

Choose Your Own Adventure: Navigating the Ethical Challenges Facing Lawyers

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1. PowerPoint Presentation
2. Applicable Rules of Professional Conduct
3. Lawyers Professional Responsibility Board Opinion No. 24: Confidentiality of Information

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Dorsey & Whitney LLP

Tuesday, October 31, 2017

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Trial Run: Which of the following categories best fits you?

- (A) Private Company or Firm
- (B) Public Company or Firm
- (C) Government
- (D) Other

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Social Media Ratings & Rants About You as a Lawyer



Can you respond? How?

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Don't Like My Advice? Then I Quit!

- Julie was General Counsel for a successful Minnesota start-up, Atom Blaster. Julie ultimately resigned from the Company when the Company refused to follow her advice to remove or amend some aggressive and incomplete disclosures made in the Company's latest fund raising efforts.
- When she resigned, Julie mentioned the prospectus statements in her resignation letter and attached copies of emails she had sent to the Founders about the problems with the disclosures.

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“I told you so, now look what happened.”

- **After Julie left, the Company began to fail. Several months later, the media reported that several prominent local investors were considering claims against the Company and its Founders due to misleading disclosures in its prospectus.**
- **When asked by the media for comment, one of the Founders replied, “the Company relied upon the advice of its former General Counsel for all statements contained in the prospectus and during its fundraising efforts.”**

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The Founder Goes on AVVO

- **Shortly after seeing the Founder’s quote to the media, Julie checked her AVVO Rating Page and found a “1.0 *Extreme Caution*” rating that had been logged by the same Founder who made the media comment.**
- **The rating was accompanied by the comment: “*Totally Incompetent - gave bad advice to my company about fundraising disclosures and now investors are threatening to sue and ruin my company – would never hire her again.*”**

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Minnesota's Rule 1.6(b)(8) – Self Defense Exception to Confidentiality

- A lawyer may reveal confidential client information when:
- (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;

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Question 1: What Could Julie Do “Informally” to Refute the False Statements Without Being Subject to Professional Discipline?

- (A) Julie can tell the media she advised the Founders not to make the questionable statements in the prospectus because the client has waived privilege by making the media statement about her advice.
- (B) Julie can refute the media statements by sending the media her emails advising the Founders against making the misleading statements because privilege was waived.
- (C) Julie can lodge an objection through AVVO's dispute process and tell AVVO she has emails that prove she advised the Company not to make the questionable disclosures.
- (D) None of the above.

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Correct Answer (D) - *None of the above*

- Minnesota Lawyers Board Opinion No. 24 (September 30, 2016): Confidentiality of Client Information.
- “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 [protected by the client confidentiality rule].”

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Question 2: What “Formal Action” Could Julie Take to Refute the False Statements Without Being Subject to Professional Discipline?

- (A) Commence a defamation suit against the Founder and attach her emails to the civil complaint she files publicly with the court.
- (B) Send a letter to the Founder, threatening to sue for defamation and attach the emails to her complaint that will be publicly filed unless the Founder withdraws or repudiates the media statement and the AVVO statement.
- (C) Both of the above.
- (D) None of the above.

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Correct Answer (C) – *Both of the above*

- A lawyer may reveal confidential client information when:
 - (8) the lawyer reasonably believes the disclosure is necessary to establish a claim ... in an actual ... controversy between the lawyer and the client....
- If there is a basis for the defamation suit, then there is nothing improper about threatening the suit to persuade the client to withdraw the false statements.
- But what about social media ratings or rants that are not specific? E.g., *“Horrible lawyer who does not know what she is doing – must have got license from the back of a cereal box.”*

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“Yes, I agreed to settle my case but I have now changed my mind” – what is a lawyer to do?

In re Panel File No. 41310 (Minn. Sup. Ct. 8/2/17)

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Reneging on the Settlement

- Lawyer represents Client in an injury claim in which there are medical providers with subrogation interests.
- With Lawyer's assistance, Client agrees to a settlement with Opposing Counsel.
- Thereafter, Client refuses to follow through and sign the settlement agreement because Client is agitated over Medicare not responding to efforts to settle its subrogation interest.
- Lawyer tells Client that case has been settled, and that Lawyer will not continue to represent Client unless Client follows through.

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Lawyer Withdraws and Sends Email to Opposing Counsel:

- I was notified by my client yesterday that he is terminating my representation and that he is not accepting the settlement offer. He is upset apparently that Medicare is taking a while, as it always does, and now doesn't want the settlement.
- I advised him that he already accepted it, and there is no rescinding his acceptance.
- He is picking up his file today apparently. I'm going to send a lien for our fees and costs to you. I'm assuming you will be having legal bring a motion to enforce the settlement. He's been advised of all of this....

