Maintaining an Ethical On-Line Presence: Blogs, Listservs, Social Media, and More

James E. Doyle Inn of Court
February 19, 20025
Sarah E. Peterson, Ethics Counsel, State Bar of Wisconsin

Outline:

1. Confidentiality
    a. SCR 20:1.6
    b. The scope of confidentiality: How big is the umbrella?
2. Relevant Ethics Opinions
    a. ABA Formal Opinion 511r: Posting on Listservs
    b. ABA Formal Opinion 480: Blogging and Other Public Commentary
    c. WI Formal Ethics Opinion EF-23-01: Responding to Online Criticism
3. Real Like Applications: Disciplinary Cases
    a. *Disciplinary Proceedings against Harman*, 244 Wis.2d 438, 628 N.W.2d 351 (2001)
    b. *Disciplinary Proceedings against Peshek*, 334 Wis.2d 373, 798 N.W.2d 879 (2011)
    c. *Disciplinary Proceedings against Merry*, 411 Wis.2d 319, 5 N.W.3d 285 (2024)
    d. *In re Quillinan, 20 DB Rptr 288 (Or. 2006)*
    e. *In re Skinner*, 740 S.E.2d 171 (Ga. 2013)
    f. *In Re McCool, 172 So. 3d 1058, 2015 ILRC 2191 (La. 2015)*

Rules:

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

...

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> ...
>
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> ...

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, 94 information relating to the representation of a client.

SCR 20:3.5 Impartiality and decorum of the tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law

...

SCR 20:3.6 Trial publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement referred to in par. (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in deprivation of liberty, and the statement relates to:

> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in deprivation of liberty, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in deprivation of liberty;
>
> (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
>
> (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Ethics Opinions (ABA Opinions are copyrighted and so are not included in the materials):

ABA Formal Opinion 98-11 Ethical Issues in Lawyer-to-Lawyer Consultations (1998)

ABA Formal Opinion 480 Confidentiality Obligations for Lawyer Blogging and Other Public Commentary (2018)

ABA Formal Opinion 496 Respond to Online Criticism

ABA Formal Opinion 511r Confidentiality Obligations of Lawyers Posting to Listservs (2024)

WI Formal Ethics Opinion EF-17-02 Duty of Confidentiality; Identities of Current and Former Clients (2017)

WI Formal Ethics Opinion EF-23-01 Responding to Online Criticism (2023)

Cases:

Disciplinary Proceedings against Harman, 244 Wis.2d 438, 628 N.W.2d 351 (2001)

Disciplinary Proceedings against Peshek, 334 Wis.2d 373, 798 N.W.2d 879 (2011)

Disciplinary Proceedings against Merry, 411 Wis.2d 319, 5 N.W.3d 285 (2024)

In re Quillinan, 20 DB Rptr 288 (Or. 2006)

In re Skinner, 740 S.E.2d 171 (Ga. 2013)

In Re McCool, 172 So. 3d 1058, 2015 ILRC 2191 (La. 2015)

Wisconsin Court System
Wisconsin Attorneys' Professional Discipline Compendium

Disciplinary Proceedings Against Harman
2001 WI 71, 244 Wis. 2d 438, 628 N.W.2d 351 (2001)

ATTORNEY disciplinary proceeding. *Attorney's license suspended.*

State Bar Id:
1007174

AREAS OF PRACTICE:
Criminal Law
Family Law
Torts

SANCTION:
Suspension-6 Months

Appeal By Respondent
Referee's Recommendation

1. PER CURIAM. Attorney Donald J. Harman appealed from the referee's findings of fact, and conclusions of law that he engaged in professional misconduct and recommendation that his license to practice law in Wisconsin be suspended for six months as discipline for that misconduct. The referee's findings and conclusions addressed eight separate counts of professional misconduct set forth in the Board of Attorneys Professional Responsibility (Board) complaint in this proceeding. Three of the counts arose from Attorney Harman's handling of proceeds he received on behalf of a client after settling the client's personal injury claim. The referee determined that Harman had engaged in dishonest conduct; failed to give a third party prompt written notification of his receipt of their funds and failed to promptly deliver those funds to the third party; and failed to continue to treat as trust property, the funds which were in dispute.

2. The remaining five misconduct counts involved Attorney Harman's conflict of interest in representing a client. The referee determined that Harman had represented the client in the presence of a conflict of interest without obtaining written consent of the client on conflict; revealed information relating to representation of a client without consent; knowingly disobeyed an obligation under the rules of a tribunal; and on two separate occasions, used information obtained during the representation of a former client to that former client's disadvantage.

Motion for Dismissal
Appropriate Discipline

Procedure
-Dismissed
-Referee (substitution)
SCR 60.04(4) and (6)

Aggravating Factors
-Pattern of Misconduct
-Lack of Respect for Judicial System

3. We adopt the referee's findings of fact and conclusions of law with respect to all eight counts of misconduct as alleged in the Board's complaint. In so doing, we reject Attorney Harman's arguments, including his motion to dismiss the complaint in this disciplinary action on the ground of the referee's alleged conflict of interest and failure to recuse herself as provided in SCR 60.04(4) and (6). We hold that Attorney Harman has waived any objection to the referee's participation in this matter; accordingly, we now deny his motion to dismiss the underlying complaint in this disciplinary matter which has been held in abeyance pending this court's consideration of this appeal. We determine that the license suspension as recommended by the referee is the appropriate disciplinary response to Attorney Harman's numerous acts of professional misconduct. This is the fourth time Attorney Harman has been disciplined for professional misconduct. We agree with the referee's observation that Attorney Harman's

pattern of conduct demonstrates a disregard of the legal system and his willingness to ignore established procedures for dispute resolution in favor of his perceived personal expediency. The seriousness of Attorney Harman's professional misconduct warrants the suspension of his license to practice law in this state for six months.

4. Attorney Donald J. Harman was admitted to practice law in Wisconsin in 1960 and currently practices in La Crosse. He has been disciplined for professional misconduct on three previous occasions.

Aggravating Factors
-Prior Discipline

5. In 1998 Attorney Harman was publicly reprimanded for his failure to act diligently and promptly in representing his client, his demonstrated lack of understanding of his professional duties, and his unwillingness to take responsibility for his misconduct. Disciplinary Proceedings Against Harman, 221 Wis. 2d 238, 584 N.W.2d 537 (1998).

6. In 1989 Attorney Harman consented to a public reprimand from the Board of Attorneys Professional Responsibility for having acted in the presence of a conflict of interest, for failing to maintain complete trust account records and render proper accounting of funds held in trust, and failing to cooperate in the Board's investigation.

7. In 1987 Attorney Harman was publicly reprimanded for having charged one client an excessive fee and for failing to turn over another client's files upon termination of representation despite a court order to do so. Disciplinary Proceedings Against Harman, 137 Wis. 2d 148, 403 N.W.2d 459 (1987).

Answer
Appeal By Respondent

8. The Board filed the instant disciplinary complaint against Harman on November 5, 1999. Attorney Janet Jenkins of La Crosse was appointed to act as a referee in this matter as she had also been appointed in the prior disciplinary matter against Harman in 1998. In Attorney Harman's answer to this complaint, he admitted many of the factual allegations contained in the complaint but denied the conclusions to be drawn from those allegations. On this appeal, Harman does not explicitly claim that any of the 29 specific findings of fact made by the referee are clearly erroneous; rather, he again disputes the conclusions and recommended discipline.

9. The Board's allegations of misconduct and the referee's findings deal with two separate matters: the St. Paul check, and Harman's representation of S.W.

THE ST. PAUL CHECK

10. Attorney Harman was retained to represent D.O. on a personal injury claim stemming from a 1995 automobile accident. D.O. had medical insurance through St. Paul Fire & Marine Insurance Company and its subsidiary, Economy Fire & Casualty Company (collectively, St. Paul). After making payments to D.O.'s health care provider, St. Paul asserted a subrogation claim totaling $3671.10. St. Paul informed Harman of its subrogation claim in three letters which Harman acknowledged receiving. Subsequently D.O.'s personal injury action was settled for $69,000. Metropolitan Insurance, as insurer of the other driver and vehicle, mailed Attorney Harman a check in that amount dated August 18, 1997. That

check was made payable to D.O., Attorney Harman, the chiropractor who had treated D.O., and St. Paul Insurance.

11. Attorney Harman endorsed the $69,000 settlement check on August 22, 1997, and deposited the proceeds in his trust account. Harman's endorsement on the check stated "St. Paul Insurance by Donald Harman, Attorney." Harman, however, had no authorization from St. Paul to endorse that settlement check on its behalf. In his appellate brief, Harman acknowledges that his endorsement was "unauthorized" and made "without . . . authority."

12. After depositing the funds into his trust account, Harman made several disbursements including to his client, the chiropractor, and to himself for a portion of his fees. Then on September 15, 1997, Harman sent St. Paul a check in the amount of $750 drawn on his trust account. Harman's accompanying letter stated that the check was "in compromise satisfaction of [St. Paul's] lien." At that time Harman's trust account contained sufficient funds from the settlement to have paid the full amount of St. Paul's subrogation claim.

13. In his September 15th letter to St. Paul, Attorney Harman also stated that if he did not hear from St. Paul within ten days, he would assume that the company agreed that the payment was in "full satisfaction" of its subrogation claim. St. Paul did not respond within the ten-day period Harman had unilaterally set. Then on October 2, 1997, Harman issued a check to D.O. in the amount of $2921.10 representing the difference between the full amount of St. Paul's subrogation claim and the $750 check Harman had previously tendered to the company.

14. There had been no mutual negotiations or verified settlement agreement between Harman and St. Paul regarding the subrogation claim. In fact, the $750 check with Harman's accompanying letter was the only written notification Harman had provided to St. Paul up to that point regarding his receipt of the settlement monies and the disbursement of the proceeds.

15. Based on those facts, the referee concluded that the Board had established by clear and satisfactory evidence Attorney Harman's misconduct on the following counts:

Count 1: By endorsing the [D.O.] settlement check on behalf of St. Paul Insurance, without authorization from that company to endorse checks on its behalf, [Harman] engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of SCR 20:8.4 (c).	**Dishonesty, Fraud, Deceit or Misrepresentation** SCR 20:8.4(c)
Count 2: By failing, upon receipt of the settlement check from Metropolitan, to notify St. Paul Insurance in writing that he was holding funds for it in trust; and instead, after waiting approximately 30 days, by sending St. Paul a check in the amount of $750, which was not the product of any negotiated reduction of St. Paul's claim, [Harman] failed to give prompt notification to a third person of [Harman's] receipt of funds in which the third person has an interest, and also failed to promptly deliver to a third person funds that the third	**Trust Accounts** -Notice of Receipt of Funds -Delivery of Funds SCR 20:1.15(b)

person was entitled to receive, in violation of SCR 20:1.15(b).

Count 3: By holding funds in trust, portions of which may have belonged to himself, [D.O.] and St. Paul Insurance, and without having resolved any dispute as to the amount St. Paul was entitled to receive, by issuing a check to St. Paul on September 15, 1997, in the amount of $750, [Harman] failed to treat funds as trust property until there was an agreed severance of interest, and [Harman] failed to continue to treat as trust property the portion in dispute, in violation of SCR 20:1.15(d).

Trust Accounts
-Disputed Funds
SCR 20:1.15(d)

16. We reject Harman's argument on this appeal that by accepting the $750 check and not objecting within the ten-day deadline he had set, St. Paul had "ratified" what would have otherwise been Harman's unauthorized signature when he endorsed the settlement check in the name of St. Paul. Harman's reliance on a provision in the Uniform Commercial Code, Wis. Stat. § 403.403(1) to support that ratification argument is misplaced. Moreover, contrary to Harman's claim, Referee Jenkins did in fact address his ratification argument and found it not only irrelevant but without merit. We agree.

Appeal By Respondent

17. The undisputed evidence established that Harman wrongfully endorsed the check on behalf of St. Paul without any authorization or prior agreement from St. Paul to do so; in addition he failed to provide St. Paul with prompt written notice of his receipt of funds and then unilaterally disbursed a reduced amount in purported settlement of St. Paul's subrogation claim without St. Paul having agreed to accept a reduced amount. St. Paul's retention of $750 as part payment of its subrogation claim cannot be viewed as a ratification or agreement by St. Paul to accept a reduced amount for its subrogation claim.

18. We also reject, as irrelevant and without merit, Harman's appellate claim that he had, in fact, called St. Paul's toll free 800 number three times to notify the insurer that he had received the settlement check and therefore the referee should have concluded that the Board had failed to meet its burden with respect to count two. We find this argument——like Harman's ratification argument——to be wholly unpersuasive. Supreme Court Rule 20:1.15(b) mandates prompt written notification to a third person of receipt of funds to which the third person is entitled. Harman's claim that he made telephone calls to St. Paul to report the receipt of the settlement check is not compliance with the rule. Alleged oral notification of receipt of funds does not satisfy the rule. In the instant case, the first written notification Harman provided to St. Paul indicating that he had received the settlement funds was his September 15th letter accompanying the $750 check. This was mailed 24 days after he had endorsed and deposited the settlement check. Neither the alleged telephone calls nor this letter complied with the rule's requirement for prompt written notification.

Trust Accounts
-Notice of Receipt of Funds
SCR 20:1.15(b)

S.W. REPRESENTATION

19. In February or March 1998 S.W. met with Attorney Harman concerning a child custody dispute she was having

with her former husband. S.W. also consulted Harman about a potential legal malpractice action against an attorney who had represented her in a medical malpractice action in Wood County in 1993. In connection with that potential legal malpractice claim, Attorney Harman obtained S.W.'s case files, which included her medical records, from her former attorney. Those medical records had previously been part of the court file in the Wood County action but had been disposed of by the Wood County clerk in 1995 after that action was dismissed.

20. At the time S.W. consulted with Attorney Harman, she was living with one E.J. On March 22, 1998, a domestic dispute occurred between E.J. and S.W. which resulted in criminal charges being filed against E.J. E.J. then retained Attorney Harman to represent him on those criminal charges. Attorney Harman appeared on behalf of E.J. at a hearing on March 30, 1998, and in the course of that proceeding, cross- examined S.W. concerning the domestic dispute incident.

21. In April of 1998 Attorney Harman wrote to the La Crosse County assistant district attorney who was prosecuting the matter against E.J. In that letter, Attorney Harman referred to materials contained in S.W.'s case file in her Wood County medical malpractice claim including her medical records. In that letter, Attorney Harman wrote:

> The records I have (which were part of the public record in Wood County) show [S.W.] to have drug and alcohol dependence and a history of self-abusive behavior. I will bring these records with me when we visit about this file.

22. Attorney Harman then forwarded some of S.W.'s medical records to the La Crosse County prosecutor. S.W. had not authorized him to disclose any of those records.

23. Subsequently on August 31, 1998, Attorney Harman, on S.W.'s behalf, filed a motion seeking a change of physical placement of S.W.'s children. That motion was accompanied by S.W.'s affidavit that Attorney Harman had drafted for her signature. At the time that motion and affidavit were filed, S.W. and E.J. were still living together.

24. On September 9, 1998, S.W. and E.J. had another domestic altercation in their home, which resulted in criminal charges being filed against both of them. Attorney Harman again represented E.J. S.W. was represented by an assistant state public defender. Under the terms of their respective bonds, S.W. and E.J. were prohibited from having contact with each other.

25. Despite his knowledge that S.W. and E.J. were subject to the court ordered no contact provision in their bail bonds, Attorney Harman arranged for the two of them to meet in his office on September 23 or 24, 1998, in order to resolve various issues between them. Attorney Harman prepared a statement which both S.W. and E.J. signed; in that statement they agreed that they would not consider that meeting to be a violation of the "no contact" provision of their respective bail bonds in their pending disorderly conduct cases.

26. On October 13, 1998, S.W. filed a petition seeking a temporary injunction and restraining order against E.J. At the subsequent October 16, 1998, hearing on that petition,

Attorney Harman again appeared on behalf of E.J. In the course of that hearing, Attorney Harman cross-examined S.W. At the same time, Attorney Harman filed an affidavit asserting that S.W. had a "medical history of self-abusive, self-destructive behavior and Tylenol Codeine abuse . . . ."

27. The La Crosse County district attorney subsequently filed a motion in E.J.'s criminal case seeking an order to recuse Attorney Harman from representing E.J. on the ground of conflict of interest. That motion was accompanied by an affidavit from S.W. in which she averred that Attorney Harman had requested her cooperation in his criminal defense of E.J. and that Attorney Harman had threatened that if she did not cooperate, she would lose her children and be referred to authorities for possible criminal prosecution on unrelated charges. S.W. further stated in her affidavit that as a result of these threats, she wrote letters to the La Crosse County district attorney accepting full responsibility for the couple's September 9, 1998, altercation which had resulted in disorderly conduct charges being filed against S.W. and E.J.

28. The day after the district attorney filed the recusal motion, Attorney Harman withdrew as E.J.'s defense counsel. Harman then notified the guardian ad litem in the child custody matter that S.W. had discharged Harman as her counsel; Attorney Harman, however, did not notify the court in which the custody dispute was pending that he was no longer S.W.'s counsel in the custody matter.

29. A few weeks later, Attorney Harman sent copies of S.W.'s medical records to the district attorney's office, the clerk of court, the public defender's office, the guardian ad litem, and a women's shelter. Harman acknowledged that he released S.W.'s medical records for the specific purpose of undermining her credibility and to keep " . . . [S.W.] from continuing to make false claims against [E.J.]." In releasing these records, Attorney Harman referred to S.W. as being "a liar of world class magnitude" and asserted that she had committed perjury and that she had been a drug and alcohol addict since age nine. S.W. never authorized release of these medical records by Attorney Harman.

30. Based on those facts, Referee Jenkins concluded that the Board had established by clear and satisfactory evidence the following additional five counts of misconduct by Attorney Harman:

Count 4: By representing [E.J.] in a criminal case stemming from the March 22, 1998, incident during the timeframe he was representing [S.W.], [Harman] represented a client when representation of that client may be materially limited by the lawyer's responsibilities to another client, without obtaining written consent from his client, in violation of SCR 20:1.7(b).	**Conflict of Interest** -Multiple Clients -Client Consent SCR 20:1.7(b)
Count 5: By his April 1, 1998, disclosure of the content of [S.W.'s] medical records to a prosecutor, [Harman] revealed information relating to representation of a client . . . without her consent, in violation of SCR 20:1.6(a).	**Confidentiality** -Breach SCR 20:1.6(a)

Count 6: While knowing that the terms of their respective bonds prohibited contact with the other [Harman] facilitated a meeting between [S.W.] and [E.J.] in [Harman's] office such that [Harman] knowingly disobeyed an obligation under the rules of a tribunal, in violation of SCR 20:3.4(c).

Court Order or Rule, Failure to Obey
SCR 20:3.4(c)

Count 7: In his October 16, 1998, cross-examination of [S.W.] at the hearing on a petition for a temporary injunction and restraining order against [E.J.], [Harman] used information obtained from [S.W.] during his prior representation of her, to her disadvantage, in violation of SCR 20:1.9 (b).

Conflict of Interest
-Former Client (use of information)
SCR 20:1.9(b)

Count 8: By his December 1998 distributions of [S.W.'s] medical records, [Harman] used information obtained from a former client during his prior representation of her, to her disadvantage, in violation of SCR 20:1.9(b).

Conflict of Interest
-Former Client (use of information)
SCR 20:1.9(b)

Appeal By Respondent

31. On appeal, Attorney Harman contends that the referee erred in refusing to allow into evidence two documents he claims would have established that S.W.'s medical records that he released were, in fact, public records and therefore S.W. could not claim any privilege with respect to their release. Harman maintains that S.W.'s medical records became public records when filed as part of S.W.'s Wood County medical malpractice action; thus, because the records were not privileged, Harman asserts he could disclose them to others. Furthermore, according to Harman, the referee should have received into this record, the two exhibits he proffered reflecting the docket entries in the Wood County medical malpractice action which Harman asserts would have established that S.W.'s medical records had previously been made public in that action.

Confidentiality
-Breach
SCR 20:1.6(a)

32. We reject this argument because, as the Board correctly argues in its response, it is irrelevant whether S.W.'s medical records were confidential medical records. Supreme Court Rule 20.1.6(a), the disciplinary rule Attorney Harman was charged with violating in Count 5, prohibits revealing or using information relating to a former representation of a client. Moreover, the comment to that rule notes that it is a "fundamental principle" in the client- lawyer relationship that the lawyer maintain confidentiality of "information relating to the representation." The comment explains that the rule of client-lawyer confidentiality applies not only to matters communicated in confidence by the client, " . . . but also to all information relating to the representation whatever its source." S.W. did not authorize Attorney Harman to release her medical records to anyone. His disclosure of information that he obtained while representing S.W. violated client-lawyer confidentiality.

33. We agree with Referee Jenkins' interpretation of this rule and her conclusion that the information obtained by Attorney Harman from his client, S.W., even if not protected or deemed confidential because it had previously been filed in the Wood County case, could not be disclosed without S.W.'s permission because that information was obtained as a result of the lawyer-client relationship he had with S.W.

