1	3				4
2015-03					1	1				2
2015-04						1				1
2015-05	2							1		3
2015-06	1								1	2
2015-07						1				1
2015-08	1									1
2015-09						1		1		2
2015-10						2				2
2015-11					2	2				4
2015-12					1		1			2
2016-02	3					4			1	8
2016-03	1			1		3	1			6
2016-04	2					1				3
2016-05	1		1		1	1			1	5
2016-06	3		1		1	4				9
2016-07	6			1		2				9
2016-08	7				4	1	2			14
2016-09	7					3	2			12
2016-10	8				2	1	2			13
2016-11	11	1		1		2				15
2016-12	11			1		4	1			17
2017-01	8					1				9
<b>Total</b>	<b>72</b>	<b>1</b>	<b>2</b>	<b>4</b>	<b>13</b>	<b>39</b>	<b>9</b>	<b>5</b>	<b>3</b>	<b>148</b>

	Total	Sup. Ct.
<b>Sub-total of Cases Over One Year Old</b>	<b>143</b>	<b>51</b>
<b>Total Cases Under Advisement</b>	<b>5</b>	<b>5</b>
<b>Total Cases Over One Year Old</b>	<b>148</b>	<b>56</b>

**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

By SUSAN HUMISTON

## Ethically unbundling legal services

In light of the MSBA's Pro Bono Week this month, it's a good time to revisit a legal services model that helps expand litigants' access to justice: "unbundled" representation. As access-to-justice professionals have noted for some time, it's not just the very poor who cannot afford legal fees; most people have sticker shock when they price lawyers for important personal matters. This article will discuss ethical considerations related to unbundled or limited scope representation, whether on a pro bono basis or for a fee.

The term "unbundling" seems to me a very lawyer-like way of saying limited representation. Instead of providing full representation—a "bundled" set of services—lawyers provide services *a la carte*: reviewing a proposed settlement agreement, for example, or offering advice-only consultations or assistance in drafting pleadings.<sup>1</sup> Many lawyers do this naturally, and may not realize there are ethical limits to structuring a representation in this manner. Conversely, there are probably lawyers who are intrigued by this idea but worried that they will not be

able to withdraw, do not know how to ethically structure a limited representation, or may be setting themselves up for a malpractice claim.

### Ethics rules implicated

In 2005, Minnesota adopted revisions to Rule 1.2 to facilitate limited scope representations. Rule 1.2(c) provides "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed

consent."<sup>2</sup> Not all cases are good candidates for limited representation.

Minnesota bankruptcy courts prohibit it.<sup>3</sup> Complex litigation or particularly contentious family law matters may make it impractical. Court rules may prevent it in some circumstances, such as criminal representation. The issue is currently a hot topic in immigration cases, given positions taken by the Executive Office for Immigration Review that prohibit limited appearances.<sup>4</sup>

When unbundling is permissible and makes sense for a particular matter, the rules require the client to give "informed consent," which is specifically defined in the ethics rules as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable alternatives to the proposed course of conduct."<sup>5</sup>

In matters of limited representation, this Office has advised through many CLE presentations that informed consent requires communicating in plain English to the client (1) what services will be provided; (2) what services will not be provided; and (3) what the client will need to do on their own in order to achieve their objectives. While not required, it is best that this communication be in writing. (This also allows the attorney to comply with Rule 1.5(b), which requires that the scope of representation and the basis and rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing.<sup>6</sup>) If you provide limited representation, take a minute to review your retainer agreement to ensure that it's sufficient to satisfy the informed consent requirement.

Another ethics issue relates to communications with represented persons. Rule 4.2 prohibits communication about the subject of the representation with a person you know to be represented by another lawyer.<sup>7</sup> Limited representations may create ambiguity for opposing counsel. You (as opposing counsel) should always address communications to a lawyer working on a matter, unless and until that lawyer consents to your direct contact with the client or clearly advises

you that the issue to be discussed is outside the representation. If you do not know whether an opposing party is represented by counsel, either generally or on a limited basis, you may ask the party, and then get clarity from counsel as to the scope of the representation. In 2015, the ABA issued a helpful formal opinion you may wish to review: "Communication with Person Receiving Limited-Scope Legal Services."<sup>8</sup> As an attorney providing limited representation, you should assist opposing counsel in navigating these issues by clearly advising on which matters direct communication is permitted and where it is not.

