MEMORANDUM

TO: Mike McCarthy, Chair
MSBA Rules of Professional Conduct Committee

FROM: William J. Wernz

DATE: April 17, 2017

RE: Rule 1.6(b)(8), LPRB Op. 24, ESM, Subcommittee Consideration

I request the appointment of a sub-committee to study and make recommendations regarding a possible petition to amend Rule 1.6(b)(8), Minn. R. Prof. Conduct, especially the "controversy clause," which permits disclosure of client information as necessary, "to establish a a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, ..." The possible amendment would state the circumstances in which a lawyer may reveal information relating to the representation of a client, as the lawyer reasonably believes necessary for self-defense in response to client allegations outside of any proceeding.

The main occasion for this request is the issuance by the Lawyers Professional Responsibility Board (LPRB) of Opinion 24, on September 30, 2016. An article by the Office of Lawyers Professional Responsibility (OLPR) appears to be intended to explicate Op. 24. Patrick R. Burns, *Client Confidentiality and Client Criticisms,* Bench & B. of Minn., Dec. 2016. I have written a blog and an article, which explain the problems with Op. 24 and OLPR's article. These materials are attached or linked.

I also request that the sub-committee be asked to consider how the development of electronic social media and other electronic publication modes may affect the issues addressed by Rule 1.6(b)(8). I make this request because Rule 1.6(b)(8) was last amended in 2005. After 2005, there has been more than a decade of enormous change in the means by which clients and former clients are able to gain public and other audiences for communicating ratings, comments, and allegations about lawyers. In 2005 Facebook was only a means for college students to communicate with each other about their fellow students. The ABA Model Rules amendments of 2002-03 and the Minnesota amendments of 2005 could not take any account of these means of going public and even going viral with statements by anyone about anyone, including lawyers.

As to the first request, I believe that Opinion 24 and the OLPR explication of Op. 24 have the serious problems described in my blog and article. Among these are:

1. Opinion 24 would render the controversy clause of Rule 1.6(b)(8) inapplicable and therefore meaningless. OLPR interprets the controversy clause to apply *only* in a public forum. Op. 24 interprets the controversy clause to not permit disclosure in self-defense in "any . . . public forum." I have asked OLPR and LPRB for examples of disclosures permitted under the controversy clause by Op. 24, but I have not received any such examples. The MSBA did not craft the controversy clause and recommend it to the Court as a null set.

2. Opinion 24 and the OLPR article do not take account of, or even address, factors that are essential to interpreting and applying the controversy clause: (a) the unique Minnesota Rule 1.6(b)(8) provision for disclosure in an "actual or potential controversy;" (b) Minnesota's history, for over thirty years, of balancing client confidentiality and redress of falsehood and endangerment through disclosure more in favor of disclosure than other states and the ABA; (c) the legislative history of the 2005 amendment of Rule 1.6(b)(8). I chaired the MSBA Task Force that proposed the amendment and I am confident that we did not intend the result found in Op. 24. We would certainly have advised the bar and the Supreme Court if we had intended to forbid disclosures for self-defense "in any public forum," (other than litigation), as Op. 24 does. LPRB endorsed the MSBA petition.

3. In adopting Op. 24, the LPRB did not follow the procedure of a "publish-for-comment" draft that it regularly followed and announced as "adopted." Martin Cole, *Lawyers Board Proposes Opinion No. 20,* Bench & B. of Minn. (March 2009). However, LPRB did not publish a draft opinion for public comment and did not include an explanatory comment, stating the rationale for Op. 24. Op. 24 does not meet the standard adopted by the Minnesota Supreme Court for LPRB opinions – they may state only the "plain meaning" of a rule. *In re Admonition 99-42*, 621 N.W.2d 240 (Minn. 2001). When LPRB does not follow its own procedures and limitations, LPRB's opinion should be studied to determine what action, if any, MSBA should take.

4. The OLPR article – which was apparently intended to explain Op. 24 – in part contradicts Op. 24. The logic of the article leads to permitting disclosure in public forums in Scenarios 1 and 2 (found in my article), while Op. 24 prohibits disclosure.

5. The underlying issues of disclosure and confidentiality are of great importance, because they are both moral and professional. An ex-client's confidentiality right should not and does not trump lawyers' rights to protect their reputations, their pocketbooks and their potential future clients against serious, consequential, provably false accusations of wrongful conduct. Likewise, confidentiality rights do not always trump the interests of prospective clients and the public in the truth. These issues should not be decided by an LPRB opinion that was issued without advance public comment, without explanation, and without explication of the operative language.