34. Attorney Harman does not dispute that he revealed and used information to S.W.'s disadvantage that he had obtained during the course of his representation of her. Regardless of whether S.W.'s medical records lost their "confidentiality" because they had been made part of the Wood County medical malpractice action, the fact remains that Attorney Harman obtained those records while he was representing S.W. and he then disseminated those records without her consent.

35. The referee's conclusion that Attorney Harman's actions violated several provisions of the Rules of Professional Conduct for Attorneys, found in chapter 20 of SCR, was based on findings of fact that are not clearly erroneous. The referee's findings of fact and conclusions of law regarding Attorney Harman's professional misconduct established in this proceeding are proper, and we adopt them.

36. The referee recommended a six-month license suspension as discipline for Attorney Harman's misconduct. We agree that under the totality of the circumstances, a six- month suspension is appropriate discipline for Attorney Harman's misconduct. That six- month suspension will require Attorney Harman to petition this court for reinstatement under SCR 22.28(3).

37. IT IS ORDERED that the license of Donald J. Harman to practice law in Wisconsin is suspended for six months commencing August 1, 2001, as discipline for his professional misconduct.

38. IT IS FURTHER ORDERED that within 60 days of the date of this order, Donald J. Harman pay to the Office of Lawyer Regulation the costs of this proceeding. If the costs are not paid within the time specified and absent a showing to this court of his inability to pay the costs within that time, the license of Donald J. Harman to practice in Wisconsin shall remain suspended until further order of the court.

39. IT IS FURTHER ORDERED that Donald J. Harman comply with the provisions of SCR 22.26 concerning the duties of a person whose license to practice law in Wisconsin has been suspended.

Disposition:
Court adopts recommendation

Reinstatement
-Petition
SCR 22.28(3)

SUPREME COURT OF WISCONSIN

CASE NO.: 2022AP35-D

COMPLETE TITLE: In the Matter of Disciplinary Proceedings Against Roger G. Merry, Attorney at Law:

Office of Lawyer Regulation,
Complainant,
v.
Roger G. Merry,
Respondent.

DISCIPLINARY PROCEEDINGS AGAINST MERRY

OPINION FILED: April 24, 2024
SUBMITTED ON BRIEFS:
ORAL ARGUMENT:

SOURCE OF APPEAL:
COURT:
COUNTY:
JUDGE:

JUSTICES:
Per curiam. ZIEGLER, C.J., filed a concurring opinion, in which REBECCA GRASSL BRADLEY, HAGEDORN, KAROFSKY, and PROTASIEWICZ, JJ., joined.
NOT PARTICIPATING:

ATTORNEYS:

2024 WI 16

No. 2022AP35-D

STATE OF WISCONSIN : IN SUPREME COURT

In the Matter of Disciplinary Proceedings Against Roger G. Merry, Attorney at Law:

Office of Lawyer Regulation,

Complainant,

v.

Roger G. Merry,

Respondent.

FILED

APR 24, 2024

Samuel A. Christensen
Clerk of Supreme Court

ATTORNEY disciplinary proceeding. *Attorney's license revoked.*

¶1 PER CURIAM. We review the report of Referee Edward E. Leineweber, issued after an evidentiary hearing, in which he concludes that Attorney Roger G. Merry committed two counts of professional misconduct as alleged by the Office of Lawyer Regulation (OLR). Referee Leineweber recommends that the court suspend Attorney Merry's license for a period of one year and

that we order Attorney Merry to pay the full costs of this disciplinary proceeding.

¶2 Neither party has appealed from the referee's report so we review this matter pursuant to Supreme Court Rule (SCR) 22.17(2).[1] After completing our review, we approve the referee's findings and conclusions. With respect to the discipline to be imposed, we consider the recommended one-year suspension to be too light a sanction. Revocation is in order for Attorney Merry's egregious misconduct. We order Attorney Merry to pay the full costs of this proceeding. We accede to the OLR's conclusion that restitution is not warranted.

¶3 Attorney Merry was admitted to practice law in Wisconsin in 1981. He has a lengthy disciplinary history. In 1990, Attorney Merry was privately reprimanded for engaging in a conflict of interest. Private Reprimand, No. 1990-26.[2] In 1993, Attorney Merry was publicly reprimanded for client fund and trust account violations, as well as making at least six intentional misrepresentations to the former Board of Attorneys Professional Responsibility, the OLR's predecessor. Public

[1] SCR 22.17(2) provides: "If no appeal is filed timely, the supreme court shall review the referee's report; adopt, reject or modify the referee's findings and conclusions or remand the matter to the referee for additional findings; and determine and impose appropriate discipline. The court, on its own motion, may order the parties to file briefs in the matter."

[2] Electronic version not available.

Reprimand of Roger G. Merry, No. 1993-3.[3] In 1994, Attorney Merry was privately reprimanded for failing to keep a client reasonably informed about the status of a matter. Private Reprimand, No. 1994-8.[4] In 1999, Attorney Merry was publicly reprimanded for engaging in a conflict of interest. Public Reprimand of Roger G. Merry, No. 1999-1.[5] In 2008, Attorney Merry was publicly reprimanded for making a false statement to a tribunal; offering false evidence; and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Public Reprimand of Roger G. Merry, No. 2008-9.[6] Attorney Merry's law license is also subject to administrative suspensions for failure to pay Wisconsin State Bar dues and failure to file a trust account certification.

¶4 This disciplinary matter concerns Attorney Merry's publication of a book regarding his former client, M.S. This matter began with three counts, one of which the referee dismissed before the evidentiary hearing at the OLR's request.

[3] Electronic version available at https://compendium.wicourts.gov/app/51417a2b8d566b1c706f83303424783b34565c38.continue.

[4] Electronic version not available.

[5] Electronic version available at https://compendium.wicourts.gov/app/12575b0f2a8b1a496c420a41151a8e486b127922.continue.

[6] Electronic version available at https://compendium.wicourts.gov/app/334e1203175d7659478d85166513148f3883286a.continue.

The referee's report and the exhibits received at the evidentiary hearing may be summarized as follows.

¶5 Attorney Merry served as M.S.'s defense attorney in her 2006 trial on charges including first-degree intentional homicide. M.S. was convicted and sentenced and remains in prison to this day.

¶6 In November 2013, Attorney Merry sent M.S. a letter, received into evidence at the evidentiary hearing, stating the following:

> There remains a debt for my representation of you of approximately $19,000.00. I am willing to call it even if you would sign a release so the public defender could give me their copy of the transcript, and also sign a waiver of attorney/client privilege.
>
> The reason I am willing to write off the bill in exchange for the above, is I am planning on publishing a book about the case.
>
> If you are unwilling to sign these two documents, I will have no choice but to sue your grandparents for the balance of the fee. Accordingly, if this meets with your approval, please sign both originals before a witness, have the witness sign it, and return it to me in the enclosed, self-addressed stamped envelope. The extra copies are for your file.

¶7 Attorney Merry enclosed with this letter an "Authorization for Release of Transcripts" from the State Public Defender's Office (SPD) to him, as well as a "Waiver of Attorney-Client Privilege," which called for M.S. to "waive all attorney-client privilege" and to "authorize my former attorney, Roger Merry, to publish any and all information he has regarding me, including, but not limited to, everything I have said to him

which might have been privileged by the attorney-client relationship." M.S. did not sign either document.

¶8 In March 2015, Attorney Merry sent the SPD's Office a letter, received into evidence at the evidentiary hearing, stating that he knew the SPD's Office considered transcripts to be the property of its clients; that he wanted a copy of M.S.'s trial transcripts; that she "did not consent to give me a copy since I obtained a judgment against her in [circuit court] for $18,000"; and that he was "hoping to execute the judgment and obtain a copy or the original of the transcripts." He asked where the transcripts might be, and whether the SPD's Office "had a preferred method of delivery to me pursuant to an execution." Attorney Merry copied M.S. on this letter.

¶9 The SPD's Office responded with a letter, received into evidence at the evidentiary hearing, informing Attorney Merry that it could not send documents from M.S.'s file without her permission.

¶10 Ultimately, in August 2020, Attorney Merry self-published a book about his representation of M.S. The book was available at public libraries and for purchase at a local book store and an online book retailer. Attorney Merry used information relating to his representation of M.S. to write the book. To provide details about the case in the book, Attorney Merry drew from his own review of court records located at the circuit courthouse, as well as from his own recollection of events, chambers discussions or sidebars, and discussions with the prosecutor, other attorneys, experts, or private

individuals——some of which might have occurred in the presence of others, but were not made in open court or in media coverage of the case at the time of the prosecution or its immediate aftermath.[7]

¶11 While the crime and the subsequent criminal prosecution had generated much publicity and discussion within the local community, it had generally subsided in the 14 years between those events and the publication of the book. Publication of the book revived public discussion of the events surrounding the crime and M.S.'s criminal prosecution.

¶12 M.S. suffered psychological harm from Attorney Merry's unsuccessful attempt to obtain her consent to his use of information concerning her case, as well as from his publication of the book about her case without her consent. The effects of the publication of the book included:

- damage to her relationships with her children, mother, siblings, and other family members who, previous to the publication of the book, were supportive of her;
- fear that the book would be available in the prison library and be read and discussed by prison staff and

[7] We note that excerpts of Attorney Merry's book were received into evidence at the evidentiary hearing. In the "Acknowledgements" section of his book, Attorney Merry wrote that "[a]ll matters in this book not derived from my own observation were taken from over five thousand pages of police reports and over two thousand five hundred pages of court reporter transcripts. All statements made by myself and others were made in anticipation of litigation."

fellow inmates, disrupting her relationships in the institution and undermining her well-being there;

- revelation of intimate private details of her personal and family history;
- reviving the stress of events from the commission of the crime through her trial, conviction, and sentencing;
- concern that the book would circulate in her home community and subject her children and family to social ostracism or abuse; and
- concern that the publication of the book would adversely affect her chances of eventually obtaining some form of relief through further court proceedings.

¶13 M.S. sought and received psychological treatment to address the emotional trauma caused by the contacts from Attorney Merry prior to publication and from circulation of the book in the community following the publication.

¶14 As pertinent here, the OLR's complaint alleges that:

- by using information to write and publish a book relating to his representation of M.S. that was not generally known, Attorney Merry violated SCR 20:1.9(c)(1) (Count 1); and
- by revealing in the book information relating to his representation of M.S. without her permission, Attorney Merry violated SCR 20:1.9(c)(2) (Count 2).

¶15 After holding an evidentiary hearing, the referee determined that the OLR had proven the misconduct alleged in both counts. The applicable Wisconsin Supreme Court Rule is SCR

20:1.9, "Duties to former clients." That rule reads, in pertinent part:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

¶16 In disputing the claimed SCR 20:1.9(c)(1) violation alleged in Count 1 before the referee, Attorney Merry argued that the information relating to the representation of M.S. that he relied upon in writing his book had become "generally known," and therefore fell outside the scope of the rule. The referee disagreed, noting that in Wisconsin Formal Ethics Opinion EF-20-02,[8] the State Bar Professional Ethics Committee explained that information is "generally known" for purposes of the rule only if widely recognized by members of the public in the relevant geographic area or within the former client's industry, profession, or trade. Id. at 6 (citing American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 479). The referee wrote that "[a]t best the

[8] Full text of the Wisconsin Formal Ethics Opinion EF-20-02 is found here: https://www.wisbar.org/formembers/ethics/Ethics%20Opinions/EF-20-02%20Former%20Client%20Cross%20Examination%20-%20FINAL.pdf.

record in this matter might demonstrate that some of the personal information and detail [used by Attorney Merry in the book] was previously known by some others, but it does not support a finding that it was 'generally known.'"

¶17 The referee additionally rejected Attorney Merry's argument that his use of information relating to the representation of M.S. in his book did not "disadvantage" M.S., as is required for an SCR 20:1.9(c)(1) violation, because the book asserted her innocence of the underlying crimes, and because she allegedly suffered from mental health issues prior to publication of the book. The referee reasoned that, regardless of the particulars of Attorney Merry's account of the crimes in the book or the status of M.S.'s mental health prior to publication of the book, M.S. was disadvantaged by the psychological harm she suffered from his use of information relating to his representation of her.

¶18 The referee also rejected Attorney Merry's claim that he neither used nor revealed former-client confidences under SCR 20:1.9(c) in that the information related to his representation of M.S. in his book fell outside the scope of the attorney-client privilege. The referee disagreed, reasoning that an attorney's ethical duty to keep client confidences is broader than the evidentiary concern of attorney-client privilege.

¶19 Ultimately, the referee recommended that a one-year suspension of Attorney Merry's law license is merited based on his disciplinary history, the "egregious facts of this case,"

the precedent cited by OLR in its briefing to the referee, and the court's policy of progressive discipline.

¶20 Attorney Merry has not appealed the referee's report and recommendation. Accordingly, this court reviews the matter pursuant to SCR 22.17(2), which provides that if no appeal is timely filed, the court shall review the referee's report; adopt, reject, or modify the referee's findings and conclusions or remand the matter to the referee for additional findings; and determine and impose appropriate discipline.

¶21 When we review a referee's report, we will affirm a referee's findings of fact unless they are found to be clearly erroneous, but we review the referee's conclusions of law on a de novo basis. In re Disciplinary Proceedings Against Inglimo, 2007 WI 126, ¶5, 305 Wis. 2d 71, 740 N.W.2d 125. We determine the appropriate level of discipline to impose given the particular facts of each case, independent of the referee's recommendation, but benefiting from it. In re Disciplinary Proceedings Against Widule, 2003 WI 34, ¶44, 261 Wis. 2d 45, 660 N.W.2d 686.

¶22 Upon careful review of the matter, we adopt the referee's findings of fact and conclusions of law. Attorney Merry has not contested the facts found by the referee, and after reviewing the record ourselves, we find no basis in the record to conclude that the referee's findings are clearly erroneous. And for the reasons set forth below, we agree with the conclusions of law that flow from the referee's findings of

fact; namely, that the OLR established by clear and convincing evidence that Attorney Merry violated SCR 20:1.9(c)(1) and (2).

¶23 Our ethical rules make clear that attorneys owe a duty of confidentiality to both current and former clients. Supreme Court Rule 20:1.6, titled "Confidentiality," prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, or the disclosures are impliedly authorized to carry out the representation, or the disclosures are authorized by SCR 20:1.6(b)[9] or (c).[10] Supreme Court Rule 20:1.9, quoted above,

[9] SCR 20:1.6(b) provides: "A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another."

[10] SCR 20:1.6(c) provides:

> (c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably likely death or substantial bodily harm;
>
> (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (3) to secure legal advice about the lawyer's conduct under these rules;
>
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the

extends this duty of confidentiality to former-clients' confidential information.

¶24 Supreme Court Rule 20:1.9(c)(1) governs an attorney's use of former clients' confidential information. It prohibits an attorney from using information relating to the representation of a former client "to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known."

¶25 Supreme Court Rule 20:1.9(c)(2) governs an attorney's revelation of a former client's confidential information. It prohibits an attorney from revealing information relating to the representation of a former client "except as these rules would permit or require with respect to a client."

¶26 Applying these provisions to the referee's well-supported factual findings, it is clear that Attorney Merry both revealed M.S.'s confidential information and used it to her disadvantage. He did the latter when he drafted a book containing M.S.'s confidences after she refused to assist him in

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client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law or a court order; or

(6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

the endeavor, causing her psychological harm. As for the former, he revealed the confidential information when he made the book available for public distribution and purchase.

¶27 It is further clear, based on the referee's well-supported factual findings, that none of the exceptions to the duty of former-client confidentiality apply. M.S. never provided informed consent to Attorney Merry's use or revelation of her confidential information. The "generally known" exception allowing use of confidential information does not apply given that, as found by the referee, the information used by Attorney Merry was not widely recognized by members of the public in the relevant geographical area. See State Bar of Wisconsin Professional Ethics Committee, Formal Opinion EF-20-02 (June 25, 2020). There has been no claim that any of the exceptions contained within SCR 20:1.6(b) and (c) apply. See n.9-10. And the referee correctly observed that the scope of information protected by the ethical duty of confidentiality is broader than that protected by the evidentiary doctrine of attorney-client privilege.[11] Thus, Attorney Merry's insistence

[11] See SCR 20:1.6, cmt. 3, which explains, in pertinent part:

> The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but

to the referee that he never violated the attorney-client privilege, even if true, does not prove that he satisfied his more robust ethical duty of confidentiality.

¶28 We therefore conclude that this record clearly establishes that Attorney Merry committed the charged misconduct. Our rules prohibited him from revealing M.S.'s confidential information or using it to her disadvantage (he did both) unless special circumstances apply (none do).

¶29 We turn now to the appropriate level of discipline to impose. Sources of guidance in determining appropriate sanctions include prior case law, the American Bar Association Standards for Imposing Lawyer Sanctions, and aggravating and mitigating factors. See Matter of Disciplinary Proc. Against DeLadurantey, 2023 WI 17, ¶52, 406 Wis. 2d 62, 985 N.W.2d 788.

¶30 Turning first to our own prior case law, we discover that the misconduct here is in a league of its own. In In re Disciplinary Proceedings Against Harman, 2001 WI 71, 244 Wis. 2d 438, 628 N.W.2d 351, we imposed a six-month suspension on an attorney for eight counts of misconduct that included revealing his client's medical records to a prosecutor who was prosecuting the client's cohabitant; we found a violation of the duty of client confidentiality even though the records had been publicly filed in a prior lawsuit. The attorney had been reprimanded three times previously. In In re Disciplinary Proceedings

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also to all information relating to the representation, whatever its source.

Against Marick, 204 Wis. 2d 280, 554 N.W.2d 204 (1996), we imposed a nine-month suspension, as reciprocal discipline identical to that imposed by the Minnesota Supreme Court, for an attorney's use of confidential information concerning a client's proposed business acquisition to profit in the stock market. The attorney had no prior discipline. Finally, in In re Peshek, 2011 WI 47, 334 Wis.2d 373, 798 N.W.2d 879, 881, we imposed a 60-day suspension, as reciprocal discipline identical to that imposed by the Illinois Supreme Court, for an attorney's misconduct that included writing blog posts about her job that contained confidential information about her clients, whose identities she made inadequate efforts to conceal. The attorney had no prior discipline.

¶31 Here, Attorney Merry's conduct is considerably more serious, and his disciplinary history considerably more troubling, than that involved in Harman, Marick, and Peshek. It is bad indeed for an attorney to share a client's confidential medical information with another attorney (Harman), or to use a client's confidential business information to profit from a stock transaction (Marick), or to expose client confidences in personal blog posts (Peshek). But it is hard to imagine a more flagrant violation of 20:1.9(c)(1) and (2) than an attorney attempting to both publicize and profit from his client's confidences against the client's express wishes, as Attorney Merry did here. Such actions destroy the trust that is vital to the client-lawyer relationship and erode public confidence in the integrity of the legal profession. And Attorney Merry's

disciplinary history——which at five previous reprimands is more extensive than any of those involved in the above cases——clearly shows that his misbehavior was not a one-off incident. Considerably more discipline is therefore merited than what we imposed in Harman, Marick, and Peshek.

¶32 We turn next to the American Bar Association Standards for Imposing Lawyer Sanctions ("ABA Standards"). Although these standards are in no way binding on this court, they provide helpful direction in assigning an appropriate sanction. Standard 4.21 applies here. It reads:

> 4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

Annotated Standards for Imposing Lawyer Sanctions, Standard 4.21 (Ellyn S. Rosen ed., 2nd ed. 2019). The Annotation to ABA Standard 4.21 explains that disbarment is warranted when a lawyer "knowingly abuses" the client's trust and "knowingly reveals confidential client information improperly with the intent of achieving personal benefit and causing injury or potential injury to the client."

¶33 That is precisely what happened here. Attorney Merry improperly revealed M.S.'s confidential information and used it to her disadvantage, causing her extensive psychological harm—— all so that he could self-publish and sell a book devoted to his musings about the case in which he represented her. This was an intentional, self-benefitting violation of client confidences

within the meaning of the standard. We therefore make an initial determination that revocation[12] is the appropriate sanction in this case, subject to modification as a result of aggravating or mitigating factors.

¶34 Several aggravating factors are present. As noted above, Attorney Merry has a considerable disciplinary history. See ABA Standard 9.22(a). His motivation was selfish; he prioritized his interest in self-publishing a book above M.S.'s confidentiality interest and his ethical duty to protect it. See ABA Standard 9.22(b). He has not acknowledged the wrongful nature of his conduct, see ABA Standard 9.22(g); to the contrary, he portrayed himself to the referee as a past and present victim of an unfair disciplinary system and insisted that "I don't care what the likes of OLR or judges or lawyers say about me and my ethics because they're wrong. It's motivated for improper purposes, and it doesn't add to the discussion. And it, in fact, disgraces the practice of law." M.S., as an inmate, was a vulnerable victim. See ABA Standard 9.22(h). Finally, Attorney Merry had decades of experience in the practice of law, and thus should have known better than to act as he did. See ABA Standard 9.22(i).

