

Quandaries and Quagmires: A spring potpourri of legal ethics news

By: Charles Lundberg May 1, 2018⁰



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It's late April 2018. The historic blizzard last weekend is now just a bad memory; spring has finally arrived in Minnesota, along with several ethics-related news items:

New rule amendments

At its assembly meeting April 20 the Minnesota State Bar Association voted to petition the Minnesota Supreme Court for two amendments to the Rules of Professional Conduct proposed by its Rules Committee (see sidebar for the full text of the changes):

Rule 5.5: The first change deals with the unauthorized practice of law in a multijurisdictional context. A recent Minnesota disciplinary decision, *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016), received strong criticism, both here and nationally, for affirming a private admonition against a Colorado lawyer who assisted family members with a small collection matter in Minnesota, where he wasn't licensed. It was a 4-3 decision, with a vigorous dissent. The MSBA changes respond directly to the court's invitation to suggest amendments that would expand the rule to better serve clients' needs for multijurisdictional legal services.

Rule 1.6: The second proposed rule change addresses 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 problems with that opinion have been discussed several times by Bill Wernz. See these articles at my.mnbar.org/blogs/william-wernz: "[Quandaries and Quagmires: Lawyers Board Opinion 24: some questions](#)" and "[Board Forbids Lawyer Self-defense in Public Forum – a Further Look – Board Op. 24.](#)"

The MSBA's amendment to Rule 1.6 would create a narrow exception, allowing 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.

Minnesota's proposed expansion of the self-defense exception to client confidentiality where the client trashes the lawyer on social media is already receiving national attention. Bill Wernz will be presenting the Minnesota experience at the annual ABA National Conference on Professional Responsibility in late May. Here's the blurb for the program:

"What Do You Mean I Can't Defend Myself on YELP®?"

"This panel will discuss the application (or not) of confidentiality exceptions when a claim is made on social media rather than in a proceeding such as a disciplinary charge, fee dispute, motion for sanctions, or malpractice claim. Lawyers have faced disciplinary sanctions for attempting to defend themselves by responding to former clients' online false and sometimes defamatory negative reviews. Should the exceptions in the confidentiality rule permit lawyers to disclose information to defend their reputations online? What about simply posting an article that discusses a former client's public record case? This panel will discuss the policy considerations underlying proposed amendments to the Rule in Minnesota, as well as recent ABA opinions addressing the extent to which lawyers may disclose client information."

New ABA ethics opinions

There has been a plethora of ABA Formal Opinions on many interesting and difficult topics in just the last couple months, including yet another new one this past week: *A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error* (FO 481, 4/17/18); *Confidentiality Obligations for Lawyer Blogging and Other Public Commentary* (FO 480, 3/6/18); *The "Generally Known" Exception to Former-Client Confidentiality* (FO 479, 12/15/17); and *Independent Factual Research by Judges Via the Internet*(FO 478, 12/8/17).

Bill Wernz raised some troubling issues about FO 479 shortly after it was issued: See *Wernz, New ABA Op. 479: Using former clients' information (February 19, 2018)*, also posted on his web blog ([MSBA Ethics Blog, 2/20/18](#))

The Minnesota Legal Ethics Summit VIII

Minnesota's premier CLE ethics program will take place on June 8. Now in its eighth year, the summit brings together the leaders in the ethics bar for an intense 3-hour program. This year's panels will address all the above issues, plus a couple more, including Lawyers, Sex, and Harassment in the #MeToo Era; New Developments in Minnesota legal malpractice law; the ethics of Internet Scams and Technological Literacy; and Ethical States of Mind: False Statements/Dishonesty vs. "Should Have Known." In addition, this year's summit will feature a conversation with new 8th Circuit Judge David Stras about lawyer discipline in Minnesota, drawing on his experience as Supreme Court liaison to the Lawyers Board. (Hope to see you there on June 8.)

The [brochure](#) for the summit is in the mail now and can be found at www.minncle.org. As always, in the weeks leading up to the Summit we grapple with how to include brand new developments that have surfaced since the program was finalized. This year, we are watching the ethical implications of the Michael Cohen affair, first the extraordinary disclosure that he personally paid Stormy Daniels for her nondisclosure agreement, for the benefit of his client, President Donald Trump, but without the president's knowledge or consent; and now the fact that the FBI has raided his law office and took client files.

New law firm culture issues

Finally, a couple of new ethics-based issues have surfaced recently. While firmly grounded in the ethics rules, both are better understood as raising broader issues of law firm culture.

First, the hottest new ethics-based risk issue for law firms is Lawyer Well-Being. The ABA has embraced this issue. It will be addressed at length at the ABA Spring Legal Malpractice Conference this coming week in Washington D.C. A National Workshop on Attorney Well-Being in the Law Firm Setting will be presented by the ABA Working Group to Advance Well-Being in the Legal Profession, followed by a plenary program on New Responsibilities for Impaired Lawyers for Law Firms and LPL Insurers. To learn more, see "[The Path to Lawyer Well-Being: Practical Recommendations for Positive Change](#)" at www.americanbar.org.

Second, several ethics and risk issues arising from sexual harassment in the law firm have surfaced in the #MeToo movement. See Lundberg, "[#MeToo in the Law Firm: Lessons for lawyers from the post-](#)

[Weinstein reckoning](#)" (Bench & Bar of Minnesota, 2/27/18). A program on this topic is now being produced for the MSBA annual convention in June.

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](#).

Sidebar:

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) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense by the lawyer in an actual or potential civil, criminal, or disciplinary proceeding 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;~~

Rule 5.5:

- A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5(c), ~~and (d), and (e)~~ for lawyers not admitted to practice in Minnesota.
- A lawyer who is not admitted to practice in ~~this jurisdiction~~ Minnesota shall not:
 - except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of Minnesota law; or
 - hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law ~~in this jurisdiction~~.
- A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:
 - are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;
 - are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
 - are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably-related

services include services which are within the lawyer's regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law.

- A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in ~~this jurisdiction~~ Minnesota that ~~are services that the lawyer is authorized to provide by~~ exclusively involve federal law or ~~the other law~~ of ~~this another jurisdiction in which the lawyer is licensed to practice law,~~ provided the lawyer advises the lawyer's client that the lawyer is not licensed to practice in Minnesota.
- A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are performed on behalf of a person who has a family, close personal, or prior professional relationship with the lawyer.