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Quandaries and Quagmires: Legal ethics and risk issues as of January 2018

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The national legal press has been buzzing recently with breaking news in the areas of legal ethics, law firm risk issues, and the law of lawyering. In addition, a couple new developments will surface soon in Minnesota. Here is a snapshot — as of January 2018 — of the hottest legal ethics and risk issues right now.

Last month, the ABA Standing Committee on Ethics and Professional Responsibility issued two new Formal Opinions:

1. ABA Form. Op. 478 (Dec. 8, 2017) covers "Independent Factual Research by Judges Via the Internet." (A link to the ABA article is embedded in this column at minnlawyer.com.) Here's the headnote:

> *Easy access to a vast amount of information available on the Internet exposes judges to potential ethical problems. Judges risk violating the Model Code of Judicial Conduct by searching the Internet for information related to participants or facts in a proceeding. Independent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice. The restriction on independent investigation includes individuals subject to the judge's direction and control.*

The opinion is most noteworthy for a series of hypotheticals; here are two – can you spot the ethics issue?

> *Hypothetical #1: In a proceeding before the judge in a case involving overtime pay, defendant's counsel explains that the plaintiff could not have worked more than 40 hours per week because defendant's restaurant is in an "industrial area" and only open for breaks and lunch during the work-week and not on weekends. The judge is familiar with the area and skeptical of counsel's claims. The judge checks websites like Yelp and Google Maps, which list the restaurant as being open from 7 am to 10 pm, seven days each week.*

Hypothetical #4: A trial judge presiding over an owner's claim for insurance coverage heard testimony from competing experts about their investigation and opinions about the cause of a fire that destroyed plaintiff's property. While preparing findings of fact and conclusions of law the judge received summaries her law clerk created from journals and articles on the proper techniques and analysis for investigating fires of unknown origin.

The basic principle that a judge may not do an investigation outside the record on a case before her is well-established. But given how pervasive internet searches have become in daily life, it is not surprising that this is deemed a possible problem area for judges. (Perhaps even more so for judges' clerks — the opinion puts the responsibility for clerk's web research squarely on the judge.)

A couple of years ago, 7th Circuit Judge Richard Posner caused a stir when he acknowledged doing online research on fact issues in an appeal before him. (A link to an article titled "Dr. Posner Will See You Now: 7th Circuit Judges Reignite a Spirited Debate over Judicial Internet Research" is embedded in this column at minnlawyer.com.)

Perhaps even more concerning is the possibility that a judge could engage in such conduct and never disclose it. One commentator has suggested the possibility that counsel might someday request the browsing history of the judge and his clerks.

2. ABA Form. Op. 479 (Dec. 15, 2017) interprets – quite narrowly – "The "Generally Known" Exception to Former-Client Confidentiality." (A link to the ABA article is embedded in this column at minnlawyer.com.) Here's the headnote:

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.

This opinion is probably of primary interest to ethics nerds, but it has a much broader practical application. Think war stories. Every time you tell a story about a client's matter you once handled (brilliantly), the former client confidentiality rule should be at the front of your mind. Very likely the story is not "generally known;" that's why you think it worth telling.

The opinion seems to significantly narrow the exception from how it had been interpreted before. (The Restatement took a broader approach in 2000, suggesting that information could be generally known if it could be obtained through publicly available information. 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."). Several questions about the opinion have already been noted, and it is safe to assume there will be further discussion and argument about the topic in the future. And it is not entirely unheard of for a court or state disciplinary authority to reject the reasoning of an ABA ethics opinion.

3. New ethical uncertainties for cannabis lawyers?

Early this month, Attorney General Jeff Sessions made national news headlines by rescinding a policy memo adopted by the Obama administration in 2013 (known as the Cole Memorandum: //en.m.wikipedia.org/wiki/Cole Memorandum) that had advised federal law enforcement not to pursue marijuana-related charges in states that have legalized the medical or recreational use of the drug. (A link to an American Lawyer article titled "The Best Laid Plans for Marijuana Laws Go Astray" is embedded in this story on minnlawyer.com.)