Another ethics question that arises in limited representation is the issue of "ghostwriting," or authoring pleadings or other court filings on behalf of a self-represented litigant without signing those documents or otherwise disclosing lawyer assistance in preparing them. The ABA has fully endorsed this practice,<sup>9</sup> but some states and federal circuits have raised a concern that the practice may run afoul of Rule 11 of those jurisdictions' civil procedure rules. The 10th Circuit, for instance, prohibits the practice under Rule 11(a), requiring that an attorney whose advice results in a pleading must sign that pleading.<sup>10</sup>

In addition to Rule 11 concerns, some courts have raised the issue of whether a party unfairly benefits from the liberal pleading rules afforded to *pro se* litigants if an attorney has ghostwritten the pleading, and whether ethical considerations like the duty of candor are undermined by ghostwriting. North Dakota amended its Rule 11 in 2016 to make clear that an attorney may prepare a pleading, brief, or other court filing for use by a self-represented litigant without being required to sign such a document.<sup>11</sup> This Office has advised that the best practice, if you are ghostwriting, is a) to ensure that any pleading is not frivolous and has a good-faith basis in law and fact, even if you will not be signing such a document; b) to indicate on the pleading that you assisted in its preparation; and c) to keep a copy of the pleading in the form that you provided it to the client (to clarify matters if issues later arise).<sup>12</sup>



**SUSAN HUMISTON** is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

## Professional Responsibility

### Additional considerations

No matter the scope of your representation, Rule 1.1 requires your representation to be competent. And, remember, competency is more than just knowing the law: It includes "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."<sup>13</sup> Limited representation presents unique challenges in making sure that you have sufficient information to provide competent advice. You also cannot ask your client to prospectively waive or limit your malpractice exposure due to the limited nature of the representation. Ethically, in order to limit your malpractice exposure, the client must be independently represented by counsel in making such an agreement.<sup>14</sup>

### Conclusion

For decades, transactional lawyers have provided limited representation. And for several years now, more and more attorneys have been providing limited representation in litigated matters. Given the number of self-represented litigants in civil matters (some reports indicate that up to 80 percent of civil cases have one unrepresented party),

the interests of justice are advanced when litigants have some access to competent representation, even if they cannot afford full representation.

As in most areas of practice, client communication is the key. Make sure your client has provided informed consent, preferably in writing, and continue to be very clear about what you are doing and what is required of your client. Scope-creep is natural, and can defeat the best-laid early plans. If you choose to offer limited services to your clients, whether on a pro bono basis or for a fee, know that there is a wealth of information available to assist you. One such resource is the ABA's Unbundling Resource Center, maintained by the ABA's Standing Committee on the Delivery of Legal Services.<sup>15</sup> You can also call this Office for an advisory opinion at (651) 296-3952. Good luck! ▲

### Notes

1 See "Ethical Considerations in Providing Unbundled Legal Services," Patrick R. Burns, *Minnesota Lawyer* (2/7/2005), available at <http://rb.mncourts.gov>, under "articles." "Unbundling is the provision of limited legal services to persons with no undertaking by the lawyer

providing services to provide the complete, 'bundled' set of services necessary to achieve the client's legal objectives."

2 Rule 1.2(c), Minnesota Rules of Professional Conduct (MRPC).

3 *In re Bulen*, 375 B.R. 858 (D. Minn. 2007).

4 See *Northwest Immigration Rights Project v. United States Department of Justice*, Case No. 2:17-cv-00716 (W. Dist. Wash.), seeking an injunction preventing the EOIR from enforcing a cease and desist letter dated 4/5/2017, relating to limited scope representation in detention proceedings.

