Ethics Around the Country

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Virtual South Carolina
Local Government Attorneys' Institute

SOUTH CAROLINA
ASSOCIATION OF COUNTIES

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Public Lawyering

Higher Standards

Private lawyers have an obligation to protect their client's confidences even when the client has engaged in wrongdoing whereas

"government lawyers have a higher, competing duty to act in the public interest."

In re Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 293 (7th Cir. 2002)

The case concluded that a government lawyer could not assert attorney client privilege in communications with a state government official in a criminal investigation of the official's activities.

A Higher Standard

"The government wins when justice is done."

Justice Department Rotunda
Frederick W. Lehmann , 13th Solicitor General of the US

From a presentation by Hon. Robert N. McDonald for
IMLA September 22, 2020

A Higher Standard

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Berger v. United States, 295 U.S. 78, 88 (1935)

From a presentation by Hon. Robert N. McDonald for IMLA September 22, 2020

A Higher Standard

Restating the premise in *Berger*:

> The [government attorney] is the [adviser or] representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.

From a presentation by Hon. Robert N. McDonald for IMLA September 22, 2020

Attorney Discipline Cases

2009 – 2019:

599 attorneys sanctioned

6 government attorneys

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A cautionary tale

Must attorneys suggest that their clients or prospective clients seek legal advice to review the attorney's contract?

City attorney sought to modify employment terms with city.

- Drafted performance review
- Drafted new terms to be adopted by resolution
- Had a member of city council offer both to council for review and adoption

City attorney subsequently fired for allegedly cheating on expense accounts and pleading nolo contendere to those charges.

Can city attorney recover contractual severance payments included in amended terms of employment?

Attorney did not explain that while severance in the original employment resolution was discretionary that severance in new resolution was not, nor the effect of that change.

From the majority opinion in *Fernandez v. City of Miami*, 147 So. 3d 553 (2014):

“ As a public officer in a local government, Mr. Fernandez was subject to Florida’s statutory declaration of policy that such officers are “agents of the people and hold their positions for the benefit of the public.”

“As the City Attorney responsible for advising and protecting the City of Miami in legal matters, Mr. Fernandez was required to “represent his client and handle his affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity.” *Gerlach*, 98 So. 2d at 498

“Mr. Fernandez’s attempt to reap the benefit of his own breaches of those duties should not be countenanced, as the trial court found. The final judgment and orders on attorney’s fees and costs are affirmed.”

In dissent Chief Judge Shepherd noted that the attorney was not acting as an attorney, rather he was acting as an employee, thus no fiduciary responsibility:

“During negotiations on the employment contract, the relationship between Fernandez and the Commission was employer/employee and not attorney/client.”

The 7th Circuit noted that distinction in a criminal case:

> “In the related area of an attorney's fiduciary duties to clients, we have cautioned that the broader scope of fiduciary duty quoted above does not apply with full force when the attorney's compensation is the issue: "Fiduciary law does not send the dark cloud of presumptive impropriety over the contract that establishes the fiduciary relationship in the first place and fixes the terms of compensation for it." *Maksym*, 937 F.2d at 1242.”

United States v. Weimert, 819 F.3d 351, 369 (7th Cir. 2016)

Rule 1.8

(a) An attorney shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the attorney acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek independent legal advice on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the attorney's role in the transaction, including whether the attorney is representing the client in the transaction.

The better choice?

Lawyer Speech and the First Amendment

Regulating Lawyer Speech under the First Amendment

As they are government regulations, the Rules of Professional Conduct implicate the First Amendment.

> "The extent to which lawyer speech is protected by the First Amendment has troubled courts, scholars, and regulators for decades. Indeed, if we attempt to build a First Amendment data set in which the constant feature across cases is the challenger's bar membership, there seems to be an erratic quality to the results of these contests, making it difficult if not impossible to develop a coherent paradigm for assessing when the bar can restrict or prohibit lawyer speech."

ARTICLE: Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech, 31 Geo. J. Legal Ethics 31, 32

A some rules regulating speech:

Rule 1.6 Client confidences

Rule 4.2 Communication with person represented by attorneys

Rule 3.6 Trial Publicity

Rules 7.1, 7.2 and 7.3 Advertising

Rule 8.4 Administration of Justice and integrity of judicial system

Professor Smolla's view

Bar rules can be functional or aspirational.

There's a First Amendment carve out for regulating lawyer speech.

The carve out exists on a continuum from protected to unprotected speech where the more functional the regulation the less protected to the more aspirational the greater protected.

Rodney A. Smolla, Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession, 66 Fla. L. Rev. 961

(2015).

Available at: http://scholarship.law.ufl.edu/flr/vol66/iss3/1

Smolla's functional rules

These functional interests include

- regulations that directly affect the operation of the legal system, such as
- regulations that are calculated to deter actual interference with the administration of justice,
- to preserve the lawyer's obligations to maintain client confidences, or
- to prevent misleading lawyer advertising or marketing.

Smolla's aspirational rules

- values such as promoting respect for the rule of law,
- maintaining public confidence in the legal system,
- Maintaining professionalism (a concept different from adherence to hard-law legal ethical rules), and
- safeguarding the dignity of the profession.

Attorney Discipline Cases

Attorney Grievance v. Markey

- "Forum of Hate"
- Emails disparaging others on basis of sex, race, sexual orientation
  - *During working hours*
  - *Government computers*
  - *Government email addresses*
- Two Maryland attorneys
- Violation of Rule 8.4(d) conduct prejudicial to the administration of justice and Rule 8.4(e) (bias or prejudice)
- Suspended indefinitely

From a presentation by Hon. Robert N. McDonald for IMLA September 22, 2020

AGC vs. Markey and Hancock

First Amendment protections not raised.

Each served a quasi-judicial function either as an ALJ or advisor to an administrative hearing board.

Conduct and speech implicated fairness of tribunals they served and administration of justice.

Could not have expected emails to remain private since they were subject to FOIA and government computers and resources used.

Heightened Sanctions

Public Lawyers can expect to be treated more harshly in disciplinary cases.

Attorney Grievance Comm'n of Md. v. McDonald, 85 A.3d 117, 144 (Md. 2014) ("Furthermore, "[d]isbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another." ABA, Standards for Imposing Lawyer Sanctions 5.21 (1992).")

A Cautionary Tale

In Re Kline, 298 Kan. 96 (2013)

“Kline points out the panel did not find he violated any duties to a client.

But the obvious flaw in this is that as Attorney General of the State of Kansas and District Attorney for Johnson County, his "client"was the public. See *Gray Panthers v. Schweiker,* 716 F.2d 23, 33 (D.C. Cir. 1983) (Public servants "have a higher duty to uphold because their client is . . . the public at large."); . . .”

Heightened Sanctions

“Although not cited by the panel, in light of Kline's status as a government official during the period of misconduct, we believe ABA Standard 5.22, concerning a lawyer's failure to maintain the public trust, also is relevant. That standard provides:

> *"5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process." ABA Standards, 471*

In Re Kline, 298 Kan. 96 (2013)

A Cautionary Tale

Plaintiff's counsel in an appeal in California attacked the judge in the lower court. The appellate court referred counsel for sanctions to the bar.

"We further note that many of the words and phrases in the notice of appeal have no place in a court filing. We cannot understand why plaintiff's counsel thought it wise, much less persuasive, to include the words "disgraceful," "pseudohermaphroditic misconduct," or "reverse peristalsis" in the notice of appeal."

Martinez vs. O'Hara, 32 Cal.App.5th 853 (2019).

Special Conflicts of Interest for Former and Current Government Employees

RULE 1.11

Current Government Officials

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

Serving as a public officer or employee

Labor Commissioner - *Rennie v. Hess Oil V.I. Corp*., 981 F. Supp. 374 (D.V.I. 1997)

Managing Director of City of Philadelphia - *Philadelphia v. Dist. Council 33, Am. Fed'n of State, etc.,* 503 Pa. 498, 469 A.2d 1051 (1983) decided under predecessor to Rule 1.11.

A cautionary tale

In re Partridge, 374 S.C. 179, 180, 648 S.E.2d 590, 590 (2007)

Attorney in AG's office engaged in conflict prohibited by Rule 1.11 and Rule 1.7 by helping a person resolve a traffic ticket.

Some SC Advisory Opinions mentioning Rule 1.11

2013 13-08 – Handling cases or being guardian in matters where spouse as lawyer for DSS had been involved. OK

2009 09-06 – Partner is mayor, appoints judges, may lawyer appear before these judges. Yes, but some limitations for both judges and lawyer.

2005 05-01- Lawyer served as solicitor and handled prosecution of child molester employee of a boy's home. Lawyer in private practice seeks to represent different boy against different perpetrator from same boy's home. Cannot do so without consent of state because lawyer personally and substantially involved in prior case and had knowledge based on that representation. Firm may handle case if lawyer screened.

Some SC Advisory Opinions mentioning Rule 1.11

2002 02-03 – While deputy solicitor attorney prosecuted defendant in arson case which is still ongoing. Now, in private practice attorney wants to represent defendant, a client of firm, in pursuing an insurance claim involving the fire for which client had been prosecuted. Solicitor does not object to firm continuing to represent client in arson case, nor to former deputy representing client in insurance claim. Rule 1.11 prohibits the representation. Interesting footnote calling into question whether Solicitor or AG is appropriate party to consent.

2000 00-18 -"Typically, matters will be substantially related only if Lawyer gained information in the prior representation that could be relevant to the current matter."

PUBLIC TO PRIVATE EMPLOYMENT

Rule 1.11(a)(b)(c)

Rule 1.11

(a) Except as law may otherwise expressly permit, an attorney who has formerly served as a ***public officer or employee*** of the government:

(1) is subject to Rule 1.9 (c); and

(2) shall not otherwise represent a client in connection with a matter in which the attorney participated personally and substantially as a ***public officer or employee***, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Rule 1.9c

(c) An attorney 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.

Note: See Rule 1.11c regarding use of "confidential government information."

Rule 1.11c confidential government information

. . . As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. . . .

Virginia Rule 1.11

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Checklist on Post Public Employment Representation

- What was the nature of your representation of the government or duties as a public official?
- Is the matter one in which you participated personally and substantially?
- Are the issues in the matter adverse to your former client?
- Have you obtained written consent to handle the matter?
- Do City ethics laws or rules apply?

ABA Rule 1.9(a) and Rule 1.11

7 Steps when public lawyer migrates to private firm

The cases suggest (1) isolating the disqualified attorney from any participation in the matter or any related matter; (2) severing any contact between the disqualified attorney and other firm attorneys concerning the matter; (3) denying the disqualified attorney access to documents and files related to the matter; (4) advising all staff of the attorney's disqualification and of the screening methods; (5) monitoring the attorney's correspondence to ensure that she does not receive any documents related to the matter; (6) ensuring that the attorney does not share in fees derived from representation in the action; and (7) submission of affidavits by the attorney and every one in the firm swearing to the facts under oath. 1994 U.S. Dist. LEXIS *20. Such mechanisms must be put in place immediately, to avoid tainting the litigation. Id.

Rennie v. Hess Oil V.I. Corp., 981 F. Supp. 374, 378 (D.V.I. 1997)

A Cautionary Tale

“(Reuters) - U.S. District Judge Dan Polster ruled … that former Cleveland U.S. Attorney Carole Rendon, now in private practice at Baker & Hostetler, may not represent the pharmaceutical company Endo in two cases in the multidistrict litigation accusing opioids defendants of sparking the opioid crisis by misrepresenting the addictiveness of prescription painkillers.

“. . .The ethics rule [Rule 1.11] on related matters, he said, is supposed to preclude government lawyers from switching sides in the same case. That’s not what Rendon did, according to Polster, because the opioids task force she headed did not investigate Endo or bring claims against the company. “

A Cautionary Tale

Instead, Polster disqualified Rendon and Baker Hostetler under the ethics rule [Rule 1.11(c)] barring ex-government lawyers from using confidential information obtained in their service – and the judge only did so because the Justice Department confirmed Rendon's receipt of such information.

"(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.. . ."

What does personally and substantially mean?

"Personally and substantially" is not defined in the Rules.

ABA Formal Op. 342 (1975) in defining "substantial responsibility" states that it envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of a matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree in the investigative or deliberative process.

Also see: MD. ETHICS DOCKET NO. 2011-08

A Cautionary Tale

County Commissioner (an attorney) participated in review and hearings involving a project which commissioner opposed and against which he voted.

Upon leaving office Commissioner was enlisted to serve as attorney for a group opposing the development.

Could the commissioner, on behalf of client, file a FOIA style (in MD PIA) request for information that had been submitted to county during his term of office?

No: MD. ETHICS DOCKET NO. 2011-08

N.Y. State 748 (2001)

NY State 748 lists “relevant facts” to consider in determining whether lawyer participated personally and substantially including whether the lawyer:

- Served in more than nominal supervisory role
- Had knowledge of government confidences and secrets relevant to the proposed representation of the same defendants
- Provided coverage for other attorneys
- Was kept apprised of cases in the office
- Had access to the case files and other information regarding cases in the office.

Adversity is not a Necessity

Note that the *"personally and substantially"* prohibition applies regardless of whether the lawyer is adverse to the former government client.

Rule 1.11

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2*) any other matter covered by the conflict of interest rules of the appropriate government agency.*

E2 – incorporates local ethics provisions where a conflict may exist, so an attorney must comply with the binding public ethics law to comply with Rule 1.11 conflict provisions.

When a lawyer is disqualified under Rule 1.11(a), is the firm also disqualified?

Not necessarily. There are steps a firm can take to prevent disqualification

ABA Rule 1.11(b)

Provides that no lawyer in a firm with which a lawyer disqualified under Rule 1.11(a) is associated may knowingly undertake or continue representation in such a matter unless:

the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

“Confidential Government Information” Disqualification

Rule 1.11(c) also disqualifies former government officers or employees who:

1. have information about a person
2. that the lawyer knows is confidential government information, and
3. that was acquired when the lawyer was a public officer

Confidential Government Info Disqualification cont'd.

From representing a private client:

1. whose interests are adverse to that person
2. in a matter in which the information could be used to the material disadvantage of that person.

ABA Rule 1.11(c)

Confidential Government Information Defined - Again

"Confidential government information" is defined as "information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public."

ABA Rule 1.11(c)

PRIVATE TO PUBLIC EMPLOYMENT
Rule 1.11(d)

Prohibitions on Current Government Lawyers

Except as law may otherwise provide, a lawyer currently serving as a public officer/employee shall not:

participate in a matter in which the lawyer participated *personally and substantially* while in nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.

ABA Rule 1.11(d)(1)

Note: the rule applies when the attorney is acting as a government employee or official regardless of whether the position is one of a lawyer.

No Adversity Necessary

Disqualification applies even if prior representation was not adverse to government.

But conflict not imputed to government agency

Unlike paragraphs (a) [former government employee] and (c) [confidential government information disqualification], Rule 1.11 (d)(1) does not impute the conflict to the office.

Only the individual lawyer is disqualified.

Informed Consent

1.11d.2.i.

unless the appropriate government agency gives its informed consent, confirmed in writing;

And Rule 1.7 applies –

(b) Notwithstanding the existence of a conflict of interest under section (a) of this Rule, an attorney may represent a client if:

(1) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

So where do Rule 1.9’s Duties to Former Clients fit in the government context?

Rule 1.9 – Duties to Former Clients – the lawyer

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or a substantially related matter* in which that person's interests are ***materially adverse*** to the former client's interests, absent informed consent, in writing.

ABA Rule 1.9(a)

Rule 1.9 cont'd. the firm

Absent informed consent, in writing, a lawyer shall not knowingly represent a person in the *same or substantially* related matter in which a firm with which the lawyer formerly was associated had represented a client:

(1) Whose interests are ***materially adverse*** to the person; and

(2) About whom the lawyer acquired confidential information that is material to the matter.

ABA Rule 1.9(b)

Rule 1.9 cont'd.

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 confidential information to the disadvantage of the former client, except as permitted or required under the rules or when information has become generally known; or

(2) Reveal confidential information of the former client except as Rules permit or require.

The role of a prosecutor

“A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches [the] task with humility.”

“In times of fear or hysteria political, racial, religious, social and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases . . . ."

Robert H. Jackson, April 1, 1940.

469 Md. 485
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE COMMISSION of Maryland
v.
James Andrew MARKEY and Charles Leonard Hancock

Misc. Docket AG No. 5, Sept. Term, 2019
|
June 26, 2020

Synopsis

Background: A petition for disciplinary or remedial action was filed against two member of the Bar of Maryland. The Circuit Court, Montgomery County, No. 468469-V, James A. Bonifant, J., filed an opinion concluding lawyers had violated the rules of professional conduct.

Holdings: The Court of Appeals, Watts, J., held that:

the conduct of attorneys in exchanging e-mails containing offensive statements about members of the Hispanic, Asian, and African American races, as well as derogatory statements about homosexual men and heterosexual women, many who were colleagues, violated the rules of professional conduct, and

indefinite suspension from the practice of law was warranted.

Indefinite suspension ordered.

McDonald, J., filed a concurring opinion.

Procedural Posture(s): Proceeding on Attorney Discipline.

****943** Circuit Court for Montgomery County, Case No. 468469-V

Barbera, C.J., McDonald, Watts, Hotten, Getty, Booth, Biran, JJ.

Opinion

Watts, J.

***488** This attorney discipline proceeding involves two lawyers who, for approximately seven years, while working for the federal government, participated in an exchange of e-mails among a group of federal government employees, who were also lawyers, ****944** using their official government e-mail addresses during work hours to make disturbingly inappropriate and offensive statements that demonstrated "bias or prejudice based upon race, sex, ... national origin, ... sexual orientation[,] or socioeconomic status," Maryland Lawyers' Rules of Professional Conduct ("MLRPC") [1] 8.4(e) (Bias or Prejudice), about Hispanic, Asian, and African American people, and people whom they referred to as gay men, who were their colleagues.

[1] Effective July 1, 2016, the MLRPC were renamed the Maryland Attorneys' Rules of Professional Conduct, or MARPC, and renumbered. We will refer to the MLRPC because the misconduct at issue occurred before this change.