¶35 There is little on the mitigating side of the scale. Attorney Merry appears to have generally cooperated with the OLR during this disciplinary process. See ABA Standard 9.32(e).

[12] The ABA Standards use the term "disbarment"; Wisconsin uses the term "revocation." See SCR 21.16(1m)(a).

And his disciplinary history is relatively remote in time. See ABA Standard 9.32(m).

¶36 Although there is no mathematical formula for weighing these factors, we conclude that the many aggravating factors outweigh the few mitigating factors present in this case. We therefore conclude that revocation is appropriate under the facts of this case.

¶37 We note that this result is consistent with that reached in an out-of-state case with reasonably analogous facts. In In re Smith, 991 N.E.2d 106 (Ind. 2013), the Indiana Supreme Court disbarred an attorney who wrote a book that purported to be a true account of his personal and professional relationship with a former client, who was active in politics and at one point held a high-level job in the federal government. See id. at 107. The attorney's professed motivation for writing the book was at least in part to recoup legal fees the former client owed him and money the former client had obtained from him over the years. Id. The Indiana Supreme Court determined that the attorney committed multiple ethical violations in writing the book, including the improper disclosure of details of his representation of the former client. The court wrote:

> In the book, Respondent revealed personal and sensitive information about [the former client] that was obtained in confidence as her attorney, and its revelation had the potential of causing her public embarrassment and other injury, such as impairment of her employment opportunities. Respondent's selfish motivation in deliberately attempting to reveal this confidential information to a wide audience for monetary gain, his false statements in the book and in

> this disciplinary matter, and his lack of any remorse lead us to conclude that that disbarment is appropriate for Respondent's misconduct.

The court cited ABA Standard 4.21, discussed above, as support for this result. Id. at 110.

¶38 We acknowledge that all of Attorney Merry's previous disciplinary matters resulted in reprimands, not license suspensions. Under different facts, a suspension, rather than revocation, might be considered a reasonable next step in the progressive discipline process. But when the circumstances have called for it, we have revoked an attorney's law license for misconduct even where (quite unlike here) the attorney had no prior disciplinary history. In In re Disciplinary Proceedings Against Wright, 180 Wis. 2d 492, 509 N.W.2d 290 (1994), for example, we concluded that an attorney's conversion of client funds warranted license revocation, even though the attorney had never been disciplined before. Here, Attorney Merry's misconduct was arguably far more serious than that involved in Wright: client funds can be replaced, but the harm caused by Attorney Merry's improper use and very public revelation of M.S.'s confidences cannot be undone; that bell cannot be unrung. We therefore impose revocation as the next disciplinary step for Attorney Merry.

¶39 We turn now to the issue of costs, which total $16,853.92 as of December 20, 2023. Attorney Merry does not dispute them. As is our normal practice, we deem it appropriate to impose the full costs of this proceeding on him. See SCR 22.24(1m).

¶40 We note that the OLR does not seek restitution. None is ordered.

¶41 Finally, we note that, on August 3, 2022, several months after the OLR filed its disciplinary complaint against him, Attorney Merry filed a petition to voluntarily surrender his law license. The court has not yet taken action on this petition. We hereby deny it. See In re Disciplinary Proceedings Against Snyder, 127 Wis. 2d 446, 380 N.W.2d 367 (1986) (voluntary resignation is an inappropriate disposition of a disciplinary proceeding).

¶42 IT IS ORDERED that the license of Roger G. Merry is revoked, effective the date of this order.

¶43 IT IS FURTHER ORDERED that Roger G. Merry's August 3, 2022 petition to voluntarily surrender his law license is denied.

¶44 IT IS FURTHER ORDERED that, within 60 days of the date of this order, Roger G. Merry must pay to the Office of Lawyer Regulation the costs of this proceeding totaling $16,853.92.

¶45 IT IS FURTHER ORDERED that Roger G. Merry shall comply with the requirements of SCR 22.26 pertaining to the duties of a person whose license to practice law in Wisconsin has been revoked.

¶46 IT IS FURTHER ORDERED that the administrative suspensions of Roger G. Merry to practice law in Wisconsin for failure to pay Wisconsin State Bar dues and failure to file a trust account certification will remain in effect until each

reason for the administrative suspension has been rectified, pursuant to SCR 22.28(1).

¶47 ANNETTE KINGSLAND ZIEGLER, C.J. *(concurring).* I concur in the court's order revoking Attorney Merry's license to practice law in Wisconsin. I write separately to point out that in Wisconsin the "revocation" of an attorney's law license is not truly revocation because the attorney may petition for reinstatement after a period of five years. See SCR 22.29(2). I believe that when it comes to lawyer discipline, courts should say what they mean and mean what they say. We should not be creating false perceptions to both the public and to the lawyer seeking to practice law again. See In re Disciplinary Proceedings Against Moodie, 2020 WI 39, 391 Wis. 2d 196, 942 N.W.2d 302 (Ziegler, J., dissenting). And, as I stated in my dissent to this court's order denying Rule Petition 19-10, In the Matter of Amending Supreme Court Rules Pertaining to Permanent Revocation of a License to Practice Law in Attorney Disciplinary Proceedings, I believe there may be rare and unusual cases that would warrant the permanent revocation of an attorney's license to practice law. See S. Ct. Order 19-10 (issued Dec. 18, 2019) (Ziegler, J., dissenting).

¶48 I am authorized to state that Justices REBECCA GRASSL BRADLEY, BRIAN HAGEDORN, JILL J. KAROFSKY, and JANET C. PROTASIEWICZ join this concurrence.

Wisconsin Court System
Wisconsin Attorneys' Professional Discipline Compendium

Disciplinary Proceedings Against Peshek
2011 WI 47, 334 Wis.2d 373, 798 N.W.2d 879 (2011)

ATTORNEY disciplinary proceeding. *Attorney's license suspended.*

State Bar Id:
1071730

AREAS OF PRACTICE:
Criminal Law

Disposition:
Court imposes reciprocal discipline

SANCTION:
Suspension-60 Days

Reciprocal Discipline

¶1 PER CURIAM. This is a reciprocal discipline matter. The Office of Lawyer Regulation (OLR) filed a complaint against Attorney Kristine A. Peshek seeking the imposition of discipline reciprocal to that imposed by the Illinois Supreme Court. On May 18, 2010, the Illinois Supreme Court suspended Attorney Peshek's Illinois law license for 60 days, effective June 8, 2010, based on two counts of misconduct. Upon our review, we impose the same 60-day suspension imposed by the Illinois Supreme Court. The OLR does not seek costs. Accordingly, no costs will be imposed.

¶2 Attorney Peshek was admitted to practice law in Illinois in 1989. She was admitted to the State Bar of Wisconsin in 2008. Attorney Peshek has not been subject to previous discipline.

¶3 The following facts are taken from the documents attached to the OLR's complaint relating to the Illinois disciplinary proceedings. Attorney Peshek's misconduct in Illinois consisted of publishing a blog with information related to her legal work from June of 2007 to April of 2008. The public blog contained confidential information about her clients and derogatory comments about judges. The blog had information sufficient to identify those clients and judges using public sources.

¶4 In addition, Attorney Peshek's misconduct involved failing to inform the court of a client's misstatement of fact. One of her clients told a judge, on the record, that she was not using drugs. Later, the client informed Attorney Peshek that the client was using methadone at the time of her statement in court. Attorney Peshek did not inform the judge of this fact or correct the client's misstatement.

¶5 On August 24, 2009, the Illinois Attorney Registration and Disciplinary Commission (the Illinois Commission) filed a complaint against Attorney Peshek alleging two counts of misconduct:

Confidentiality

- Count I: Using or revealing a confidence or secret of the client known to the lawyer, in violation of Rule 1.6(a) of the Illinois Rules of Professional Conduct (IRPC); and conduct which tends to defeat the administration of justice or bring the courts or the legal profession into disrepute, in violation of Illinois Supreme Court Rule 770; and

Fraud by Client

Dishonesty, Fraud, Deceit or Misrepresentation

- Count II: failing to call upon a client to rectify a fraud that the client perpetrated on the court, in violation of IRPC 1.2(g); failing to disclose to a tribunal a material fact known to the lawyer when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, in violation of IRPC 3.3(a)(2); conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of IRPC

8.4(a)(4); conduct that is prejudicial to the administration of justice, in violation of IRPC 8.4(a)(5); and conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute, in violation of Illinois Supreme Court Rule 770.

¶6 Attorney Peshek filed in the Illinois Supreme Court a petition to impose discipline on consent and affidavit admitting the facts of the misconduct. On February 26, 2010, at a hearing before the Illinois Commission, Attorney Peshek requested the panel approve the petition to impose discipline on consent. On Attorney Peshek's behalf, her counsel informed the panel that Attorney Peshek had been practicing law for more than 20 years and worked tirelessly as a public defender for her entire career. Counsel asked the panel to consider the traumatic event that led to the stress Attorney Peshek attempted to resolve through writing a blog about her experiences as a public defender. The stressful incident occurred when Attorney Peshek was representing a criminal defendant at his trial for home invasion and armed robbery. In open court during the trial, the client punched Attorney Peshek in the face, resulting in Attorney Peshek suffering a concussion and other physical injuries.

¶7 The client was charged with aggravated battery in relation to his assault on Attorney Peshek. Attorney Peshek was ultimately diagnosed with acute stress disorder. The trial judge denied Attorney Peshek's motion to withdraw and Attorney Peshek was required to represent the client at his re-trial. Attorney Peshek was also suffering from a serious medical issue that at the time was undiagnosed.

¶8 Counsel advised the panel that Attorney Peshek began the blog about her thoughts and experiences to help her deal with her stressful situation. At no time did she discern any risk of disclosing client confidences, because she believed she adequately concealed her clients' identities to avoid inappropriate disclosure.

¶9 However, at the time of the disciplinary proceeding, Attorney Peshek realized the risk in that regard and regretted her mistake. After the issue was brought to her attention, she removed all entries related to client matters. As far as her client's misinforming the court, counsel advised that Attorney Peshek misunderstood her ethical obligations at that point and had no intention of assisting her client in a fraud on the court.

¶10 On May 18, 2010, the Illinois Supreme Court accepted the petition of the Illinois Commission to impose discipline on consent and suspended Attorney Peshek's license to practice law in Illinois for 60 days, effective June 8, 2010. The Illinois Supreme Court also directed Attorney Peshek to reimburse the Client Protection Program Trust Fund for any client protection payments arising from her conduct.

Reciprocal Discipline
SCR 22.22

¶11 After reviewing the matter, we impose the identical 60-day suspension imposed by the Illinois Supreme Court. See SCR 22.22. On April 25, 2011, Attorney Peshek admitted service of the authenticated copy of the OLR complaint and the order to answer. On April 28, 2011, this court ordered Attorney Peshek to inform the court, in writing, of any claim, predicated upon the grounds set forth in SCR 22.22(3), that the

imposition of discipline identical to that imposed in Illinois would be unwarranted and of the factual basis for any such claim. The order stated that if Attorney Peshek failed to respond by May 18, 2011, the court would proceed under SCR 22.22. Attorney Peshek filed no answer to the complaint and did not respond to this court's April 28, 2011, order.

¶12 On June 2, 2011, the OLR filed with this court a stipulation signed by Attorney Peshek in which she agrees with the facts alleged in the complaint and the documents attached to the complaint, and that she is subject to reciprocal discipline pursuant to SCR 22.22. Through the stipulation, Attorney Peshek does not claim defenses to the proposed imposition of reciprocal discipline, nor does she contest the imposition of discipline in Wisconsin.

¶13 IT IS ORDERED that the license of Kristine A. Peshek to practice law in Wisconsin is suspended for a period of 60 days, effective July 25, 2011.

¶14 IT IS FURTHER ORDERED that Kristine A. Peshek shall comply with the terms and conditions set forth in the Illinois Supreme Court's order and judgment of May 18, 2010.

¶15 IT IS FURTHER ORDERED that Kristine A. Peshek comply with the provisions of SCR 22.26 concerning the duties of a person whose license to practice law in Wisconsin has been suspended.

Wisconsin Formal Ethics Opinion EF-17-02: Duty of Confidentiality; Identities of Current and Former Clients.

April 4, 2017

Synopsis

The ethical duty of confidentiality protects all information relating to the representation of the client, whatever its source, including the identity of the client. SCR 20:1.6 prohibits the disclosure of a client's identity unless the client gives informed consent to the disclosure, the disclosure is impliedly authorized in order to carry out representation, or the disclosure falls within certain stated exceptions. Whether a client's identity is protected by the lawyer-client privilege under Wis. Stat. § 905.03 is beyond the scope of this opinion.

Ethics Opinion E-93-5 is withdrawn.

Introduction

Lawyers may wish to disclose information about the clients they represent, including the identity of current or former clients, for a variety of reasons not related to the representation of those clients, such as listing representative clients in marketing materials or providing client references to prospective clients. This opinion discusses whether client identity is protected by Supreme Court Rule ("SCR") 20:1.6 and also discusses the scope of information protected by SCR 20:1.6.

Opinion

The lawyer's professional duty to protect the confidentiality of information relating to the representation of clients is governed by SCR 20:1.6. The Rule states, in relevant part:

> SCR 20:1.6 Confidentiality
>
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).
>
> (b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.
>
> (c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably likely death or substantial bodily harm;
>
> (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (3) to secure legal advice about the lawyer's conduct under these rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a court order; or

(6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

The Rule contains a general prohibition on disclosing information relating to the representation of clients, then sets forth one mandatory disclosure provision and several circumstances in which disclosure is permissive. In the course of representing clients, lawyers disclose information in ways that are reasonably necessary to achieve the lawful objectives of the clients, such as negotiating with adversaries, arguing the case in court or representing the client's interests before governmental agencies. Such disclosures are "impliedly authorized" under SCR 20:1.6(a) and do not violate the Rule. The mandatory and permissive disclosure provisions of SCR 20:1.6(b) and (c) also permit disclosure when applicable.

This opinion, however, will focus on whether client identity (and other information relating to the representation of current or former clients) is protected when a lawyer wishes to disclose client identity for the lawyer's own purposes when disclosure is not necessary to further the client's objectives. One example of such a situation is the listing of representative clients in marketing materials.

Information relating to the representation of a client

SCR 20:1.6 is noteworthy in that it does not categorize information as "confidential" and "non-confidential" information – it simply prohibits lawyers from revealing information relating to the representation of a client. It is therefore necessary to determine the scope of "information relating to the representation of a client" and whether client identity falls within this category.

While the Rule itself does not define "information relating to the representation of a client, Comment [3] states, "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Thus, information received from third parties, learned from opposing parties or gathered from other sources is protected provide that the information relates to the representation of the client. This extremely broad definition, coupled with the term "confidential," can lead to confusion as to the scope of the rule. The next sections of the opinion discusses some common questions about the scope of information protected by SCR 20:1.6.

What if the lawyer believes that the identity of a client is not protected by the lawyer-client privilege*?*

Lawyers sometimes misunderstand the duty to protect information because they confuse the duty of confidentiality with the lawyer-client privilege. It is important to understand the distinction between the evidentiary rule of lawyer-client privilege and the ethical duty of confidentiality

ABA Comment [3] to SCR 20:1.6 notes the differences between these bodies of law:

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The

> confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Being a rule of evidence, not ethics, lawyer-client privilege only applies in proceedings in which the rules of evidence govern and only determines whether certain types of evidence may be admitted or compelled in such proceedings. Lawyer-client privilege does not therefore guide lawyers in determining what information about a client that a lawyer may voluntarily reveal. SCR 20:1.6, which governs a lawyer's duty of confidentiality, applies in all other situations, and governs what information relating to the representation of clients lawyers may voluntarily reveal.

Much information relating to the representation of a client is not covered by the lawyer-client privilege, but nonetheless is protected by SCR 20:1.6. This means that when considering "information related to the representation of a client," the privileged or non-privileged nature of the information is not determinative of whether the information is protected by the duty of confidentiality.

What if the identity of the client has already been disclosed in public?

In Formal Ethics Op. 04-433 (2004), the ABA's ethics committee noted the scope of confidentiality in analyzing a lawyer's duty to a report a lawyer not engaged in the practice of law:

> We also note that Rule 1.6 is not limited to communications protected by the attorney-client privilege or work-product doctrine. Rather, it applies to all information, whatever its source, relating to the representation. Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.
>
> (Footnotes omitted)

ABA Formal Ethics Op. 04-433 makes the point that even information that may be available from public sources remains protected as long as it is information relating to the representation of a client.

Wisconsin case law has also addressed this issue.[1] In one disciplinary case, the Respondent lawyer was charged with violating his duty of confidentiality by revealing information relating to the representation of a former client. The Respondent argued that he was free to reveal that information because it had previously been placed in the public record in a different case. The Wisconsin Supreme Court rejected this argument, holding as follows:

> We agree with Referee Jenkins' interpretation of this rule and her conclusion that the information obtained by Attorney Harman from his client, S.W., even if not protected or deemed confidential because it had previously been filed in the Wood County case, could not be disclosed without S.W.'s permission because that information was obtained as a result of the lawyer-client relationship he had with S.W.

Thus the Wisconsin Supreme Court has recognized that whether information has been previously publicly disclosed does not prevent the information from being protected by the Rule. If the publicly disclosed (or available) information relates to the representation of a client, it is protected by SCR 20:1.6.[2] Similarly,

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[1] *Disciplinary Proceedings against Harman,* 244 Wis.2d 438, 628 N,W.2d 351 (2001)

[2] Other jurisdictions have also recognized that the protections of the confidentiality rule extends to publicly available information. See, e.g., *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995); *Iowa Supreme Court Attorney Disciplinary Bd.*

information remains protected even if known by others or available from other sources. This also illustrates another important distinction between privilege and confidentiality – disclosure does not constitute waiver of confidentiality. Generally when the privilege is waived, it is waived forever and for all purposes, but when information protected by SCR 20:1.6 is disclosed for a permitted purpose, the information does not lose its protected status.[3]

What if the lawyer wishes to disclose the identity of a prospective or former, rather than current, client?

The protections of SCR 20:1.6 may also arise outside the temporal confines of a lawyer-client relationship. SCR 20:1.18 sets forth the duties owed by lawyers to prospective clients. SCR 20:1.18(b) states:

> Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as SCR 20:1.9 would permit with respect to information of a former client.

Thus the Rules specifically apply the same duty of confidentiality owed to former clients to prospective clients even when no lawyer-client relationship ensues. Needless to say, this Rule also protects information learned in discussions with prospective clients when a lawyer-client relationship does ensue. Similarly, a lawyer may learn information from a former client that relates to the representation of that client, such as when a former client calls to ask the lawyer questions about the matter and provides the lawyer with additional information. The determinative factor is whether the information relates to the representation of a client.

The protections of the Rule do not end at the end of the representation of the client.[4] SCR 20:1.9(c)(2) states:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The duty of confidentiality continues beyond the death of the client.[5]

What if the client has not specifically requested that their identity not be disclosed?

The Rule also operates automatically and protects information even if the client has not requested that the information be held in confidence or does not consider it confidential.[6] There is no requirement in the language of either the Rule or Comment of SCR 20:1.6 requiring that the client request information be kept confidential in order to trigger the protections of the Rule. Thus, in order to disclose information relating to the representation of a client, it is the obligation of the lawyer to obtain the client's informed consent or determine that the information falls within one of the stated exceptions.

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v. Marzen, 779 N.W.2d 757 (Iowa 2010); *In re Bryan*, 61 P.3d 641, (Kan. 2003); *Akron Bar Ass'n v. Holder*, 810 N.E.2d 426, (Ohio 2004).

[3] See e.g. *Newman v. Maryland*, 863 A.2d 321 (Md. 2004).

[4] See SCR 20:1.6 Comment [18]. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2)

[5] See Wisconsin Ethics Op. E-89-11.

[6] See Nevada Ethics Op. 41 (2009)

What if the disclosure of the client's identity would be harmless?

Also, whether a lawyer believes that a disclosure would be "harmless" is not relevant to the analysis of whether such a disclosure would be permissible. This is demonstrated by the way the duty under SCR 20:1.6 differs from its predecessor, DR 4-101, which prohibited the lawyer from disclosing "confidential" or "secret" information. Confidential information previously was defined as information protected by the lawyer-client privilege and secrets were defined as information which may be detrimental or embarrassing to the client or which the client has requested be held in confidence. Unlike DR 4-101, SCR 20:1.6 is not limited to information communicated in confidence by the client and does not require the client to indicate what information is protected. Moreover, unlike DR 4-101, SCR 20:1.6 does not permit the lawyer to speculate whether particular information might be embarrassing or prejudicial if disclosed. As long as the information relates to the representation, it is protected by the duty of confidentiality.