5 Rule 1.0(f), MRPC.

6 Rule 1.5(b), MRPC.

7 Rule 4.2, MRPC.

8 ABA Formal Opinion 472 (11/30/2015).

9 ABA Formal Opinion 07-446 (5/5/2007).

10 *Duvan v. Carris*, 238 F.3d 1268, 1273 (10<sup>th</sup> Cir. 2001).

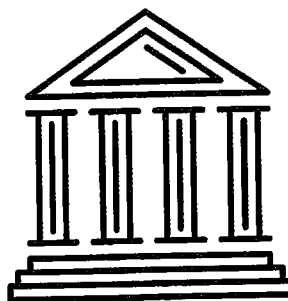
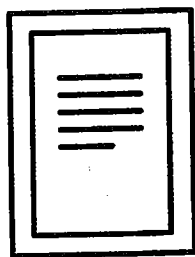
11 Rule 11(e)(1), N.D.R.Civ.P. (2016).

12 "Opportunity for All or Pandora's Box," Scott Russell, *Bench & Bar* (Feb. 2007), available at <http://hmbenchbar.com/2007/02/opportunity-for-all-or-pandoras-box/>, last visited 9/18/2017.

13 Rule 1.1, MRPC.

14 Rule 1.8(h), MRPC.

15 [https://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](https://www.americanbar.org/groups/delivery_legal_services/resources.html), last visited 9/18/2017.



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By SUSAN HUMISTON

## Is your firm complying with the Minnesota Professional Firms Act?

"For those of you who like to live on the edge, let me offer you some thoughts on compliance. Beyond the obvious fact that your firm is violating state law (and engaged in the unauthorized practice of law—a misdemeanor), there are some potential practical ramifications you may wish to take into consideration as well."

**D**id you know that a legal entity cannot engage in the practice of law in Minnesota unless it is organized under the Minnesota Professional Firms Act (MPFA)?<sup>1</sup> Did you know that no firm can provide legal services in Minnesota unless that firm has invoked the requirement of the act and filed certain documents with the board exercising jurisdiction over the professional firm?<sup>2</sup> Did you further know that the Office of Lawyers Professional Responsibility, on behalf of the Lawyers Professional Responsibility Board, is charged with monitoring firms' compliance with the act?<sup>3</sup>

I suspect that many of you may not have known, and are now wondering whether someone has taken care of this for your legal entity. If you do not know, now is the time to take a minute to confirm that someone has been addressing this for your firm. If you just checked and no one has any idea what you are talking about, take heart! It is fairly easy to bring your firm into compliance

with the law, and with the annual filing deadline approaching, now is the perfect time to review your firm's compliance.

### The law

The MPFA can be found in Chapter 319B. Please take a minute to review the act. Since 1973, Minnesota state law has required all corporations, limited liability companies, and limited liability partnerships that provide legal services in Minnesota—whether organized under the law of Minnesota or another state—to file an initial report before offering services, and annual reports thereafter by the first of each calendar year.<sup>4</sup> The act does not apply to sole proprietorships. The initial report is straightforward, and can be found at our website ([lprb.mncourts.gov](http://lprb.mncourts.gov)) by selecting Professional Firms from the Lawyer Resources tab. You must include with this form the applicable organization document(s), which demonstrate that the firm has elected to invoke the act to provide specified professional services. The first-time fee is \$100.

Even though the first report is straightforward (it has only five questions), many reports are submitted with inaccurate or incomplete information. This causes a lot of back and forth correspondence with our office, which can be easily avoided. Some tips: Make sure you enclosed the required document(s), which must denote on its face that it has also been filed with the Secretary of State or with accompanying proof of filing with the Secretary of State. Use the name of your firm as registered with the Secretary of State; do not file under an assumed

name and make sure your firm name has the required name endings as specified by the act—we check.<sup>5</sup> The first report must be signed by an owner of the firm who is a licensed attorney; non-lawyers cannot sign the report. (Non-lawyers or other disqualified individuals also cannot have an ownership interest in the firm.)<sup>6</sup> The signature should be notarized, since statements are being made under oath.