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Client Files an Ethics Complaint

- **After investigation, the local district ethics committee recommends a private admonition for violation of Rules 1.6 and 1.9 – disclosing confidential client information.**
- **The Director disagrees and dismisses the matter with a long explanation. Client appeals.**
- **A Lawyers Board member directs the Director to issue an admonition. Lawyer appeals.**
- **A Panel of the Lawyers Board affirms the admonition for disclosing confidential information.**
- **Lawyer appeals admonition to the Supreme Court.**

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Question 3: How Does the Court Rule?

- (A) **Admonition affirmed for disclosing confidential information.**
- (B) **Admonition reversed because information disclosed, although confidential, was not prejudicial to the Client or Client's case.**
- (C) **Admonition reversed because Client's conduct in renegeing on settlement offer without any justification was fraudulent and Lawyer was permitted to disclose confidential information to prevent fraud.**
- (D) **Admonition affirmed because Lawyer told Opposing Counsel he was "going to" send a lien for attorney fees and costs before the lien was publicly filed.**

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Correct Answer (A)

(A) Admonition affirmed for disclosing confidential information.

- The problematic statements cited by the Court:
I advised him that he already accepted it, there is no rescinding his acceptance.
He is picking up his file today apparently. I'm going to send a lien for our fees and costs to you. I'm assuming you will be having legal bring a motion to enforce the settlement. **He's been advised** of all of this....
- No exception to the client confidentiality Rule 1.6 was applicable to Lawyer's email.

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Attorney-Client Privilege and the Reliance Upon Advice of Counsel Defense

U.S. v. Berkeley Heartlab, Inc., (U.S. Dist. Ct. South Carolina 4/5/17) 2017 WL 1282012

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Government *Qui Tam* Action

- Government files a *Qui Tam* complaint alleging FCA violations from BlueWave's marketing of laboratory tests from two subsidiary companies.
- Violations include kickback schemes to induce doctors to refer blood samples to BlueWave that were unnecessary.
- Violations also included waiving co-payments owed by patients receiving governmental subsidized health benefits.
- Prior to the suit, the U.S. issued a CID to BlueWave. BlueWave hired counsel to conduct an investigation.

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Reliance on Advice of Counsel

- In its answer to the *Qui Tam* complaint, BlueWave asserted it acted in good faith reliance on counsel and identified the lawyers who had advised BlueWave about the contracts that were the subject of the alleged FCA violations. BlueWave did not identify counsel who represented and advised BlueWave concerning the OIG investigation.
- The Government then served discovery seeking all advice and opinions BlueWave received during the entire time the alleged violations were occurring, including the internal investigation conducted in response to the OIG investigation.
- BlueWave objects asserting *Attorney-Client Privilege* and *Work Product Protection*.

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Question 4: How Does the Court Rule?

- (A) Attorney-Client Privilege and Work Product not waived as to BlueWave's OIG investigation lawyers.
- (B) Attorney-Client Privilege waived as to OIG lawyers, but Work Product opinions by OIG lawyers still protected.
- (C) Attorney-Client Privilege and Work Product waived as to BlueWave's OIG investigation lawyers.
- (D) Attorney-Client Privilege waived. Work Product waived as to BlueWave's OIG lawyers but only as to what the OIG lawyers communicated to BlueWave and not what BlueWave communicated to its OIG lawyers.

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Correct Answer (C)

- (C) Attorney-Client Privilege and Work Product waived as to BlueWave's OIG investigation lawyers.
 - Asserting reliance of counsel defense waives attorney-client privilege as to the entire "subject matter" of that defense.
 - Applies to advice received during the entire period in which misconduct is alleged which can extend to trial.
 - BlueWave placed its communications with OIG counsel at issue and thereby waived attorney-client privilege.

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Correct Answer (C) (continued)

- Waiver of attorney-client privilege does not necessarily waive work product protection, as they are related but different concepts.
- Work product protects documents and tangible things prepared in anticipation of litigation and can include non-privileged things.
- Waiver of work product in this matter includes waiver of all communications between BlueWave and its OIG counsel, including information provided by BlueWave to its Counsel.
- Waiver did not apply to trial counsel.

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Disclosure of Investigative Report: Waiver of Attorney-Client Privilege and/or Work Product Protection?

***Banneker Ventures, LLC v. Graham*, 97 Fed. R. Serv.
3d 923 (Dist. Ct. D. C. 5/16/17)**

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The Investigative Report Facts

- **Banneker was negotiating a development agreement with the D.C. Transit Authority. Negotiations broke down and the Transit Authority terminated its association with Banneker for the development.**
- **Banneker wrote the Transit Authority alleging improper actions of Transit Authority board members and demanded that negotiations be restarted or Banneker may seek further remedies.**
- **Banneker did not commence suit and two years later the Transit Authority conducted an internal investigation regarding the actions of its board members in the Banneker development agreement.**

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The Investigative Report Is Released

- **After outside counsel completed the investigation, it provided a report to the Transit Authority.**
- **The Transit Authority's Board then passed a resolution recommending public release of the investigative report.**
- **After release, Banneker commenced litigation and sought discovery of all employee and non-employee witness interviews referred to in the investigative report.**
- **The Transit Authority moves for a Protective Order claiming the witness interviews from the investigation are protected by the attorney-client privilege and the work product doctrine.**

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Question 5: How Does the Court Rule?