James Andrew Markey and Charles Leonard Hancock, Respondents, members of the Bar of Maryland, worked as a Veterans Law Judge and an Attorney-Advisor, respectively, at the Board of Veterans' Appeals ("the Board"), which is part of ***489** the United States Department of Veterans Affairs ("the Department"). For approximately seven years, Markey, Hancock, and three other employees of the Board used their official Department e-mail addresses to participate in an e-mail chain that they called "the Forum of Hate" ("FOH"). They referred to themselves as FOH members. As members of the FOH, Markey and Hancock sent numerous e-mails that included statements about their Board colleagues that were highly offensive, and that frequently evinced "bias or prejudice based upon race, sex, ... national origin, ... sexual orientation[,] or socioeconomic status." MLRPC 8.4(e). As examples, in one instance, in response to a photograph of Hancock's son's all-white Little League team, Markey asked where the white sheets were and stated " '[b]onfire' after every victory[,]" referencing the Ku Klux Klan, and, in another, Markey referred to an African American woman Chief Veterans Law Judge as "a total b[****.]" Among many other examples, Hancock referred to the Chief Veterans Law Judge as a "Ghetto Hippopotamus" and "a despicable impersonation of a human woman, who ought to [have] her cervix yanked out of her by the Silence of the Lamb[s] guy, and force[-]fed to her." [2] The Veterans Affairs Office of Inspector General discovered the e-mails, the Veterans Administration terminated Markey, and Hancock voluntarily

retired. Eventually, Markey's and Hancock's actions came to Bar Counsel's attention.

[2] The "*Silence of the Lambs*" is a movie about "a cannibalistic serial killer[.]" Green v. Franklin Nat'l Bank of Minneapolis, 459 F.3d 903, 907 & n.2 (8th Cir. 2006).

On May 30, 2019, on behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed in this Court a "Petition for Disciplinary or Remedial Action" against Markey and Hancock, charging them with violating MLRPC 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), 8.4(e) (Bias or Prejudice), and 8.4(a) (Violating the MLRPC).

On June 4, 2019, this Court designated the Honorable Alison L. Asti of the Circuit Court for Anne Arundel County to hear the attorney discipline proceeding. Bar Counsel and ***490** Markey filed a joint motion to transfer venue to the Circuit Court for Montgomery County because Markey lived in Montgomery County and Hancock lived in Frederick County. As a result, this Court designated the Honorable James A. Bonifant ("the hearing judge") of the Circuit Court for Montgomery County to hear the attorney discipline proceeding. On November 12, 2019, the hearing judge conducted a hearing.[3] On January 2, 2020, the ****945** hearing judge filed in this Court an opinion including findings of fact and conclusions of law, concluding that Markey and Hancock had violated MLRPC 8.4(d), 8.4(e), and 8.4(a).

[3] The hearing judge noted that, at the hearing, Hancock testified, introduced evidence, and called two character witnesses, whereas Markey was present but elected not to testify or to introduce any evidence.

On February 5, 2020, this Court scheduled oral argument for April 2, 2020. On March 17, 2020, due to the COVID-19 emergency, the Chief Judge of this Court issued an Administrative Order, postponing oral arguments that had been scheduled for April 2020 until further notice.[4] Bar Counsel filed a Request to Waive Oral Argument. On March 27, 2020, this Court issued a Show Cause Order, directing Markey and Hancock to show cause why oral argument should be heard. Markey has not filed a response to the Show Cause Order, or anything else, in this Court. Hancock filed a handwritten document indicating that oral argument was not necessary and that he did not object to the matter being considered on the record. On April 9, 2020, this Court issued an order granting the Request to Waive Oral Argument.

[4] On March 27, 2020, the Chief Judge of this Court issued another Administrative Order, rescheduling the oral arguments in question for May 2020.

For the below reasons, we indefinitely suspend Markey and Hancock from the practice of law in Maryland.

BACKGROUND

The hearing judge found the following facts, which we summarize.

***491** On December 15, 1988, this Court admitted Hancock to the Bar of Maryland. From September 1995 to January 31, 2016, Hancock worked for the Board as an Attorney-Advisor. Hancock's main job duty was to assist Veterans Law Judges with drafting opinions regarding appeals of dispositions of veterans' claims for benefits.

On December 14, 1994, this Court admitted Markey to the Bar of Maryland. In November 1995, Markey began working for the Board as an Associate Counsel. In October 2005, Markey was promoted to Senior Counsel. In December 2007, Markey became a Veterans Law Judge. As a Veterans Law Judge, Markey conducted hearings and issued opinions regarding appeals of dispositions of veterans' claims for benefits.

The hearing judge found that beginning in 2008, and continuing into 2015, Markey, Hancock, Chief Veterans Law Judge Dennis Chiappetta, and lawyers Bernard DoMinh and John Prichard,[5] all of whom were employees of the Board, exchanged numerous inappropriate and offensive e-mails using their official Department e-mail addresses. Markey, Hancock, Chiappetta, DoMinh, and Prichard referred to the e-mail chain as the Forum of Hate and referred to themselves as members of the FOH. The e-mails included, in the hearing judge's words, "many racist, misogynic, xenophobic, and homophobic statements."

[5] Chiappetta, DoMinh, and Prichard are not members of the Bar of Maryland.

The hearing judge provided numerous examples of such e-mails.[6] As one example, on January 14, 2008, an e-mail exchange consisted of the following:

[ ] DoMinh: Hooray! Eye weel be go-eeng choo San Peet weeth my boddy Jeeemi. We weel hav good time, si? Eet weel be FIESTA time!

***492** [ ] Markey: Thankfully he stays at his own house when he's there...so there will be limited social interaction. Perhaps we'll go out for a taco lunch or something.

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****946** [ ] Hancock: His photo shows semi-bloated face, like AA's does. They BOTH gobble j[***]?

[ ] Markey: Yes, Regan's

[ ] DoMinh: HARSH!

[ ] Hancock: Hey Trendy – There may be a spot open in AA's Forum of Gayness.

[ ] DoMinh: Filled to capacity already between El Rojo and Baby Gap.

[ ] Markey: Don't forget Geezagher and Moran

[ ] DoMinh: They of the 'leaky reeky feaky' from their over-filled colostomy bags.

(Ellipses in original) (footnotes omitted). Markey acknowledged that, by referring to "a taco lunch[,]" he was mocking the Deputy Vice Chairman's nationality. The hearing judge explained that, "AA[,]" "El Rojo[,]" and "Baby Gap" were references to lawyers who worked at the Board. [7]

6 The hearing judge's findings of fact contains quotes from a total of ten e-mail exchanges.

7 In the conclusions of law, the hearing judge found that, in above-quoted e-mail, DoMinh was ridiculing a Deputy Vice Chairman of the Board's national origin by mocking his accent.

On December 7 and 8, 2010, e-mails contained the following:

[ ] DoMinh: Did A-Mack leak the BVA e-mail archive to Julian Assange?

[ ] Hancock: No, but he like to leak some semen his way.

[ ] Prichard: Apparently Assange is the one who leaks. Sabotaged condom gate.

***

[ ] Markey: DoMinh only likes the old Fireplace on DuPont.

[ ] DoMinh: Coincidence that Jimmy can immediately remember the names of a DuPont bar? I think not. Jimmy probably has frequent patron discounts there, too, like El verde scores at Bobby Van's.

***493** Close Encounters of the TURD kind indeed.

[ ] Hancock: Kind thought the same thing gate.

[ ] Markey: Yeah, walked into that one. Too easy for you guys.

I recall walking past that place on the way to the Brickskellar years ago ... and the door was propped open ... creepy looking clientele, and I'm no homophobe.

[ ] DoMinh: James sixth sense regarding his immediate unsettled first impression upon viewing the clientele through the open door at Fireplace is accurate. In the open forum public review website, Yelp DC, even gay dudes wrote to remark that The Fireplace is regarded as a s[***]hole in their community.

[ ] Hancock: Can we talk about gay stuff on the VA email system?

[ ] DoMinh: Riding the grommet comet ain't my thang.

[ ] Markey: Take me off the list.

[ ] DoMinh: Dupont is a TURD – world nation whose population engages in close encounters of the TURD kind.

(Ellipses in original) (brackets omitted).

On December 21, 2012, an e-mail exchange included the following statements:

[ ] Prichard: In another relevant bulletin, the 2nd floor ladies room at the Butte, Montana VA clinic is out of paper towels.

[ ] Markey: That's where baby t will be shipped when chairman Sullivan arrives

[ ] Hancock: Was that place named after G-Pot?

[ ] DoMinh: No. You're thinking of the VA Medical Center in the city of Giant Lard Ass Kentucky Fried Chicken Eater, North Dakota.

[ ] Markey: Good xmas hate gate

[ ] DoMinh: This workplace just fills me with the Christmas spirit and goodwill towards all. I'm sure that G-POT, as a **947 self-professed Christian herself, feels the same love and charitable regard to all under her leadership as well. Oh, *494 right she's clinical a[**]hole. And a hypocrite, to boot. Scratch what I just said.

[ ] Hancock: Not to mention a despicable impersonation of a human woman, who ought to [have] her cervix yanked out of her by the Silence of the Lamb[s] guy, and force[-]fed to her. Whew, I might be hated out...

[ ] Markey: Holy s[***] gate, Batman. Never has morale been so low, and that's saying something.

(Ellipsis in original). Markey and Hancock acknowledged that "baby t" was short for "baby talk," and was a disparaging reference to the tone of voice of a woman who was a Vice Chairman of the Board. The hearing judge found that "G-Pot" was short for "Ghetto Hippopotamus," and was a specific reference to an African American woman Chief Veterans Law Judge.

On March 20, 2013, Hancock, Markey, and Chiappetta commented on a photograph of the Little League team of which Hancock's son was a member, and of which all of the members were white. On that date, an e-mail exchange included the following statements:

[ ] Hancock: First baseball practice. Not a Charo, Adrian, or BD in the bunch.

[ ] Markey: Nice, but where are the white sheets? Gotta start them when they are young.

[ ] Chiappetta: Come on James, that is the name of the kid's team: "The Maryland White Sheets."

[ ] Markey: Of Course, my bad. 'Bon fire' after every victory.

[ ] Hancock: Nice management hate. Bout time!!

The hearing judge found that that the terms "white sheets" and "Bon fire" were references to the Ku Klux Klan. The hearing judge found that the term "Charo" was "code for someone of Spanish descent[,]" the term "Adrian" was code for African Americans, and that "BD" were the initials of DoMinh, "who is Asian."

*495 On August 28, 2013, Markey, Hancock, and DoMinh commented on photographs of DoMinh receiving an award. The photographs had been digitally altered to include derogatory terms for people of Vietnamese ancestry. The e-mail exchange included the following statements:

[ ] DoMinh: This is the award they give at the Denver, Colorado VARO. [8]

[ ] Hancock: The sign will say one chicken wing for you, 200 for me when the next boss lady arrives.

[ ] DoMinh: ... or if G-POT become acting "Executive in Charge."

[ ] Hancock: Fat t[***] shouldn't manage a KFC for God's sake.

[ ] DoMinh: Here's another I-wish-it-were-true dream award.

[ ] Markey: How do you keep doing these? On the paint thing? Or at home?

[ ] DoMinh: Home. Put the kid to sleep yesterday night and killed time f[***]ing around with the latest grip and grin photo I got of me and Terry (two years after the fact).

[ ] Markey: hilarious.

(Ellipsis in original).

8 "VARO" stands for "Veterans Affairs Regional Office." Deloach v. Shinseki, 704 F.3d 1370, 1372-73 (Fed. Cir. 2013).

On September 11, 2013, Hancock, Markey, and DoMinh commented on a photograph of different employees of the Board. Markey and Hancock participated in the following e-mail exchange commenting on the photograph:

[ ] Hancock: Who's the chick beside A[.[9]] **948 Crazy in the top right pic; not the terrorist.

[ ] DoMinh: V[.] B[.]: BVA attorney 1995-97. I actually got introduced to Markey through her.

*496 [ ] Hancock: Like to have my pee pee introduced to her va jay jay.

[ ] Markey: No — pic is much better than how she looked in person.

9 To protect the privacy of other employees of the Board, we refer to them by their initials.

On the same date, e-mails also included the following statements:

> [ ] DoMinh: By the way, I just taught a BVA 101 class with A[.] S[.] as my wingman for the first time. She used to write for Markey. She is a sharp attorney and a pretty driven kid who looks like she's trying hard to make a mark at the BVA. I recall Markey saying at one time during her novitiate phase as a BVA newbie that that c[**]t G-POT kind of had a hard-on for her. I can't understand why. A[.] is a good kid. What made G-POT decide to f[***] with her?
>
> [ ] Markey: When that 30 day thing came out of nowhere, A[.] had a case on the 30 day list, and K[.] berated her for over a week about it...she was a total b[****] to her.
>
> [ ] DoMinh: Well that explains why during BVA 101 A[.] was particularly emphatic in her presentation about timeliness and the "30-day rule." She is still traumatized by G-POT rolling on her out of the blue like that.
>
> [ ] Hancock: Previously administered abuse can take awhile to leave. Sometimes never completely. Meanwhile, looked her up in the yearbook. Nice DSL's.
>
> [ ] DoMinh: You are in particularly randy mood today, Charles. Must've been a long cruise, huh, sailor?
>
> [ ] Hancock: Randy is too gay a word to use here.
>
> [ ] Markey: Nothings too gay for BD
>
> [ ] DoMinh: said Jim, his voice muffled by the closet he is in.

(Ellipsis in original). The hearing judge found that "DSLs" stood for "d[***-]sucking lips."

On September 19, 2013, Markey e-mailed Hancock, Chiappetta, DoMinh, and Prichard a news article regarding an employee of the Frederick County Sheriff's Office who had been suspended. Markey had edited the article by adding the ***497** following paragraph, which indicated that Hancock had supported the suspended employee:

> Some of his supporters — to include Chuck Hancock of Urbana — came to Thursday's hearing and got into a heated debate with an opponent. The opponent, a fast food working, basketball type playing man, indicated that such talk just wasn't cool. He left, timidly, when 11 people causally tossed ropes at him.

The hearing judge found that Markey used the phrase "fast food working, basketball type playing man" as a reference to African Americans, and that Markey's use of the term "tossed ropes" was a reference to the Ku Klux Klan's use of ropes to lynch African Americans.

On January 30, 2014, an e-mail exchange included the following statements:

> [ ] Markey: Meanwhile, I just saw BD leave for the evening. What, no nonpaid OT [10] tonight??
>
> [ ] Hancock: Insane.
>
> [ ] Markey: Ewok stayed later than him — I saw him leaving a few minutes later. WTF? [11]
>
> ****949** [ ] Hancock: Maybe a clandestine bj meeting has been arranged.
>
> [ ] Markey: You're on fire today Chuckles!!!
>
> [ ] Hancock: I clearly am filled with hate. Need to stop.
>
> [ ] Markey: No!! actually keeps it sane here.

The hearing judge found that Markey used the term "Ewok" as a reference to Ewoks, the teddy-bear-like creatures from the *Star Wars* franchise, and that he used the term to mock a Veterans Law Judge. The hearing judge found that the term "bj" was a reference to fellatio.

10 "OT" stands for "overtime[.]" Clark v. Champion Nat'l Sec., Inc., 952 F.3d 570, 589 (5th Cir. 2020).

11 "WTF" stands for " 'what the f[***].' " State v. Ravi, 447 N.J.Super. 261, 147 A.3d 455, 461 & n.9 (N.J. Super. App. Div. 2016).

***498** On March 26, 2014, an e-mail exchange consisted of the following:

[ ] DoMinh: Nothing makes my day more than seeing a beachfeet selfie from a lazy Chief. Makes me want to punch out a nun.

[ ] Prichard: At least she was merciful enough not to show the rest of herself

[ ] DoMinh: Few things are more hurt-inducing than seeing her astride that mechanical bull with the only thing keeping me from seeing straight up her too-short-for-her-age skirt into her gash was the fortunate placement of angle and shadow.

[ ] Prichard: They started out using a real bull but it got tired.

[ ] DoMinh: In G-POT's case, the real bull didn't last long because she ATE it.

[ ] Hancock: And threw the bones at white people.

In addition to the e-mails above, on August 28, 2014, Hancock sent an e-mail referring to a woman Chief Veterans Law Judge as follows: "Thought of her on the train this morning when I read this sentence in a book I'm reading. True. Here's the sentence: 'you're so fat your c[**]t probably turns inside out when you sit down.' "

In 2015, during an unrelated investigation, the Veterans Affairs Office of Inspector General discovered the e-mails and began investigating Markey, Hancock, Chiappetta, DoMinh, and Prichard. On December 1, 2015, the Department issued a Notice of Proposed Action, informing Markey that the Department sought to remove him from his position. The Department filed a complaint against Markey with the United States Merit Systems Protection Board, alleging conduct unbecoming of a Veterans Law Judge and misuse of government resources. Markey filed a response, admitting that he had participated in the e-mails, but denying that his conduct constituted good cause for his removal. The United States Merit Systems Protection Board conducted a hearing, and on November 9, 2017, issued an opinion, finding good cause for Markey's ***499** removal from federal service. The Department terminated Markey.

Because Hancock was an at-will employee, he was not entitled to the United States Merit Systems Protection Board's process. On January 31, 2016, Hancock voluntarily retired. Afterward, the Social Security Administration hired Hancock with full knowledge of his participation in the e-mails that led to his departure from the Board. Hancock later resigned from the Social Security Administration to spend more time with his son, who according to the hearing judge, is a person with a disability. The hearing judge noted that, at the time of the hearing, Hancock worked as a substitute teacher, and volunteered assisting disadvantaged people and people experiencing homelessness.