Relevant Rules

Of particular relevance to this question is the recently adopted SCR 20:1.6(c)(6), which states:

> (c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

The Wisconsin Committee Comment provides guidance:

> Paragraph (c)(6) differs from its counterpart, Model Rule 1.6(b)(7). Unlike its counterpart, paragraph (c)(6) is not limited to detecting and resolving conflicts arising from the lawyer's change in employment or from changes in the composition or ownership of a firm. Paragraph (c)(6), like its counterpart, recognizes that in certain circumstances, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest. ABA Comment [13] provides examples of those circumstances. Paragraph (c)(6), unlike its counterpart, also recognizes that in certain circumstances, lawyers may need to disclose limited information to clients and former clients to detect and resolve conflict of interests. *Under those circumstances, any such disclosure should ordinarily include no more than the identity of the clients or former clients.* The disclosure of any information, to either lawyers in different firms or to other clients or former clients, is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client. ABA Comment [13] provides examples of when the disclosure of any information would prejudice the client. Lawyers should err on the side of protecting confidentiality.
>
> (Emphasis added)

The fact that a provision allowing permissive disclosure in certain circumstances is necessary to permit lawyers to disclose identities of current or former clients clearly demonstrates that client identities are protected.

Paragraph [2] of the ABA Comment to SCR 20:7.2, the advertising rule, also recognizes that client identity is protected by the duty of confidentiality.

> This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references *and, with their consent,*

names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

(Emphasis added)

The Committee has long recognized this fact, opining in Wisconsin Ethics Opinion E-90-03 that client identity and information concerning fees are protected by SCR 20:1.6(a). This position is also consistent with opinions from other jurisdictions.[7]

Conclusion

The ethical duty of confidentiality under SCR 20:1.6 is thus extremely broad: it protects all information relating to the representation of the client, whatever its source. It protects information irrespective of whether that information is privileged, or if the lawyer believes that disclosure would be "harmless." It protects information that is known to others or may be available from public sources. This duty of confidentiality extends to information relating to the representation of former clients as well by virtue of SCR 20:1.9(c)(2), which prohibits lawyers from revealing information relating to the representation of former clients except as permitted or required by the Rules. Thus, information relating to the representation of former clients is protected to the same extent as that relating to current clients.

It is hard to imagine information more closely relating to the representation of a client than the identity of the client. Therefore, a client's identity, as well as a former client's identity, is information protected by SCR 20:1.6 and the disclosure of a client's identity is prohibited unless the client gives informed consent to the disclosure, the disclosure is impliedly authorized in order to carry out representation, or the disclosure falls within certain stated exceptions. Lawyers must be mindful of the duty of confidentiality owed to current and former clients when considering the use of such information for purposes such as marketing, authoring articles, or presentations.

The State Bar's Standing Committee of Professional Ethics (the "Committee") previously addressed revealing the identity of current and former clients in Wisconsin Ethics Opinion E-93-5. That opinion, which incorrectly states that client identity is not considered to be information relating to the representation of that client, is withdrawn.

[7] Ellen J. Bennett, Elizabeth J. Cohen, Martin Whittaker, Annotated Model Rules of Professional Conduct 98 (7th ed. ABA Center for Professional Responsibility); Ill. Ethics Op. 12-03 (2012) (client's identity is protected information that may not be disclosed to members of reciprocal referral business networking group without client's informed consent); New York State Ethics Op. 907 (2012) (lawyer may not disclose client's identity when making anonymous charitable donation on client's behalf); Nevada Ethics Op. No. 41 (2009) (lawyer may not reveal information relating to the representation of the client even if the information is generally known and not to the disadvantage of the client); Ill. Ethics Op. 97-1 (1977); Iowa Ethics Op. 97-4 (1977). A former client's identity is also protected under SCR 20:1.6 because SCR 20:1.9(c)(2) prohibits a lawyer from disclosing information except as the rules would permit with respect to a client.

Wisconsin Formal Ethics Opinion EF-23-01

Responding to Online Criticism

June 22, 2023

Synopsis: *A lawyer may not reveal information relating to the representation of a client in response to online criticism of the lawyer without the affected current, prospective or former client's informed consent. A response to online criticism which reveals protected information is not permitted by the self-defense exception outlined in SCR 20:1.6(c)(4). In most instances, the committee believes that no response best serves both the interests of the client and the lawyer. However, should the lawyer decide to respond, they may not reveal protected information and should be restrained and proportional in their response. Suggested permissible responses are discussed at the end of this opinion.*

Introduction

Social media postings have become a prevalent method for consumers to communicate about goods and services they have used or purchased, or to comment upon issues that arise in business or society at large. The legal profession is no exception, and lawyers are regularly subject to online commentary and criticism. Online postings about lawyers may come from a variety of sources – prospective, current, or former clients, opponents or third parties whom the lawyer has never represented or opposed. They may lack context, be wholly or partly inaccurate, and be harmful to the lawyer's reputation. Basic notions of fair play suggest the lawyer should be allowed to respond to negative postings. However, the lawyer's duty of confidentiality imposes substantial constraints on what a lawyer may do, constraints that do not apply to other professionals. In this opinion, the State Bar's Standing Committee on Professional Ethics (the "committee") discusses a lawyer's options and responsibilities when subject to online criticism.

The Scope of the Ethical Duty of Confidentiality

SCR 20:1.6(a) states, "[a] lawyer shall not reveal information relating to the representation of a client …"

All information relating to the representation is protected regardless of its source or whether the information is publicly available. ABA Formal Ethics Op. 480 (2018).[1] The duty applies not only to current clients, but also prospective clients, SCR 20:1.18(b), and former clients, SCR 20:1.9(c). The ABA comment to the rule further provides,

> This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.

ABA Model Rule 1.6 cmt. [4].

The rule's reach is significantly broader than the attorney-client privilege which protects only confidential communications between the lawyer and client made for the purpose of obtaining legal services. Wis. Stat. §905.03. As an evidentiary rule, the attorney-client privilege is relevant only in formal proceedings in which the rules of evidence apply.

Examples of information that is protected by the rule but not privileged include the identity of the client, Wisconsin Formal Ethics Op. EF-17-02 (2017), ABA Formal Ethics Op. 480 (2018), the location of the client, Virginia Ethics Op. 929 (1987), Nebraska Ethics Op. 90-2, cf. *Suarez v. Hillcrest Dev. of South Florida Inc.*, 742 So. 2d 423 (Fla. Dist. Ct. App. 1999), or litigation details even if publicly available. Rhode Island Ethics Op. 99-02 (1999).

In addition to protecting publicly available information and information not covered by the attorney client privilege, SCR 20:1.6 also protects information previously disclosed to others, information learned from third parties and disclosures that would not be harmful to the client. Wisconsin Formal Ethics Op. EF-17-02 (2017).

Online complaints typically concern dissatisfaction with the lawyer's performance, the result obtained, or the fee charged, all topics protected by the duty of confidentiality. Absent the affected client's informed consent or the availability of an exception to the duty, there is little a lawyer can say in response to a complaint that would not involve disclosure of protected information.

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[1] *See Restatement (Third) of the Law Governing Lawyers* §59 (2000) (in contrast to the ABA and Wisconsin confidentiality rules, information "generally known" is not considered confidential under the Restatement provisions).

Exceptions to the Duty of Confidentiality

The duty of confidentiality in Wisconsin is not absolute; there are situations in which a lawyer must disclose confidential information[2] and others in which they have discretion to do so.[3]

A. Implied authority

SCR 20:1.6(a) allows for the disclosure of protected information absent a client's informed consent when "impliedly authorized in order to carry out the representation." Comment [5] explains, "[i]n some situations … a lawyer may … make a disclosure that facilitates a satisfactory conclusion to a matter." Similarly, §61 of the Restatement (Third) of the Law Governing Lawyers (2000) allows disclosure of protected client information that furthers the client's interests. *See also* North Carolina Ethics Op. 2015-5 (2015) (lawyer may provide former client's file to successor counsel to further the former client's interests). This exception would not apply when a lawyer is contemplating responding to a critical online comment as the lawyer's response is almost never necessary to advance the client's interests.

B. Informed consent

A lawyer may also disclose protected information if the client gives informed consent, defined 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 reasonably available alternatives to the proposed course of conduct." SCR 20:1.0(f). *See also* cmt. [6]. Implicit in the requirement of informed consent is the need to focus on the interests of the client and not the lawyer. An adequate explanation must include whether disclosure of protected information would advance or harm the client's interests, and the proposed disclosure should ordinarily reveal no more information than is necessary to fairly respond to the criticism. When the lawyer has had a falling out with their client, it would be unlikely they would give the necessary informed consent to allow the lawyer to respond to the online criticism.[4] In the case of a currently represented opponent posting online criticism, SCR 20:4.2

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[2] SCR 20:1.6(b) requires the disclosure of confidential information "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another." This requirement is not part of the ABA rule. In addition, SCR 20:3.3(c) also requires the disclosure of confidential information if necessary to correct a false statement or the presentation of false evidence. Unlike the ABA version of this rule, there is no Wisconsin time limit on this remedial responsibility.

[3] See SCR 20:1.6(c)(1)-(6). Of the various situations allowing discretion to disclose confidential information only the "self-defense" exception, SCR 20:1.6(c)(4), is relevant to the issue of responding to online criticism.

[4] If the criticism was from an opponent or other non-client complaining about the case outcome it may be that the client or former client would give informed consent to a minimal disclosure by their lawyer.

would prohibit responding directly or communicating to that person about the matter absent the consent of their lawyer.

C. The "Self-Defense" Exception

Most relevant to this opinion is the "self-defense" exception to confidentiality. SCR 20:1.6(c)(4)[5] provides,

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary … (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client …

This provision allows disclosure of protected information in three situations:

(1) "[T]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client …"
(2) To "establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved"
(3) "[T]o respond to allegations in any proceeding concerning the lawyer's representation of the client …"

Although confidentiality rules among the states vary, many have adopted the ABA "self-defense" provision. Without exception, all that have considered the issue have agreed that online criticism alone does not fall within the language that permits disclosure of protected information to "establish a defense to a criminal charge or civil claim …" or to "respond to allegations in any proceeding …"[6] The committee agrees with this view.

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[5] The text of Wisconsin's self-defense exception is identical to the ABA version. The only difference is their numbering. Wisconsin's exception is found in SCR 20:1.6(c)(4) whereas the ABA version is Rule 1.6(b)(5).

[6] For example, ABA Formal Opinion 496 provides, "[o]nly subparagraph (b)(5) is implicated here, and there are three exceptions bundled into that provision, the first two of which are clearly inapplicable to online criticism. First, online criticism is not a "proceeding," in any sense of that word, to allow disclosure under the exception "to respond to allegations in any proceeding concerning the lawyer's representation of the client." Second, responding *online* is not necessary "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." A lawyer may respond directly to a person making such a claim, if necessary, to defend against a criminal charge or civil claim, but making public statements online to defend such a claim is not a permissible response. *See also* ABA Formal Opinion 10-456; Texas Professional Ethics Comm. 662 (2016); N.J. Advisory Committee on Professional Ethics 738 (2020).

The self-defense provision also allows for the disclosure of protected information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client …"

The word "controversy" is defined as "a disagreement, often a public one, that involves different ideas or opinions about something."[7] To be sure, common usage could embrace both formal disagreements involving litigation and informal disputes, such as social media disagreements. If the former, the self-defense provision would not allow disclosure of protected information on social media in response to online criticism. If the latter, lawyers could disclose protected information anytime a dispute arose, however minor.

For several reasons, the committee believes the term "controversy" should not be interpreted to include informal disagreements reflected in online criticisms. First, lawyers' relationships with clients are often contentious and involve disagreements about matters large and small. This is not surprising; lawyers frequently deal with the most difficult of human experiences. To view any disagreement between a lawyer and client as a "controversy" which makes it necessary for the lawyer to disclose protected information would significantly diminish client protections. Such a view cannot be reconciled with the important role of confidentiality in the representation of clients.

Second, lawyer responses to online criticism are likely to be critical of the author. If that person is or was a client, as is often the case, allowing disclosure of negative information about the client would violate SCR 20:1.8(b), which cautions without exception that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client …"

Third, a response in kind to online criticism is unlikely to be necessary to serve any of the purposes underlying the exceptions to the duty of confidentiality. ABA Rule 1.6 cmt [16]. If the lawyer is faced with formal accusations their response will typically be a written answer or denial, not an online posting. And, if the criticism is not connected to any type of formal complaint the lawyer will have a variety of options that do not require public disclosure of protected information on social media.[8]

Fourth, limiting the interpretation of controversies to formal disagreements is consistent with the other exceptions outlined in SCR 20:1.6(c)(4).

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[7] https://dictionary.cambridge.org/us/dictionary/english/controversy.

[8] *See* pp. 6-7 inf*ra*.

The ABA commentary is consistent with this view of the "self-defense" provision:

> [10] 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)(5) 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.

Nothing in the commentary suggests that informal social media disputes trigger the "self-defense" exception. All examples refer to some type of formal proceeding. And, although the comment does suggest a formal proceeding need not be pending to allow the lawyer to respond, this circumstance is framed to apply only to situations where a formal accusation is imminent.[9]

Most jurisdictions that have considered the issue have reached the conclusion that the self-defense exception does not permit disclosure of protected information because informal criticism of a lawyer does not constitute a controversy as that term is used in the rule and a response is therefore not necessary.[10]

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[9] ABA Model Rule 1.6 cmt. [14]; Penn. Bar Association Formal Opinion 2014-200 at 3-4. See also *Restatement (Third) of the Law Governing Lawyers* §64 cmt. c (2000)

[10] Penn. Bar Assoc. Formal Opinion 2014-200; Texas Prof. Ethics Comm. Op. 662 (2016); New York State Bar Association Opinion 1032 (2014); Bar Association of San Francisco Opinion 2014-1 (2014); Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 525 (2012); Bar Association of Nassau County Committee on Professional Ethics Opinion 2016-01 (2015); West Virginia Legal Ethics Opinion No. 2015-02 (2015). See also *In re Skinner*, 758 S.E.2d 788 (Ga. 2014).

It should be noted that there is contrary authority. *See* Colorado Bar Ass'n Opinion 136 (2019) and State Bar of Ariz. Ethics Op. 93-02. The former is quite cautious in its view and the latter opinion was overruled by State Bar of Ariz. Ethics Op. 19-0010. As authority for disclosure outside of a formal proceeding, the Colorado opinion cites a Wisconsin case – *In re Thompson*, 2014 WI 25, 353 Wis. 2d 556, 847 N.W.2d 793 (2014). In that case, a lawyer faced with a claim of ineffective assistance of counsel obtained court permission to disclose substantial confidential information in a letter to the court prior to an evidentiary hearing. Under the circumstances, the supreme court concluded the lawyer's actions did not violate SCR 20:1.9(c). The committee believes the unique

The committee believes a narrow interpretation of SCR 20:1.6(c)(4) best complements the other relevant disciplinary rules and, as a practical matter, best avoids harm to the client's or lawyer's interests. In most instances, a lawyer response will not resolve the dispute, may simply draw more attention to the matter, and ultimately reflect poorly on the client, the lawyer, or both.

Informed Consent and Waiver of Privilege

It has been suggested that a client's decision to disclose protected information in an online critique of their lawyer might operate as a waiver of confidentiality or constitute informed consent to disclose confidential information, at least as to the topics discussed. Such a view incorrectly confuses the significance of a client's disclosure of information to the evidentiary attorney-client privilege with the ethical duty of confidentiality.

The attorney-client privilege is an evidentiary rule that protects communications between a lawyer and client made for purposes of receiving legal services. Wis. Stat. §905.03(1)(d), (2). A client's voluntarily disclosure of communications with their lawyer is generally viewed as a waiver of the privilege as it suggests the client did not intend to keep the communications confidential, part of the statutory definition of what information is privileged.[11] Thus, a client's intentional posting of information about their lawyer on social media would operate to waive the privilege at least as to the information posted.

However, whether information is privileged is not determinative of whether it is protected by SCR 20:1.6. This is because the privilege only protects communications between the lawyer and client whereas the disciplinary rule protects all information related to the representation, whatever its source. Moreover, there is no provision for "waiver" under SCR 20:1.6, as information that is disclosed for a permissible purpose under SCR 20:1.6 does not lose its protected status.[12] The client's disclosure of protected information has no bearing on whether their lawyer may likewise do so under SCR 20:1.6. Instead, lawyer disclosure is controlled by SCR 20:1.6(b), (c) and SCR 20:3.3.[13]

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circumstances of the *Thompson* case suggests it does not support a lawyer's right to disclose confidential information anytime the lawyer receives online criticism as a lawyer is unlikely to have court permission to respond to online criticism.

[11] *See* Wis. Stat. §905.03(1)(d); *Restatement (Third) of the Law Governing Lawyers* §79 (2000).

[12] See Wisconsin Formal Ethics Opinion EF-17-02 (2017).

[13] Disclosure of confidential information by the lawyer involving a client with diminished capacity is controlled by SCR 20:1.14(c).

A Lawyer's Options when Subject to Online Criticism

While SCR 20:1.6 does not permit a lawyer to disclose information relating to the representation of the client in response to online criticism, that does not necessarily mean that a lawyer facing such criticism may take no action whatsoever.

ABA Formal Ethics Opinion 496 makes several suggestions as to what a lawyer may do. The lawyer may ask the website or search engine to remove the post. The lawyer may contact the person who posted the criticism and seek to resolve the issue outside public view, including by asking the person to seek to remove or correct the post. The lawyer may also choose to simply ignore the criticism, understanding that most online postings lose their relevance quickly. In addition, experience teaches that one response can result in others, which may only make the parties' positions more intractable and the dispute more visible.

If the lawyer believes a response is necessary, the committee suggests the following:

> I do not believe the [post/comments] are fair or accurate. Professional obligations prevent me from commenting further.[14]

If the criticism is from a person who is not nor has ever been a client of the lawyer, the lawyer may note that fact.

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[14] Several other jurisdictions have provided sample responses:

Professional obligations do not allow me to respond as I would wish. [ABA Formal Ethics Opinion 496 at 6].

My professional and ethical responsibilities do not allow me to reveal confidential client information in response to public criticism. [Kentucky Bar Association Ethics Opinion KBA E-448 at 1].

A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events. [Penn. Bar Assoc. Formal Opinion 2014-200 at 1. Cited with approval: Arizona Ethics Op. 19-0010; Texas Ethics Op. 622; Florida Bar Ethics Op. 20-01; Colo. Ethics Op. 136].

As an attorney, I am constrained by the Rules regulating the [Florida Bar] from responding in detail, but I will simply state that it is my belief that the [comments/post] present neither a fair nor accurate picture of what occurred and I believe that the [comments/post] [is/are] false. [Florida Bar Ethics Op. 20-10 at 3].

Conclusion

While a limited response may be ethically permissible, the committee strongly believes that no response at all will almost always be the lawyer's best option. A response in kind will rarely be beneficial to the lawyer and risks harm to and further estrangement from the client. Ignoring the criticism eliminates the risk of an ethics violation and minimizes the possibility of a prolonged and unproductive public dialogue.

NO. 2015-B-0284
Supreme Court of Louisiana.

In re McCool

172 So. 3d 1058 (La. 2015)
Decided Jun 30, 2015

No. 2015–B–0284.

2015-06-30

In re Joyce Nanine McCOOL.

Office of Disciplinary Counsel, Charles Bennett Plattsmier, Tammy Pruet Northrup, Baton Rouge, LA, for Applicant. McCool Law, LLC, Mandeville, LA, Joyce Nanine McCool; Richard Ducote, PC, Richard Lynn Ducote, Metairie, LA, for Respondent.

Conduct Prejudicial to the Administration of Justice

1060*1060

Office of Disciplinary Counsel, Charles Bennett Plattsmier, Tammy Pruet Northrup, Baton Rouge, LA, for Applicant. McCool Law, LLC, Mandeville, LA, Joyce Nanine McCool; Richard Ducote, PC, Richard Lynn Ducote, Metairie, LA, for Respondent.

ATTORNEY DISCIPLINARY PROCEEDING

KNOLL, Justice.

*

* Retired Judge James L. Cannella, assigned as Justice ad hoc, sitting for Hughes, J., recused.

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Joyce Nanine McCool,

[1] an attorney licensed to practice law in Louisiana.

[1] Respondent, a Mandeville attorney, is 52 years of age and was admitted to the practice of law in Louisiana in 2000.

UNDERLYING FACTS

The underlying facts of this case are rather complex. By way of background, respondent was friends with Raven Skye Boyd Maurer ("Raven"). Following Raven's divorce in 2006, she and her former husband were involved in a bitter child custody dispute. Raven accused her ex-husband of sexually abusing their two young daughters, H. and Z.,

[2] and unsuccessfully sought to terminate his parental rights in proceedings pending in Mississippi before Judge Deborah Gambrell.

[2] The children's names have been redacted from the record of this matter and only their initials are used to protect and maintain their privacy. All phone numbers and addresses for social media and internet sites have been redacted as well to further ensure their privacy.

[3] Respondent is not admitted to the Mississippi Bar and was not admitted *pro hac vice* in Raven's Mississippi case, but she did offer assistance to Raven as a friend.