Thereafter, on an annual basis before January 1, the firm must file a report with this Office on the form specified, along with a \$25 annual fee. You must file this annual report even if no legal services were provided in the year; the filing obligation continues while the entity remains in legal existence. The annual report is also straightforward; it only contains six questions. It is very similar to the initial report and the same tips apply. Once you have filed a first report, every November the Office will helpfully mail you an annual report to complete before the January 1 deadline. That's it—all there is to it!

### What if I don't file as required?

If you have inadvertently overlooked this legal requirement, please act now. You cannot fix what has already occurred, but you can bring your firm into compliance. For those of you who like to live on the edge, let me offer you some thoughts on compliance. Beyond the obvious fact that your firm is violating state law (and engaged in the unauthorized practice of law—a misdemeanor), there are some potential practical ramifications you may wish to take into consideration as well.



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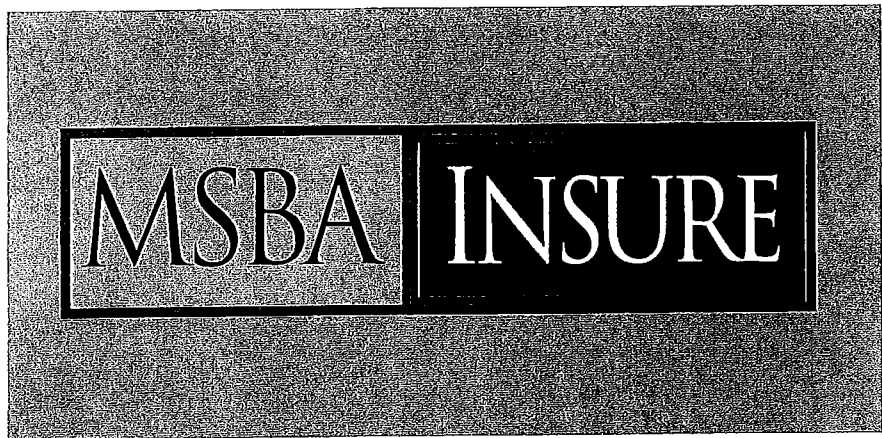
In an unpublished decision, the Minnesota Court of Appeals upheld a trial court's decision to hold an individual owner liable for the law firm debt, due in part to the fact that the owner had misrepresented his corporate status as compliant with Minnesota law.<sup>7</sup> Similarly, in California, a law firm was unable to enforce its fee agreements in a tortious interference action because it was not lawfully registered as a law corporation under California's law corporation statute.<sup>8</sup> Who wants to risk personal liability, or powerlessness to collect fees, when compliance is so straightforward? You should know that information filed by the professional firm is public data under the Minnesota Data Practices Act, and thus accessible to those who care to request it.<sup>9</sup>

**Conclusion**

Only duly organized professional firms should be providing legal services in Minnesota. Ownership of professional firms is limited to licensed professionals, and the filing requirements, which include disclosure of ownership interests, help this Office maintain oversight of this requirement. While it may involve a bit of annual busywork, this act (which covers not only legal services but other professional services such as engineering, social work, dentistry, and accounting) has been in place for several decades and deserves your attention. If you have any questions regarding required filings, please review the information at our website or call the Office at (651) 296-3952, and ask to speak with our professional firms staff. ▲

**Notes**

<sup>1</sup> See Minn. Stat. § 481.02, subd. 2 (2017) (providing no corporation organized for pecuniary profit may give legal advice or otherwise engage in the practice of law by or through its officers or employees unless organized as a professional firm).  
<sup>2</sup> Minn. Stat. §319B.11, subd. 3 (2017).  
<sup>3</sup> Minn. Stat. §319B.02, subd. 2 (2017).  
<sup>4</sup> Minn. Stat. §319B.02, subd. 10 (2017); Minn. Stat. § 319B.04, subd. 2 (2017).  
<sup>5</sup> Minn. Stat. §319B.05, subd. 2 (2017).  
<sup>6</sup> Minn. Stat. §319B.07 (2017).  
<sup>7</sup> *Miles v. Cohen*, 1999 WL 451336 (Minn. 7/6/1999).  
<sup>8</sup> *Cappiello v. Boyle*, 87 Cal.App.4th 1064 (2001).  
<sup>9</sup> Minn. Stat. §319B.11, subd. 8 (2017).