- (A) Attorney-client privilege protects the interview materials with employees, but not the non-employees.
- (B) Work product protection applies to both the employee and non-employee interviews.
- (C) Work product protection applies to the employee interviews, but not the non-employee interviews.
- (D) None of the interviews referenced in the investigative report are protected by attorney-client privilege or work product protection.

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Correct Answer (D)

- (D) None of the interviews referenced in the investigative report are protected by attorney-client privilege or work product protection.
 - The interviews were not conducted in “anticipation of litigation” citing: (a) two-year gap between demand letter and commencement of investigation; and (b) purpose was to evaluate business practices and revise Standards of Conduct for Board of Directors.
 - Attorney-client privilege cannot apply to interviews with non-employees.
 - Waiver of privilege as to the Investigative Report was “intentional.”
 - Disclosure of Report resulted in “subject matter” waiver, requiring disclosure of all interviews referenced in the Report.

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Inadvertent Disclosure of Work Product by Expert Witness: Waiver?

Lloyds of London Syndicate 2003 v. Fireman's Fund Ins. Co., No. 15-CV-2681-DDC-GLR (D. Kan. 7/6/17)

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The Expert Report

- In litigation between Fireman's and Lloyds, Fireman's hires an expert.
- After the expert emails a draft report to Fireman's, counsel responds asking the expert to "expand his discussion on two of the topics in the report."
- After the expert revises the report, counsel directs the expert to provide the report and various other non-privileged documents in the report to Lloyds.
- When the expert sends the report and other materials to Lloyds, he accidentally includes the email from Fireman's counsel asking him to expand his discussion of two topics.

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The Expert's Deposition

- Counsel for Lloyds deposes the Expert. During the deposition, Fireman's becomes aware that Lloyds has the email to the Expert asking to expand the report.
- Counsel for Fireman's demands that the email be immediately returned.
- Lloyds refuses to return the email and claims Fireman's has waived work product protection by disclosing the email and by allowing the Expert to produce the report directly instead of transmitting the report to Fireman's for production to Lloyds.
- Fireman's seeks a protective order.

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Rule 26(b)(4)(C), Federal Rules of Civil Procedure

- All communications between an Expert and a party's lawyer are protected as work product except where the communication:
 - (1) addresses the Expert's compensation;
 - (2) identifies facts or data provided by the lawyer and considered by the Expert in the opinion; or
 - (3) identifies assumptions provided by the lawyer that were relied upon by the Expert in formulating the opinion.

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Question 6: How Does the Court Rule?

- (A) Order Denied. Work product protection waived because Fireman's did not use reasonable care by allowing the Expert to transmit the report directly to Lloyds.
- (B) Protective Order issued. Work product protection waived, but attorney-client privilege still protects the email because it was a communication from the lawyer.
- (C) Protective Order issued. Work product protection was not waived.
- (D) Order Denied. Email falls within one of the three work product exceptions for Experts under Rule 26(b)(4)(C).

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Correct Answer (C)

- (C) Protective Order issued. Work product protection was not waived.
 - None of the three exceptions to work product protection in Federal Rule 26 applied.
 - The communication was not between the lawyer and client so attorney-client privilege could not apply.
 - The Court used the five-factor test in determining whether the inadvertent disclosure constituted waiver of the work product protection.

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The Five-Factor Test

- ***Reasonableness of precautions taken to prevent disclosure.***
- **While the court found that Fireman's could have more closely monitored the Expert's culling of protected information from the report, counsel's actions were still reasonable.**
- **Counsel had 17 days to oversee production of materials in the Expert report which contained 1,500 pages of materials. The email was the only protected document inadvertently produced.**

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Other Factors

- ***Time taken to rectify the error.*** Fireman's immediately notified Lloyds when it became aware of the inadvertent disclosure.
- ***Scope of the discovery.*** The email was the only protected document amongst 40,000 produced by Fireman's.
- ***Extent of Disclosure.*** The email was only disclosed to Lloyds and not any other parties.
- ***Overriding issue of fairness.*** Lloyds will sustain no prejudice if the court refuses to find waiver. Losing access to an inadvertently disclosed document is not by itself sufficient to warrant waiver.