3 To date, no law enforcement agency or court has found any merit to the serious allegations made against Raven's former husband.

Meanwhile, respondent filed a petition in St. 1061 Tammany Parish on behalf of Raven's *1061 new husband, who sought to adopt H. and Z. The presiding judge, Judge Dawn Amacker, stayed the intrafamily adoption proceedings pending resolution of the Mississippi matter. Judge Amacker also declined to exercise subject matter jurisdiction in response to a motion for emergency custody filed by respondent on Raven's behalf. After Judge Amacker issued her ruling declining to exercise subject matter jurisdiction, respondent filed a writ application with the First Circuit Court of Appeal, which was denied.

[4] On August 31, 2011, this Court likewise denied writs. *Maurer v. Boyd,* 11–1787 (La.8/31/11), 68 So.3d 517.

4 In denying Raven's writ application, the court of appeal, with a panel composed of Judges Guidry, Pettigrew, and Welch, stated: "[o]n the showing made, we find no error."

Unhappy with the various rulings made by Judge Gambrell and Judge Amacker and believing those rulings were legally wrong, respondent drafted an online petition entitled "Justice for [H] and [Z]" which she and Raven posted on the internet at change.org, along with a photo of the two girls. With regard to the Mississippi proceeding before Judge Gambrell, the online petition stated:

To Judge Deborah Gambrell, we, the undersigned, ask that you renounce jurisdiction in this matter to the Louisiana court because the children have lived exclusively in Louisiana for the past three years. Their schools, teachers, physicians, therapists, little sister and brother and the vast majority of significant contacts are now in Louisiana. There is also an adoption proceeding pending in Louisiana over which Louisiana has jurisdiction and in the interest of judicial economy, and the best interest of the girls, Louisiana is the more appropriate forum to oversee ensure [sic] the "best interest" of the girls are protected. If you refuse to relinquish jurisdiction to Louisiana, we insist that you remove the Guardian Ad Litem currently assigned to the case, and replace him with one that has the proper training and experience in investigating allegations of child sexual abuse in custody proceedings. We further insist that, in keeping [with] *S.G. v. D.C.,* 13 So.3d 269 (Miss.2009), you specifically define the Guardian Ad Litem's role in the suit; require the new Guardian Ad Litem [to] prepare a written report; require that the report be shared with all parties prior to a hearing; that all proceeding be conducted on the record, with advance notice and opportunity to be heard, and that an evidentiary hearing be conducted to review the allegations of child sexual abuse, and that no visitation be allowed until you have seen all of the evidence.

As to Judge Amacker and the Louisiana proceedings, the petition stated:

To Judge Amacker, we, the undersigned, insist that you withdraw the unlawful stay of the adoption proceedings currently pending in your court, and, in accordance with La.Ch.C. art. 1253, a hearing be set with all due speed to allow the girls' stepfather to show why it is in the girls' best interest that they be adopted by him, thereby terminating all parental rights of the girls' biological father.

Respondent re-posted the online petition on her blog site and in online articles she authored, one of which again included a photo of the two girls. She provided contact information for the judges' offices and this Court, and added comments in which she solicited and encouraged others to express their feelings to the judges and this Court about the pending cases:

In spite of overwhelming evidence that the girls
1062 have been abused by their father,*1062 the judge in Mississippi, Judge Deborah Gambrell, of the Chancery Court of Marion County, Mississippi, refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised visitation with their father.

Judge Dawn Amacker, in the 22nd JDC, Division L, for the Parish of St. Tammany in Louisiana also refused to protect the girls, even though she has the power and authority to protect them. RM now has an application to the LA supreme court, asking that it order Judge Amacker to protect the children.

Insist that Judge Amacker and Judge Gambrell do their jobs! If you want more info, go to [website] and read the writ application to the LA supreme court.

Please sign the petition, circulate it to all of your friends and families and call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children. Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!

Call the Louisiana Supreme Court and tell them you want the law to protect these girls [phone number]. [A]sk about the writ pending that was filed by attorney Nanine McCool on Friday, August 12, 2011.

Let's turn this around and be [H's] hero. Please sign the Care2 petition and continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.

You can sign the petition and lend your voice to this cause *here*. Or, you can contact directly. Contact information is: [provided contact information for the judges].

In response to the postings made by respondent, on August 14, 2011—two days prior to a hearing in Mississippi on Raven's motion for contempt and to terminate her former husband's parental rights—Judge Gambrell's staff received an e-mail from Heather Lyons, a signer of the online petition. Ms. Lyons stated she lived and voted in Forrest County, Mississippi, and she would "be paying attention" to Raven's case "due to the fact that Judge Gambrell refused to hear evidence of abuse in the case of little girls who are likely being molested by their father. She has an obligation to protect our most vulnerable children. Please do not let them down judge!"

A copy of the online petition and comments thereto was then filed with the Marion County Chancery Clerk of Court's Office ("Marion County Court") and faxed directly to Judge Amacker's office in Louisiana, apparently by Raven or her mother. On August 22, 2011, Judge Amacker had her administrative assistant return the petition to respondent with instructions respondent caution her client against *ex parte* communications with the judge.

Undaunted, respondent continued her online and social media campaign, further disseminating the sexual abuse allegations and even going so far as to link the audio recordings in which Raven and her children discussed the alleged abuse.

1063[5] Respondent also stated (falsely) that no *1063 judge had ever heard these recordings because Judge Gambrell refused to allow the recordings into evidence and Judge Amacker refused to conduct a hearing:

> [5] Pursuant to a September 2, 2008 Agreed Judgment in the Mississippi case, the parties agreed and were ordered not to disclose any audio or video recordings of the minor children to anyone except counsel of record and the court, and not to make said recordings available to anyone except the appropriate investigatory agencies at their request. Respondent

> argues the Agreed Judgment does not bind her because she is not a party to the Mississippi proceeding, or counsel in the proceeding, or even an attorney licensed to practice law in Mississippi.

Listen to their 1st disclosure to Raven: [link to recording] and a day later, their second: [link to recording]

Now consider that no judge has ever heard those recordings. Why? Because for 4.5 years, the judges have simply refuse [sic] to do so. On August 16, 2011, Judge Deborah Gambrell in the Chancery Court of Marion County, Mississippi, once again refused to admit all of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past.

Judge Dawn Amacker in the 22nd Judicial District Court for the Parish of St. Tammany in Louisiana is also refusing to hear any evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence.

Their dad keeps calling them liars and saying that their mom is making them say it. All their mom wants is for a judge to look at ALL the evidence and THEN decide who to believe. Don't you think Judge Gambrell and Judge Amacker should look at the evidence before they make [H] and [Z] go back to their father's house where there is no one to protect them except the person they are most afraid of?

[H] still loves her daddy. She just wants him to stop doing what he is doing to her. She does not feel safe with him alone. She said as much in her journal, but Judge Gambrell refused to allow it as evidence and Judge Amacker just ignored her.

Sign our petition telling the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored. Tell them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z]'s lives. Ask yourself, what if these were your daughters?

Have questions want to do more to help? Email us at [address] and someone will respond within 24 hours. Want to see more, go to [website] and read the writ submitted to the Louisiana Supreme Court on August 12, 2011.

Horrified? Call the judges and let them know: [contact information provided]

Respondent also used her personal Twitter account to promote the online petition and to otherwise draw attention to the audio recordings and the manner in which the judges were handling the cases. On August 16, 2011, the day of the Mississippi hearing, respondent tweeted 30 messages about the case and petition, including:

I realize most of u think the courts care about kids but too often there's no walk to go with the talk: [link to online petition].

Shouldn't judges base decisions about kids on evidence?: [link to online petition].

GIMME GIMME GIMME Evidence! Want some? I got it. Think u can convince a judge to look at it? Sign this petition: [link to online petition].

Judges are supposed to know shit about ... the law ... aren't they. And like evidence and shit? Due process? [link to online petition].

I am SO going 2 have 2 change jobs after this ...! I'm risking sanctions by the LA supreme court; u could be a HUGE help.

The very next day, she tweeted: "Make judges protect [H] and [Z] from abuse by their father!: [link to online petition]."

On August 24, 2011, respondent tweeted a local 1064 investigative news organization *1064 should "focus ur lens on Y Judge Amacker won't protect these girls ..." and "ask Judge Amacker why she won't listen." Respondent also provided links to the audio recordings and the online petition in

numerous tweets, asking various national news/media outlets and celebrities from *Dateline* to Oprah inquire "why 2 girls can't get a judge to listen to this." Another tweet said, "Judge Gambrell at it again—turned a 4 YO child over to a validated abuser—PLEASE TELL ME WHAT IT WILL TAKE FOR EVERYON [sic] TO SAY 'ENOUGH'."

These online articles and postings by respondent contain numerous false, misleading, and inflammatory statements about the manner in which Judge Gambrell and Judge Amacker were handling the pending cases. But respondent denies any responsibility for these misstatements, contending these were "Raven's perceptions of what had happened" and respondent was simply "helping [Raven] get her voice out there." For example:

• In an article entitled "Make Louisiana and Mississippi Courts Protect HB and ZB!" it is alleged the children were being sexually abused by their father and in spite of "overwhelming" evidence, Judge Gambrell "refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised visitation with their father." This allegation refers to journals written by H., which Judge Gambrell excluded from evidence. Judge Gambrell gave reasons for her evidentiary rulings, but in any event, she did not simply "refuse" to look at the evidence. As for Judge Amacker, it is alleged she "refused to protect the girls, even though she has the power and authority to protect them." Judge Amacker did not refuse to protect the minor children, but rather, she stayed proceedings in Louisiana because related proceedings were already pending in Mississippi.

• In an article entitled "Justice for [H] and [Z]," it was alleged the children were being sexually abused by their father, and the children's mother had evidence of the abuse, including an audio recording and video evidence, but this evidence "was excluded from consideration on one legal technicality or another" by Judge Gambrell. Once again, Judge Gambrell's evidentiary rulings were not arbitrary or capricious. She gave reasons for her evidentiary rulings and did not simply "refuse" to look at the evidence.

•In a posting on her online blog, respondent linked to audio recordings of the minor children speaking to their mother about alleged sexual abuse by their father, contrary to the September 2, 2008 Agreed Judgment in the Mississippi proceedings. *See supra,* note 5. Respondent's blog stated no judge had ever heard the recordings because "for 4.5 years, the judges have simply refuse [sic] to do so. On August 16, 2011, Judge Deborah Gambrell in the Chancery Court of Marion County, Mississippi once again refused to admit all of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past." However, respondent later acknowledged the audio recordings were not offered into evidence at the August 16, 2011 hearing. In fact, the audio recordings were not even brought to court that day. Furthermore, the audio recordings have ***never*** been offered into evidence in any proceeding before Judge Gambrell. In the same blog, respondent stated Judge Amacker "is also refusing 1065 to hear any *1065 evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence." However, Judge Amacker did not refuse to have a hearing; she declined to exercise jurisdiction because related domestic proceedings were already pending in Mississippi. Judge Amacker's ruling was upheld when both the court of appeal and this Court denied writs. *Maurer, supra.*

Subsequently, respondent filed motions to recuse Judge Amacker in two matters unrelated to Raven's case. In response, Judge Amacker signed orders stating she was "voluntarily recus[ing herself] due to the possibility that the judge may be called as a witness" in disciplinary proceedings against respondent, "and out of an abundance of caution and to avoid the appearance of

impropriety." Notwithstanding the judge's stated reasons for her recusal, respondent filed two more motions for recusal in which she stated Judge Amacker had "voluntarily and *expressly admitted [her] extreme bias and conflict in recusing [herself]* in several other cases, which grounds are equally applicable in the case at bar." [Emphasis added.] Respondent testified this was not an untruthful statement because in her view, the mere fact Judge Amacker had voluntarily recused herself was an express admission by Judge Amacker of bias against her. She also noted Judge Amacker had not denied any of the allegations respondent made in the motions to recuse, nor did Judge Amacker impose sanctions against her or file a disciplinary complaint against her. These facts further reinforced respondent's view Judge Amacker had admitted being biased against her.

On September 14, 2011, Judge Gambrell signed an order commanding respondent to appear before the Marion County Court on October 5, 2011, to show cause why she should not be held in contempt of court by disclosing information from a "sealed" record. Respondent received a copy of the notice of the contempt hearing by regular United States mail; however, she did not appear, contending she was not properly served and the Mississippi court did not have jurisdiction over her. On October 6, 2011, Judge Gambrell signed an order holding respondent in contempt of court. In October 2012, Judge Gambrell rescinded the order of contempt because "service of process was insufficient ... and though violations of this Court's order relating to disclosure of audio transcriptions may have taken place, the Court is without authority to hold said Joyce Nanine McCool in contempt of this Court." In January 2013, Judge Gambrell *sua sponte* recused herself from further action in Raven's case "in accordance with the Mississippi Code of Judicial Conduct Canon 3 and to avoid the appearance of impropriety or bias."

DISCIPLINARY PROCEEDINGS

In September 2011, Judge Gambrell filed a complaint against respondent with the ODC. Judge Amacker also provided information in connection with the ODC's investigation. In May 2014, the ODC filed one count of formal charges against respondent, alleging her conduct as set forth above violated Rules 3.5(a)(a lawyer shall not seek to influence a judge by means prohibited by law), 3.5(b)(a lawyer shall not communicate *ex parte* with a judge during the proceeding), 8.4(a)(it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), 8.4(c)(it is professional misconduct for a lawyer to engage in dishonesty, fraud, deceit, or misrepresentation), and 8.4(d)(it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice) of the
1066 Rules of Professional Conduct.*1066

Respondent answered the formal charges by denying any misconduct and asserting her actions are protected by the First Amendment. In her pre-hearing memorandum, respondent admitted she "did implore the electorate to communicate accountability to its elected judges" and "asked publically [sic] elected judges to 'look at the evidence,' 'protect children,' and 'apply the law'," but she denied this constituted ethical misconduct. Respondent also filed an exception of vagueness and a motion for more specific allegations of misconduct. The ODC opposed the exception and motion, arguing the formal charges give respondent fair and adequate notice of the alleged misconduct. Following a telephone conference conducted on December 11, 2013, the chair of the hearing committee denied the exception and motion.

On January 10, 2014, respondent directed discovery to the ODC seeking a listing of each and every specific act or omission, which the ODC alleged to constitute a violation of the Rules of Professional Conduct, the date of each and every such act or omission, and the specific Rule

purportedly violated by each such act or omission. The ODC responded to the discovery request, but refused to provide any additional information, noting the chair's previous ruling denying the exception of vagueness and the motion for more specific allegations of misconduct. Respondent then filed a motion to compel the ODC to provide the requested information. Following a telephone conference conducted on February 11, 2014, the chair denied the motion to compel. Consequently, respondent filed a petition for writ of mandamus in this Court, seeking to compel the ODC to provide more specific details of the alleged misconduct set forth in the formal charges. She also sought a stay of the hearing on the formal charges set for February 27, 2014. We denied respondent's writ and her request for a stay on February 21, 2014. *In re: McCool,* 14–0366 (La.2/21/14), 133 So.3d 669 (Hughes, J., recused).

Formal Hearing

The hearing committee conducted a two-day hearing on February 27, 2014, and March 27, 2014. Therein, the ODC called Judge Amacker and Judge Gambrell to testify before the committee. Respondent testified on her own behalf and was cross-examined by the ODC. During her testimony, respondent repeatedly denied she violated the Rules of Professional Conduct. Instead, she suggested her conduct was justified by what the judges had done in the underlying cases and in the interest of protecting the minor children:

Q. What does the law say, if anything, you can do after [the Supreme Court denies writs]? I mean you've exhausted what the law allows you to do. What is your recourse then under the law?

A. Weep for the children.

Q. Okay. Can you cite me a law that says you can take to an online campaign to try to get the Judge's [sic] to change their mind?

A. This is the United States of America. The land of the free. The home of the brave. Cite me a law that says I can't.

Q. The rules that you are charged with are in the formal charges.

A. They do not say that I can't take—I cannot assist a client to craft an online petition seeking whatever help she can to protect her children because the legal system absolutely failed her

Q. Ms. McCool

A. —because the Judge's [sic] and the processes will not follow the law, will not obey the law, but hold us to the letter of the law.

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Hearing Committee Report

After considering the evidence and testimony presented at the hearing, the hearing committee made factual findings generally consistent with the facts set forth above. Based on these facts, the committee determined respondent violated the Rules of Professional Conduct as follows:

Rules 3.5(a), 3.5(b), and 8.4(a)—Respondent used the internet, an online petition, and social media to spread information, some of which was false, misleading, and inflammatory, about Judge Gambrell's and Judge Amacker's handling of and rulings in pending litigation. Respondent circulated contact information for Judge Gambrell and Judge Amacker and solicited and encouraged others to make direct, *ex parte* contact with the judges to express their feelings about the pending cases, and attempted to influence the outcome of the pending cases. The clear intent of respondent's online campaign was an attempt to influence the judges' future rulings in the respective cases, and to do so through improper *ex parte* communication directed at the judges.

Rule 8.4(c)—Respondent disseminated false, misleading, and inflammatory information on the internet and through social media about Judge

Gambrell and Judge Amacker and their handling of these pending domestic proceedings. She also instructed others to sign and circulate an online petition, and to call the judges and let them know they are "watching" them and are "horrified" by their rulings. Finally, respondent made blatantly false statements about Judge Amacker in multiple motions to recuse.

Rule 8.4(d)—Respondent used the internet and social media in an effort to influence Judge Gambrell's and Judge Amacker's future rulings in pending litigation. Respondent's conduct threatened the integrity and independence of the court and was clearly prejudicial to the administration of justice. Respondent also used her Twitter account to publish tweets linking the audio recordings of the minor children discussing alleged sexual abuse; to publish false, misleading, and inflammatory information about Judge Gambrell and Judge Amacker; and to promote the online petition, all of which was designed to intimidate and influence the judges' future rulings in the underlying proceedings.

The committee determined respondent violated a duty owed to the public and the legal system. She acted knowingly, if not intentionally. She caused actual and potential harm by threatening the independence and integrity of the judicial system, and causing the judges concern for their personal safety and well-being. The applicable baseline sanctions, therefore, range from suspension to disbarment.

In aggravation, the committee found a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law (admitted 2000). In mitigation, the committee found respondent has no prior disciplinary record.

Considering this Court's prior jurisprudence addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for one year and one day. The committee further recommended respondent be required to attend the Louisiana State Bar Association's Ethics School ("Ethics School") and assessed with the costs and expenses of this proceeding.

Respondent filed a brief with the disciplinary board objecting to the hearing committee's report and recommendation.

Disciplinary Board Recommendation

After review, the disciplinary board determined the hearing committee's factual findings are 1068 supported by the record *1068 and are not manifestly erroneous. Based on these facts, the board agreed the committee correctly applied the Rules of Professional Conduct to the facts, except the board declined to find respondent engaged in *ex parte* communications with a judge, in violation of Rule 3.5(b). The board reasoned respondent did not have direct contact with either Judge Gambrell or Judge Amacker, and thus, no violation of Rule 3.5(b) occurred. Nevertheless, by circulating contact information for the judges and soliciting non-lawyer members of the public to make direct contact with the judges regarding a matter pending before them, respondent encouraged the public to do what she is forbidden to do by Rule 3.5(b). As such, she violated Rule 8.4(a) by attempting to communicate with Judge Gambrell and Judge Amacker "through the acts of another."

By her own admission, respondent was unhappy with the decisions rendered in the matters she was litigating. After her legal options were exhausted, she decided to launch a social media campaign to influence the presiding judges. Consequently, respondent knowingly, if not intentionally, spearheaded a social media blitz in an attempt to influence the judiciary.

The board determined respondent violated duties owed to the public and the legal system by making false, misleading, and inflammatory statements about two judges. She did so as part of a pattern of

conduct intended to influence the judges' future rulings in pending litigation. Considering the ABA's *Standards for Imposing Lawyer Sanctions* ("ABA Standards"), the board determined the baseline sanction is suspension.

In aggravation, the board found a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law. In mitigation, the board found respondent has no prior disciplinary record.

After further considering respondent's misconduct in light of this Court's prior jurisprudence, the board adopted the committee's recommendation respondent be suspended from the practice of law for one year and one day, required to attend Ethics School, and assessed with the costs and expenses of this proceeding.

Respondent filed an objection to the disciplinary board's recommendation. Accordingly, the case was docketed for oral argument pursuant to Louisiana Supreme Court Rule XIX, § 11(G)(1)(b).

DISCUSSION

Bar disciplinary matters come within the exclusive original jurisdiction of this Court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. La. Sup.Ct. R. XIX, § 11(G); *In re: Banks,* 09–1212, p. 10 (La.10/2/09), 18 So.3d 57, 63. While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *Banks,* 09–1212 at p. 10, 18 So.3d at 63; *see also In re: Caulfield,* 96–1401 (La.11/25/96), 683 So.2d 714.