The hearing judge found that Markey's and Hancock's misconduct was aggravated by substantial experience in the practice of law and a pattern of misconduct. The hearing judge found that Markey's misconduct was also aggravated by a refusal to acknowledge the wrongful nature of the ****950** conduct. In support of that finding, the hearing judge observed that "Markey was polite and otherwise appropriate with the [hearing judge,] and admitted [ ] the underlying facts of this matter." That said, the hearing judge stated that, although Markey was "not dismissive, he gave the impression that he was resigned to the fact that the Courts were going to do what they were going to do[,] regardless what he may present." The hearing judge pointed out that, in a letter to Bar Counsel, Markey stated: "I hope [that] the [Attorney Grievance] Commission will not take further action, but[,] if so, I am in no position to fight it." The hearing judge concluded that "Markey does not fully appreciate the seriousness of his actions and how they interfered with the administration of justice."

The hearing judge found that Markey's and Hancock's misconduct was mitigated by a lack of prior attorney discipline, cooperation with Bar Counsel's and the Office of Inspector General's investigations, and the imposition of other sanctions in the form of Markey and Hancock losing their jobs as a ***500** result of the e-mails.[12] The hearing judge observed that, although in his Answer to the Petition for Disciplinary or Remedial Action, Markey asserted that he was remorseful and had " 'good moral and ethical character[,]' " at the evidentiary hearing, Markey did not offer evidence of any mitigating factors.

12 As to Hancock, the hearing judge acknowledged that Hancock "resigned" from his position, but the hearing judge "accept[ed] that [Hancock] lost his employment due to his participation and statements made in the e[-]mails."

The hearing judge found that Hancock's misconduct was mitigated by remorse and good character and reputation. The hearing judge pointed out that, at the evidentiary

hearing, Hancock testified that he was remorseful, that he felt "terrible" that his e-mails "may have hurt people[,]" and "that many of his comments in the e[-]mails were both inappropriate and offensive." The hearing judge found that Hancock's expression of remorse was sincere. The hearing judge noted that, at the evidentiary hearing, Hancock called two character witnesses, each of whom had served as a Veterans Law Judge for decades, and had worked with Hancock on several matters. The character witnesses testified that they had read Hancock's e-mails, and did not believe that the e-mails were representative of his character. One of the character witnesses testified that Hancock had treated her with respect, that she had never seen him act inappropriately with anyone else, and that she would have no reservations about working with him again. The hearing judge found that there were numerous letters of support that corroborated the testimony of the character witnesses.

STANDARD OF REVIEW

Where no party excepts to any of the hearing judge's findings of fact, we "treat the findings of fact as established[.]" Md. R. 19-741(b)(2)(A). [13] In an attorney discipline proceeding, ***501** this Court reviews without deference a hearing judge's conclusions of law, see Md. R. 19-741(b)(1), and determines whether clear and convincing evidence establishes that a lawyer violated an MLRPC, see Md. R. 19-727(c).

13 Neither Bar Counsel, Markey, nor Hancock excepts to any of the hearing judge's findings of fact.

DISCUSSION

(A) Conclusions of Law

None of the parties excepts to the hearing judge's conclusions of law, all of which we uphold.

**951 MLRPC 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice)

"It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice[.]" MLRPC 8.4(d).

According to the hearing judge, Markey and Hancock contended that the comments in their e-mails did not violate MLRPC 8.4(d) because the comments were intended to be humorous, and were spread in a small circle of people, without the expectation that the comments would ever be shared outside of the small group, *i.e.*, the comments were private and were not intended to become public. The hearing judge found that Markey and Hancock made "derogatory statements about Hispanic, Asian, African American, and gay men[,]" and women. The hearing judge determined that the e-mails were related to the practice of law and violated MLRPC 8.4(d). We conclude that the hearing judge's determinations are supported by clear and convincing evidence.

"[W]here ... a lawyer engages in conduct that is related to the practice of law[,]" the lawyer violates MLRPC 8.4(d) if the lawyer's conduct "would negatively impact [the] perception of the legal profession" of "a reasonable member of the public[.]" Attorney Grievance Comm'n v. Basinger, 441 Md. 703, 720, 109 A.3d 1165, 1175 (2015) (cleaned up). Where a lawyer engages in "purely private conduct—*i.e.*, conduct that is entirely unrelated to the practice of law—" the lawyer ***502** violates MLRPC 8.4(d) "if the lawyer's conduct is criminal or so egregious as to make the harm, or potential harm, flowing from it patent." Attorney Grievance Comm'n v. Paul, 459 Md. 526, 547-48, 187 A.3d 625, 637 (2018) (cleaned up).

In Attorney Grievance Comm'n v. Link, 380 Md. 405, 428-29, 844 A.2d 1197, 1211-12 (2004), this Court explained that conduct that impacts the image or perception of the court or the legal profession or that engenders disrespect for the court and the profession may violate MLRPC 8.4(d). We recognized that the phrase prejudicial to the administration of justice had been interpreted to include conduct that a lawyer engages in outside of the legal profession. See id. at 427, 844 A.2d at 1210. It is clear from the discussion in Link, id. at 428-29, 844 A.2d at 1211-12, however, that purely private conduct refers to conduct that is unrelated to the practice of law, *e.g.*, social interactions between a lawyer and a non-lawyer, rather than conduct that is unknown by the public.

In Link, id. at 428-29, 408-13, 844 A.2d at 1211-12, 1199-1202, we held that a lawyer's conduct was "purely private[,]" and that the lawyer did not violate MLRPC 8.4(d), where the lawyer engaged in a verbal altercation with two employees of the Motor Vehicle Administration. The lawyer

was "rude, boorish, insensitive, oppressive[,] and certainly insulting[.]" Id. at 428, 844 A.2d at 1211. This Court determined that the lawyer's conduct was unrelated to the practice of law because it did not occur "during the course of litigation or court proceedings[,]" id. at 426, 844 A.2d at 1210, and because, "[a]lthough [the lawyer] was representing a client at the time of the incident, that fact was not readily apparent or sought to be emphasized[; i]ndeed, the [lawyer] resisted informing the [employee who later filed a complaint against him] that he was a lawyer[,]" id. at 428, 844 A.2d at 1211. Applying the "patent harm" test, this Court concluded that the lawyer did not violate MLRPC 8.4(d) because his conduct was "neither criminal nor conduct of the kind that the harm or potential harm flowing from it [was] patent[.]" Id. at 429, 844 A.2d at 1212.

***503** In Basinger, 441 Md. at 720, 714, 109 A.3d at 1175, 1171, this Court held that a ****952** lawyer's conduct was related to the practice of law where the lawyer wrote letters to his sister-in-law, who was his client, and described his sister-in-law as, among other things, "A TRUE C [* *]T" who had "finally f[* * *]ed up one time too many"; and as "a reprehensible human being" with "worthless progeny." (Alterations in original). [14] In Basinger, id. at 707, 109 A.3d at 1167, the lawyer and his sister-in-law had entered into an attorney-client relationship in connection with her grandson's death during a motor vehicle accident. Within a month, the sister-in-law mailed an insurance company a letter in which she denied retaining the lawyer. See id. at 707-08, 109 A.3d at 1167. As a result, the lawyer sent his sister-in-law three letters containing disparaging remarks. See id. at 708, 109 A.3d at 1167-68.

14 In Basinger, 441 Md. at 718, 109 A.3d at 1174, this Court explained "that, in Link, by 'private,' this Court meant 'unrelated to the practice of law[,]' " as opposed to " 'not known or intended to be known publicly.' "

This Court determined that the lawyer's "statements were made at least partially in his capacity as [a] lawyer" because the lawyer's letters were on his firm's letterhead and had headings that referenced the sister-in-law's grandson's estate, the "purpose in mailing the first letter was to formally acknowledge the representation's termination[,]" and the letters included information regarding his actions on the client's behalf. Id. at 713, 109 A.3d at 1171. Applying the "reasonable member of the public" test, this Court held that the lawyer violated MLRPC 8.4(d) because his "conduct—in his capacity as [the sister-in-law]'s lawyer, putting into letters numerous insults (including the obscene, sexist word 'c[**]t') that were aimed at the letters' recipient [ ]—would negatively impact a reasonable member of the public's perception of the legal profession." Id. at 720, 109 A.3d at 1175 (second alteration in original).

Here, applying the reasonable member of the public test, the hearing judge concluded that "the insulting[,] demeaning ***504** language" that Markey and Hancock used in the e-mails would "undoubtedly bring[ ] the legal profession into disrepute in the eyes of a reasonable member of the public." We concur with the hearing judge's determination.

The hearing judge concluded that, in taking the position that the e-mails did not violate MLRPC 8.4(d) because there was no expectation that the e-mails would be shared outside of their group, Hancock misinterpreted this Court's holding in Link, as had the lawyer in Basinger. The hearing judge pointed out that the term "private" in Link meant unrelated to the practice of law, not undisclosed to or unknown by the public. As the hearing judge determined, Markey's and Hancock's conduct was related to the practice of law. When they made the statements in question, Markey and Hancock were a Veterans Law Judge and an Attorney-Advisor of the Board, respectively. By definition, the Board—*i.e.*, the Board of Veterans' Appeals—performs legal work. Both of Markey's and Hancock's positions were law-related and could be performed only by lawyers. Markey's main job duties were to conduct hearings and issue opinions regarding appeals of decisions concerning veterans' claims for benefits. Hancock's main job duty was to assist Veterans Law Judges with drafting opinions. Markey and Hancock made their statements using their Department e-mail addresses, and, as the hearing judge observed, mostly during work hours. The hearing judge found that, although Markey's and Hancock's statements did not directly pertain to a particular veteran or a particular appeal that was ****953** before the Board, in their statements, Markey and Hancock repeatedly referred to Board colleagues and Board-related matters.

For example, a review of the e-mail exchanges reveals that, on September 11, 2013, Markey discussed a change in rules at the Department and that a woman (an African American

Chief Veterans Law Judge), whom he referred to as "a total b[****,]" berated another woman (a Board employee) about having "a case on the 30[-]day list[.]" Hancock responded concerning the woman who had the case on the 30-day list, that he had looked her up in the yearbook and she had "[n]ice ***505** [d***-sucking lip]s." In an e-mail exchange on January 30, 2014, Markey observed that another Board employee was leaving for the evening and suggested that the employee would not be getting "nonpaid OT[.]" Markey and Hancock discussed the timeframe that another employee left the office and the reason why. In an e-mail exchange on August 28, 2013, discussing an award that DoMinh received at a Veterans Affairs Regional Office, Hancock stated: "The sign will say one chicken wing for you, 200 for me when the next boss lady arrives."

The purpose of the Board is to conduct hearings and determine appeals of claims by veterans for compensation. All five of the participants in the e-mail chain were lawyers, and most of the Board colleagues to whom Markey and Hancock referred in the e-mails were also lawyers. One person was an African American woman Chief Veterans Law Judge about whom Markey and Hancock repeatedly made extremely disparaging remarks. Another person was a Board colleague to whom Markey referred in stating that the Chief Veterans Law Judge "was a total b[****] to her[,]" and who, Hancock said, had "nice [d***-sucking lip]s." Another person was a woman who was a Board colleague about whom Hancock stated: "Like to have my pee pee introduced to her va jay jay[,]" and about whom Markey stated: "No — pic is much better than how she looked in person." There was a Board colleague who, Hancock said, belonged to a "Forum of Gayness." And Markey referred to another Veterans Law Judge as "Ewok[.]" Markey and Hancock held positions of authority with the Board and used their federal government e-mail accounts during work hours to make offensive and derogatory remarks in e-mails that discussed Board-related matters and were about other Board colleagues who were also in positions of authority with the Board. Overall, Markey and Hancock made demeaning remarks about their colleagues and work, during times when they were supposed to be performing the work of the Board and made the demeaning remarks using resources provided to them by the federal government to do the Board's legal work. Under these circumstances, it would be difficult, if not impossible, ***506** to conclude that the conduct at issue was not related to the practice of law.

Because Markey's and Hancock's actions were related to the practice of law, the reasonable member of the public test applies. See Basinger, 441 Md. at 720, 109 A.3d at 1175. The inappropriate and offensive remarks in the e-mail chains would certainly negatively impact the perception of the legal profession of a "reasonable member of the public[.]" Id. at 720, 109 A.3d at 1175. Any reasonable member of the public's perception of the legal profession would be negatively affected upon learning that Markey and Hancock, a Veterans Law Judge and an Attorney-Advisor, used their Department e-mail addresses during work hours to repeatedly send such offensive e-mails about their colleagues in the legal profession over such a long period of time. The remarks not only demonstrated little regard for others who ****954** the Department employed in legal positions, but also evidenced little awareness of the professional trust and responsibility given to Markey and Hancock by the Department in their respective roles. A reasonable member of the public would not expect a Veterans Law Judge and Attorney-Advisor of the Board to conduct themselves in such an unprofessional manner in the workplace.

This case is distinguishable from Link, 380 Md. at 428, 411, 844 A.2d at 1211, 1201, in which the lawyer's conduct was unrelated to the practice of law because he was not acting as a lawyer when he got into a verbal altercation at an office of the Motor Vehicle Administration—which is open to the general public—and, during the altercation, the lawyer resisted advising the complainant that he was an attorney. By contrast, here, Markey and Hancock sent their e-mails mostly during work hours at their workplace (*i.e.*, the Board), using Department e-mail addresses, and talked about their colleagues and Board-related matters. That Markey and Hancock sent the e-mails using their Department e-mail addresses is significant, because, by definition, the e-mail addresses were provided to them by the Department for use in their work in the legal profession.

***507** As the hearing judge correctly explained, Markey's and Hancock's contention that the e-mails were not intended to be publicized lacked merit not only because a lawyer's conduct need not be publicly known to constitute a violation of MLRPC 8.4(d), but also because it would have been unreasonable for Markey and Hancock to expect that their remarks would not become publicly known. Under the Freedom of Information Act, 5 U.S.C. § 552, records of the federal government are generally available to members

of the public on request, see 5 U.S.C. § 552(a), subject to certain exemptions, see 5 U.S.C. § 552(b). As the hearing judge rightly observed, Markey and Hancock did not identify any exemption that would apply to their e-mails. Additionally, where, as here, a federal employee sends an e-mail using a government e-mail address, that e-mail is the property of the federal government, not the federal employee. See, e.g., United States v. Story Cty., Iowa, 28 F. Supp. 3d 861, 877 (S.D. Iowa 2014). Simply put, e-mails from federal government e-mail addresses can never be presumed to remain private—whether from federal employees to federal employee recipients or to members of the general public.

Additionally, as the hearing judge observed, regardless of Markey's and Hancock's intentions, their e-mails did not remain private. The e-mails were discovered by the Veterans Affairs Office of Inspector General, and subsequently gave rise to an opinion of the United States Merit Systems Protection Board. In that opinion, which the hearing judge admitted into evidence, the United States Merit Systems Protection Board observed that the e-mail chain was the subject of a government watchdog's blog post and articles by multiple news outlets, including *The Wall Street Journal*. [15] And, of ***508** course, the e-mail chain came to Bar Counsel's attention, and resulted in this attorney discipline proceeding. Plainly, any contention that Markey's ****955** and Hancock's conduct fit the definition of purely private conduct is wrong, even if purely private meant that the conduct was not to be publicly known, which it does not.

15 Indeed, the opinion of the United States Merit Systems Protection Board includes an excerpt from the blog, which stated:

> If I were a veteran and learned that my [Board] denial may have been decided by an individual who holds racist or sexist bias, I'd sure be speaking with a veterans law attorney. This is one more embarrassing event for your Department of Veterans Affairs. Only at the VA will you find adult professionals who think it's OK to distribute racist or sexist e[-]mail message[s] to others.

This excerpt shows that information about the e-mails became publicly known and commented upon.

In sum, the hearing judge rejected the argument that the e-mails were "purely private" and determined that Markey's and Hancock's conduct was "related to the practice of law[.]" The hearing judge concluded that Markey's and Hancock's conduct would negatively impact the perception of the legal profession of a reasonable member of the public. The hearing judge stated:

> Markey and Hancock participated in numerous derogatory statements about Hispanic, Asian, African American, and gay men. Using an objective standard required by the law, this Court finds the insulting demeaning language used by them in the e[-]mails undoubtedly brings the legal profession into disrepute in the eyes of a reasonable member of the public.

The hearing judge's conclusions are more than amply supported by clear and convincing evidence.

MLRPC 8.4(e) (Bias or Prejudice)

MLRPC 8.4(e) stated:

> It is professional misconduct for a lawyer to ... knowingly manifest[,] by words or conduct[,] when acting in a professional capacity[,] bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation[,] or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of [MLRPC 8.4(e).]

***509** As MLRPC 8.4(e)'s plain language makes clear, a violation of the provision is comprised of four components. To violate MLRPC 8.4(e), a lawyer must: (1) when acting in a professional capacity, (2) knowingly manifest by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or

socioeconomic status, (3) when such action is prejudicial to the administration of justice, and (4) not legitimate advocacy. To put the matter into criminal law terms, a violation of MLRPC 8.4(d) would be considered a lesser-included offense of a violation of MLRPC 8.4(e), as the latter includes all of the components of the former, plus additional ones.

Comment 4 to MLRPC 8.4 stated in pertinent part:

> Section (e) of this Rule reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in section (e) of this Rule and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession.

Here, the hearing judge determined that, as to Markey and Hancock, Bar Counsel had proven, by clear and convincing evidence, a violation of MLRPC 8.4(e). The hearing judge concluded that Markey's and Hancock's many inappropriate and offensive remarks in e-mails clearly constituted examples of knowingly manifesting bias and prejudice based upon race, sex, sexual orientation, national origin, and socioeconomic status. The hearing judge determined that Markey and Hancock were acting in a professional capacity when they made the statements at issue, and, as discussed above, their conduct was related to the practice of law and violated MLRPC 8.4(d), *i.e.*, was prejudicial to the administration of justice. The hearing judge concluded that Markey's and Hancock's ****956** e-mails clearly served no legitimate advocacy. We agree with all of the above.

