MINNESOTA LAWYER

Bill Wernz was photographed at Minnesota Public Radio in St. Paul, Minn. Friday, March 6, 2015.

Quandaries and Quagmires: Board forbids lawyer self-defense in public forum

By: William J. Wernz April 10, 2017 0

For decades, Minnesota ethics rules allowed a lawyer to disclose client information as needed to "defend… against an accusation of wrongful conduct." No longer, according to the Lawyers Board.

Board Opinion 24 advises that a lawyer may not disclose client information to defend against the client's accusation of wrongful conduct, or other criticisms, "in any public forum," other than a judicial proceeding.[i]

Board Opinion 24 interprets Rule 1.6(b)(8), R. Prof. Conduct, as amended in 2005. The "controversy clause" of 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 … defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client…"[ii]

Two scenarios will illustrate the breadth and error of Opinion 24's disclosure prohibition. Consider the scenarios in relation to the controversy clause. Consider also that Board opinions may state only the "scope or plain meaning" of a rule. *In re Admonition 99-42,* 621 N.W.2d 240 (Minn. 2001).

SCENARIO 1

A lawyer, Lee, is running for county attorney in a rural area. The election is in five days. Lee's former client, Carp, appears at a candidates' town hall forum, either in person or by webcast. Carp falsely alleges that Lee advised Carp to withhold certain information when Carp sold property. Carp states, "Lee is both dishonest and incompetent." Lee's file contains a letter in which Lee specifically advised Carp to disclose the information in question. When Carp did not respond to the letter affirmatively, Lee withdrew from representation. As it happened, Carp's attempted fraud did not succeed and Lee's services were not use to perpetrate a fraud. When Carp previously made the same allegation privately to Lee, Lee showed the letter to Carp, but Carp refused to withdraw his claim. Anticipating Carp's public allegation, Lee has brought the letter to the forum. The forum moderator and local broadcast media ask Lee's response. May Lee deny ever having given such advice? May Lee display the letter?

SCENARIO 2

Rapp, a former client of Counsel, has a wide readership for her regular posts on Facebook and Twitter. On these sites and on a lawyer rating service, Rapp posts an allegation that Counsel "stole" her money in a personal injury case. Rapp's post goes viral and is quoted by the local media. Counsel has a document, signed by Rapp, in which Rapp agrees to the distribution of the proceeds of the verdict that Counsel obtained for Rapp. Attached to the document are financial documents showing that the distributions were entirely proper. Counsel's practice relies on a steady stream of new clients. Counsel's marketing consultant advises that if Rapp's allegation is not rebutted, Counsel's new client intake will drop by 25 percent to 40 percent. In addition, Counsel is a finalist in two RFP's for outside general counsel services for organizations. The organizations tell Counsel the other finalist will be chosen if Counsel does not immediately clear up Rapp's charges. Rapp, like Carp, refuses to retract. May Counsel respond online and in communications to the organizations, by denying or disproving the allegations?[iii]

Under ordinary and plain meanings of "controversy," these lawyers have actual or potential controversies with their former clients.[iv] Nonetheless, Op. 24 categorically forbids self-defense by disclosure of client information. Opinion 24 broadly applies to all "comments," by clients or anyone else, whether "negative or otherwise." Op. 24 applies to statements in "any. . .public forum." According to Op. 24, the controversy clause does not ever permit a lawyer to disclose client information to defend against negative statements in any public forum.[v]

A rationale for Opinion 24 has been offered by the Office of Lawyers Professional Responsibility (OLPR). Patrick R. Burns, *Client Confidentiality and Client Criticisms,* Bench & B. of Minn., Dec. 2016.[vi] However, OLPR's rationale undermines Op. 24, because OLPR's definitions of "controversy" would be met by Scenarios 1 and 2.

OLPR's article, citing Black's Law Dictionary definitions, concludes that a "controversy" under Rule 1.6(b)(8) means (1) A public disagreement or a dispute, and (2) "[A] controversy involving issues that are debated publicly and that have substantial ramifications for persons other than those engaged in it." The article argues that the "substantial ramification" test is "unlikely" to be met by internet ratings. Whether the scenarios are "unlikely" or not, however, they fit OLPR's definitions and thereby permit disclosure. Put differently, *unlikely* (OLPR) and *never* (Op. 24) produce consistent results most, but not all, of the time. For petty controversies, such as ordinary internet ratings, the article supports Op. 24's prohibition on disclosure. For serious controversies, such as Scenarios 1 and 2, the article undermines Op. 24's prohibition.

According to OLPR, the controversy clause *always* refers to a public forum. According to Opinion 24, the controversy clause *never* permits disclosure for self-defense in a public forum. For Op. 24, the controversy clause of Rule 1.6(b)(8) is a null set, i.e., the controversy clause never permits disclosure. The controversy clause is thereby read out of the rule.[vii] This interpretation cannot be correct, for several reasons.

First, all Rule 1.6(b) sub-sections, and all clauses in those sub-sections, are expressly intended to identify circumstances in which "A lawyer may reveal information relating to the representation of a client." If the controversy clause never permits disclosure, it does not serve its intended purpose, of identifying circumstances that permit disclosure.

Second, a standard canon of construction, for statutes and rules, is that some meaning must be given to every provision of a law. "Every law shall be construed, if possible, to give effect to all its provisions."[viii]

Third, this canon is made even more important by the legislative history of Rule 1.6(b)(8) (see sidebar).