At the outset, we note the ODC's formal charges in this case are somewhat confusing. Rather than separating out the allegations and rule violations into multiple counts, the ODC chose to combine all the factual allegations into a single count spanning eighteen pages. In an effort to clarify the matter, we have divided the allegations into three broad categories: (1) improper *ex parte* communications; (2) dissemination of false and 1069 misleading information;*1069 and (3) conduct prejudicial to the administration of justice. We will address each category in turn.

Improper Ex Parte Communication

The ODC's allegations in this area relate to respondent's use of the internet and social media to disseminate information about the manner in which Judge Gambrell and Judge Amacker handled the child custody and visitation cases at issue, in an apparent attempt to marshal public opinion against these judges and attention from this Court. According to the ODC, this conduct violated Rules 3.5(a) and (b) and Rule 8.4(a) of the Rules of Professional Conduct.

Rule 3.5 provides:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

Rule 8.4(a) provides:

It is professional misconduct for a lawyer to:

Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

The ODC alleges respondent violated these rules by using "the internet and social media to elicit outrage in the general public and to encourage others to make direct contact with judges in an effort to influence their handling of pending cases." Respondent, however, takes the position her comments were only intended to encourage

the public to remind the judges to do justice in this case by listening to the evidence and applying the law. Nonetheless, the hearing committee made a finding of fact that respondent's clear intent was to influence the judges' future rulings in this case through *ex parte* communication directed specifically at the judges. In support, the committee cited the following examples of respondent's actions:

• Please sign the petition, circulate it to all of your friends and families and call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children. Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!

• Call the Louisiana Supreme Court and tell them you want the law to protect these girls? [phone number] [A]sk about the writ pending that was filed by attorney Nanine McCool on Friday, August 12, 2011.

• Let's turn this around and be [H's] hero. Please sign the Care2 petition and continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.

• You can sign the petition and lend your voice to this cause *here*. Or, you can contact directly. Contact information is: [provided contact information for the judges and their staff].

• Sign our petition telling the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored. Tell them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z's] lives. Ask yourself, what if these were your daughters? ... Horrified? Call the judges and let them know.

We agree the examples clearly and convincingly establish respondent solicited the public to contact the presiding judges and this Court. Although respondent asserts "the admonitions in the petitions did nothing other than ensure that both 1070 parties *1070 would receive the same treatment—a hearing based on the law and evidence," the evidence shows she used the internet and social media to solicit and encourage others to make direct, *ex parte* contact with Judge Gambrell, Judge Amacker, and this Court in an effort to influence their and our decisions in sealed, pending domestic litigations.

Moreover, when the petition was printed and faxed to the Marion County Court and Judge Amacker's office, it became *ex parte* communication between the judiciary and all signatories just as if it were a signed letter. And the first signatory on both printed petitions was respondent: "1. Nanine McCool Lacombe, LA."

Although not directly responsible for its delivery, respondent, by signing the petition, "lent her voice to the cause" along with the rest of the signatories, making the petition her own and, in turn, communicating directly to the judges and this Court, in its entirety:

LA Supreme Court; Judge Dawn Amacker; Judge Deborah Gambrell

We, the undersigned, insist that you ensure that the two little girls who are the subject of the case [ ], pending in the 22nd JDC, St. Tammany Parish Louisiana, and the case [ ], pending in the Chancery Court of Marion County Mississippi, are afforded all legal protections, including a full evidentiary hearing, to ensure that they are protected from abuse.

To the Louisiana Supreme Court, we, the undersigned, ask that you issue emergency writs, ordering the courts below to exercise emergency jurisdiction over the two small girls until, based on all the evidence available, it is established by clear and convincing evidence, that the little girls subject to these proceedings are being protected from further abuse, including ordering the Hon. Dawn Amacker, Judge, Division L, 22nd JDC, Parish of St. Tammany, to lift the unlawful stay of the adoption proceedings and to set an evidentiary

hearing at all due speed, allowing the girls' stepfather to show why it is in the girls' best interest that he be allowed to adopt them.

To Judge Amacker, we, the undersigned, insist that you withdraw the unlawful stay of the adoption proceedings currently pending in your court, and, in accordance with La.Ch.C. art. 1253, a hearing be set with all due speed to allow the girls' stepfather to show why it is in the girls' best interest that they be adopted by him, thereby terminating all parental rights of the girls' biological father.

To Judge Deborah Gambrell, we, the undersigned, ask that you renounce jurisdiction in this matter to the Louisiana court because the children have lived exclusively in Louisiana for the past three years. Their schools, teachers, physicians, therapists, little sister and brother and the vast majority of significant contacts are now in Louisiana. There is also an adoption proceeding pending in Louisiana over which Louisiana has jurisdiction and in the interest of judicial economy, and the best interest of the girls, Louisiana is the more appropriate forum to oversee ensure [sic] the "best interest" of the girls are protected. If you refuse to relinquish jurisdiction to Louisiana, we insist that you remove the Guardian Ad Litem currently assigned to the case, and replace him with one that has the proper training and experience in investigating allegations of child sexual abuse in custody proceedings. We further insist that, in keeping [with] *S.G. v. D.C.,* 13 So.3d 269 (Miss.2009), you specifically define the Guardian Ad Litem's role in the suit; require the new Guardian Ad Litem [to] prepare a written report; require that *1071 the report be shared with all parties prior to a hearing; that all proceedings be conducted on the record, with advance notice and opportunity to be heard, and that an evidentiary hearing be conducted to review the allegations of child sexual abuse, and that no visitation be allowed until you have seen all of the evidence.

Thank you for your consideration and for protecting HB and ZB!

This petition is not just a communication from the electorate to its elected judges to "look at the evidence," "protect children," and "apply the law," it is a directive asking and insisting the judges and this Court:

• issue emergency writs

• order[ ] lower courts below exercise emergency jurisdiction

• order[ ] [Judge] Amacker to lift the unlawful stay

• set ... a hearing at all due speed

• withdraw the unlawful stay

• terminat[e] all parental rights of the girls' biological father

• renounce jurisdiction

• remove the Guardian Ad Litem

• replace [the Guardian Ad Litem]

• define the Guardian Ad Litem's role in the suit

• require the new Guardian Ad Litem prepare a written report

• conduct all proceedings ... on the record

• conduct an evidentiary hearing ... to review the allegations of child sexual abuse

• disallow visitation ... until [the judge] ha[s] seen all of the evidence

By its very language, the petition implores the judges to review/see "ALL" the evidence irrespective of the rules of evidence and the judges' discretionary gatekeeping function conferred therein and likewise sets forth in explicit detail the specific manner in which the petitioners want the judges and this Court to "apply" and "follow" the law—essentially a quest for mob justice or rather "trial by internet."

Respondent claims her postings are not *ex parte* communication because

first and foremost we encourage people to draw their own conclusions. We gave them the information, we gave them the evidence and we said form your own opinion, and then if you feel strongly about it share your opinion, your independent opinion of that with the judge.... But I don't consider it an ex parte communication unless I told all those people this is what you need to tell them, and I didn't.

However, the postings belie her depiction and speak for themselves:

• Insist that Judge Amacker and Judge Gambrell do their jobs!

• Call Judge Amacker and Judge Gambrell ... to ask why they won't follow the law and protect these children.

• Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!

• Call the Louisiana Supreme Court and tell them you want the law to protect these girls....

• Continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.

• Tell[ ] the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored.

•Tell them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z's] lives.

• Ask Judge Amacker why she won't listen

Just as in the petition, respondent gives explicit directives to the public on how to voice "concern" and "horror" to the presiding judges. *1072

As to this Court, respondent repeatedly admitted she sought to bring this case to our attention through the elicited phone calls because this Court is a "policy court":

Q. And while the writ was pending at the Supreme Court you encouraged people to call them also?

A. Yes. To let them know that they were concerned because it's a Policy Court.

Q. Do you still think that's appropriate conduct today for an attorney to encourage people to contact a Court and ask them and voice their opinions about pending cases?

A. To—yes. I do.

Q. Okay. And do you think it's perfectly okay, even today, for you to encourage that and to solicit that?

A. Yes. They're elected officials. They are responsible—they are responsive and responsible to the people they serve. And if they don't know that people aren't concerned—The Supreme Court is a Policy Court. It responds to things that they believe are important social trends. So, yes, I do believe it's important that the Supreme Court be aware that this is an important issue for people in the community. And the number that was provided is the Clerk of Court's number.

We also note the petition was drafted and posted on more than one internet site when the matter was pending before this Court on writs and just days before Judge Gambrell held her first hearing in the custody matter in Mississippi on August 16, 2011. The pleas to "call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children" and "call the Louisiana Supreme Court ... and ask about the writ pending that was filed by [respondent]" were made, therefore, for the sole purpose of improperly influencing the courts' future rulings to gain a tactical advantage in the pending underlying litigation. In her sworn statement, respondent even explained:

I guess I see judges as public officials. If I understand this correctly they're elected both in Mississippi and Louisiana. They answer to the public. The public has a right to tell them how they feel. And I guess—oh boy, I'm getting on a soap box now, when the judicial—when it comes to the judiciary they have such incredible immunity that they somehow feel like they don't have to answer to the public. And I feel strongly that particularly when it comes to family law that hearing from people about what's going on is a part of what will make them better judges.

As the record reveals, one of the signatories, Heather Lyons, not only emailed Judge Gambell on August 14, 2011—just two days before the August 16, 2011 hearing—she also apparently called Judge Gambell at home, "[a]ccusing [her] of being a person who supports child predators or whatever." Judge Amacker testified her office received "hundreds" of calls regarding the petitions, while Judge Gambell testified she even mentioned on the record in the August 16, 2011 hearing "that numerous people were calling and that they should not do that." Both viewed the petition as an attempt to threaten, intimidate, and/or harass them into handling the case in the manner the petitioners wanted, and they both felt threatened. Specifically, Judge Gambell explained:

Q. Judge, did you receive any calls or view anything in the petition or these comments that we've looked at already that ever gave you any
1073 *1073 cause for concern for your personal safety?

A. Yes, sir. The kind of work that we do in this court places you in a situation where somebody is going to win most of time and somebody's going to lose.... So that concerned me that all these people are being told to call me. You could easily Google map me; find out where I am and it really —I was really concerned because I had just gotten into the case and before I could even do what I needed to do, I was being harassed by phone calls and then this Twitter and all this other stuff. It did not make sense to me, but I was concerned about my safety.

When asked a similar question regarding whether she had personally received any telephone calls, Judge Amacker responded:

Let me see if I can break that down just to be accurate. I—no. We have things put in place at our offices that no one ever gets to me as the Judge without it first being vetted through usually my secretary and my staff attorney. So if there's ex-parte communications that come in, and we get a lot in Family Court. You get a lot of angry people and people calling in and it happens. Those never get to the Judge.

So I can't tell you who called, what they said, these types of things of who called in. I can say that hundreds of members of the public and attorneys have stopped by or called to let us know this was on the internet out of concern; out of concern for us. They just wanted to let my staff know or me know. Stop me on the street, in the hallway, whatever, out of concern and horror—the horrified was the public and the attorneys that saw this. And still are.

Reviewing all the evidence, we conclude the telephone calls, the email, and the faxed petitions constitute prohibited *ex parte* communication induced and/or encouraged by respondent. Coupled with her social media postings, we further conclude respondent's online activity amounted to a viral campaign to influence and intimidate the judiciary, including this Court, in pending, sealed domestic litigations by means prohibited by law and through the actions of others. Accordingly, we find the evidence clearly and convincingly shows respondent's conduct in this regard violated Rules 3.5(a) and (b) and Rule 8.4(a) of the Rules of Professional Conduct.

Dissemination of False and Misleading Information

The ODC alleges respondent "disseminated false, misleading and/or inflammatory information through the internet and social media about Judge

Deborah Gambrell and Judge Dawn Amacker in pending cases wherein Respondent was counsel of record and/or had a personal interest." It further alleges respondent "also made false and misleading statements in multiple motions to recuse Judge Amacker." The ODC concludes these actions violate Rule 8.4(c).

Rule 8.4(c) provides:

It is professional misconduct for a lawyer to:

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In finding respondent violated this rule, the hearing committee made several specific factual findings:

(1) Respondent stated Judge Gambrell ignored "overwhelming evidence" of abuse and "refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised *1074 visitation with their father." The committee found respondent's statement was a "gross mischaracterization" of the facts.

(2) Respondent stated Judge Amacker "in Louisiana also refused to protect the girls, even though she has the power and authority to protect them ..." The committee found this statement was false and inflammatory, as Judge Amacker did not refuse to protect the children, but instead stayed the Louisiana proceedings on the ground related proceedings were already pending in Mississippi.

(3) Respondent posted audio recordings of the minor children purportedly talking about abuse and stated that on August 16, 2011, Judge Gambrell "once again refused to admit all of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past." The committee found this statement was clearly false, as the tapes were not offered into evidence on August 16, 2011; therefore, Judge Gambrell could not have "refused to admit" them.

(4) Respondent stated, "Judge Dawn Amacker in the 22nd Judicial District Court for the Parish of St. Tammany in Louisiana is also refusing to hear any evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence." The committee found this statement was false, because Judge Amacker had stayed the Louisiana proceedings in light of the Mississippi proceeding.

(5) Respondent stated the Louisiana court (Judge Amacker presiding) "has voluntarily and expressly admitted its extreme bias and conflict in recusing itself in two other cases, which grounds are equally applicable in the case at bar." The committee found this statement was false, as Judge Amacker's judgment stated, "[t]he Court hereby voluntarily recuses itself due to the possibility that the judge may be called as a witness in the proceedings referenced by counsel, and out of an abundance of caution and to avoid the appearance of impropriety."

In her brief, respondent takes the position she did not make any knowingly false statements. While respondent acknowledges she may have made some factual mistakes, such as with regard to the admission of the audio tapes, she claims this does not amount to making an intentionally false statement. She further contends her characterization of the judges' actions in this case was not false, but simply based on her subjective analysis of their actions.

However, we find the record evidence supports the ODC's charges in this regard. Respondent's online posting and twitter feeds are littered with misrepresentations and outright false statements. Although she claims they were not made intentionally, respondent even concedes to the misrepresentations. Moreover, even after learning of the "mistakes" through her own review of the underlying records, respondent made no attempt to remedy them, but merely took the position they were her client's subject view of the proceedings, raising the level of her continuous posting and

twitter conduct from a simple mischaracterization into a knowing and arguably intentional dissemination of false information. This is particularly true regarding the judges' "refusal" to "hear," "view," or "admit" evidence, namely the audio recordings, which were never offered into evidence at any proceeding before either Judge
1075 Gambrell or Judge Amacker.*1075

Regarding the recusal notices, the signed orders of recusal contain no express admissions of "extreme bias." Respondent attempts to excuse her statements as merely her subjective interpretation of Judge Amacker's action in recusing herself, arguing the recusal itself is an expression of bias. Moreover, she styles her motion to recuse a pleading, casting Judge Amacker as the adverse party, and argues that by not outright denying the allegations therein, Judge Amacker essentially admitted to the extreme bias. Rather than an answer, however, Judge Amacker's recusal is an order of the court, and as well established, those matters not expressly granted in a judgment or order of a court are considered denied. *M.J. Farms, Ltd. v. Exxon Mobil Corp.,* 07–2371, p. 12 (La.7/1/08), 998 So.2d 16, 26 (relief sought presumed denied when judgment silent as to claim or demand). Accordingly, we find the evidence clearly and convincingly shows respondent's repeated false statements concerning Judge Amacker's "expressly admitted extreme bias" were not mere misrepresentations, but false statements knowingly and intentionally made. Accordingly, we find the evidence clearly and convincingly shows a violation of Rule 8.4(c) of the Rules of Professional Conduct.

Conduct Prejudicial to the Administration of Justice

Lastly, the ODC alleges respondent's overall conduct—utilizing the internet and social media both in an attempt to influence the judges and to expedite achievement of her goals in the case—was prejudicial to the administration of justice and violated Rule 8.4(d).

Rule 8.4(d) provides:

It is professional misconduct for a lawyer to:

(d) Engage in conduct that is prejudicial to the administration of justice.

In determining respondent violated this rule, the hearing committee found:

Respondent used the internet and social media in an effort to influence Judge Gambrell's and Judge Amacker's future rulings in pending litigation. Respondent's conduct threatened the independence and integrity of the court and was clearly prejudicial to the administration of justice.

Respondent also used her Twitter account to publish multiple tweets linking the audio recordings of the minor children discussing alleged sexual abuse; to publish false, misleading and inflammatory information about Judge Gambrell and Judge Amacker, and to promote the online petition, all of which was designed to intimidate and influence the judges' future rulings in the underlying proceedings.

Respondent knowingly if not intentionally embarked on a campaign using internet, social media and *ex parte* communication specifically designed to intimidate and to influence the judges' future rulings in pending litigation. Her online campaign to influence judges in pending litigation threatened the independence and integrity of the judiciary. Respondent's conduct also caused the judges concern for their personal safety.

In her brief, respondent asserts there is no evidence any of her statements were intended to be intimidating or threatening to the judges. Rather, she claims her statements were within the scope of the First Amendment and were intended to "encourage the public, to extoll their elected judges to do justice, listen to the evidence, apply the law, and protect children."

We disagree and take strong exception to respondent's artful attempt to use the First Amendment as a shield against her clearly and

convincingly proven ethical misconduct. As the 1076 United *1076 States Supreme Court noted in *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991):

It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. *Sacher v. United States,* 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717 (1952) (criminal trial); *Fisher v. Pace,* 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949) (civil trial). Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer,* 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. There, the Court had before it an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. The plurality opinion, which found the discipline improper, concluded that the comments had not in fact impugned the judge's integrity. Justice Stewart, who provided the fifth vote for reversal of the sanction, said in his separate opinion that he could not join any possible "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." *Id.,* at 646, 79 S.Ct., at 1388. He said that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id.,* at 646–647, 79 S.Ct., at 1388–1389. The four dissenting Justices who would have sustained the discipline said:

"Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer."

....

"He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *Id.,* at 666, 668, 79 S.Ct., at 1398, 1399 (Frankfurter, J., dissenting, joined by Clark, Harlan, and Whittaker, JJ.).

Likewise, in *Sheppard v. Maxwell,* where the defendant's conviction was overturned because extensive prejudicial pretrial publicity had denied the defendant a fair trial, we held that a new trial was a remedy for such publicity, but

"we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*" 384 U.S., at 363, 86 S.Ct., at 1522 (emphasis added).

.....

We think that the quoted statements from our opinions in *In re Sawyer,* 360 U.S. 622, 79 S.Ct. 1077 1376, 3 L.Ed.2d 1473 (1959), and *1077 *Sheppard v. Maxwell, supra,* rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and the cases which preceded it. Lawyers representing clients in pending cases are key participants in the

criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in *Nebraska Press,* which was joined by Justices Stewart and Marshall, "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.,* at 601, n. 27, 96 S.Ct., at 2823, n. 27. Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative. *See, e.g., In re Hinds,* 90 N.J. 604, 627, 449 A.2d 483, 496 (1982) (statements by attorneys of record relating to the case "are likely to be considered knowledgeable, reliable and true" because of attorneys' unique access to information); *In re Rachmiel,* 90 N.J. 646, 656, 449 A.2d 505, 511 (N.J.1982) (attorneys' role as advocates gives them "extraordinary power to undermine or destroy the efficacy of the criminal justice system"). We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.
Gentile, 501 U.S. at 1071–73, 111 S.Ct. at 2743–44.

Applying this reasoning herein, respondent, as an officer of the court, is held to a higher standard than a non-lawyer member of the public. As we stated in the matter of *In re: Thomas,* 10–0593, p. 11 (La.6/25/10), 38 So.3d 248, 255:

An attorney is trained at law, has taken an oath, assumes a position of public trust and holds himself out to the public as being fit and capable of handling its funds and problems. The attorney has assumed a position of responsibility to the law itself and any disregard for the law is more serious than a breach by a layman or non-lawyer. He is an officer of the Court.

By holding the privilege of a law license, respondent, along with all members of the bar, is expected to act accordingly. This is particularly so when a lawyer is actively participating in a trial, particularly an emotionally charged child custody proceeding. Respondent in this instance "is not merely a person and not even merely a lawyer. [She] is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *See Gentile, supra.* And as such, her "[o]bedience to ethical precepts require[d] abstention from what in other circumstances might be constitutionally protected speech," to preserve the integrity and independence of the judicial system. *Id.*

The appropriate method for challenging a judge's decisions and evidentiary rulings, as respondent even conceded, is through the writ and appeal process, not by starting a social media blitz to influence the judges' and this Court's rulings in pending matters and then claiming immunity from
1078 discipline through the First Amendment.*1078

Rather than protected speech, the evidence clearly and convincingly shows respondent's online and social media campaign was nothing more than an orchestrated effort to inflame the public sensibility for the sole purpose of influencing this Court and the judges presiding over the pending litigation. As such it most assuredly threatened the independence and integrity of the courts in the underlying sealed domestic matters. Moreover, the testimony irrefutably establishes both presiding judges perceived the campaign as a threat to their personal security and as an attempt to intimidate and harass them into ruling as the petitioners wanted.