***510** This is only the second case in which this Court has determined whether a lawyer violated MLRPC 8.4(e). The first was Attorney Grievance Comm'n v. Sanderson, 465 Md. 1, 65, 25-26, 213 A.3d 122, 159, 136 (2019), in which this Court held that a lawyer violated MLRPC 8.4(e) by approaching a social worker who had just testified at a hearing in a Child in Need of Assistance case and calling her a "baby-snatching b[****]." This Court determined that the lawyer was acting within his professional capacity at the time because of the temporal proximity between the hearing and the remark. See id. at 65, 213 A.3d at 159. This Court concluded that, based on the language alone, the lawyer knowingly manifested bias or prejudice based upon sex. See id. at 65, 213 A.3d at 159. Both MLRPC 8.4(e)'s plain language and this Court's holding in Sanderson support the conclusion that, in this case, the hearing judge's determination is supported by clear and convincing evidence.

The hearing judge's conclusion that, with the statements in the e-mail exchanges, Markey and Hancock knowingly manifested bias or prejudice based upon race, sex, sexual orientation, national origin, and socioeconomic status is supported by clear and convincing evidence. While participating in the e-mail chain, Markey demonstrated bias or prejudice based on race when, in response to a photograph of Hancock's son's all-white Little League team, Markey asked "where are the white sheets?" and stated " 'Bon fire' after every victory[,]" referencing the Ku Klux Klan. In another e-mail, Markey made up a story about a "fast food working, basketball type playing man" at whom "people causally tossed ropes[,]" casually and callously referring to the Ku Klux Klan's lynchings of African Americans.

Markey demonstrated bias or prejudice based on sex by calling an African American woman Chief Veterans Law Judge as "a total b[****,]" and by referring to another woman who was a colleague as "baby t[,]" which was short for "baby talk," a disparaging reference to that colleague's tone of voice. In one e-mail exchange in which participants were commenting on a photograph, Markey commented of a woman colleague ***511** that the "pic is much better than how she looked in person." As to statements demonstrating bias or prejudice based upon sexual orientation, the hearing judge concluded that Markey's and Hancock's "statements included multiple homosexual references and slurs to describe other male [ ] employees." In one e-mail, Markey stated that "[n]othing[']s too gay for" one of the e-mail participants. In another e-mail, Markey indicated that the same e-mail participant had gone to a gay bar and stated that the bar had "creepy[-]looking clientele[.]" As to bias or prejudice based on national origin, in one e-mail exchange, after one of the participants appeared to imitate a Spanish accent, Markey stated "[p]erhaps we'll go out for a taco lunch or something[,]" making a joke about a Deputy Vice Chairman's nationality.

Likewise, in the e-mails, Hancock made numerous statements demonstrating bias or prejudice based upon race, sex, sexual orientation, national origin, and socioeconomic status. Specifically, as to bias or prejudice based on race, Hancock referred to an African American woman Chief Veterans Law Judge as "G-Pot" (which was short for "Ghetto Hippopotamus"), and in response to DoMinh's remark that the Chief Veterans Law Judge had eaten a "bull," Hancock responded that she had "thr[o]w[n] the bones at white people." In an e-mail which included a photograph of Hancock's son's all-white Little League team, Hancock stated that there was not a ****957** "Charo, Adrian, or BD in the bunch." The hearing judge found that "Charo" was "code for someone of Spanish descent[,]" "Adrian" was "code for African Americans[,]" and "BD" referred to DoMinh, "who is Asian."

Concerning bias or prejudice based on sex, Hancock stated that the African American woman Chief Veterans Law Judge was "a despicable impersonation of a human woman, who ought to [have] her cervix yanked out ... and force[-]fed to her." Referring to a woman Chief Veterans Law Judge, Hancock stated she was "so fat [that her] c[**]t probably turns inside out when [she] sit[s] down." In one e-mail, Hancock stated that he had looked a colleague up in the yearbook and that she had "[n]ice DSL's" (which stood for "d[***-]sucking ***512** lips"). Hancock said of another colleague who was a woman that he would "[l]ike to have [his] pee pee introduced to her va jay jay," and referred to yet another colleague as "A[.] Crazy[.]"

Demonstrating bias or prejudice based on sexual orientation, in an e-mail, Hancock stated that two male colleagues "gobble[d]" another male individual's "j[***]" and stated that two male individuals belonged to a male colleague's "Forum of Gayness." In yet another e-mail, Hancock stated that "a clandestine bj meeting ha[d] been arranged" by a male colleague, referring to fellatio, and when Markey complimented him on the remark, Hancock responded: "I clearly am filled with hate. Need to stop." In response to a question about whether an employee leaked the Board e-mail archive to Julian Assange, Hancock responded: "No, but he like to leak some semen his way." In the same e-mail exchange, Hancock asked: "Can we talk about gay stuff on the VA e[-]mail system?" In another email exchange, in which one participant used the word "randy," Hancock retorted that "[r]andy is too gay a word to use here."

Hancock made statements demonstrating bias or prejudice based on national origin or race when he referred to a colleague as a "terrorist" and when he used derogatory terms to observe that the photograph of his son's all-white Little League team did not contain people of certain ethnic backgrounds. The hearing judge concluded that both Markey and Hancock participated in multiple e-mail exchanges that manifested bias and prejudice based on socioeconomic status. For example, in one exchange, an e-mail participant (DoMinh) referred to the location of a Veterans Affairs medical center as being in "the city of Giant Lard A[**] Kentucky Fried Chicken Eater, North Dakota." In another instance, as the hearing judge indicated, Hancock demonstrated bias or prejudice based on socioeconomic status when one e-mail participant suggested that the African American woman Chief Veterans Law Judge might be promoted to an executive position and he responded that she was a "[f]at t[*** who] shouldn't manage a KFC for God's sake."

***513** Without question, the remarks summarized above demonstrate that Markey and Hancock engaged in conduct that knowingly manifested bias or prejudice based upon race, sex, national origin, sexual orientation, and socioeconomic status. The hearing judge determined that Markey and Hancock "were acting in their professional capacity" when they made the comments at issue because they made the comments using Department email addresses and they sent the e-mails "largely during work hours." Also, the hearing judge concluded that, although none of the e-mails involved a specific case, the e-mails were aimed at their Board colleagues, including employees and supervisors, and were generally about the work performed by the Board. The hearing judge also determined that the statements were prejudicial to the administration of justice and plainly not in ****958** support of legitimate advocacy. We fully agree. Clear and convincing evidence supports the hearing judge's conclusions.

MLRPC 8.4(a) (Violating the MLRPC)

"It is professional misconduct for a lawyer to[ ] violate ... the" MLRPC. MLRPC 8.4(a). The hearing judge's conclusion that Markey and Hancock violated MLRPC 8.4(a) is supported by clear and convincing evidence. As discussed above, Markey and Hancock violated MLRPC 8.4(d) and 8.4(e).

(B) Sanction

Without specifying whether the sanction should be an indefinite or definite suspension, Bar Counsel recommends that we suspend Markey and Hancock from the practice of law in Maryland. Hancock requests that we reprimand him. Markey has made no recommendation.

In Attorney Grievance Comm'n v. Slate, 457 Md. 610, 646-47, 180 A.3d 134, 155-56 (2018), this Court stated:

> This Court sanctions a lawyer not to punish the lawyer, but instead to protect the public and the public's confidence in the legal profession. This Court accomplishes these goals by: (1) deterring other lawyers from engaging in similar ***514** misconduct; and (2) suspending or disbarring a lawyer who is unfit to continue to practice law.
>
> In determining an appropriate sanction for a lawyer's misconduct, this Court considers: (1) the MLRPC that the lawyer violated; (2) the lawyer's mental state; (3) the injury that the lawyer's misconduct caused or could have caused; and (4) aggravating factors and/or mitigating factors.
>
> Aggravating factors include: (1) prior attorney discipline; (2) a dishonest or selfish motive; (3) a pattern of misconduct; (4) multiple violations of the MLRPC; (5) bad faith obstruction of the attorney discipline proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (6) submission of false evidence, false statements, or other deceptive practices during the attorney discipline proceeding; (7) a refusal to acknowledge the misconduct's wrongful nature; (8) the victim's vulnerability; (9) substantial experience in the practice of law; (10) indifference to making restitution or rectifying the misconduct's consequences; (11) illegal conduct, including that involving the use of controlled substances; and (12) likelihood of repetition of the misconduct.
>
> Mitigating factors include: (1) the absence of prior attorney discipline; (2) the absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith efforts to make restitution or to rectify the misconduct's consequences; (5) full and free disclosure to Bar Counsel or a cooperative attitude toward the attorney discipline proceeding; (6) inexperience in the practice of law; (7) character or reputation; (8) a physical disability; (9) a mental disability or chemical dependency, including alcoholism or drug abuse, where: (a) there is medical evidence that the lawyer is affected by a chemical dependency or mental disability; (b) the chemical dependency or mental disability caused the misconduct; (c) the lawyer's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (d) the recovery arrested the misconduct, and the misconduct's recurrence is unlikely; (10) delay in the attorney ***515** discipline proceeding; (11) the imposition of other penalties or sanctions; (12) remorse; (13) remoteness of prior violations of the MLRPC; and (14) unlikelihood of repetition of the misconduct.

(Cleaned up).

In assessing the appropriate sanction for Markey and Hancock, we consider that ****959** they violated MLRPC 8.4(d) and 8.4(e) by using Department e-mail addresses to make alarmingly inappropriate and offensive remarks about their colleagues that were both prejudicial to the administration of justice and evinced bias and prejudice on multiple grounds. In the context of concluding that Markey and Hancock violated MLRPC 8.4(d), the hearing judge found that "[t]he extremely offensive comments in [their] e[-]mails were deliberate[.]" All of the circumstances that the hearing judge found point to the conclusion that Markey and Hancock made the inappropriate and offensive remarks intentionally over a lengthy period of time. These were not spontaneous, impulsive, or out-of-character remarks or isolated incidents. Markey's and Hancock's misconduct clearly had the potential to undermine the work of the Board and the public's confidence in that work, as well as damage the public's perception of the legal profession, the Board, the Department, and the federal government at large.

The hearing judge found that the aggravating factors of substantial experience in the practice of law and a pattern of misconduct applied to both Markey and Hancock. The hearing judge found that the additional aggravating factor of a refusal to acknowledge the wrongful nature of the misconduct applied to Markey. The record supports the hearing judge's findings by clear and convincing evidence. And, we discern one additional aggravating factor that applies to both Markey and Hancock: multiple violations of the MLRPC.

The hearing judge found that the mitigating factors of a lack of prior attorney discipline, cooperation with Bar Counsel's and the Office of Inspector General's investigations, and the imposition of other sanctions in the form of loss of ***516**

employment applied to both Markey and Hancock. We accept the hearing judge's determinations. [16]

16 We are aware that Hancock voluntarily retired from the Board. Although Hancock leaving the Board was voluntary and he obtained employment with the Social Security Administration, the hearing judge accepted that Hancock's loss of employment was due to the e-mail exchanges. We will not disturb the hearing judge's finding.

The hearing judge found that additional mitigating factors—remorse [17] and good character and reputation [18] —applied to Hancock. We do not disturb the hearing judge's findings of the additional mitigating factors as to Hancock.

17 In the document in which he requests a reprimand, Hancock concedes that he violated MLRPC 8.4(d), 8.4(e), and 8.4(a), but states: "I candidly admit that, to a reader of some of these messages, who was not aware of the context of the messages, an objective reading could result in the reader forming a negative image and perception of the legal profession." This acknowledgement of wrongdoing is extremely qualified, and seems to incorrectly suggest that only "some of" Hancock's remarks were wrongful, and/or that his offensive statements may have seemed less egregious in "context[.]" That said, we cannot determine that the hearing judge clearly erred in finding credible Hancock's testimony that he was remorseful.

18 Although Hancock presented the testimony of two witnesses who attested to his good character and provided character letters, according to comment 4 to MLRPC 8.4, a violation of MLRPC 8.4(e) in and of itself demonstrates a lack of character. Comment 4 states that a lawyer who violates MLRPC 8.4(e) "commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession." Although the comment to MLRPC 8.4 states that the conduct demonstrates a lack of character and the numerous e-mail exchanges between Markey and Hancock belie a finding of good character and reputation, given the evidence presented at the disciplinary hearing, we decline to conclude that the hearing judge's finding was clearly erroneous.

We conclude that the appropriate sanction for Markey's and Hancock's misconduct ****960** is an indefinite suspension for each from the practice of law in Maryland. Markey's and Hancock's remarks were egregious, were part of an approximately seven-year-long pattern, and were not stray, random, or isolated. Markey, Hancock, and the other participants in the e-mail chain referred to it as "the Forum of Hate," and referred to themselves as "members" of "the Forum of Hate." These ***517** circumstances establish that Markey and Hancock were making remarks that were intentionally offensive. The *modus operandi* of the group was for its members to regularly make deliberately offensive statements, and to praise each other for the statements. For example, after DoMinh made an offensive remark about an African American woman Chief Veterans Law Judge four days before Christmas 2012, Markey stated: "Good xmas hate gate[.]" Similarly, after Chiappetta, a Chief Veterans Law Judge, made a reference to the Ku Klux Klan, Hancock stated: "Nice management hate. Bout time!!"

Markey's and Hancock's statements demonstrating bias and prejudice speak for themselves and constitute abhorrent conduct without the need for any evidence that Markey and/or Hancock discriminated against a particular veteran in a case before the Board. Actual discrimination is not required to determine that Markey and Hancock glaringly violated MLRPC 8.4(e) when, acting in their professional capacities, they knowingly engaged in conduct demonstrating bias and prejudice that was prejudicial to the administration of justice and not in pursuit of legitimate advocacy. Comment 4 to MLRPC 8.4 explains that MLRPC 8.4(e) "reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system[,]" and that a violation "manifests a lack of character required of members of the legal profession." Markey's and Hancock's many inappropriate and offensive statements were demeaning of many groups of people in our society, an affront to the dignity of the legal profession, and cannot be tolerated from any members of the Bar of Maryland—especially ones who occupy positions of public trust.

Markey's and Hancock's misconduct warrants the same sanction even though Markey was a Veterans Law Judge and Hancock was an Attorney-Advisor. To be sure, Markey occupied a higher position of trust than an Attorney-Advisor and as a Veterans Law Judge was responsible for fairly and impartially making decisions with respect to claims by veterans and Hancock as an Attorney-Advisor assisted Veterans Law Judges with drafting opinions and did not

have decision-making ***518** authority. Regardless of their positions, however, Markey and Hancock equally participated in the e-mail exchanges and the applicable aggravating and mitigating factors do not compel different sanctions. Although Hancock has the additional mitigating factors of remorse and good character and reputation, and Markey has the additional aggravating factor of a refusal to acknowledge the wrongful nature of the misconduct, those differences are counterbalanced by the circumstance that Hancock's statements were particularly egregious and that we do not give great weight to Hancock's additional mitigating factors. As but one example of the egregiousness of his statements, Hancock called a Chief Veterans Law Judge a "Ghetto Hippopotamus" and "a despicable impersonation of a human woman, who ought to [have] her cervix yanked out of her ...." In other examples, Hancock referred to people of different ethnicities as "Charo," "Adrian," and "BD[,]" he stated that he wanted to perform a sexual act with a woman colleague who was depicted in a photograph, and said that another woman colleague had "[n]ice DSL's." And these are just a few examples.

****961** Although we decline to disturb the hearing judge's findings with respect to remorse and good character and reputation, those mitigating factors are of limited significance in assessing the appropriate sanction for Hancock's misconduct. Hancock's expression of remorse was qualified; he acknowledged that only some of his remarks were wrongful and insisted that his statements were less offensive when read in context. And, although Hancock presented evidence in the form of character witnesses and letters, the comment to MLRPC 8.4 indicates that conduct violating MLRPC 8.4(e) manifests a lack of character. Hancock's statements in the e-mails demonstrate a lack of character; and it could be taken that the support for and against the mitigating factor of good character and reputation is in equipoise.

Bar Counsel contends that this attorney discipline proceeding is similar to In re Kahn, 16 A.D.3d 7, 10, 8, 791 N.Y.S.2d 36 (N.Y. App. Div. 2005), in which the Appellate Division of the Supreme Court of New York suspended for six months a ***519** lawyer who violated the New York rules of professional conduct that prohibited "conduct that adversely reflects on [one]'s fitness as a lawyer" and "undignified or discourteous conduct that is degrading to a tribunal[.]" For approximately thirteen years, the lawyer engaged in a pattern of making remarks that were inappropriate. See id. at 8-9, 791 N.Y.S.2d 36. For example, the lawyer regularly offered round peppermint candies to opposing counsel who were women by asking: "Do you want to suck one of my b[***]s?" Id. at 9, 791 N.Y.S.2d 36. Whenever opposing counsel indicated that the offer was offensive, the lawyer would respond: "If you're so damned refined[,] then why do you understand?" Id. On one occasion, the lawyer referred to a woman who was opposing counsel as "pig vomit on [his] shoes." Id. On another occasion, when the same opposing counsel was about to enter a courtroom, the lawyer yelled: "Here is the elephant, she's coming in. Who wants tickets? Come see the show." Id. Additionally, the lawyer made improper remarks about a thirteen-year-old girl who was his client and who had been arrested for prostitution, and in another instance, invited a woman who was opposing counsel to guess a fourteen-year-old client's bra size. See id. In separate occurrences, a friend warned the lawyer that his remarks were inappropriate, and opposing counsel asked him to refrain from vulgarity, but the lawyer continued his pattern of making inappropriate remarks. See id. at 9-10, 791 N.Y.S.2d 36.

In the attorney discipline proceeding, the lawyer requested a public censure, contending that his misconduct was mitigated by him cooperating with the Disciplinary Committee, beginning psychotherapy to address the problem, acknowledging his misconduct, and showing remorse by sending letters of apology after the disciplinary hearing. See id. at 8-9, 791 N.Y.S.2d 36. In contrast, the Disciplinary Committee recommended a six-month suspension, contending that a public censure would have been appropriate for "a single outburst or incident[,]" but a suspension was warranted for the lawyer's "pattern of abusive behavior[.]" Id. at 8, 791 N.Y.S.2d 36 (citations omitted).