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Melissa Heinlein  
✉ melissa@mnlordlaw.com



By SUSAN HUMISTON

## Lawyer well-being and lawyer regulation

“To be a good lawyer, one has to be a healthy lawyer,” wrote the co-chairs of a national panel on lawyer well-being earlier this year in introducing their report, “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change.”<sup>1</sup>

Your thoughts? At first glance, I think most people would say they agree—this is obvious, right? On reflection, however, you may start thinking about all of the good lawyers you know whose lives are a mess. Their work/life balance is out of whack; they cannot find the time they need to spend with their children; their kids hate Mom or Dad’s job and the constant competing for attention with a smart phone. Maybe their after-work happy hours get pretty rowdy as stressed co-workers blow off steam. Or perhaps you have co-workers with DUIs, or for whom exercise and healthy eating habits have fallen by the wayside. Yet many of them remain good, or even great, lawyers by and large.

This is the toxic contradiction that underlies our profession, and we are all too aware of this fact due to current studies and personal experiences. A recent task force led by a partnership of lawyer assistance programs and disciplinary counsel assembled a diverse group of stakeholders in an effort to push the profession to get serious about problem-solving. And that group has challenged each state’s professional leadership to implement several very specific recommendations. I encourage everyone to read this call to action, particularly those in positions of leadership within the profession. In this column, I would like to

focus specifically on the recommendations related to attorney regulation and how this Office is thinking about these recommendations as part of our own strategic planning process.

### Recommendations for regulators

The report defines “regulators” broadly so as to include everyone who helps the highest court in each state regulate the practice of law—including disciplinary and admission offices, boards, volunteer committee members, and professional liability attorneys who advise firms and represent lawyers in regulatory matters. There are 13 specific recommendations for this category of stakeholders.

1. Adopt regulatory objectives that prioritize lawyer well-being.
2. Modify the rules of professional conduct to endorse well-being as part of a lawyer’s duty of competence.
3. Expand continuing education requirements to include well-being topics.
4. Require law schools to create well-being education for students as an accreditation requirement.
5. Reevaluate bar application inquiries

about mental health history.

6. Adopt essential eligibility admission requirements.
7. Adopt a rule for conditional admission to practice law with specific requirements and conditions.
8. Publish data revealing the rate of denied admissions due to mental health disorders and substance use.
9. Implement proactive management-based programs that include well-being components.
10. Adopt a centralized grievance intake system to promptly identify well-being concerns.
11. Modify confidentiality rules to allow one-way sharing of lawyer well-being-related information from regulators to lawyer assistance programs.
12. Adopt diversion programs and other alternatives to discipline that have proven successful in promoting well-being.
12. Add well-being-related questions to the multistate professional responsibility exam (MPRE).<sup>2</sup>


Minnesota has already implemented Items 6 and 7 through its conditional admissions rule and essential eligibility requirements.<sup>3</sup> Items 1, 2, and 9-12 are generally within the purview of this Office. Because this Office has recently commenced strategic planning, it’s a perfect time to talk briefly about each and let you know about our planning process.

### Strategic planning and lawyer wellness

This Office has recently undertaken a strategic planning process in order to create a plan for the next three to five years. Committee members include the members of the Executive Committee of the Lawyers Professional Responsibility Board, the past chair of the board, as well as the director of professional services and staff of the OLPR. As part of this process, we are thinking about the mission, vision, and values of the Office, and how we fit generally within the framework of lawyer regulation. A terrific starting point has been Item 1 from the above list.