The MSBA petition varied from Model Rule 1.6(b), by adding "actual or potential" before "controversy" in Rule 1.6(b)(8). The word "potential" obviously adds a circumstance in which disclosure is permitted. What is the meaning of "potential?" What were the "strong precedent or reasons for variation" from the Model Rule? Might the "strong precedent" be Minnesota's history of permitting disclosure to "defend. . . against an accusation of wrongful conduct?" Neither Opinion 24 nor OLPR attempts to answer any of these crucial questions. Neither even attempts to construe or apply the crucial term, "potential controversy."

Some disclosure must be permitted

Instead of dealing with the issues necessary for opining on the controversy clause, Opinion 24 in effect opines that the clause has no meaning or application. By issuing Op. 24, the Lawyers Board has taken a position that is at odds with the plain meaning of the controversy clause, with the legislative history of this clause, and with a well-recognized principle of construction of law.

To return to Scenarios 1 and 2, even under OLPR's narrow definitions of "controversy," Lee and Counsel have actual and potential controversies with Carp and Rapp. The actual and potential effects on the electorate of Carp's allegations are ramifications of the controversy engendered by Carp's allegations. Decisions regarding which lawyer to retain are often among the most important decisions a person may make. Numerous potential clients may well be deterred by Rapp's claims from retaining Counsel.

In addition, the lawyers have potential claims against their former clients for defamation per se. A lawyer's tort action against a former client carries with it permission, under Rule 1.6(b)(8), to disclose client information, as necessary. *Kidwell v. Sybaritic,* 784 N.W.2d 220 (Minn. 2010). Lee and Counsel could sue Carp and Rapp and disclose client information as necessary in the suits. Rule 1.6(b)(8) extends disclosure permission to "potential" controversies, as well as "actual" controversies.

It appears that Op. 24 does not even allow Lee to say, "I never advised Carp to act fraudulently." What was *not* advised appears to be information related to the representation. It appears that Op. 24 does not allow Counsel to disclose distribution information, even if the amount of the verdict was public, the fee was a standard percentage and the disbursements were standard, e.g. witness and filing fees, court reporter, and copying. The logic of the OLPR article, in contrast, would permit disclosure, because OLPR's definition of "controversy" applies.

The ethics rules sometimes resonate with issues of basic morality, such as "May a lawyer may defend her good name, in the court of public opinion, by disclosing information of a former client to rebut false accusations by that person?" The controversy clause permits disclosure in "an actual or potential controversy." The plain meaning of these words cannot be, as Opinion 24 would have it, that the controversy clause *never* permits disclosure.[ix] Even OLPR, in trying to defend Op. 24, uses a logic that permits disclosure *some* of the time.

Footnotes

i Opinion 24, adopted Sept. 30, 2016, states, " 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."

i[i] Rule 1.6(b)(8) 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." This article does *not* address the provisions of Rule 1.6(b)(8) relating to a lawyer establishing a "claim."

i[ii] In both scenarios, assume that (1) the clients request that all information relating to the representations be held inviolate and (2) no disclosure permission other than the controversy clause applies.

[iv] Webster's defines "controversy" as "a discussion marked especially by the expression of opposing views." Webster's synonyms for "controversy" are "dispute," "quarrel," and "strife."

v Two other clauses of Rule 1.6(b)(8) permits disclosures in a "proceeding." However, the OLPR article states that it is "evident" that Op. 24 does *not* include a "legal proceeding" in its meaning of "public forum."

v[i] There is not space here to respond fully to the OLPR article. My full response is being posted in a blog to *Minnesota Legal Ethics,* on the MSBA website.

v[ii] On March 15, 2017, I sent an e-mail to OLPR, inquiring whether OLPR could provide any example of a disclosure permitted by Opinion 24, under the controversy clause. On March 28, 2017, I sent a follow-up e-mail, to OLPR and to a Board representative. No example of a permitted disclosure, or any other response, has been received.

v[iii] Minn. Stat. § 645. 16; *Citizens Advocating Responsible Dev. V. Kandiyohi Ct. Bd. Of Comm'rs,* 713 N.W.2d 817, 828 n. 9 (Minn. 2006).

i[x] For "plain meaning," the OLPR article substitutes the opposite, "The term 'controversy' is not so clearly limited so as to plainly preclude the conclusion that a posting critical of a lawyer is not included in the definition."

Five important legislative history points about Rule 1.6.

- For decades before the 2005 amendment of Rule 1.6(b), Minnesota ethics law allowed a lawyer to disclose client information as needed to "defend… against an accusation of wrongful conduct."
- The overall direction of the 2005 amendments to Minnesota and 2002-03 amendments to ABA Model Rule 1.6 was to increase permissions to disclose, to counteract fraud, lies, and the like.
- The MSBA explained its petition for the 2005 amendments by stating that its rare departures from the Model Rules were "demonstrably supported by strong precedent or reasons for variation."
- The MSBA explained its proposed amendments to Rule 1.6(b) principally as codifying Minnesota confidentiality law. If the MSBA intended to curtail a lawyer's longstanding right to disclose in self-defense, it would have informed the Minnesota Supreme Court.
- The Lawyers Board notified the Court that it supported the MSBA petition.