This development comes after several years of careful work by courts and ethics authorities to come up with a rationale that would allow attorneys in cannabis-legal states to advise clients involved in the burgeoning marijuana industry. The problem was ABA Model Rule 1.2 (d), which provides that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal…" Obviously, even though a state may have legalized marijuana (whether medical or recreational), it was still strictly illegal as a matter of federal law. Many ethics opinions were issued over the past several years to provide an ethical safe harbor for such legal advice. Query whether this action by AG Sessions takes us back to square one.

4. New ABA Advertising Rules on the horizon?

The ABA recently released draft rule changes that if adopted will significantly alter the advertising rules. (A link to the draft rule changes is embedded in this column at minnlawyer.com.) The proposed changes will be considered for adoption by the House of Delegates at the ABA annual meeting in Chicago in August 2018. A detailed memorandum describing the history and rationale for the rule changes has been issued. (Links to the draft rule changes and the memorandum are embedded in this column at minnlawyer.com.)

5. Lawyer Well-Being – the hottest topic?

Last year a National Task Force on Lawyer Well-Being issued a comprehensive report on alarmingly increasing problems with what it called "lawyer well-being," a concept that comprehends the many different ways in which lawyers can be impaired, including substance abuse, stress, depression, and other problems. The report focused on practical steps that law firms, disciplinary authorities, malpractice insurers, and other bar-related groups could take to make a difference. (A link to the report is embedded in this column at minnlawyer.com.)

The ABA has embraced the topic, and it is likely to be a subject of substantial discussion this year.

6. Ethics and risk issues involving sexual harassment in the Post-Harvey Weinstein Reckoning?

The ramifications of the recent cultural phenomenon known as the Reckoning are only beginning to be felt. It has been "one of the highest-velocity shifts in our culture since the 1960s" in the judgment of Time Magazine, which declared the silence-breakers behind the Reckoning to be its 2017 Person of the Year.

This phenomenon will no doubt have an impact on the legal profession. Sexual harassment by lawyers and judges has been recognized as a legal ethics issue in Minnesota for decades. Two very recent articles by Minnesota legal ethics experts outline the history and scope of attorney discipline for sexual harassment. First, Bill Wernz wrote a column entitled "Harassment, Sex, Discipline," initially for *Minnesota Lawyer*, and then an expanded treatment for his MSBA Legal Ethics Blog.

Second, in her Professional Responsibility column in the January 2018 issue of Bench & Bar of Minnesota, Susan Humiston, director of the Office of Lawyers Professional Responsibility, addressed "Harassment and Attorney Ethics." Both pieces are well worth reading. (Links to both pieces are embedded in this column at minnlawyer.com.)

Today, lawyers and law firms must recognize two undeniable facts: (1) the standards in this area have just changed fundamentally, and (2) the new standards will now be applied retroactively. A comprehensive treatment of the issues — including best practices for law firms — will be forthcoming in the March 2018 issue of Bench & Bar.

7. Finally, a couple of breaking issues peculiar to Minnesota: Two significant changes to the Minnesota ethics rules are being proposed in 2018.

The first change involves Rule 5.5, concerning the unauthorized practice of law in a multijurisdictional context. A recent Minnesota decision, *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016), received strong criticism, both here and nationally, for its holding disciplining a lawyer who assisted a family member with a small collection matter in another state where he wasn't licensed. The amendment to Rule 5.5(c)(4) is intended to respond directly to the court's invitation in the opinion to suggest an amendment that would expand the rule to better reflect the bar's understanding of the meaning of fields of practice that are "reasonably related" to a lawyer's practice in a jurisdiction in which the lawyer is licensed.

The second proposed rule change is intended to address this issue: Should a lawyer ever be able to disclose confidential information to defend against a public attack by a client in social media, online reviews, etc.? Lawyers Board Op. 24 (Sept. 30, 2016) says, categorically, "No." The MSBA Rules Committee proposes an amendment to Rule 1.6(b), to clarify that the answer should be, "Yes, but only in very limited circumstances."

The rule change would amend Rule 1.6 to allow a lawyer to respond to a client's specific and public accusation of misconduct by the lawyer, made outside a legal proceeding, 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 the lawyer's representation of the client. The bar association and the Lawyers Board are attempting to reach an agreed approach to this issue at this writing.

CHUCK LUNDBERG is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now teaches at the University of Minnesota Law School and consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics (www.lundberglegalethics.com).