We also find the ultimate result of the viral blitz was the recusal of both judges from the underlying domestic cases as well as other cases involving

respondent as counsel. As Judge Gambrell testified, to which Judge Amacker would agree:

A Judge is a human being also and it is very difficult for me to feel that I am exercising my integrity and being independent when I'm being constantly barraged by allegations that are just completely false. It is very difficult for a Judge to make decisions without knowing that all of this intimidation and harassment is out there.

It is insulting to me as an—well, I practiced law for 30 years. I'm a mother of six daughters. It would have been better for [respondent] just to drive across the state line and come sit in the court and actually see what was being done. As an advocate for the children or whatever as opposed to making these malicious attacks to the point—I think it was designed to run me from the case. Intimidate me to the point that I felt that there was no way to be fair or impartial.

That's basically what it did. I tried—I've never been one to run away from doing what I've been called to do, but this was just more than I could bear. I have a family like everybody else and it just would not stop. My—I wanted to stop it at the Show Cause hearing so that I could just look at everybody and say look, this is not how we do this. Give me a chance to look at this and let everybody have access to the court system. But everybody just went on their own tears and it took away my ability to really do anything with the case.

Though not as blatantly offensive as the blitzing itself, this result nevertheless prejudiced the administration of justice by causing undue delays in numerous time sensitive matters, some of which these judges had presided over for a long period of time. Therefore, we find respondent's overall conduct in this regard was prejudicial to the administration of justice in violation of Rule 8.4(d).

Accordingly, having found the ODC has proven by clear and convincing evidence respondent's conduct violated Rule 3.5(a) and (b) and Rule 8.4(a), (c), and (d), we must determine the appropriate sanctions.

Sanctions

In determining a sanction, we are mindful disciplinary proceedings are not primarily to punish the lawyer, but rather are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173, 1177–78 (La.1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington,* 459 So.2d 520, 524 (La.1984).

Louisiana Supreme Court Rule XIX, § 10(C) 1079 states, in imposing a sanction after *1079 a finding of lawyer misconduct, this Court shall consider four factors:

(1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;

(2) whether the lawyer acted intentionally, knowingly, negligently;

(3) the amount of actual or potential injury caused by the lawyer's misconduct; and

(4) the existence of any aggravating or mitigating factors.

As required, we turn now to a consideration of each factor.

Violated Duties

As the hearing committee and disciplinary board both found, there is no question respondent's misconduct violated a duty to the legal system, as well as the public. More importantly, we find her misconduct also violated a duty to the children in the underlying domestic litigation. In child custody and abuse cases, our courts are extremely cognizant of the need to protect the identity and privacy of the children and their best interest is

always at the forefront of any litigation involving their welfare. *State ex rel. S.M.W.,* 00–3277, p. 21 (La.2/21/01), 781 So.2d 1223, 1238 ("primary concern of the courts and the State remains to secure the best interest for the child"); La. Civ.Code art. 131 (custody awarded "in accordance with the best interest of the child"); *Kieffer v. Heriard,* 221 La. 151, 160, 58 So.2d 836, 839 (1952)("well established that the paramount consideration ... is the welfare and best interest of the child"). This is why such cases are often sealed as the litigations herein were, one of which was sealed at the request of respondent. With that being said, we take umbrage with respondent's online and social media activity that not only released the names of these children, but linked their audio conversations with their mother detailing their abuse allegations and posted their faces on the world wide web for anyone to see. We find very telling in this regard the following discussion respondent had with ODC counsel in her sworn statement:

Q. And so part of the concern is in now in Louisiana in a knowingly sealed matter because you are the one who asked it be sealed, I assume it was granted and was sealed, that now in the public arena you're discussing and complaining about those very proceedings which are sealed.

A. Well, I guess my understanding of sealing records is that you would be sealing the sensitive evidence or information in the record, not the fact that the record exists itself. So we never and I would not allow the drawings that were submitted as part of that record to be made part of the social

Q. Okay.

A. —you know,

Q. So the drawings and none of the excerpts from the journal, none of that was ever

A. No.

Q. —linked or attached or images uploaded and connected with any of the social media sites?

A. No, absolutely not.

Q. Okay.

A. They've very compelling images but I believe they belong to H. So I wouldn't—didn't want to do that to her.

We agree, but would also extend respondent's reasoning and concerns to the children's audio recordings, their photos, and their names, some of which are still accessible even today. In her misguided attempt to protect the children, respondent intentionally facilitated their exposure, breaching what we would consider one of the greatest duties owed by an attorney in a domestic litigation involving *1080 minor children and allegations of sexual abuse.

Intentional, Knowing, Negligent Action

The ABA Standards define the terms intent, knowledge, and negligence. Intent is defined as "the conscious objective or purpose to accomplish a particular result." Knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Whereas negligence is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation."

Both the hearing committee and disciplinary board found the evidence proved respondent acted knowingly if not intentionally. As to the internet and social media campaign, respondent repeatedly admitted her purpose was to increase the chance of this Court granting her writ, to "influence the judges to apply the law and look at the evidence ... through whatever means available," and "to get local and national media attention on this particular case." In her sworn statement, respondent explained her reasons for employing her social media blitz:

Q. ... you've afforded yourself the appeal route although we discussed at least in the one instance where that was not, didn't give the results that y'all were still looking for.

A. Correct.

Q. But you understand that's how our system is set up, and you go to district court and if the ruling is wrong and or you disagree with it factually or legally and you have grounds to then you appeal and you can go up to the circuit court and to the Louisiana Supreme Court. What I don't understand is or what I'm trying to understand is why the two pronged attack. I mean you know you have access to appeal Judge Amacker

A. Uh-huh.

Q. —since that's the case you're involved in, okay, and if she's wrong to get her ruling overturned, right?

A. Right.

Q. And y'all availed yourself of that?

A. Correct.

Q. Why also then used the online slash social media attack to effect her rulings at the district court level?

A. Yeah, well, you know, my initial thing that I wanted to say was why not because we're talking about little kids here and used every available resource to try and protect them. So as a general response to your question that would be my answer as to why I would use any available and appropriate tactic to help these kids. Whether or not I thought—I mean at the moment the—I think the social pressure that, you know, we thought—because the appeal process is a long process, in the meantime the kids are being exposed, you know, and they're not being protected. So I think maybe the better answer to your question is that our concern was that even if we were successful on the appeal or the writ it was going to take a while and in fact it did. I think it took up two months, two maybe two and a half months. And even if we had been successful that would have been two and a half months where these children were being exposed to this trauma and we were just trying to do anything we could to protect them.

Q. Did you ever think that this—the kind of social media approach that there was something wrong with it or that it jeopardized you?

A. I wanted to be careful that I didn't do anything 1081 inappropriate. I understand*1081 that I'm a lawyer and that I have to protect, you know, that my—I'm very, very, very serious about my own ethics and my own integrity. So—but, you know, I served in the military, I have a very strong sense of what it means to be a U.S. citizens and I absolutely believe in being active and pro-active and just standing up and taking a voice. I'm standing up against what I do believe is wrong in an appropriate manner and I didn't see anything wrong with reaching out to other citizens and saying I have a problem with this, do you agree with me, and if you do come join me. I think that's just, you know, inherently American. So, no, I guess the short answer is no, did I proceed with caution, yes, I did. I had—I had to have a sit down with myself about whether or not how involved I wanted to be in drafting the petition. But after considering it, you know, Raven needed my help. She didn't, you know, she was too close to it emotionally to be coherent so I helped her shape her ideas. I helped her be more coherent in what she wanted to say. And I have no—I can't regret doing that.

We agree this evidence demonstrates both a level of intent and knowledge. As previously discussed, we likewise find the evidence demonstrates respondent acted knowingly, if not outright intentionally, in the dissemination of false information on social media/internet and in her motions to recuse as well as in her request for public action in calling the presiding judges to express concern and outrage.

Regarding the actual faxing of the petition to the Marion County Court and Judge Amacker's office, we find respondent's participation was knowingly made, *i.e.,* with "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Without question, once respondent knowingly and intentionally signed the petition, it was published and released to anyone with access to the internet. Her act in signing an online petition directly related to a pending litigation in which she was enrolled as counsel thus rises to the level of knowledge, because although she did not fax the petition, she, given her internet and social media suavity, clearly was aware the petition she signed could and might very well be printed and sent to the judges and courts to whom the petition was addressed. Though "uncomfortable" upon learning of the fax shortly after it was sent, respondent could not admit she was surprised. And when asked if she said anything that either directed or encouraged her client to fax the petition, she conceded:

I can't remember anything I said that was directly encourage [sic] her but I don't know that I did anything to discourage her, you know, honestly. You know, there is a lot of frustration with this case....

Thus, we find this evidence does demonstrate knowledge on respondent's part.

Actual or Potential Harm

Furthermore, we find the evidence shows respondent's conduct caused actual and potential harm to the independence and integrity of the judicial system and also caused the judges concern for their personal well-being. We also find her exposure of the children on the world wide web extremely harmful.

Aggravating and Mitigating Factors

After reviewing the record, we adopt the hearing committee's and disciplinary board's findings on the aggravating and mitigating factors in this case. In aggravation, we find respondent: (1) acted dishonestly and selfishly, (2) engaged in a pattern of misconduct involving multiple offenses, (3) had substantial experience in *1082 the practice of law having been admitted to the practice of law since October 2000, and, most importantly, (4) absolutely refuses to acknowledge the wrongful nature of her conduct or show any remorse for her actions. It is this utter lack of remorse that astonished this Court when she appeared before us for oral argument. Her defiant attitude as to the rules of our profession vis-à-vis her First Amendment rights was clearly evident in her response to questions posed by several members of the Court. Completely unapologetic for her misconduct, respondent made it abundantly clear she would continue to use social media and blogs to effect her agenda to bring about the changes she sought in the underlying cases. Respondent will not admit to any wrong doing whatsoever.

There can be no greater professional calling than to stand as an attorney at the bar of justice and assert as well as defend the rights of citizens. With that being said, we have long recognized the utmost importance of our rules of professional conduct to maintain and preserve the dignity and integrity of our time-honored profession. Any lawyer privileged to stand at the bar and pursue this noble endeavor has taken an oath to abide by those rules. This Court will not tolerate respondent's defiant attitude and unapologetic actions, which make a mockery of our rules and traditions.

In imposing sanctions we also look at any mitigating factors. The only mitigating factor in this case is respondent's absence of a prior disciplinary record.

While there is no Louisiana case directly on point with the manner in which respondent facilitated her misconduct, *i.e.,* through social media and the internet, we do find the serious nature of her actions requires serious sanction. In these cases, we look to the ABA Standards for guidance in

determining the baseline sanction. Under the standards relevant herein, disbarment is generally appropriate when a lawyer:

(1) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceedings; or

(2) engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standards 6.31(b) and 5.11(b), respectively. Suspension is generally appropriate when a lawyer:

engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

ABA Standard 6.32. Accordingly, the applicable baseline sanction under the ABA Standards ranges from suspension to disbarment.

Although the manner in which respondent violated the applicable rules of professional conduct is novel, the misconduct— *ex parte* communication, dissemination of false and misleading information, and conduct prejudicial to the administration of justice—is hardly so. As both the hearing committee and disciplinary board properly noted, our prior jurisprudence provides us guidance in dealing with professional misconduct involving lawyers who engage in improper communications with and about judges and in conduct dishonest and prejudicial to the administration of justice.

1083 For example, in the matter of *In re: White,* 08–1390, p. 14 (La.12/02/08), 996 So.2d 266, 274, this Court held "disbarment is the applicable baseline standard for respondent's conduct in engaging in *ex parte* communications with the trial judge presiding over his client's pending domestic litigation." This Court disbarred attorney White for, among other things, his *ex parte* communication with the presiding judge, Ronald Bodenheimer, about seafood pricing information.

In the matter of *In re: Lee,* 07–2061, p. 10 (La.02/16/08), 977 So.2d 852, 858, this Court stated "the language of Rule 3.5(b) clearly and broadly prohibits all *ex parte* communication with a judge during the course of a proceeding." The attorney therein was suspended for six months, with all but 45 days deferred, subject to the condition he attend Ethics School and obtain five additional hours of continuing legal education in professionalism, for his misconduct which included extremely vile and insulting remarks to the trial court and an *ex parte* communication with the judge during the course of a proceeding. This Court noted his behavior presented a common theme of "lack of respect for the dignity, impartiality, and authority of the district court." *Lee,* 07–2061 at p. 10, 977 So.2d at 858. And in *Louisiana State Bar Ass'n v. Harrington,* 585 So.2d 514 (La.1990), this Court found a lawyer need not represent a party in a case to be subject to the Rule 3.5(b) proscription against *ex parte* communication and suspended an attorney for 18 months for making false statements, engaging in conduct that unduly embarrassed, delayed or burdened a third person, and engaging in improper *ex parte* communication with a judge. Considering the attorney's conduct "caused no harm to his clients and his inexperience and remorse," this Court reduced the suspension to nine months on rehearing. *Harrington,* 585 So.2d at 524.

We likewise suspended an attorney for six months, with all but 30 days deferred, for making false statements about judges in a hypothetical attached to an appellate brief in which the attorney described a judge's ruling as having "violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is based." *In re: Simon,* 04–2947, p. 4 (La.6/29/05), 913 So.2d 816,

819. In the matter of *In re: Larvadain,* 95–2090 (La.12/8/95), 664 So.2d 395, 395–96, this Court suspended a lawyer for three months, fully deferred, and placed him on unsupervised probation for one year with special conditions, for having accused the judge of being a racist while cursing him, threatening him, and attempting to intimidate him.

Notably, we also suspended an attorney for one year for accusing a judge of being "dishonest, corrupt and engaging in fraud and misconduct," and for causing his unfounded accusations to be published in the local newspaper. *Louisiana State Bar Ass'n v. Karst,* 428 So.2d 406, 408 (1983).

As these cases demonstrate, the discipline for similar misconduct corresponds with the ABA recommended baseline sanction ranging from suspension to disbarment. Respondent's misconduct is further distinguishable because of her use of the internet and social media to facilitate her misconduct. As a result, the petition and associated offensive postings had and still have the potential to reach a large number of people world-wide and remain present and accessible on the world wide web even today. Coupled with her complete lack of remorse and admitted refusal to simply allow our system of review to work without seeking outside interference, respondent's misconduct reflects a horrifying lack of respect for the dignity, impartiality, and authority of our courts and our judicial process as a whole. As noted by the
1084 United State Supreme Court:*1084

> The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though cost and delays undermine it in all too many cases, the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases.

Gentile, 501 U.S. at 1058, 111 S.Ct. at 2736. Respondent's social media campaign conducted outside the sealed realm of the underlying judicial proceedings constitutes, in our view, an intolerable disservice to these traditions and our judicial system, which the constraints of our rules of professional conduct seek to safeguard against. Accordingly, we find her ethical misconduct warrants the highest of sanction—disbarment.

DECREE

Upon review of the findings and recommendations of the hearing committee and the disciplinary board, and considering the record, briefs, and oral arguments, it is ordered that Joyce Nanine McCool, Louisiana Bar Number 27026, be and hereby is disbarred. Her name shall be stricken from the roll of attorneys and her license to practice law in the State of Louisiana shall be revoked. All costs and expenses in the matter are assessed against respondent in accordance with Louisiana Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this Court's judgment until paid.

WEIMER, Justice, concurs in part and dissents in part and assigns reasons.

GUIDRY, Justice, concurs in part and dissents in part.

CRICHTON, Justice, additionally concurs and assigns reasons.

CANNELLA, Justice, concurring in part and dissenting in part.

WEIMER, J., concurring in part, dissenting in part.

I agree with the majority that the respondent has engaged in professional misconduct. However, I find some aspects of respondent's conduct amounted to constitutionally protected speech, for which respondent cannot be sanctioned.

Furthermore, I find the majority's sanction of disbarment to be disproportional to respondent's misconduct.

The majority finds that the respondent's online and social media campaign was an orchestrated effort to inflame the public sensibility and to direct public criticism toward the judges presiding over child custody litigation in both Louisiana and Mississippi. I do not doubt this was the respondent's motivation. I also have no doubt that the respondent was wrong on several points for which she sought to have the public become incensed. Contrary to respondent's internet postings, the Mississippi judge did not ignore audio recordings of the children. Rather, the recordings were never offered into evidence in the Mississippi proceeding. Similarly, and contrary to respondent's postings, the Louisiana judge did not ignore evidence because proceedings in Louisiana were appropriately stayed in deference to the proceedings pending in Mississippi. After the Louisiana judge realized she would likely be a witness in the respondent's disciplinary proceedings, the judge recused herself "to avoid the appearance of impropriety" in two unrelated cases in which respondent *1085 was counsel of record. However, the respondent followed this up by filing motions in two other unrelated cases in which the respondent misrepresented the judge had recused herself because of the judge's "extreme bias" against the respondent.

1085

Making misrepresentations in court pleadings is sanctionable. The misrepresentations within the respondent's online and social media campaign and the fact that they were made by a lawyer representing the mother's custody interests are also sanctionable. *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1038, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (upholding the ability of a state supreme court to sanction an attorney who "knew or reasonably should have known his remarks created a substantial likelihood of material prejudice" to a judicial proceeding). The misrepresentations in respondent's statements justify a sanction under Rule 3.5

[1] for the substantial likelihood it would prejudicially disrupt the child custody proceedings, "since lawyers' statements are likely to be received as especially authoritative." *Id.* at 1074, 111 S.Ct. 2720. Also, to the extent respondent maintained internet resources, such as websites and social media, directing petitions to be sent to the Louisiana and Mississippi judges, I construe respondent's actions as sanctionable ex parte communications in violation of Rule 3.5.

[1] .Rule 3.5 of the Louisiana Rules of Professional Conduct provides:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

[2] This court's majority goes further, however, and sanctions the very acts of criticizing judges and inspiring public criticism toward judges. In so doing, the majority impermissibly sanctions the respondent for engaging in constitutionally protected speech.

[2] The Rules of Professional Conduct prohibit a lawyer from utilizing others to do what a lawyer is prohibited from doing. *See*Rule

8.4(a).

As the Court in *Gentile* explained, "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Id.* at 1034–35, 111 S.Ct. 2720. Furthermore, "limits upon public comment about pending cases are 'likely to fall not only at a crucial time but upon the most important topics of discussion.' " *Id.* at 1035, 111 S.Ct. 2720, *quoting Bridges v. California,* 314 U.S. 252, 268, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

Indeed, because of the adversarial nature of our system of justice, criticism of judges is an expected part of the judicial system. Criticism of judges takes place regularly by parties who perceive they have been aggrieved by judges' decisions. The appeals process actually requires parties—and the lawyers who represent them—to identify and criticize the aspects of judicial decisions with which they disagree. Had the respondent not peppered her criticism with misrepresentations, engaged in ex parte communications, engaged in conduct designed to gain an unfair advantage in on-going litigation, and broken a court-ordered seal imposed to protect confidentiality, the respondent's online criticisms of the judges' handling of the child custody matter 1086 would likely have *1086 been fully protected speech.

[3] As the Supreme Court explained in *Bridges,* 314 U.S. at 270–71, 62 S.Ct. 190:

> [3] Although the respondent's brief relies heavily on First Amendment protections of speech, during oral argument, the respondent's repeated comments about the possibility of losing her license to practice law tacitly recognize that a lawyer's speech is subject to regulation.

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion .... And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Here, the respondent perceived there to be mistreatment of her client's children and looked to the judicial system to address that mistreatment. In light of her evaluation of the situation, respondent's initial efforts to invoke judicial action were both expected and appropriate. However, as an officer of the court, a lawyer must abide by the principle that cases should be decided by careful deliberation and application of the facts to the law, not by public clamor. Therefore, after the litigation was complete, the respondent would have been entitled to disseminate appropriate criticism—on the internet if she preferred—that the courts ignored the rule of law, if her representations had been true. But they were not.

Respondent cannot even lay claim to holding a reasonable belief in the veracity of some of her most significant criticisms. As noted earlier, there was simply no evidence that the Mississippi court had ignored tape recordings, which allegedly revealed child abuse, when those recordings had never been submitted for the court's consideration. I emphasize this example, because I believe it underscores that the respondent is passionate in her belief there is a need for society to prevent child abuse. Passionate belief is usually preferable to apathy and, regarding the need for society to prevent child abuse, only an unreasonable person would argue in favor of apathy. In every given case as to whether abuse has actually occurred and must be stopped, society has chosen the courts to be the ultimate arbiters. Because respondent, in her privileged role as a lawyer, is an officer of the court, both society and the government serving it have a justified expectation that officers of the courts will temper their public criticisms with truthful statements. *See Gentile,* 501 U.S. at 1031, 111 S.Ct. 2720 (explaining that lawyers "are key

participants" in the justice system, "and the State may demand some adherence to that system's precepts in regulating their speech and conduct.").