In 2016, the ABA adopted model regulatory objectives that they encouraged each state’s highest court to adopt.<sup>4</sup> These objectives specify the purposes of lawyer regulation in an attempt to provide guideposts for all regulation (i.e., protection of the public, transparency, access to justice). The Supreme Courts of Colorado and Washington have adopted their own regulatory objectives. Other states are discussing the subject. As noted, the report recommends including a wellness component within any adopted regulatory objectives. Because the planning committee is thinking broadly about issues of lawyer well-being and discipline, the adoption of regulatory objections and what they would look like in Minnesota is currently under active discussion.

Item 2, I’m sure, has sent shock waves through anyone who has actually read it. Change Rule 1.1 to include well-being as part of a lawyer’s duty of competence? Oh great, another basis by which lawyers can be disciplined, you think to yourself. The report notes, however, that the task force does not recommend discipline solely for a lawyer’s failure to satisfy the well-being requirement. The goal of the proposed rule change is not to threaten lawyers with discipline but to underscore the importance of lawyer well-being to client representation.



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

## Professional Responsibility

It will be interesting to see how this proposal plays out, and I am keeping an open mind about the proposal.

Item 9 is near and dear to my heart. In general, I believe that the more this Office can do to proactively educate and assist lawyers, the better off the profession and public are. That is why I and the attorneys in the Office try to prioritize making CLE presentations, and emphasize our advisory ethics line (651-296-3952). There are only so many hours in a day, however, and because our primary purpose is enforcement of the Rules of Professional Conduct, we cannot always do as much as we want to. But I believe strongly that proactive education and assistance are core responsibilities of the Office; the challenge for myself, the board, the Office, and the strategic plan is how to do as much of this as possible with the resources available.

Item 10, a centralized intake system, is something I want to study and learn more about. Item 11 is currently in process; we are working on a proposed rule change that would allow this Office to share information with a lawyer assistance program such as Lawyers Concerned for Lawyers if we believe there is an issue. Current confidentiality rules prevent us from doing so until a matter is public. Item 12, diversionary programs, is also something that I want to learn more about. As the report says, "Discipline does not make an ill lawyer well."<sup>5</sup> The USPTO ethics office just adopted a diversionary program. Minnesota has private probation, which is used to sometimes address minor lawyer misconduct (which often includes an underly-

ing mental health or substance use disorder component), but private probation is considered discipline in Minnesota.

### Conclusion

The recommendations listed above are just a small part of the practical recommendations contained in the well-being report. Many stakeholders are still digesting the recommendations, as this Office continues to do, and I'm excited to see people answering this call to action. As the year ends and we look ahead to 2018, I welcome your thoughts on how attorney regulation can assist you in your practice, and how we can work together to emphasize the importance of lawyer well-being. It truly is essential to public trust and confidence in the profession. I can be reached at the phone number listed above or [susan.humiston@courts.state.mn.us](mailto:susan.humiston@courts.state.mn.us). ▲

### Notes

- <sup>1</sup> "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change," The Report of the National Task Force on Lawyer Well-Being, August 2017, introductory cover letter from Co-Chairs Bree Buchanan and James Coyle, report available at [www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf).
- <sup>2</sup> Lawyer Well-Being Report at 25-30.
- <sup>3</sup> Rules 5 and 16, Minnesota Rules for Admission to the Bar (2017).
- <sup>4</sup> ABA Model Regulatory Objectives for the Provision of Legal Services, adopted February 8, 2016.
- <sup>5</sup> Lawyer Well-Being Report at 29.



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BY SUSAN HUMISTON

## Harassment and attorney ethics

**T**ime's 2017 Person of the Year was the "Silence Breakers," women who courageously went public with allegations of sexual misconduct against powerful men. These individuals, and the #MeToo movement they spawned, were honored because they, and the media covering their stories, set in motion a high-velocity cultural shift by effectively "pushing us all to stop accepting the unacceptable."<sup>1</sup> The movement has initially caused powerful men—primarily in entertainment, media, and politics—to lose their positions of power. How far-reaching the cultural shift will be is an open question. Whether more women will feel like they can come forward and be believed, without seeing their careers suffer as a result, remains unknown. As we watch how our culture handles these issues moving forward, it is a good time to remind those in the legal profession about the ethical rules in place on this topic.