***520** The Court adopted the Disciplinary Committee's recommendation, explaining that the lawyer's "persistent behavior warrant[ed] more than a minimum sanction[.]" Id. at 9-10, 791 N.Y.S.2d 36 (citations omitted). The Court observed that the lawyer's misconduct lasted for over a decade and did not involve isolated incidents. See id. at 8-9, 791 N.Y.S.2d 36. The Court determined that the lawyer's letters of apology did "little to ameliorate the harm inflicted by [his] abusive, vulgar[,] and demeaning comments, directed

at female [opposing **962 counsel] and young clients[ ] alike." Id. at 9, 791 N.Y.S.2d 36.

We agree with Bar Counsel that, in certain respects, this attorney discipline proceeding is analogous to Kahn, but we conclude that the misconduct in this case is much more egregious. Like Kahn, Markey and Hancock engaged in a years-long pattern of regularly making remarks that were offensive or otherwise inappropriate, and that were "not limited to isolated incidents." Kahn, 16 A.D.3d at 8-9, 791 N.Y.S.2d 36. Similar to Kahn making offensive remarks about a woman who was opposing counsel as she entered the courtroom, id. at 9, 791 N.Y.S.2d 36, Markey and Hancock made offensive remarks in e-mails about an African American woman Chief Veterans Law Judge. [19] Just as Kahn asked women who were opposing counsel an inappropriate question laced with sexual innuendo, see id., Hancock spoke of women who were his colleagues in an inappropriate manner. [20] Although Kahn insulted woman in person rather than in e-mails to third parties, and Markey's and Hancock's offensive statements about women occurred in e-mails to others, the sentiment and disparagement of women is the same. The difference in the cases is that, *521 while Kahn made inappropriate and offensive remarks to and about women, see id., Markey and Hancock made a wide variety of contemptible and extremely offensive remarks about multiple groups of people, including women. In addition to disparaging and demeaning women in the e-mail exchanges, Markey and Hancock used vitriol to display bias and prejudice against many different groups of people who were not targeted by Kahn. The hearing judge expressly found that Markey did not appreciate the seriousness of his misconduct. And, like Kahn's letters of apology, Hancock's expression of remorse by no means rehabilitates the harm of his wide-ranging degrading and vulgar statements. Like Kahn's long-running misconduct, Markey's and Hancock's misconduct was persistent and certainly warrants more than a reprimand and, indeed, a sanction longer than a six-month suspension. See id. at 9-10, 791 N.Y.S.2d 36. On the whole, a comparison of this attorney discipline proceeding to Kahn persuades us that a more severe sanction—namely, an indefinite suspension—is warranted for Markey's and Hancock's misconduct. See id. at 10, 791 N.Y.S.2d 36. [21] An indefinite suspension protects the public's confidence in the legal profession **963 and deters similar misconduct by communicating that behavior of this type is simply not acceptable.

19 Kahn stated "[h]ere is the elephant, she's coming in. Who wants tickets? Come see the show." Kahn, 16 A.D.3d at 9, 791 N.Y.S.2d 36. Among other things, Markey referred to the African American woman Chief Veterans Law Judge as "a total b[****,]" and Hancock referred to her as a "Ghetto Hippopotamus[.]"

20 Kahn stated "Do you want to suck one of my b[***]s?", Kahn, 16 A.D.3d at 9, 791 N.Y.S.2d 36, and Hancock stated that a colleague had "nice [d***-sucking lip]s[,]" and with respect to another colleague that he would "[l]ike to have [his] pee pee introduced to her va jay jay."

21 In the filing regarding the recommendation as to the appropriate sanction, Bar Counsel contends that Markey's and Hancock's misconduct is similar not only to that in Kahn, 16 A.D.3d 7, 791 N.Y.S.2d 36, but also to the misconduct in Attorney Grievance Comm'n v. Marcalus, 442 Md. 197, 112 A.3d 375 (2015), in that the misconduct occurred over a protracted period of time. As Bar Counsel acknowledges, however, the misconduct in Marcalus is distinguishable. In Marcalus, id. at 200, 199, 112 A.3d at 376, this Court disbarred a lawyer who, among other misconduct, engaged in "sexting" with a female party in litigation in which he represented the opposing party. Significantly, the lawyer in Marcalus had been previously suspended from the practice of law twice. See id. at 210, 112 A.3d at 382. Because Marcalus involved a lawyer who had a history of prior attorney discipline, Marcalus does not provide guidance as to the appropriate sanction in this attorney discipline proceeding.

It is of no significance that, as Hancock emphasizes, his statements were never meant to be shared with anyone other than members of the FOH. In *522 Basinger, 441 Md. at 718, 109 A.3d at 1174, this Court explained that with respect to MLRPC 8.4(d), it does not matter whether a lawyer's misconduct was " 'not known or intended to be

known publicly.' " Considering "whether other people knew of the lawyer's conduct ... would lead to the absurd result that whether a lawyer violated MLRPC 8.4(d) would depend on ... how much the lawyer's conduct was publicized." Id. at 716-17, 109 A.3d at 1173. This Court pointed out:

> Ultimately, it does not matter whether the lawyer's conduct was publicized before this Court considers the attorney discipline proceeding. By issuing an opinion that will become available to anyone with an internet connection, this Court will effectively inform the public of the lawyer's conduct. It would be ironic if we issued a publicly available opinion in which we recited the lawyer's conduct, then concluded that the lawyer's conduct could not have negatively impacted the public's perception of the legal profession because the public did not actually know of the lawyer's conduct.

Id. at 717 n.7, 109 A.3d at 1173 n.7.

We find no worth in Hancock's contention that, in light of Basinger, id. at 722, 109 A.3d at 1176, we should merely reprimand him. Both Markey's and Hancock's misconduct is far more egregious than Basinger's. Although Basinger made multiple offensive remarks, his insults were directed at one person and were limited to three letters that he sent over the course of four days. See id. at 708, 109 A.3d at 1167-68. By contrast, the e-mails in which Markey and Hancock participated spanned approximately seven years. Additionally, Markey and Hancock did not limit their expression of prejudice to one person, and instead demeaned and mocked a wide range of people in their e-mails. The hearing judge's opinion quotes ten different e-mail exchanges in which Markey and Hancock made remarks demonstrating bias or prejudice based upon race, sex, national origin, sexual orientation, or socioeconomic status. These statements included not only the obscenity "c[**]t[,]" which the lawyer in Basinger used, id. at 708, 109 A.3d at 1168, but also a wide array of other inappropriate and offensive remarks. As repugnant as Basinger's remarks were, ***523** they pale in comparison with some of the statements that Markey and Hancock made in their e-mails. Basinger offers no support whatsoever for Hancock's request for a reprimand.

Reprimanding either Markey or Hancock would be inconsistent with our goals of "protect[ing] the public and the public's confidence in the legal profession [by] deterring other lawyers from engaging in similar misconduct[.]" Slate, 457 Md. at 646, 180 A.3d at 155 (citation omitted). This is the second attorney discipline proceeding in which this Court has concluded that a lawyer violated MLRPC 8.4(e) —and, in the first one, Sanderson, 465 Md. at 74-75, 213 A.3d at 165, there were several additional MLRPC violations that warranted disbarment. Sanderson does not provide guidance as to the appropriate sanction in an attorney discipline proceeding like this one, in which the lawyers have violated MLRPC 8.4(d), 8.4(e), and 8.4(a). We agree with Bar Counsel that there is no case in Maryland that is directly on point with respect to the appropriate sanction.

We are essentially writing on a blank slate, and what we decide in this attorney discipline proceeding will become precedent ***964** for the sanctions imposed for similar misconduct by lawyers in the future. If we were to reprimand either Markey or Hancock, we would effectively be communicating to members of the Bar of Maryland and the public that making these types of inappropriate and offensive remarks is not serious misconduct. A reprimand or even a short suspension would beg the question of what, if any sanction, would be appropriate for a lawyer who violates MLRPC 8.4(e) by making a stray offensive comment, as opposed to many statements that are deliberate, egregious, and occur over a period of time. Markey's and Hancock's violations of MLRPC 8.4(e) were serious and flagrant, and warrant a sanction that makes clear to every Maryland lawyer and the public that such conduct is unacceptable. We must assure that lawyers do not evince bias or prejudice while acting in their professional capacities and that the principles of fairness and equal justice under the law are foremost in the legal profession.

***524** For the above reasons, we indefinitely suspend Markey and Hancock from the practice of law in Maryland. Markey is currently decertified and temporarily suspended from the practice of law in Maryland as a result of his failures to pay an annual assessment to the Client Protection Fund,

provide information regarding his federal Tax Identification Number, and file a Pro Bono Legal Service Report and an Interest on Lawyers Trust Accounts Report for the period from January 1, 2018, through June 30, 2019. Markey's indefinite suspension will take effect immediately. Although Hancock is not currently suspended from the practice of law in Maryland, he is in inactive/retired status, and his indefinite suspension will also take effect immediately.

IT IS SO ORDERED; RESPONDENTS SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE 19-709(d), FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST JAMES ANDREW MARKEY AND CHARLES LEONARD HANCOCK.

McDonald, J., joins opinion and concurs.

McDonald, J., concurring

I join the opinion of the Court in this case. I add a few words to emphasize the seriousness of this case in that it involves government attorneys – one an administrative judge. As the Majority Opinion outlines, the conduct involved email communications during the attorneys' employment over government information systems.

Every Maryland attorney takes an oath to "at all times demean myself fairly and honorably as an attorney" and to uphold the State and federal constitutions. Maryland Code, Business Occupations & Professions Article, § 10-212. The lawyer's oath is not a rote formula recited solely to cross the threshold of bar admission, but a pledge for the duration of one's career. Those lawyers privileged to be in public service ***525** have a special obligation to exemplify those principles of fairness, probity, and adherence to constitutional values.

In the context of a disciplinary case involving a Deputy State's Attorney, this Court observed that the attorney was to be held to a higher standard of conduct due to his public position. *Attorney Grievance Comm'n v. McDonald*, 437 Md. 1, 46, 85 A.3d 117 (2014) (citing an American Bar Association publication that relates the disciplinary sanction to be imposed on a government attorney to the failure to maintain the public trust). While that case concerned a prosecutor, that norm applies to all government attorneys who exercise, or ****965** advise the exercise of, the sovereign powers of government – including those involved in the veterans' benefits system. *Cf. Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (in the veterans' benefits system, "the importance of systemic fairness and the appearance of fairness carries great weight"). The conduct here was contrary to the lawyer's oath and gave, at the least, the appearance that fairness and decency did not animate those charged with this important public service.

ORDER

Upon consideration of the Motion for Reconsideration of Effective Date of Sanction Imposed filed by Attorney Grievance Commission of Maryland, Petitioner, on July 16, 2020, and the lack of any response thereto, it is this 6th day of August, 2020,

ORDERED, by the Court of Appeals of Maryland, that the last two sentences of the last paragraph on page 41 of the opinion are replaced with the following sentences:

> Markey's indefinite suspension will take effect immediately. Although Hancock is not currently suspended from the practice of law in Maryland, he is in inactive/retired status, and his indefinite suspension will also take effect immediately.

All Citations

469 Md. 485, 230 A.3d 942

377 Md. 656
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND
v.
Douglas F. GANSLER.

Misc. AG No. 81, Sept. Term, 2002.
|
Nov. 12, 2003.

Synopsis

In an attorney disciplinary proceeding against prosecutor, the Court of Appeals referred petition for hearing. The Circuit Court, Frederick County, Julie R. Stevenson, J., found a single violation of rule applicable to extra-judicial comments. Bar Counsel and prosecutor filed exceptions. The Court of Appeals, Battaglia, J., held as a matter of first impression that: (1) comments about a defendant's confession, decision to offer plea bargain, and apprehension of perpetrators of two murders violated disciplinary rule applicable to extra-judicial statements; (2) some comments were within safe harbor of disciplinary rule allowing attorney to make extra-judicial statement about information contained in a public record since a broad definition of "public record" applied to case against prosecutor; (3) for future cases the "public record" is limited to public government records; and (4) public reprimand was warranted.

Reprimand ordered.

Attorneys and Law Firms

****551 *663** Melvin Hirshman, Bar Counsel and John C. Broderick, Asst. Bar Counsel for the Attorney Grievance Commission of Maryland, for petitioner.

Carmen M. Shepard, Washington, DC, for respondent.

****552** Argued before BELL, C.J., and ELDRIDGE, WILNER, CATHELL, HARRELL, BATTAGLIA, and ROBERT L. KARWACKI (Retired, specially assigned), JJ.

Opinion

BATTAGLIA, Judge.

Respondent Douglas F. Gansler was admitted to the Bar of this Court on December 18, 1989. On November 7, 2002, the Attorney Grievance Commission of Maryland, by Bar Counsel, acting pursuant to Maryland Rule 16–751(a),[1] filed a petition for disciplinary action, alleging that Gansler violated the following Maryland Rules of Professional Conduct (hereinafter "MRPC"): MRPC 3.1MRPC 3.1 (Meritorious Claims and Contentions),[2] ***664** MRPC 3.6MRPC 3.6 (Trial Publicity),[3] MRPC 3.8MRPC 3.8 (Special Responsibilities ***665 **553** of a Prosecutor),[4] MRPC 8.2(a)MRPC 8.2(a) (Judicial and Legal Officials),[5] and MRPC 8.4(a) & (d)MRPC 8.4(a) & (d) (Misconduct).[6]

1 Maryland Rule 16–751(a) provides:

> (a) **Commencement of disciplinary or remedial action.** Upon approval of the [Attorney Grievance] Commission, Bar Counsel shall file a Petition for Disciplinary or Remedial Action in the Court of Appeals.

2 MRPC 3.1MRPC 3.1 states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.

3 MRPC 3.6MRPC 3.6 states:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> (b) A statement referred to in paragraph (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 incarceration, 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 incarceration, 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 incarceration;
(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.
(c) Notwithstanding paragraph (a) and (b)(1–5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
(1) the general nature of the claim or defense;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case:
(i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

4 MRPC 3.8MRPC 3.8 states:
The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
(e) exercise reasonable care to prevent an employee or other person under the control of the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6Rule 3.6.

5 MRPC 8.2(a)MRPC 8.2(a) states:
(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

6 MRPC 8.4MRPC 8.4 states in relevant part:
It is professional misconduct for a lawyer to:
(a) 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;
* * *

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

***666** The charges arose from numerous extrajudicial statements made by Gansler, who has served as the State's Attorney for Montgomery County since January of 1999. By order dated November 13, 2002 and pursuant to Maryland Rules 16–752(a) and 16–757(c), [7] we referred the petition to Judge Julie R. Stevenson of the Circuit Court for Frederick County for an evidentiary hearing and to make findings of fact and conclusions of law. During that hearing, which took place on March 10, 2003, Bar Counsel offered into evidence three videotapes of Gansler's extrajudicial statements and the report of his expert in the case, Professor Abraham Dash. Professor Dash and Professor Lisa Lerman, Gansler's expert, testified at the hearing. Gansler also offered his own testimony as well as that of two Deputy State's Attorneys for Montgomery County.

[7] Maryland Rule 16–752(a) states:

(a) **Order.** Upon the filing of a Petition for Disciplinary or Remedial Action, the Court of Appeals may enter an order designating a judge of any circuit court to hear the action and the clerk responsible for maintaining the record. The order of designation shall require the judge, after consultation with Bar Counsel and the attorney, to enter a scheduling order defining the extent of discovery and setting dates for the completion of discovery, filing of motions, and hearing.

Maryland Rule 16–757(c) states in pertinent part:

(c) **Findings and conclusions.** The judge shall prepare and file or dictate into the record a statement of the judge's findings of fact, including findings as to any evidence regarding remedial action, and conclusions of law....

Judge Stevenson filed a Report and Recommendations on April 29, 2003, in ****554** which she presented findings of fact and conclusions of law. Judge Stevenson concluded that Bar Counsel had presented clear and convincing evidence that Gansler, in one instance, had violated MRPC 3.6(a)MRPC 3.6(a); however, in Judge Stevenson's judgment, the evidence insufficiently supported Bar Counsel's charges that Gansler had violated MRPC 3.6(a)MRPC 3.6(a) in other instances and had violated other MRPC provisions. Both Bar Counsel and Gansler filed exceptions to Judge Stevenson's findings and conclusions. We overrule Gansler's exception and conclude, further, that he violated ***667** MRPC 3.6(a)MRPC 3.6(a) on more than a single occasion. Accordingly, as to Gansler's extrajudicial statements in which he discussed Cook's confession and his opinion of Cook's and Lucas's guilt, we sustain Bar Counsel's exceptions.

I. Facts

The undisputed facts in this case have been proven by clear and convincing evidence as required by Maryland Rule 16–757(b). Those facts demonstrate that, between 2000 and 2001, Gansler made several extrajudicial statements in connection with his office's prosecution of various well-publicized crimes. A discussion of the circumstances of each of the extrajudicial statements follows. [8]

[8] The facts we present in this section are based on the findings of fact and evidentiary items relied upon by the hearing judge in her Report and Recommendations.

A. The Cook Case

In late January of 2001, Sue Wen Stottsmeister was found beaten and unconscious. She had been accosted while jogging along a recreational path located in the Aspen Hill area of Montgomery County. Ms. Stottsmeister ultimately died from the injuries she suffered during that attack.

Nearly six-months later, on June 4, 2001, Albert W. Cook, Jr. allegedly attacked a woman near his home. Witnesses of that attack chased and kept visual contact with Cook until police arrived and arrested him for that incident. While the police were investigating the June 4, 2001 attack, they began to focus their attention on Cook as a suspect in the murder of Stottsmeister. In the afternoon of June 5, 2001, police officials convened the media for a press conference. Before the press conference began, a Washington D.C. television station broadcasted a report that large sneaker footprints had been found at the scene of the murder and that Cook had large feet that might fit sneakers of that size. The press conference then commenced, and the police announced that Cook would be charged with the Stottsmeister murder.

***668** Gansler attended that press conference and made several statements to the media regarding the anticipated prosecution of Cook. He described Cook's confession and the circumstances surrounding his custodial statements to police:

> The police were able to obtain a confession completely consistent with [Cook's] constitutional rights, he confessed within just a few hours with incredible details that only the murderer would have known. He was then provided the opportunity to rest and ... he slept, and where he had said was one of the best nights of sleep he had gotten in a long time.
>
> This morning at dawn, he was taken up to the crime scene, video taped by police, and went over in detail by detail every step of what he did to Ms. Stottsmeister this past January.