Respondent certainly did not champion the rule of law in her handling of information relating to her client's children. Respondent sought and obtained the sealing of the record in a case dealing with the children. However, respondent later released information in violation of the seal that she had obtained from the judicial system.

Therefore, I concur with the majority inasmuch as I find discipline is warranted for respondent's misrepresentations, ex parte communications during on-going litigation, and breaking of a court-ordered seal. I dissent, however, from the majority's inclusion of respondent's acts of online criticism (apart from the impermissible content just noted) as sanctionable conduct.

1087[4] *1087

[4] The majority finds that the respondent's "overall conduct" constitutes misconduct by "clear and convincing evidence." *In re McCool,* No. 15–0284, op. at 1075, 1078 (La.06/30/15). Thus, the majority sweeps both protected and un-protected speech into the category of sanctionable conduct.

I certainly share the majority's concern that unfounded criticism can impede the judicial process. As one commentator also has noted, "with increasing frequency ... attacks on the judiciary ... are purely ideologically driven. This type of 'criticism' ... undermines the rule of law by suggesting that judges are free to ignore the relevant facts or the applicable law to reach the outcome sought by a special interest group." Steven M. Puiszis, *The Need to Protect Judicial Independence,* 55 No. 4 DRI For Def. 1 (Apr.2013). Caustic though it may be, such speech even by a lawyer is protected by the First Amendment, as long as the speech does not, as it does here, contain misrepresentations or as the Supreme Court has explained, present a "substantial likelihood of material prejudice" to a case. *Gentile,* 501 U.S. at 1037, 111 S.Ct. 2720.

I further dissent as to the sanction. The Office of Disciplinary Counsel (ODC) recognizes that "[t]here is no Louisiana Jurisprudence addressing misconduct similar to Respondent's" and relies on the jurisprudence of two other states

[5] to support the recommended sanction of one year and one day suspension. While it is true that the novelty in Louisiana of the issues in this case presents certain challenges, this court is not without guidance and that guidance does not point to the disbarment the majority now imposes.

[5] The ODC cited unpublished disciplinary cases. It cited the public reprimand ordered in *The Florida Bar v. Conway,* SC08–326 (Fla.10/29/08), 2008 WL 4748577, and administered by the Florida Bar in *The Florida Bar v. Sean William Conway,* TFB File No. 2007–51,308(17B), *available at* https:// www. floridabar. org/ DIVADM/ ME/ MPDis Act. nsf/ da Toc! Open Form& Auto Framed& MFL = Sean William C¨onway&ICN=200751308&DAD=Public Reprimand (last visited 6/4/15).

In *Conway,* the lawyer maintained a website entitled "Judge Aleman's New (illegal) 'One–Week to prepare' policy," and referred to the judge throughout the website as an "EVIL UNFAIR WITCH." *Conway,* TFB File No. 2007–51,308(17B). The reprimand stated: "although attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention."

The ODC also cited *In re: Kristine Ann Peshek,* M.R.23794 (Ill.5/18/10), *available at* http:// www. illinoiscourts. gov/ Supreme Court/ Announce/ 2010/ 05181.

pdf, and accepting the petition for discipline *available at* http:// www. iardc. org/ 09 CH 0089 CM. html (last visited 6/4/15). According to the petition in *Peschek,* the attorney referred to a judge as "Judge Clueless" and referred to another judge as "a total a* * * * * *."

Specifically, the ABA Standards for Imposing Lawyer Sanctions address violations of a lawyer's duties to the legal system. Respondent's violations of her duties to the legal system are the crux of this case, even under the majority's analysis. However, under the rubric of "Improper Communications with Individuals in the Legal Systems," ABA Standard 6.32 provides a baseline sanction of a suspension for an ex parte "communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding." Under the same rubric of improper communications, disbarment is reserved for an ex parte communication which "causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding." ABA Standard 6.31(b). However, in its prosecution of this case, the ODC did not charge respondent with violating Rule 3.6

1088[6] or even allege that respondent's *1088 actions created a danger of imminent and substantial harm. Thus, the baseline sanction is suspension because of the potential for harm rather than a showing of actual harm. *See* ABA Standard 6.32; *compare* ABA Standard 6.31(b).

[6] .Rule 3.6(a) of the Rules of Professional Conduct prohibits a lawyer from "mak[ing] an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

In contrast to these standards establishing a baseline of suspension, the majority's sanction analysis relies on *In re White,* 08–1390 (La.12/02/08), 996 So.2d 266, 274, in which this court determined a lawyer's ex parte communications fell within a baseline sanction of disbarment. The majority presently describes our analysis in *In re White* as turning on the fact that the ex parte communication was "about seafood pricing information." *In re McCool,* No. 15–0284, op. at 1083 (La.06/30/15). While it is true that seafood prices were one topic of the lawyer's ex parte communications in *In re White,* the majority presently fails to mention that the seafood pricing information supplied by the lawyer was stipulated to be "relatively useless" to the judge and, therefore, our finding in *In re White* that the baseline sanction for certain ex parte communications was disbarment actually rested on the lawyer engaging in other communications. *In re White,* 08–1390 at 7, 996 So.2d at 270. To benefit his employer in a pending domestic dispute case, the lawyer engaged in ex parte communications to arrange for providing lavish gifts to a judge and his family. *Id.* at 7–8, 996 So.2d at 270–71. Specifically, the lawyer stipulated to the following ex parte communications with Judge Bodenheimer, which were found to have been made with the intent to benefit the lawyer's client, restauranteur Al Copeland:

14. During the course of the Copeland/Hunter domestic relations proceedings, Bodenheimer requested and respondent provided complimentary appetizers and refreshments at one of Copeland's restaurants to Bodenheimer's daughter for a birthday. Although it was (and is) a regular and common practice of Copeland's restaurants to provide complimentary food and beverages to various members of the public, respondent acknowledges that he should have declined Judge Bodenheimer's request.

15. Additionally, on another occasion, respondent provided promotional gift cards for complimentary food and refreshments at a Copeland's restaurant to members of Bodenheimer's staff during the time that the Copeland/Hunter proceedings were then pending. Although it was (and is) a regular and common practice of Copeland's restaurants to provide complimentary food and beverages to various members of the public, respondent acknowledges that he should have declined to furnish these promotional gift cards.
In re White, 08–1390 at 7–8, 11–12, 996 So.2d at 270, 272–73.

Here, and unlike *In re White,* there has been no allegation that the respondent engaged in ex parte communications as part of a *quid pro quo* exchange to curry favor with a judge during a pending case. Aside from *In re White,* which plainly deals with misconduct of a more egregious nature than the misconduct here, the majority's sanction analysis relies on cases in which this court suspended lawyers who engaged in ex parte communications. *In re McCool,* No. 15–0284, op. at 1082–83 (*citing In re Lee,* 07–2061, p. 11 (La.02/26/08), 977 So.2d 852, 858 (suspension of 6 months, all but 45 days deferred); *In re Simon,* 04–2947 (La.06/29/05), 913 So.2d 816, 819 (suspension of 6 months, all but 30 days deferred); *In re Larvadain,* 95–2090 (La.12/08/95), 664 So.2d 395 (suspension of 3 months, fully deferred); *Louisiana State Bar Ass'n v. Harrington,* 585 So.2d 514 (La.1990) (suspension of 18 months); and *Louisiana State Bar Ass'n v. Karst,* 428 So.2d 406 (La.1983) (suspension of 1 year)). To disbar the respondent here, *1089 considering the suspensions cited by the majority, reveals that disbarment is not only disproportionate to the misconduct, but is impermissibly punitive. *See Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173, 1177–78 (La.1987) (noting the primary purposes of disciplinary proceedings are to maintain the high standards and integrity of the legal profession, protect the public, and to deter misconduct, rather than punish the lawyer).

The suspension of one year and one day recommended by the hearing committee, disciplinary board, and ODC is consistent with the baseline of suspension under the ABA Standards. I would impose the recommended suspension, with one alteration. Because the misconduct here is novel in that this court has never directly addressed an attorney's use of social media and the internet and the ODC points to only two other states that have addressed misconduct involving improper internet postings, I would defer all but six months of the suspension subject to the condition that the suspension would be fully imposed if respondent were to commit misconduct during the period of active or deferred suspension. *See In re Raspanti,* 08–0954, p. 23 (La.3/17/09), 8 So.3d 526, 540 (finding as a significant mitigating factor that "we are issuing a sanction for a matter for which no one has been sanctioned previously.").

[7] The recommended suspension is also supported by the mitigating factor that respondent has no disciplinary history in over 14 years as a member of the bar.

[7] Noting the novelty of internet blogging, one commentator suggests the rules governing the legal profession currently fail to equate blogging with an ex parte communication. *See* Rachel C. Lee, Symposium: *Media, Justice, and the Law:* Note: *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era,* 61 Stan. L.Rev. 1535 (April 2009). Here, respondent's conduct, such as her online petition, went beyond the type of commentary typically associated with blogging and, as earlier noted, I have no difficulty finding that the respondent has engaged in communications which violate the Rules of Professional Conduct. However, the commentary just cited

> underscores that this is a developing area of the law, a reality which weighs against imposing disbarment under the facts presented.

Thus, I respectfully concur in part and dissent in part, with the opinion of the majority.

GUIDRY, Justice, concurs in part and dissents in part.

I concur that respondent should be sanctioned, but I dissent as to majority's imposition of disbarment and I would impose a suspension of three years.

CRICHTON, J., additionally concurs and assigns reasons:

I wholeheartedly agree with the majority opinion in this matter. I write separately, however, to touch upon what I believe to be an outrageous disregard for the sacred profession we, as well as respondent, have chosen. The majority aptly notes that holding a law license is a great privilege. As United States Supreme Court Justice Benjamin Cardozo, then Judge on the Court of Appeals of New York, also stated almost a century ago: "Membership in the bar is a privilege burdened with conditions." *In re Rouss,* 221 N.Y. 81, 116 N.E. 782, 783 (1917). Those conditions are numerous, and do not come without great sacrifice. Respondent is an " 'officer of the court' in the most compelling sense,"

[1] as the majority so correctly finds, and consequently, she is held to a higher standard than a non-lawyer member of the public. She cannot confuse a First Amendment claim of the right to free speech with a serious and intentional violation 1090*1090 of the Rules of Professional Conduct, which are rules that apply both to her and to every lawyer. Not only did her conduct cause major disruptions in the course of litigation, it also unnecessarily put members of the judiciary at risk.

> [1] *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (internal citations omitted).

But perhaps respondent's most astounding and egregious action is her complete and utter lack of remorse, and defiance in the face of her impending sanction. At oral argument of this matter, respondent admitted she did "not have any remorse for [my] conduct" and that she would "continue to speak out and advocate for change." It is unfortunate that respondent does not seem to understand that being a zealous advocate does not equate to such repugnant disrespect for the system we are charged to honor and serve. It is for these reasons I agree with the majority's decision to impose the most serious of sanctions: disbarment.

CANNELLA, J.,

[*] **concurring in part and dissenting in part.**

> [*] Retired Judge James L. Cannella, assigned as Justice ad hoc, sitting for Hughes, J., recused.

I dissent in part as to the sanction and would impose a three year suspension, but I concur in all other respects.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 06-01
	)	
KASIA QUILLINAN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of RPC 1.6(a), RPC 1.9(c)(1), and RPC 1.9(c)(2). Stipulation for Discipline. 90-day suspension.
Effective Date of Order:	December 27, 2006

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 90 days, effective December 15, 2006, or 30 days after approval by the Disciplinary Board, whichever is later, for violation of RPC 1.6(a), RPC 1.9(c)(1), and RPC 1.9(c)(2).

DATED this 27th day of November 2006.

/s/ John A. Berge
John A. Berge, Esq.
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Esq., Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

Kasia Quillinan, attorney at law (hereinafter "Accused"), and the Oregon State Bar (hereinafter "Bar") hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 18, 1980, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Marion County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On March 15, 2006, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of RPC 1.6(a) (revealing information relating to the representation of a client); RPC 1.9(c)(1) (using information relating to the representation of a former client to the disadvantage of the former client); and RPC 1.9(c)(2) (revealing information relating to the representation of a former client). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

On October 27, 2005, the Accused sent an email message to members of the Oregon State Bar Workers Compensation Section listserv (consisting of 275 bar members) regarding a former client. This email disclosed personal and medical information that the Accused had learned during the course of her representation of the client. The Accused's email also characterized the Accused's former client as "difficult" and suggested that she was now "attorney shopping" because she was unwilling to accept a "very fair" offer from a workers compensation insurer.

6.

The Accused stated in her email that the reason she was sending this information to the listserv attorneys was to "provide some background on (the client's) case, in the event you are contacted by her." The Accused's disclosures in her email were or were likely to be disadvantageous to the Accused's former client's efforts to find another qualified attorney to represent her.

Violations

7.

The Accused admits that, by drafting and transmitting the email disclosing information regarding her former client's representation, she violated RPC 1.6(a), RPC 1.9(c)(1), and RPC 1.9(c)(2).

Sanction

8.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

a. *Duty Violated.* The Accused violated her duty to preserve client confidences. *Standards,* § 4.2. The most important ethical duties are those obligations which a lawyer owes to clients. *Standards,* p. 5.

b. *Mental State.* The Accused knowingly disclosed information related to her former client's representation. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct, but without the conscious object or purpose to accomplish a particular result. *Standards,* p. 7.

c. *Injury.* Injury can be actual or potential. In this case, the Accused's client was caused potential injury insofar as the Accused's disclosures potentially inhibited her client's ability to obtain replacement counsel through the Accused's unfavorable characterization of her former client's demeanor and participation in her case.

d. *Aggravating Factors.* Aggravating factors include:

1. The Accused drafted and transmitted the email, referencing an attorney lien in the case. *Standards,* § 9.22(b).

2. There are multiple offenses, insofar as more than one violation of the Rules of Professional Conduct occurred. *Standards,* § 9.22(d).

3. The Accused has substantial experience in the practice of law. She was admitted in Oregon in 1980. *Standards,* § 9.22(i).

e. *Mitigating Factors.* Mitigating factors include:

1. The Accused has no prior record of discipline. *Standards*, § 9.32(a).

2. The Accused made a full and free disclosure of her conduct in connection with the disciplinary investigation and has demonstrated a cooperative attitude toward the proceedings.

3. The Accused has expressed remorse for her conduct.

9.

Taking into account all of the factors, the *Standards* provided that a suspension is generally appropriate where a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client. *Standards*, § 4.22.

10.

Oregon cases also support the imposition of a term of suspension. For example, in *In re Lackey*, 333 Or 215, 37 P3d 172 (2001), the attorney was suspended for one year for disclosing confidences and secrets of his former client (and employer) to the press. The court in *Lackey* found that, after being forced to resign, the attorney divulged his client's information in an effort to embarrass or injure and thereby "exact revenge" on his former client and employer. 333 Or at 229. While the Accused's disclosure in this matter was not favorable to her client and could be viewed as detrimental, the aim and effect of the Accused's conduct was not nearly as serious as that in *Lackey*. Accordingly, while the Accused's conduct is deserving of a suspension, it does not merit the length or severity of that imposed in *Lackey*. *See also In re Paulson*, 341 Or 542, 145 P3d 171 (2006) (four-month suspension for disclosure and use of former-client information on behalf of current client, among other violations); *In re Jennings*, 18 DB Rptr 49 (2004) (30-day suspension for conflicts and confidential disclosures in an estate-planning matter).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 90 days for violations of RPC 1.6(a), RPC 1.9(c)(1), and RPC 1.9(c)(2), the sanction to be effective December 15, 2006, or 30 days after approval by the Disciplinary Board, whichever is later.

12.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the State Professional Responsibility Board (SPRB). If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 14th day of November 2006.

/s/ Kasia Quillinan
Kasia Quillinan
OSB No. 80098

EXECUTED this 16th day of November 2006.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott
Amber Bevacqua-Lynott
OSB No. 99028
Assistant Disciplinary Counsel

In the Supreme Court of Georgia

Decided: March 18, 2013

S13Y0105. IN THE MATTER OF MARGRETT A. SKINNER

PER CURIAM.

Following the issuance by the State Bar of Georgia of a formal complaint against respondent Margrett A. Skinner, a member of the State Bar since 1987,[1] and the appointment of a special master by this Court, Ms. Skinner filed a petition for voluntary discipline in which she admitted having violated Rule 1.6 of the Georgia Rules of Professional Conduct and sought imposition of a Review Panel Reprimand for her infraction. The Office of General Counsel of the State Bar recommended that the special master accept the petition for voluntary discipline and, after noting the circumstances of the violation, Ms. Skinner's lack of a record of prior disciplinary action, and the personal and emotional problems she faced at the time of the infraction, the special master found imposition of a Review Panel Reprimand to be an appropriate recommendation and recommended that this Court accept the petition for voluntary discipline.[2]

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[1]State Bar Number 650748

[2]In addition to the allegation that Rule 1.6 had been violated, the Formal Complaint filed against Ms. Skinner averred that Ms. Skinner had violated the Georgia Rules of Professional Conduct in other aspects of her representation of the client by wilfully disregarding a legal matter entrusted to her, without just cause and to the detriment of the client (Rule 1.3); by failing to

Rule 1.6 of the Georgia Rules of Professional Conduct requires a lawyer to maintain in confidence all information gained in the professional relationship with a client unless the client consents to disclosure after consultation, excepting disclosures that are not present in this case. Rule 1.6 (a, b). The duty of confidentiality survives the termination of the client-lawyer relationship (Rule 1.6 (e)), and the maximum penalty for violation of Rule 1.6 is disbarment. In her petition, Ms. Skinner admitted that, after the client had notified Ms. Skinner that the client had discharged Ms. Skinner and had obtained new counsel, Ms. Skinner posted on the internet personal and confidential information about the client that Ms. Skinner had gained in her professional relationship with the client. Ms. Skinner posted the information in response to negative reviews of Ms. Skinner the client had posted on consumer websites.

While this Court has not been faced with a violation of Rule 1.6 by means of internet publication, the supreme courts of two states have. The Supreme Court of Illinois accepted a petition to impose a 60-day suspension on consent of an attorney who, among other things, had published in a blog related to her legal work confidential information about her clients and derogatory comments about judges, and had included information from which the identity of the

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keep a client reasonably informed of the status of the client's legal matter and by failing to provide an itemized statement as requested by the client (Rule 1.4); and by failing to honor the client's request to deliver the client's file to the client's new attorney and by initially refusing to refund to the client the unearned portion of the fee paid by the client (Rule 1.16). Because the client and Ms. Skinner had conflicting factual accounts underlying these charges, the special master believed it appropriate to consider only Ms. Skinner's petition for voluntary discipline that contained admissions of violating Rule 1.6.

clients and the judges could be discerned.[3] The Supreme Court of Wisconsin imposed reciprocal discipline, i.e., a 60-day suspension, for the attorney's conduct, quoting extensively in its opinion from documents filed in the Illinois proceeding. See Office of Lawyer Regulation v. Peshek, 334 Wis.2d 373 (798 NW2d 879) (2011). In In Re Quillinan, 20 DB Rptr. 288 (2006), *summarized by the State Bar of Oregon in* http://www.osbar.org/publications/bulletin/07jan/discipline.html, the Oregon disciplinary board approved a stipulation for discipline that suspended for 90 days an attorney who drafted and transmitted an e-mail disclosing to members of the Oregon State Bar's workers' compensation listserve personal and medical information about a client whom she named, and suggesting the client was seeking a new lawyer.[4]

That a lawyer maintain confidentiality of information relating to the representation is a fundamental principle in the client-lawyer relationship. Comment [4], Rule 1.6. The observance of this ethical obligation "facilitates the full development of facts essential to proper representation of the client ... [and] encourages people to seek early legal assistance." Comment [2], Rule 1.6.

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[3]In addition to a violation of Rule 1.6, the Illinois attorney admitted "conduct which tends to defeat the administration of justice or bring the courts or the legal profession into disrepute," and, for failing to inform the court of a client's mis-statement of fact to the court, violations of Rules 1.2(g), 3.3(a)(2), and 8.4(a)(4 and 5). Office of Lawyer Regulation v. Peshek, 334 Wis.2d 373 (798 NW2d 879) (2011).

[4]Ms. Quillinan's 90-days suspension was for her violations of Rules 1.9(c)(1) and (c)(2), in addition to her violation of Rule 1.6.

While we recognize the existence of mitigating factors in this case,[5] based on the lack of information concerning Ms. Skinner's violation that is in the record before us,[6] we reject the petition for voluntary discipline that seeks a Review Panel Reprimand, the mildest form of public discipline authorized by the Rules of Professional Conduct, for the violation of Rule 1.6.

Petition for voluntary discipline rejected. All the Justices concur.

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[5]Mitigating factors are Ms. Skinner's lack of a disciplinary history, her refund of the fee paid by the client, her statement of remorse, and the emotional and physical effects of her own surgery and the deaths of both her parents

[6]Among other things, we note that the record does not reflect the nature of the disclosures (except that they concern personal and confidential information) or the actual or potential harm to the client as a result of the disclosures.