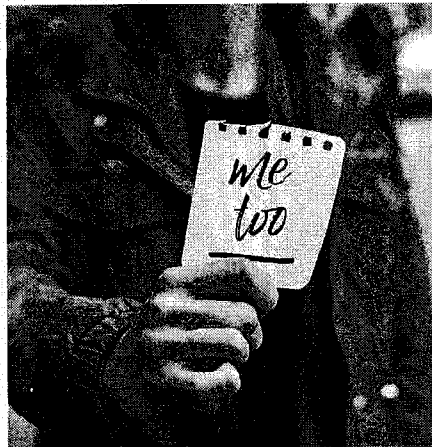
### Minnesota's ethics rules

It has long been professional misconduct in Minnesota for a lawyer

to "harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities."<sup>2</sup> It is also professional misconduct for a lawyer to "commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness

as a lawyer."<sup>3</sup> This latter rule applies irrespective of whether the act was committed in connection with the lawyer's professional activities, although that is one factor to be considered in determining whether the act reflects adversely on a lawyer's fitness to practice.<sup>4</sup>

Minnesota adopted these rules in 1990 and 1991, and in many respects led the country in this area. Over the years, an additional 13 states added anti-harassment or anti-discrimination requirements to their ethics rules.



As the comments to Minnesota's rule make clear, the anti-discrimination rules in particular are based upon the premise that "human equality lies at the very heart of our legal system."<sup>5</sup> "A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession."<sup>6</sup>

National progress on this front has been slow. In 2016, the ABA finally approved an amendment to Model Rule 8.4 to add subparagraph (g), which is similar but not identical to Minnesota's long-existing Rule 8.4(g), but limits misconduct to the practice of law.<sup>7</sup> Only a few states have subsequently adopted Rule 8.4(g) that did not already have some form of anti-harassment or anti-discrimination rule (specifically, Vermont and the U.S. Virgin Islands); other states are studying the proposed rule. This still leaves the vast majority of U.S. states without a specific rule to

address discrimination or harassment by lawyers. It will be interesting to see if the current cultural climate changes that fact.

### Discipline in Minnesota

In 1988, even before Minnesota had specific rules prohibiting discriminatory and harassing conduct, the court publicly disciplined Geoffrey Peters, then dean of the William Mitchell College of Law, for repeatedly engaging in unwelcome physical contact and verbal communications of a sexual nature with four women employees, two of whom were also law students.<sup>8</sup> In that case, Dean Peters argued that he was merely a "tactile" man and that his conduct was misunderstood by "overly sensitive" individuals. The court disagreed, appropriately finding his actions (such as walking up to a student, placing his hand on the back of her head, running his fingers through her hair and down to her waist, and letting his hand come to rest on the small of her back, among other examples of unwelcome physical touching) harassment.<sup>9</sup>

An attorney, Thomas Ward, received public discipline for making unwanted physical contact of a sexual nature with an applicant for employment in his office; the applicant was a 20-year-old recent business school graduate.<sup>10</sup> Clark Griffith, while an adjunct at William Mitchell College of Law, engaged in sexual harassment of a law student, and entered an *Alford* plea to indecent exposure for conduct involving that same student.<sup>11</sup> Mr. Griffith also attempted to pressure the student to withdraw her complaint once made (with suggestions of assistance with future employment) and continued to contact the student despite being specifically instructed by law school administration and the student herself to cease all communications.<sup>12</sup>

Other forms of harassment and discrimination also subject attorneys to discipline. Rebekah Nett, in a series of bizarre court filings, called a bankruptcy judge a "Catholic Knight Witch Hunter," the Chapter 7 trustee a "Jesuitess," and the U.S. trustee a "priest's boy." The filings also asserted that "these dirty Catholics have conspired to hurt Debtor."<sup>13</sup>



**SUSAN HUMISTON** is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

## Professional Responsibility

An attorney has also been transferred to disability status after making a series of 12 calls to a client within 60 minutes, which calls included harassing statements on the basis of religion and national origin.<sup>14</sup>