Gansler further stated that investigators had "boot print matches and that type of thing, or actually in this case the sneaker matches, but we're very confident, obviously ****555** more than confident that we have apprehended the right person...."

After the press conference, police charged Cook with the murder of Stottsmeister.[9] The statement of charges, which was filed in the District Court of Maryland, Montgomery County, stated: "Cook provided a full and detailed account of the assault and murder of Stottsmeister.... Cook provided details about the murder that would only be known by the perpetrator of the crime."

[9] Judge Stevenson noted, specifically, that the statement of charges in Cook's case had not been filed at the time of the June 5, 2001 press conference.

B. The Lucas Case

While asleep during the middle of the night, Monsignor Thomas Martin Wells, a revered member of the Montgomery County community, was beaten and killed in the rectory at his parish. On June 17, 2000, the Montgomery County police arrested Robert P. Lucas and charged him with the murder of ***669** Monsignor Wells. The statement of charges stated that the police had observed Lucas "wearing shoes having a shoe print consistent with the ones found on the crime scene" and that after Lucas was arrested, he "admitted breaking into the church rectory and responsibility for Well's murder."

The police held a press conference on June 18, 2000 to announce the arrest of Lucas and the charges against him. Gansler spoke at the press conference:

> The Montgomery County Police ... were able to determine definitively that indeed it was Mr. Lucas who had committed the crime. They were able to do so by following him. They conducted surveillance for over 24 hours. And then when they actually found him, he was wearing a very unique shoe, a very unique boot, and the print of that boot matched the print that was found at the scene of the crime, and then further questioning revealed, in fact, he was the person that had done it.

He offered several remarks about the evidence against Lucas, which he described as "a confession from the perpetrator as well as scientific and forensic evidence to corroborate that confession...." Gansler then expressed his opinion that "we have found the person who committed the crime at this point" and that the case against Lucas "will be a strong case."

Additionally, Gansler commented at the press conference that "it was a violent murder" and that Lucas "has a criminal record which includes residential burglaries and that will be obviously something that will come out later on as well." In fact, Lucas's criminal record came out again later, when Deputy State's Attorney Katherine Winfree discussed it at Lucas's bond hearing on the Monday after the press conference.

C. The Perry Case

James Edward Perry was convicted in the Circuit Court for Montgomery County of first-degree murder and sentenced to death for his role in the 1993 killings of an 8 year-old quadriplegic boy, the boy's mother, and a nurse. Although ***670** upheld on direct appeal, in post-conviction proceedings, Perry's conviction was reversed by this Court on December 10, 1999.

On January 4, 2000, the *Washington Post* ran an article describing Gansler's discussions with family members of the victims of the 1993 murders. The article explained that Gansler had asked the family members whether Perry

should be retried or offered a plea agreement. Quoted in the article was Perry's attorney, William Jordan Temple, who commented that he "certainly would look forward" to a plea ****556** offer because "anyone faced with the possibility of a death penalty considers an offer of life."

While preparing for Perry's retrial, Gansler made extrajudicial statements that the *Gazette Community News* published on April 5, 2000. According to the *Gazette's* report, Gansler had announced that "he has decided to offer [Perry] a plea bargain" and that, "when the offer is formally presented, Perry would have six weeks to make a decision." The article also recounted the events of a hearing in the Perry case, held the day before, at which the court appointed new defense counsel. At that hearing, according to the *Gazette,* the prosecutor "did not mention the plea bargain offer" and Perry's lawyers "declined to discuss a plea offer or any details about the case."

On or about July 6, 2000, Gansler again appeared in front of television cameras. Responding to questions from the media, Gansler remarked that "the Court of Appeals' decision to reverse the original conviction of Mr. Perry was a completely result oriented opinion." Gansler expressed his view that the "four to three" opinion "was clearly an effort to overturn the death penalty in the Perry case."

D. The Bomb Threat Case

On February 8, 2000, the *Montgomery County Journal* published an article reporting the dismissal of charges against two Montgomery County teenagers who had been accused of calling bomb threats to Wheaton High School. At the juveniles' ***671** trial, the State presented evidence of two telephone calls that purportedly were the bomb threats. One of the calls, the article stated, could not be linked to either juvenile, and the other had been made three days prior to the alleged bomb threat. The article quoted the presiding judge, who in dismissing the charges, said, "I have no idea who did this" and "I have no evidence." The *Journal* account relayed Gansler's comments that "his office will continue to prosecute youths suspected of making bomb threats, even if the case is not strong enough to warrant a conviction." Gansler was quoted as saying, "We try hard cases.... Juveniles who phone in bomb threats will be prosecuted. It's more important to prosecute someone and have them acquitted [sic] than let them commit crimes with impunity." [10]

10 In the proceedings before the hearing judge, Bar Counsel presented evidence of numerous other extrajudicial statements by Gansler that Bar Counsel considered objectionable. The hearing judge's Report and Recommendations do not refer to those other statements, and Bar Counsel has not raised any exceptions based on those statements. Because Bar Counsel failed to take exceptions to the hearing judge's factual findings, we consider only those statements discussed by Judge Stevenson to be at issue. *See* Maryland Rule 16–759(2)(B) ("The [Court of Appeals] may confine its review to the findings of fact challenged by [a party's] exceptions.").

II. The Hearing Judge's Conclusions of Law

The hearing judge concluded that Gansler committed a single violation of MRPC 3.6MRPC 3.6 by making extrajudicial statements about his decision to offer a plea agreement in the Perry case. The judge determined that those statements clearly violated the general proscriptions of MRPC 3.6(a)MRPC 3.6(a) as well as the specific provisions of MRPC 3.6(b)(2)MRPC 3.6(b)(2) limiting extrajudicial references to plea agreements. Furthermore, in the hearing judge's estimation, Gansler's plea agreement remarks found no safe harbor under MRPC 3.6(c)MRPC 3.6(c), which provides that certain types of statements *are permissible* even though, under MRPC 3.6(a)MRPC 3.6(a), those statements might have a "substantial ****557** likelihood of materially prejudicing an adjudicative proceeding."

***672** The hearing judge found no violations with respect to Gansler's other extrajudicial statements. The judge concluded that Gansler's references to the physical evidence against Cook and Lucas fell under the safe harbor provision of MRPC 3.6(c)(2)MRPC 3.6(c)(2), which allows a lawyer to state, "without elaboration," "information contained in a public record" notwithstanding the strictures of MRPC 3.6(a)MRPC 3.6(a) or MRPC 3.6(b)MRPC 3.6(b). In the hearing judge's view, the "public record" safe harbor suffered from First Amendment vagueness concerns because it was susceptible of multiple and widely varying interpretations. Lacking a precise definition, the judge indicated that the terms "without elaboration" and "public record" fail to provide lawyers with adequate guidelines for determining when "remarks pass from protected to prohibited."

The hearing judge, however, conveyed concern over Gansler's comments regarding the Cook and Lucas confessions, which, she stated, "clearly do no fall under [the safe harbor provision of MRPC] (c)(2)," violated "the spirit of [MRPC] 3.6MRPC] 3.6" and "could create a substantial likelihood of materially prejudicing an adjudicative proceeding." Nevertheless, the judge found no violations of MRPC 3.6MRPC 3.6 in these comments because she determined that, due to their timing, no material prejudice actually flowed from them. [11]

11 The hearing judge stated that she reached this conclusion "with reluctance" and that she was "troubled by such statements made by an elected State's Attorney prior to trial."

The judge examined Gansler's extrajudicial criticism of this Court's reversal of Perry's conviction in light of MRPC 8.2MRPC 8.2. The judge agreed with Bar Counsel's expert, who considered Gansler's comments "a lawful and appropriate expression of opinion protected under the First Amendment of the United States Constitution." Consequently, the hearing judge determined that Gansler had not violated MRPC 8.2MRPC 8.2.

Finally, the hearing judge concluded that Bar Counsel had not demonstrated that Gansler violated MRPC 3.1MRPC 3.1 or MRPC 3.8(a)MRPC 3.8(a) by making comments regarding his intended prosecution of youths suspected of making bomb threats. The judge ***673** was persuaded by Gansler's hearing testimony that "his intent was not to prosecute in bad faith" but, rather, to stress that "the State often must try cases difficult to prove." Specifically finding Gansler's testimony credible, the hearing judge concluded that Bar Counsel had not presented clear and convincing evidence that Gansler intended to prosecute without probable cause in violation of MRPC 3.1MRPC 3.1 and MRPC 3.8(a)MRPC 3.8(a).

As we noted earlier, both parties filed exceptions to the hearing judge's conclusions. Bar Counsel maintained that the hearing judge's finding of a single violation was in error and that the evidence clearly and convincingly supported a conclusion that Gansler violated MRPC 3.6MRPC 3.6 on numerous occasions. In addition, Bar Counsel argued that Gansler intended to prosecute without probable cause, in violation of MRPC 3.1MRPC 3.1, MRPC 3.8MRPC 3.8, and MRPC 8.4(d)MRPC 8.4(d). Bar Counsel, however, took no exception from the hearing judge's conclusion that Gansler did not violate MRPC 8.2MRPC 8.2. Gansler found no fault with most of the hearing judge's findings and conclusions, except, however, for her determination that his comments regarding the plea offer to Perry had violated MRPC 3.6MRPC 3.6.

III. Standard of Review

Our recent opinion in *Attorney Grievance Comm'n v. Zdravkovich,* 375 Md. 110, 126, 825 A.2d 418, 427 (2003), ****558** iterated our well established and frequently recognized standard of review in attorney disciplinary matters:

> This Court exercises " 'original and complete jurisdiction for attorney disciplinary proceedings in Maryland,' and conducts 'an independent review of the record.' " *Attorney Grievance Comm'n v. Blum,* 373 Md. 275, 293, 818 A.2d 219, 230 (2003) (quoting *Attorney Grievance Comm'n v. McLaughlin,* 372 Md. 467, 492, 813 A.2d 1145, 1160 (2002) (citations omitted)). "In conducting that review, we accept the hearing judge's findings of fact as *prima facie* correct unless shown to be 'clearly erroneous,' and we give due regard to the hearing judge's opportunity to assess the credibility of witnesses." *Attorney Grievance Comm'n v. Wallace,* 368 Md. 277, 288, 793 A.2d 535, 542 (2002) (citation ***674** omitted). "As to the hearing judge's conclusions of law," however, " 'our consideration is essentially *de novo.*' " *Attorney Grievance Comm'n v. Dunietz,* 368 Md. 419, 428, 795 A.2d 706, 711 (2002) (quoting *Attorney Grievance Comm'n v. Thompson,* 367 Md. 315, 322, 786 A.2d 763, 768 (2001) (quoting *Attorney Grievance Comm'n v. Briscoe,* 357 Md. 554, 562, 745 A.2d 1037, 1041 (2000))).

IV. Discussion

A. MRPC 3.6MRPC 3.6

This case serves as this Court's first opportunity to consider the application of MRPC 3.6MRPC 3.6, the rule of professional responsibility governing trial publicity. More significant than the case's novelty, however, are the balance and interplay of the numerous interests, rights, and responsibilities involved. To provide the proper context for understanding the important issues presented, we begin with a historical discussion of the regulation of trial publicity. We

then proceed to dissect Maryland's present rule and apply it to the extrajudicial statements in controversy.

1. Origins of the MRPC 3.6MRPC 3.6

Criminal justice must be carried out in the courtroom. [12] As Justice Holmes declared in *Patterson v. Colorado,* 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879, 881 (1907), "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." The constitutional underpinnings for this concept reside in the Sixth Amendment's right to a fair trial, made applicable to our State through the Fourteenth Amendment. [13] ***675** *Ristaino v. Ross,* 424 U.S. 589, 595 n. 6, 96 S.Ct. 1017, 1020 n. 6, 47 L.Ed.2d 258, 263 n. 6 (1976) ("A criminal defendant in a state court is guaranteed an "impartial jury" by the Sixth Amendment as applicable to the States through the Fourteenth Amendment.") (citing *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)); *see* ****559** *Estes v. Texas,* 381 U.S. 532, 540, 85 S.Ct. 1628, 1632, 14 L.Ed.2d 543, 549 (1965) (describing the right to a fair trial as "the most fundamental of all freedoms"). Article 21 of the Maryland Declaration of Rights also guarantees the right to a fair trial in all criminal prosecutions. [14]

12 For extended discussions of the origin and historical development of the modern rules governing trial publicity, see Charles W. Wolfram, MODERN LEGAL ETHICS at 633–34 (1986); Alberto Bernabe–Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech,* 33 LOY. U. CHI. L.J. 323 (2002).

13 U.S. CONST. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

14 Article 21 of the Maryland Declaration of Rights provides:

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

The text of the Sixth Amendment makes clear that a fair trial consists of numerous components, including, but certainly not limited to, the rights of an accused to a public trial and impartial jury. These components alone, of course, do not necessarily ensure a fair trial, as Chief Justice Warren explained:

> It has been held ... that the fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment.... But it also has been agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though "every ***676** form [be] preserved," the forms may amount to no " more than an empty shell" when considered in the context or setting in which they were actually applied.

Id. at 560, 85 S.Ct. at 1641, 14 L.Ed.2d at 560 (Warren C.J., concurring). Thus, even where a court has observed all of the Sixth Amendment formalities, it is possible for a defendant to be deprived of a fair trial if circumstances occurring outside the courtroom taint the proceedings. *See* *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) (holding that a defendant's fundamental due process rights had been violated because a local television

station had broadcasted his confession, and he was denied a change of venue).

One outside circumstance that may affect a defendant's right to a fair trial and, specifically, his right to an impartial jury, occurs when an attorney makes a publicized, out-of-court statement about the defendant's case. This is particularly true because attorneys occupy a special role as participants in the criminal justice system, and, as a result, the public may view their speech as authoritative and reliable. Attorneys involved in a particular case have greater access to information through discovery, the ability to converse privately with knowledgeable witnesses, and an enhanced understanding of the circumstances and issues. Their unique role and extensive access to information lends a degree of credibility to their speech that an ordinary citizen's speech may not usually possess. Comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public. When such seemingly credible information reaches the ears or eyes of the public, the jury pool may become contaminated, greatly diminishing the court's ability to assemble an impartial jury. The defendant's right to a fair trial, thus, may be compromised. *See* Joan C. Bohl, *Extrajudicial Attorney Speech and Pending Criminal Prosecutions: The Investigatory Commission Meets A.B.A. Model Rule 3.6,* 44 KAN. L.REV. 951, 973–74 (1996) (discussing how attorney speech differs from the speech of other individuals).

****560** ***677** Limiting extrajudicial attorney speech to preserve a fair trial, however, can be accomplished only in a way that is consistent with the fundamental right to free expression under the First Amendment. In general, the First Amendment applies equally to an ordinary citizen and an attorney, as long as the attorney "plays no lawyerly role in the matter under comment." *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS at 632 (1986). On the other hand, when the attorney has some professional relationship to a matter, the attorney's freedom to speak about it is not as broad. For instance, inside the courtroom, the rules of evidence and principles of relevance place rigid restrictions upon what an attorney may say, and when and how he or she may speak. Even outside the courtroom, the speech of a lawyer may be curtailed to an extent greater than an ordinary citizen's. In the arena of attorney advertising, the Supreme Court has upheld a state's thirty-day waiting period for solicitation letters by plaintiffs' personal injury lawyers, *see* *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), and a state's ban on in-person attorney solicitations, *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

In 1908, the American Bar Association first attempted to control the ill effects of attorney-generated trial publicity through the development of professional standards entitled "Canons of Professional Ethics" (hereinafter the "ABA Canons"). Many states adopted the ABA Canons, including Canon 20, which "[g]enerally ... condemned" newspaper publications "by a lawyer" regarding a pending case because such publications "may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice." [15] *See* ***678** *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1066, 111 S.Ct. 2720, 2740, 115 L.Ed.2d 888, 918 (1991); Alberto Bernabe–Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech,* 33 LOY. U. CHI. L.J. 323, 331 (2002) (hereinafter Bernabe–Riefkohl). The Maryland State Bar Association formally adopted the ABA Cannons in 1922. *Canons of Ethics, Adopted by the Maryland State Bar Association, Annual Session 1922* at 1.

15 The full text of Canon 20 stated:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation form the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

Despite the widespread adoption of the ABA Canons, trial publicity continued to affect defendants' Sixth Amendment rights and, consequently, gained the attention of the Supreme Court during the 1950s and 1960s. The Court dealt with the detriments of excessive media involvement in cases by reversing a number of criminal convictions on the ground that excessive trial publicity deprived the defendants of due process. *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (holding that a defendant had been denied due process because a pre-trial hearing had been televised live and then rebroadcast, and because the court proceedings had been disrupted by the presence of the media); *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct.

1417, 10 L.Ed.2d 663 (1963) (reversing a conviction after the defendant had been denied a change of venue even though a local television station had broadcast his recorded confession three times, ****561** and 106,000 of the estimated 150,000–person community viewed the broadcast); *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) (reversing a conviction where pre-trial publicity distributed in the vicinity of the trial included, *inter alia,* media accounts of the defendant's juvenile record, the confessions to several murders, and previous court-martial proceedings); *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959) (reversing a conviction because seven of twelve jurors had been exposed to news accounts of evidence that was not admitted at trial).

***679** The leading case during this era, which identified the need for trial publicity reform and shaped the American Bar Association's (hereinafter "ABA") remedial measures, was *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). There, the Court, on due process grounds, reversed the murder conviction of Sam Sheppard, whose high-profile trial had been preceded and pervaded by a media frenzy. *Id.* at 363, 86 S.Ct. at 1522–23, 16 L.Ed.2d at 621. Newspapers had documented Sheppard's alleged refusal to cooperate with investigating officials and had published articles discussing incriminating evidence that was never admitted at trial. *Id.* at 338–41, 86 S.Ct. at 1509–11, 16 L.Ed.2d at 606–08. During trial, members of the media frequently moved in and out of the courtroom, causing so much noise and confusion that it became difficult to hear lawyers and witnesses. *Id.* at 344, 86 S.Ct. at 1513, 16 L.Ed.2d at 610. Furthermore, reporters had crowded the defense table at trial, making it very difficult for Sheppard to have private discussions with his counsel. *Id.* Despite the chaotic conditions, the trial judge refused to allow a change of venue and failed to take steps to control the adverse effects of the publicity. *Id.* at 354 n. 9, 358–59, 86 S.Ct. at 1518 n. 9, 1520, 16 L.Ed.2d at 615 n. 9, 618.