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Using Testers and Surreptitious Investigations

Leysock v. Forest Labs, U.S. Dist. Mass (4/28/17)
2017 U.S. Dist. Lexis 65048

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***Qui Tam* Action Relating to Off-Label Use of Drug to Treat Moderate Alzheimer's Disease**

- Relator sues Forest Labs for alleged off-label use of *Namenda* on Medicare patients in 2012. Government declines to intervene and in 2014 case is unsealed.
- Relator's counsel, Milberg law firm, retains a licensed doctor in 2013 to investigate the off-label use. Milberg's lawyers developed and directed the investigation.
- The investigation involved hiring Charter Oak, a healthcare market research firm with a proprietary physician database.
- The doctor falsely told Charter Oak he wanted to conduct a medical research survey on the use of *Namenda* by physicians.

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The Surveys Included:

- **Falsely telling the doctors the survey was a “market research dementia study.”**
- **All responses will be anonymous and aggregated with information being used only for research purposes.**
- **Doctors were paid a \$35 honorarium for participating.**
- **A second survey in 2014 (before the case was unsealed) focused more specifically on the off-label use of *Namenda*. None of the doctors was told the information might later be publicly disclosed.**
- **The names of 36 doctors and information obtained in the surveys was included in a Second Amended Complaint filed when the case was unsealed in 2014.**
- **Forest Labs moves to strike all allegations in the Second Amended Complaint related to the surveys and to dismiss the action.**

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Question 7: How Does the Court Rule?

- (A) **Allegations relating to the surveys are stricken and the *Qui Tam* action is dismissed.**
- (B) **Motion to dismiss is denied because the deceit used during the surveys is a commonly accepted practice when using testers in housing and trademark investigations.**
- (C) **Allegations relating to the surveys are stricken, but motion to dismiss is denied.**
- (D) **Motion to dismiss denied, some allegations related to the surveys are stricken and motion to strike others is denied.**

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Correct Answer (A)

(A) Allegations relating to the surveys are stricken and the *Qui Tam* action is dismissed.

- The Court found the investigation was directed by the law firm and violated the ethics rules prohibiting deceit, misrepresentation and intentional false statements even though the lawyers made none of the false statements. See e.g., Rules 8.4(c) and 4.1(a).
- As a sanction for the deceit, the court struck all allegations of the Second Amended Complaint relating to evidence obtained in the surveys.
- Once these allegations were stricken, the Second Amended Complaint could not survive the motion to dismiss.

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Are All Covert Investigations Unethical?

- The court acknowledged that tester type investigations are permissible in limited circumstances including deception used by criminal prosecutors, housing discrimination testers and those who represent themselves as customers to detect trademark and copyright violations.
- The court found that the investigation in this matter went far beyond what is permissible.

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Reasons Cited by the Court:

- The lawyers developed and directed the investigative scheme and designed it to appear as if it were a medical research study.
- The doctor hired by the law firm lied and repeatedly implied to the physicians that the study had a benign purpose.
- The scheme was highly intrusive in that it sought information from the patient-doctor relationship.
- The targets of the deception (doctors) were not the suspected wrongdoers.
- The FCA envisions Relators filing suit based upon their own knowledge and not information gathered in a separate investigation fraught with deceit and misrepresentation to others.

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The End

Thank you for attending

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Applicable Rules of Professional Conduct

and

Lawyers Professional Responsibility Board Opinion No. 24: Confidentiality of Information

MINNESOTA RULES OF PROFESSIONAL CONDUCT

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:

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;

(4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, or to prevent the commission of a crime;

(5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;

(7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer's compliance with these rules;

(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;

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

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

(11) 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.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

FEDERAL RULES OF CIVIL PROCEDURE

RULE 26(b)(4)(C).

(4) Trial Preparation: Experts.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

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OPINION NO. 24

Confidentiality of Information

Rule 1.6(a), Minnesota Rules of Professional Conduct (MRPC), generally prohibits a lawyer from knowingly revealing information relating to the representation of a client. Contained within the subsections of Rule 1.6(b), MRPC, however, are eleven enumerated exceptions to that general prohibition. Amongst those exceptions is Rule 1.6(b)(8), MRPC, which permits a lawyer to reveal information relating to the representation of a client provided:

[T]he lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client

When responding to comments, negative or otherwise, posted on the internet (or any other public forum) concerning the lawyer's representation of a client, Rule 1.6(b)(8), MRPC, does not permit the lawyer to reveal information relating to the representation of a client.

Lawyers are cautioned that, when responding to comments posted on the internet or other public forum which are critical of the lawyer's work, professionalism, or other

conduct, any such response should be restrained and should not, under Rule 1.6(b)(8), reveal information subject to Rule 1.6(a), MRPC.

Adopted: September 30, 2016.



Stacy L. Vinberg, Chair
Lawyers Professional Responsibility Board