### And do not forget...

There are other rules attorneys should note. Sex with clients is wrong, unless a consensual sexual relationship existed prior to the attorney-client relationship.<sup>15</sup> Sex with witnesses can also present a conflict. Attorneys also cannot, in representing a client, use means that have no substantial purpose other than to embarrass, delay, or burden a third party.<sup>16</sup>

Minnesotans should be proud that the state has been a leader in implementing strong ethics rules designed to prevent harassment and discrimination by lawyers. Lawyers hold positions of power in law firms, in courtrooms, in politics, and in corporations, and abuse of those positions by conduct that harasses or discriminates should be and is professional misconduct. Thank you to the "Silence Breakers" who have courageously stepped forward to speak out, whether against a national figure or a local attorney. ▲

### Notes

<sup>1</sup> "The Choice" by Edward Felsenthal, *Time*, at <http://time.com/time-person-of-the-year-2017-silence-breakers-choice> (last visited 12/11/2017).

<sup>2</sup> Rule 8.4(g), Minnesota Rules of Professional Conduct (MRPC).

<sup>3</sup> Rule 8.4(h), MRPC.

<sup>4</sup> Rule 8.4(h)(4), MRPC.

<sup>5</sup> Rule 8.4(h), MRPC, Comment [6].

<sup>6</sup> *Id.*

<sup>7</sup> ABA Model Rule 8.4(g), Revised Resolution 109, August 8, 2016.

<sup>8</sup> *In re Peters*, 428 N.W.2d 375 (Minn. 1988).

<sup>9</sup> *Id.* at 376.

<sup>10</sup> *In re Ward*, 726 N.W.2d 497 (Minn. 2007).

<sup>11</sup> *In re Griffith II*, 838 N.W.2d 792 (Minn. 2013).

<sup>12</sup> *Id.* at 797.

<sup>13</sup> *In re Nett*, 839 N.W.2d 716 (Minn. 2013).

<sup>14</sup> *In re Woroby*, 779 N.W.2d 825 (Minn. 2010).

<sup>15</sup> Rule 1.8(j), MRPC.

<sup>16</sup> Rule 4.4(a), MRPC.

memo

RECEIVED

JAN 22 2018

OFFICE OF LAWYERS  
PROF. RESP.

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 Rule 1.6(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.<sup>1</sup> N.Y. State Bar Op 1032, which the Burke memo cites to

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<sup>1</sup> 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.

## **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 to table consideration of the MSBA's remaining proposed amendments to Rule 1.6(b)(8) for further evaluation and discussion by the Rules Committee and the LPRB
4. Committee voted 5-1 on a motion to recommend that the LPRB withdraw Opinion 24 pending LPRB's consideration of 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
<p>(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</p>	<p>(8) the lawyer reasonably believes the disclosure is necessary to <u>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</u> <del>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;</del></p>
	<p>(9) the lawyer reasonably believes the disclosure is necessary to <u>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.</u> <del>comply with other law or a court order;</del></p>

OPINION 24	BURNS ARTICLE
<p>“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.”</p> <p>“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.”</p>	<p>Comments posted on the internet or another public form should not be considered a “proceeding”</p> <p>“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.”</p>

memo

RECEIVED

JAN 22 2018

OFFICE OF LAWYERS  
PROF. RESP.

To: Lawyers Professional Responsibility Board  
From: William J. Wernz  
Date: January 22, 2018  
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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.<sup>1</sup> N.Y. State Bar Op 1032, which the Burke memo cites to

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<sup>1</sup> 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.

## **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
<p>(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</p>	<p>(8) the lawyer reasonably believes the disclosure is necessary to <u>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</u> <del>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;</del></p>
	<p>(9) the lawyer reasonably believes the disclosure is necessary to <u>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.</u> <del>comply with other law or a court order;</del></p>

OPINION 24	BURNS ARTICLE
<p>“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.”</p> <p>“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.”</p>	<p>Comments posted on the internet or another public form should not be considered a “proceeding”</p> <p>“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.”</p>