The Supreme Court admonished the trial court in *Sheppard* for its failure to control the extrajudicial publicity:

> The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity....

Id. at 361, 86 S.Ct. at 1521, 16 L.Ed.2d at 619. The Court suggested how the trial judge could have minimized the prejudicial publicity, including proscribing extrajudicial statements by lawyers and other trial participants, requesting local officials to implement regulations with respect to the dissemination of trial information, and warning news media about the impropriety of publicizing material not introduced at the proceeding. ***680** *Id.* at 361–62, 86 S.Ct. at 1521–22, 16 L.Ed.2d at 619–20. Emphasizing the prejudicial effect of news media on fair trials, the Court iterated:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.... [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue until the threat abates, or transfer it to another county not so permeated with publicity.

Id. at 362–63, 86 S.Ct. at 1522, 16 L.Ed.2d at 620. Moreover, the Court recognized that repeatedly reversing convictions ****562** would not suffice as a long-term remedy for the harm of trial publicity. The Court recommended an alternative solution:

> 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 it is highly censurable and worthy of disciplinary measures.

Id. at 363, 86 S.Ct. at 1522, 16 L.Ed.2d at 620.

In response to *Sheppard* and as a culmination of four years of meetings by a committee appointed by the ABA to develop standards to regulate the criminal justice system, the ABA in 1968 introduced Standards Relating to Fair Trial and Fair Press (hereinafter the "ABA Standards"). ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS ix (3rd ed.1991). ABA Standard 1–1, which merely set aspirational ***681** goals for lawyers, stated that it was a "duty" of a lawyer to prevent the "release" of information for "dissemination" that is reasonably likely to interfere with a fair trial. [16] In addition, the ABA included a disciplinary rule related to trial publicity in its newly proposed Model Code of Professional Responsibility of 1969 (hereinafter "ABA Model Code of 1969"). Bernabe–Riefkohl at 337. Disciplinary Rule 7–107 of the ABA Model Code of 1969 established a detailed set of mandatory guidelines to be used by lawyers considering the propriety of extrajudicial statements. *Id.* The guidance of Rule 7–107 differed depending on the stage of the case and the nature of the proceeding, but it generally banned all extrajudicial statements that had a "reasonable likelihood" of interfering with a trial or prejudicing the administration of justice. In 1970, Maryland adopted the ABA Model Code of 1969 verbatim and in its entirety.

16 ABA Standard 1–1 provided:

> It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

ABA Advisory Comm. of Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press, Standard 1–1 (1969).

In 1983, the ABA again proposed a new model code in an effort to address concerns that the "reasonable likelihood" standard of ABA Standard 1–1 and Disciplinary Rule 7–107 might not meet the requirements of the First Amendment. *See Chi. Council of Lawyers v. Bauer,* 522 F.2d 242 (7th Cir.1975), *cert. denied sub nom., Cunningham v. Chi. Council of Lawyers,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976) (holding that a local criminal rule nearly identical to ABA Standard 1–1 and similar to Disciplinary Rule 7–107 violated the First Amendment as a vague and overbroad restriction on speech). Rule 3.6Rule 3.6 of the Model Rules of Professional Conduct (hereinafter the "ABA Model Rules") attempted to regulate trial publicity in a way that constitutionally balanced the lawyers' right to free expression and an accused's ***682** right to a fair ****563** trial. [17] MRPC 3.6MRPC 3.6, which first appeared in the Maryland Rules in 1986 and presently governs trial publicity in Maryland, is identical to this initial version of ABA Model Rule 3.6Rule 3.6.

17 The first paragraph of the Comment to ABA Rule 3.6Rule 3.6 describes that delicate balancing act:

> It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by

> the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

2. The Structure and Operation of MRPC 3.6MRPC 3.6

MRPC 3.6MRPC 3.6 has three subsections, which all operate together to give the rule its full meaning. Subsection (a) announces a general prohibition against lawyers making extrajudicial statements that "the lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding." This prohibition applies, however, only to those statements that a reasonable person "would expect to be disseminated by means of public communication."

Subsection (b) provides examples of the types of extrajudicial statements that would have "a substantial likelihood of materially prejudicing an adjudicative proceeding." Under subsection (b), statements are prohibited that "ordinarily [are] likely" to include references to criminal matters that relate to, among other things, the criminal record of a party, the possibility of a plea of guilty, the existence or contents of any confession, admission, or statement by a defendant, or any opinion as to the guilt or innocence of a defendant.

***683** Subsection (c) states, however, that circumstances exist where an attorney, without risking discipline, may make extrajudicial statements that fall under subsections (a) and (b). The provisions under subsection (c) are known as "safe harbors." *See* *Gentile,* 501 U.S. at 1033, 111 S.Ct. at 2723, 115 L.Ed.2d at 897 (describing the provisions of Nevada Supreme Court Rule 177(3), which are substantively identical to MRPC 3.6(c)MRPC 3.6(c), as "safe harbors"). For example, an attorney may disclose, through extrajudicial statements and "without elaboration," "the scheduling or result of any step in litigation," even if that information, in some way, would have a "substantial likelihood of materially prejudicing an adjudicative proceeding." MRPC 3.6(c) (4)MRPC 3.6(c) (4). Another such "safe harbor" permits attorneys to comment outside the courtroom and without elaboration on "information contained in a public record." MRPC 3.6(c)(2)MRPC 3.6(c)(2).

3. Gansler's Extrajudicial Statements Applied to MRPC 3.6MRPC 3.6

In the case before us, Bar Counsel argues that Gansler violated MRPC 3.6MRPC 3.6 by making extrajudicial statements related to the Cook, Lucas, and Perry cases. Gansler asserts, however, that his statements in these cases fall under the "public record" exception under the safe harbor provisions of MRPC 3.6(c)MRPC 3.6(c). In addition, Gansler claims that the safe harbor provisions ****564** do not provide sufficient guidance as to what information is contained in the "public record," so he was incapable of determining which statements actually would constitute violations.

The issues in this case are similar to those discussed by the Supreme Court in *Gentile.* In a fractured opinion, the Court held that Nevada Supreme Court Rule 177, a rule substantively identical to MRPC 3.6MRPC 3.6, had been unconstitutionally applied to discipline a defense lawyer for making extrajudicial statements that professed his client's innocence in a criminal case. *Id.* at 1033, 111 S.Ct. at 2723, 115 L.Ed.2d at 897. Chief Justice Rehnquist authored the portion of the majority opinion analyzing the "substantial likelihood of material prejudice" ***684** standard of Rule 177Rule 177, and Justice Kennedy represented the majority of the Court in striking down Nevada's application of Rule 177Rule 177 as unconstitutionally vague.

Nevada's rule, like Maryland's, prohibited an attorney from making extrajudicial statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Gentile, the Nevada attorney challenging the rule, argued that this standard infringed upon an attorney's right to free speech as guaranteed by the First Amendment to the United States Constitution. The State Bar of Nevada, arguing in favor of the standard, emphasized the State's interest in maintaining fair trials that are decided in the courtroom and not through the use of "the meeting-hall, the radio, and the newspaper." *Id.* at 1070, 111 S.Ct. at 2742, 115 L.Ed.2d at 920 (quoting *Bridges v. California,* 314 U.S. 252, 271, 62 S.Ct. 190, 197, 86 L.Ed. 192, 208 (1941)).

In analyzing the parties' arguments, the Court acknowledged that the First Amendment permitted States to regulate attorney speech more stringently than the speech of an ordinary citizen. *Id.* at 1071, 111 S.Ct. at 2743, 115 L.Ed.2d at 921. The Chief Justice explained the State's particular interest in restricting speech of a lawyer involved in a pending case:

> 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, "as 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." 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.

***685** *Id.* at 1074, 111 S.Ct. at 2744–45, 115 L.Ed.2d at 923 (citation omitted). The Court concluded 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." *Id.* at 1075, 111 S.Ct. at 2745, 115 L.Ed.2d at 923 (internal quotations omitted).

The Court also subjected the "substantial likelihood" standard under Rule 177Rule 177 to traditional First Amendment scrutiny, requiring that content-based speech regulation be necessary to achieve a legitimate state interest. *Id.* The Court stated:

> The "substantial likelihood" test embodied in Rule 177Rule 177 is constitutional under this analysis, for it is designed to protect ****565** the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. Even if a fair trial can ultimately be ensured through *voir dire,* change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by [Gentile]. The State has a substantial interest in preventing officers of the court, such as lawyers, form imposing such costs on the judicial system and on the litigants.

Id. at 1075, 111 S.Ct. at 2745, 115 L.Ed.2d at 923–24 (citations omitted). The Court concluded that the "substantial likelihood" standard was narrowly tailored to protect these State interests. *Id.* at 1076, 111 S.Ct. at 2745, 115 L.Ed.2d at 924. This was so because the restraint on attorney speech was ***686** limited—"it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after trial." *Id.*

In addition to upholding the "substantial likelihood" standard on its face, the *Gentile* Court also considered the constitutionality of Nevada's application of Rule 177Rule 177. The Nevada Supreme Court had imposed a sanction against Gentile for making extrajudicial statements labeling the alleged victims in the criminal case as "drug dealers" and "money launderers," blaming the alleged crime on the police, calling into question the police's motives for levying the criminal charges against his client, and proclaiming the

innocence of his client. *Id.* at 1078–79, 111 S.Ct. at 2747, 115 L.Ed.2d at 925–26. Gentile had testified at his disciplinary hearing that he believed his statements were protected by Rule 177(3)(a)Rule 177(3)(a), one of Rule 177Rule 177's "safe harbors," which allowed an attorney to comment outside of the courtroom and "without elaboration" on the "general nature of the ... defense," even if the lawyer "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 1048–49, 111 S.Ct. at 2731, 115 L.Ed.2d at 907.

A majority of the Justices, led by Justice Kennedy, decided that, "[a]s interpreted by the Nevada Supreme Court, [Rule 177] is void for vagueness ... for its safe harbor provision, Rule 177(3)Rule 177(3), misled [Gentile] into thinking that he could give his press conference without fear of discipline." The Court described its reasoning:

> Given [the Rule's] grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "fair notice to those to whom [it] is directed." *Grayned v. City of Rockford,* 408 U.S. 104, 112, 92 S.Ct. 2294, 2301, 33 L.Ed.2d 222, 230 (1972). A lawyer seeking to avail himself of Rule 177(3)Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance ***687** because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms ****566** have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general into the forbidden sea of the elaborated.

Id. at 1048–49, 111 S.Ct. at 2731, 115 L.Ed.2d at 906–07. The Court further declared that, without providing sufficiently precise guidance, Rule 177Rule 177 "creates a trap" even for the lawyers who study the rule and make a conscious effort to comply with it. *Id.* at 1051, 111 S.Ct. at 2732, 115 L.Ed.2d at 908. Finally, Rule 177(3)(a)Rule 177(3)(a) was "so imprecise" that, in the Court's view, it created an "impermissible risk of discriminatory enforcement."

The case before us involves the application of a different safe harbor, MRPC 3.6(c)(2)MRPC 3.6(c)(2), which refers to "information contained in a public record." This provision suffers from constitutional infirmities similar to those of Nevada's Rule 177(3)(a)Rule 177(3)(a). [18] The text of MRPC 3.6(c)(2)MRPC 3.6(c)(2) provides that an attorney may make extrajudicial statements "without elaboration" concerning "information contained in a public record." These protections lack a clarifying interpretation by this Court, and the term "elaboration," a classic term of degree, has no settled usage or tradition of interpretation in law.

[18] Following the Supreme Court's decision in *Gentile,* the American Bar Association amended ABA Rule 3.6Rule 3.6. The amendments deleted "without elaboration" and "general" from the text of the Rule to address the Court's concern over those terms. *See A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–1998,* at 196 (1999); *Annotated Model Rules of Professional Conduct,* at 357 (1999). MRPC 3.6MRPC 3.6, however, has not changed since its first promulgation in 1986.

The phrase "information contained in a public record" also does not provide sufficient guidance for determining which statements were protected under MRPC 3.6(c)(2)MRPC 3.6(c)(2). As evidenced by the widely disparate meanings for "public record" that the parties' experts in this case have advanced, the term, standing alone, can be subject to multiple interpretations even ***688** by lawyers well educated on this specific principle of professional responsibility. Gansler and Professor Lerman define "information in a public record" broadly as " anything that has been filed in court ... and anything that has been otherwise made public." Bar Counsel and Professor Dash offer a narrower interpretation, suggesting that "the public record exception applies to that formal information in the public domain that exists *prior to, or separate from,* the investigation and prosecution of the subject criminal matter." (emphasis added). Bar Counsel, however, has provided no authority to support its interpretation and, in fact, concedes that the term "does not appear to have been the subject of judicial scrutiny and little guidance is afforded...."

"Public record" has been defined in other contexts, as the hearing judge recognized in her report, but those definitions also fail to provide uniform guidance. Maryland Code, § 10–611(g)(1)Maryland Code, § 10–611(g)(1) of the State Government Article (1984, 1999 Repl.Vol.), sets forth one definition for purposes of the Public Information Act:

> (g) *Public Record.*—(1) "Public record" means the original or any copy of any documentary material that:

(i) is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and

(ii) is in any form, including:

1. a card;

2. a computerized record;

3. correspondence;

****567** 4. a drawing;

5. film or microfilm;

6. a form;

7. a map;

8. a photograph or photostat;

9. a recording; or

10. a tape.

***689** The Maryland Code provides a different definition of "public record" in Section 8–606(a)(3) of the Criminal Law Article. That section states:

(3) "Public Record" includes an official book, paper, or record, kept on a manual or automated basis, that is created, received, or used by a unit of:

(i) the State;

(ii) a political subdivision of the State; or

(iii) a multicounty agency.

The Maryland Rules describe "public record" in still a different way. Maryland Rule 5–803(b)(8)(A) defines "public records and reports" for purposes of the "public records" exception to the hearsay rule, as including:

> a memorandum, report, record, statement, or data compilation made by a public agency setting forth (i) the activities of the agency; (ii) masters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or (iii) in civil actions and when offered against the State in criminal actions, factual finding resulting from an investigation made pursuant to authority granted by law.

Another source, Black's Law Dictionary, defines "public record" as "[a] record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse." BLACK'S LAW DICTIONARY 1279 (7th ed.1999). These characterizations of "public record" contemplate only information that has been created or distributed by a government entity.

Not all sources, however, consider "public record" to be a reference to materials produced by any government entity. Although Canon 20 of the 1908 ABA Canons of Ethics did not use the phrase "information contained in a public record," its terms do furnish some instruction as to the meaning of the phrase. Canon 20 prohibited "*ex parte* reference" to the facts of a case "beyond quotation from the *records and papers on file in the court.*" (emphasis added). Similarly, Local Rule 204 of the United States District Court for the District of Maryland prohibits an attorney from making certain extrajudicial statements after the arrest of an accused, except that the ***690** lawyer may quote from or refer to without comment to "public Court records" in the case. Thus, according to some sources, "public records" are limited to the exact information contained in documents on file with the court.

Because there is no settled definition of "information contained in a public record" we agree with Gansler that MRPC 3.6(c)(2)MRPC 3.6(c)(2) does not provide adequate guidance for determining which extrajudicial statements would qualify under the safe harbor. For this reason, we construe the phrase in its broadest form as applied to Gansler in this case and to any other extrajudicial statements made prior to the filing of this Opinion. In this case, we consider "information in a public record" to include anything in the public domain, including public court documents, media reports, and comments made by police officers.

Under this broad interpretation, it is clear that a number of Gansler's extrajudicial statements do not warrant discipline, as the hearing judge determined. Gansler did not violate MRPC 3.6MRPC 3.6 by commenting on the sneaker print matches in Cook's case because, shortly before Gansler's

extrajudicial ****568** comments, a television reporter had broadcast an account of that evidence nearly mirroring Gansler's version. Additionally, in the Lucas case, Gansler made statements to the media about a shoe print at the crime scene that matched shoes Lucas had been observed wearing. This information was already public as recorded in the statement of charges filed by the police the day before. Also contained in the statement of charges was an account of Lucas's admission to police that he broke into the church rectory and murdered Monsignor Wells. Therefore, the next day, when Gansler relayed information about the admission to the media, he revealed "information contained in a public record." We overrule Bar Counsel exceptions as they relate to Gansler's extrajudicial statements about physical evidence in the Cook and Lucas cases as well as the confession in the Lucas case.

Gansler argues that the "public record" safe harbor also should protect his reference to Lucas's history of convictions. ***691** MRPC 3.6(b)(1)MRPC 3.6(b)(1) informs lawyers that extrajudicial statements relating to the "criminal record of a party" are ordinarily likely to be intolerably prejudicial. Nevertheless, during the June 18, 2003 press conference announcing the arrest of Lucas, Gansler mentioned that Lucas "has a criminal record which includes residential burglaries." To support his assertion that this statement should be protected by the "public record" safe harbor, Gansler points to Deputy State's Attorney Winfree's testimony, characterizing Lucas's prior arrest and conviction record as "part of the public record."

Based on this testimony, we hold that Gansler's reference to Lucas's criminal record falls under our broad definition of "information in a public record." We reach this result because we have inferred from Deputy State's Attorney Winfree's testimony that she was referring to publicly accessible court records in Maryland, either case files or docket sheets, which indicate that an individual has been convicted of a crime. Maryland law does not bar an ordinary citizen from combing these court documents to learn information about someone's criminal history. For this reason, Lucas's history of convictions could have existed in the public domain before Gansler spoke of it. Under the circumstances of this case, the extrajudicial reference to Lucas's convictions qualifies for the protection of the "public record" safe harbor, as we have broadly defined it for this Opinion. Because of the strong prejudicial impact of the public disclosure of criminal record information, future respondents will have the burden of establishing that such information was contained in a bona fide public court record accessible to the general public. [19]

19 Not all criminal record information would qualify as "information in a public record," even if the term is defined broadly. Some information relating to an individual's criminal history, such as that collected by the Criminal Justice Information System (hereinafter "CJIS"), may not appear in a case file or docket sheet or otherwise have reached the public domain. The CJIS Central Repository compiles and maintains data of an individual's history of arrests, convictions, and other adverse criminal actions, but CJIS strictly limits access to its data. *See* Maryland Code, § 10–213Maryland Code, § 10–213 of the Criminal Procedure Article (2001); COMAR 12.15.01.08—12.15.01.13 (2003). An ordinary citizen may not obtain criminal history information from CJIS without demonstrating convincingly that the purpose of requesting the data meets one of CJIS's narrow exceptions (e.g., an employer who is seeking background information on a prospective employee whose job could "jeopardize the life and safety of individuals"). COMAR 12.15.01.13. As a result, the CJIS report is not public.
This non-public criminal history information collected by CJIS, of course, may overlap with information contained in publicly accessible case files and docket entries. If that should occur, the overlapping criminal record information would be considered part of the public government records, and statements referring to that particular information would receive protection under the "public record" safe harbor. The converse is also true; if an extrajudicial statement refers to criminal history information obtainable only from a non-public source like CJIS, the "public record" safe harbor would not apply.

****569** ***692** Additionally, lawyers who make extrajudicial statements in the future will not find shelter in the broad definition of MRPC (c)(2) that we apply here. Public policy mandates a more limited definition of "information in a public record." We believe that, to best " protect[ ] the right to a fair trial and safeguard[ ] the right of free expression," the phrase "information in a public record" should refer only to public government records—the records and papers on file with a

government entity to which an ordinary citizen would have lawful access.

To receive the protection of the "public record" safe harbor, the lawyer must not provide information beyond quotations from or references to public government records. The definition we establish in this case prevents attorneys from side-stepping the rule by directing or encouraging individuals not bound by the MRPC to publicize information so that attorneys can speak freely about it. Furthermore, by strictly limiting what is considered a public record, this definition enables all of the components of MRPC 3.6MRPC 3.6 to filter objectionable publicity, preventing the "public record" exception from swallowing the general rule of restricting prejudicial speech.

In any event, no matter whether one defines "information in a public record" broadly to include everything in the public domain or narrowly, Gansler violated the MRPC 3.6MRPC 3.6 by making several extrajudicial statements at issue in this case. Initially, we must point out that Gansler has not challenged ***693** that his comments qualify, under MRPC 3.6(a)MRPC 3.6(a), as statements that "a reasonable person would expect to be disseminated by means of public communication." The only contested issues in this case concern whether Gansler knew or should have known that his statements would have a substantial likelihood of materially prejudicing an adjudicative proceeding and whether the statements are protected under the safe harbor provisions of MRPC 3.6(c)MRPC 3.6(c). As we discuss in detail below, Gansler did violate MRPC 3.6MRPC 3.6 by commenting on Cook's confession, by discussing the plea offer to Perry, and by providing his opinion as to the guilt of Cook and Lucas.

First, Gansler violated MRPC 3.6MRPC 3.6 by discussing Cook's confession to the Stottsmeister murder. MRPC 3.6(b)(2)MRPC 3.6(b)(2) provides that a statement relating to the "existence or contents of any confession, admission, or statement given by a defendant" is "ordinarily likely" to have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Notwithstanding the cautionary language of the rule and prior to the filing of murder charges, Gansler publicly stated that police were able to obtain a confession from Cook. Apparently seeking shelter again under the "public record" safe harbor, Gansler points out that his reference to "incredible details" mirrored the information and even the language of the charging document. This observation fails to acknowledge that officials did not file the statement of charges against Cook until *after* the press conference. The "public record" safe harbor, whether construed narrowly or broadly, could not apply possibly to any statement that introduced information ****570** to the public for the first time. Gansler should have known that these statements, by themselves, would prejudice Cook in the public's eye.

Not only did Gansler announce the existence of Cook's confession, but he also furnished specific information of the surrounding circumstances, including that Cook provided "incredible details that only the murderer would have known." Gansler magnified the prejudicial effect of his statements by bolstering the believability of the confession. He stated that, ***694** before Cook traveled to the crime scene and "went over in detail by detail every step of" the murder, the police had provided him with a restful night's sleep. If we found no fault with such public disclosures, we would be allowing attorneys, in effect, to evade the operation of the exclusionary rule by taking advantage of the probative value of the confession without regard to its constitutionality or admissibility as evidence. That is, Gansler made Cook's confession public even though its contents might never reach the jury as a result of a constitutional challenge. His actions, in this regard, run afoul of our principles of criminal justice, as Chief Justice Rehnquist illustrated:

> The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

Gentile, 501 U.S. at 1070, 111 S.Ct. at 2742, 115 L.Ed.2d at 920. Accordingly, with respect to Gansler's remarks on the Cook confession, we sustain Bar Counsel's exception because Gansler knew or should have known that his announcement would have a substantial likelihood of causing material prejudice. [20]

20 We observe that, prior to Gansler's comments at the Cook press conference, a television reporter noted that Cook had confessed and Captain Bernie Forsythe mentioned in his comments to the press that investigators had obtained a confession from Cook. The reporter and Captain Forsythe limited their comments to the existence of the confession and offered no additional information about it. Gansler's statements, however, as we noted above, provided a great deal of specific information that had not been disclosed.

Gansler also committed a violation of MRPC 3.6MRPC 3.6, as Judge Stevenson concluded, by commenting extrajudicially on the matter of Perry's plea bargain. MRPC 3.6(b)(2)MRPC 3.6(b)(2) states that a statement is "ordinarily likely" to have a substantial likelihood of materially prejudicing an adjudicative proceeding ***695** if the statement relates to "the possibility of a plea of guilty to the offense." Gansler's reported statement in April of 2000 disclosed, for the first time, his decision "to offer [Perry] a plea bargain."

Gansler argues, though, that his comments to the *Gazette* about the plea offer should be covered by the "public record" safe harbor because the public already knew of his conversations with the victims' family members, in which they were consulted about whether to retry Perry or plea bargain. The public's general knowledge about plea bargains and how they normally play a part in every prosecution does not equate, however, to the public having actual knowledge that a plea bargain would be offered in this particular case. The decision to offer a plea bargain does not qualify as "information contained in a public record," even under the broadest meaning of that phrase.

****571** Besides announcing the plea offer, Gansler also discussed the impending deadline for Perry to accept that offer, all during a very public and controversial prosecution of a multiple murder suspect. Public comments such as these place greater pressure on the defendant to accept the plea offer. More importantly, the comments likely influenced potential jurors in Perry's case by communicating that the lead prosecutor believed the defendant was guilty. *See* JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 12.16 (2nd ed. 1996) ("Any ... statement [regarding the possibility of a plea of guilty] is, of course, a direct reference to an opinion of the speaker as to guilt of the accused or as to the belief of the accused as to his own guilt. It is tantamount to publication of an opinion as to guilt."). We, therefore, overrule Gansler's exception to Judge Stevenson's conclusion that the comments related to Perry's plea offer violated MRPC 3.6MRPC 3.6.

MRPC 3.6(b)(4)MRPC 3.6(b)(4) specifically addresses attorney comments discussing "any opinion as to the guilt or innocence of a defendant." Although several of Gansler's extrajudicial statements fall under this category of restricted speech and were ***696** not covered by any safe harbor, the hearing judge determined that the evidence did not show that any "material prejudicial effect" stemmed from them. Gansler's statements, indicating that "they" had apprehended the person who committed the crimes in the Cook and Lucas cases, came soon after the defendants had been arrested and well before the eve of trial. This, coupled with the fact that neither Lucas's nor Cook's attorneys claimed that Gansler's statements caused prejudice, persuaded the hearing judge to conclude that Bar Counsel had not shown a substantial likelihood of material prejudice.

We disagree with the hearing judge's conclusion that the evidence failed to show that Gansler knew or should have known that his statements of opinion would have a substantial likelihood of material prejudice. In considering the propriety of a statement under MRPC 3.6MRPC 3.6, we determine the likelihood that a particular statement will cause prejudice at the time the statement was made, not whether that statement, in hindsight, actually worked to the detriment of a defendant. Whether Cook or Lucas claimed at their trials to be prejudiced by Gansler's statements, therefore, does not weigh in our analysis. Rather, we concentrate on the point in time when Gansler offered his public comments to determine the probability of prejudice.

According to the hearing judge, the point in time when Gansler made the extrajudicial statements minimized whatever prejudicial effect flowed from his remarks. As support for this conclusion, the hearing judge cited Part II of Justice Kennedy's minority opinion in *Gentile.* Justice Kennedy suggested that statements made well before a defendant's trial have less prejudicial impact than statements made closer to the empaneling of a jury. *Gentile,* 501 U.S. at 1044, 111 S.Ct. at 2729, 115 L.Ed.2d at 904 (Kennedy, J., dissenting). Gentile had made his controversial statements six months prior to voir dire, enough time, according to Justice Kennedy, for the content of the message to fade from the public's memory. *Id.* The timing of Gentile's statement, however, was not the only factor that Justice Kennedy considered in determining that no ***697** prejudice

had occurred in that case. He also analyzed the contents of Gentile's message, which, Justice Kennedy stated, " lack any of the more obvious bases for a finding of prejudice." *Id.* at 1046, 111 S.Ct. at 2730, 115 L.Ed.2d at 905.

**572 We agree with Gansler's theory that the timing of an extrajudicial statement may affect its prejudicial effect, but we do not believe that the timing element in this case neutralizes the obvious prejudicial content of Gansler's statements of opinion. Like in *Gentile,* the timing of Gansler's statements came well before the beginnings of Cook's and Lucas's trials; however, Gansler's proclamation that "they" had apprehended the persons who committed the crimes in the Cook and Lucas cases directly contravened the provisions of MRPC 3.6(b)(4)MRPC 3.6(b)(4) (opinion on guilt of innocence). The comments blatantly expressed Gansler's opinion of the guilt of the defendants. In contrast to the lawyer in *Gentile,* who refused to comment on confessions and evidence from searches, *see* *Gentile,* 501 U.S. at 1046, 111 S.Ct. at 2730, 115 L.Ed.2d at 905 (Kennedy J., dissenting), Gansler supported his opinions of guilt by pointing to specific circumstances, such as confessions and physical evidence, to make his views more reliable.

Gentile differs from the case before us for yet another reason: Gansler is a prosecutor, not a defense lawyer. Prosecutors play a unique role in our system of criminal justice. We recognized this recently in *Walker v. State,* 373 Md. 360, 394–95, 818 A.2d 1078, 1098 (2003), where Judge Harrell for the Court stated:

> Prosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice. The special duty of the prosecutor to seek justice is said to exist because the State's Attorney has broad discretion in determining whether to initiate criminal proceedings. *Brack v. Wells,* 184 Md. 86, 90, 40 A.2d 319, 321 (1944). The office of prosecutor is therefore "not purely ministerial, but involves the exercise of learning and discretion," and he or she "must exercise a sound discretion to distinguish between the guilty and the *698 innocent." *Id.* The responsibilities of the prosecutor encompass more than advocacy. The prosecutor's duty is not merely to convict, but to seek justice. "His obligation is to protect not only the public interest but the innocent as well and to safeguard the rights guaranteed to all persons, including those who may be guilty." *Sinclair v. State,* 27 Md.App. 207, 222–23, 340 A.2d 359, 369 (1975).

In addition to their special role as ministers of justice, prosecutors have limitations not experienced by criminal defense attorneys in that defense attorneys have the benefit of their client's presumption of innocence. In other words, a criminal defense attorney may announce an opinion that his or her client is innocent with a lesser risk of causing prejudice because the law, itself, presumes the defendant's innocence.

On the other hand, a prosecutor's opinion of guilt is much more likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public's eye. *See* Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech,* 58 FORDHAM L.REV. 865, 886 (1990) ("When the prosecutor speaks publicly about a pending case, he cannot separate his representational role from his speech, and he thereby involves the state in the extrajudicial comment."). As lawyers, prosecutors are so distinct that some commentators have argued that the rules against extrajudicial statements should apply only to them. *See, e.g.,* Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys,* 29 STAN. L. REV. 607 (1977). Although we do not embrace this position, it nonetheless reinforces the notion that **573 prosecutors, in particular, should be even more cautious to avoid making potentially prejudicial extrajudicial statements. [21] Because we hold that *699 Gansler knew or should have known that his public opinions of Cook's and Lucas's guilt would have a substantial likelihood of material prejudice, we sustain Bar Counsel's exception with respect to those statements. [22]

21 We also observe that prosecutors, as public employees, may not speak publicly with the same broad freedom that ordinary citizens enjoy. *See* *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *DiGrazia v. County Exec. for Montgomery County,* 288 Md. 437, 418 A.2d 1191 (1980). This is so because, in the context of an employer and employee relationship, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering,* 391 U.S. at

568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817. Our cases have acknowledged that public employees may be subjected to greater speech limitations by the State as a result of the State's interests as an employer. *Hawkins v. Dep't. of Public Safety & Corr. Servs.,* 325 Md. 621, 602 A.2d 712 (1992); *O'Leary v. Shipley,* 313 Md. 189, 199, 545 A.2d 17, 22 (1988); *De Bleecker v. Montgomery County,* 292 Md. 498, 507, 438 A.2d 1348, 1353 (1982); *DiGrazia,* 288 Md. at 449, 418 A.2d at 1198.

22 The hearing judge did not address the application of MRPC 8.4(a)MRPC 8.4(a), which finds professional misconduct where a lawyer "violates or attempts to violate the Rules of Professional Conduct." We have held that a violations of a MRPC 1.15MRPC 1.15 and MRPC 1.4(a)MRPC 1.4(a) "necessarily" result in a violation of MRPC 8.4(a)MRPC 8.4(a) as well. *Attorney Grievance Comm'n v. Gallagher,* 371 Md. 673, 710–11, 810 A.2d 996, 1018 (2002). Likewise, we conclude in this case that Gansler's violation of MRPC 3.6MRPC 3.6 also constituted a violation of MRPC 8.4(a)MRPC 8.4(a).

B. MRPC 3.1MRPC 3.1, 3.8(a)3.8(a), and 8.4(d)8.4(d)

Bar Counsel excepted to the hearing judge's conclusion that Gansler did not violate MRPC 3.1MRPC 3.1, 3.83.8, and 8.4(d)8.4(d). The charges under these rules arose from two events: (1) Gansler's unsuccessful prosecution in District Court of two juveniles based on charges that they called bomb threats to a Montgomery County High School, and (2) Gansler's statements regarding his intention to prosecute "[j]uveniles who phone in bomb threats" even if "the case is not strong enough to warrant a conviction." Bar Counsel argues that by prosecuting the two juveniles with minimal evidence, Gansler brought a frivolous claim in violation of MRPC 3.1MRPC 3.1 and prosecuted a charge not supported by probable cause in violation of MRPC 3.8(a)MRPC 3.8(a). Furthermore, in Bar Counsel's view, Gansler's violated MRPC 8.4(d)MRPC 8.4(d) because the statements about future bomb-threat prosecutions communicated to the public that "someone acquitted of a crime was guilty nonetheless and warranted to be prosecuted...." Gansler responds that he ***700** prosecuted the juveniles because he believed that they had committed a crime beyond a reasonable doubt. He contends that the judge's decision to acquit the juveniles represented only that she disagreed with his evaluation of the evidence, not that the prosecution lacked probable cause.

MRPC 3.1MRPC 3.1 prohibits attorneys from bringing frivolous suits, and MRPC 3.8(a)MRPC 3.8(a) prohibits prosecutors from knowingly prosecuting a charge that is not supported by probable cause. Expressly addressing only the comments Gansler made, the hearing judge concluded that Bar Counsel had not presented clear and convincing evidence that Gansler "intended to prosecute in violation of [MRPC] 3.1MRPC] 3.1 and [MRPC] 3.8(a)MRPC] 3.8(a)." Although she did not specifically address the issue in her Report and Recommendations, the hearing judge, by finding no violation under MRPC 3.1MRPC 3.1 and MRPC 3.8(a)MRPC 3.8(a), determined implicitly that insufficient evidence supported Bar Counsel's charge concerning the actual ****574** prosecution of the juveniles. Likewise, the hearing judge also implicitly concluded that the evidence did not support a violation of MRPC 8.4(d)MRPC 8.4(d).

We agree with Judge Stevenson that, based on the evidence presented, Gansler did not commit a violation of MRPC 3.1MRPC 3.1, MRPC 3.8(a)MRPC 3.8(a), or MRPC 8.4(d)MRPC 8.4(d), when he commented on future prosecutions of juveniles who phone bomb threats. Gansler testified and responded to Request for Admissions that he never intended to prosecute any charges in bad faith. Rather, according to Gansler's testimony, by making the comments about prosecuting bomb threats, he intended to communicate that his office must try "hard cases." The hearing judge found this testimony credible, a determination that we readily accept.

Gansler's actual prosecution of the youths also did not amount to a violation of MRPC 3.1MRPC 3.1, as Bar Counsel contends. Evidence before the hearing judge related to this charge came solely from a newspaper article covering the juveniles' case. The article reported that the District Court judge acquitted the juveniles, stating, "I have no idea who did this" and "I have no evidence." As further reported by the article, the ***701** State's evidence of telephone calls could not link the juveniles to the bomb threat. Without more, the news article does not demonstrate by clear and convincing evidence that Gansler violated MRPC 3.1MRPC 3.1. Consequently, we overrule Bar Counsel's exceptions to Judge Stevenson's ruling that Gansler's prosecution of the juveniles as well as his reported comments about future prosecutions do not violate MRPC 3.1MRPC 3.1, MRPC 3.8MRPC 3.8, or MRPC 8.4(d)MRPC 8.4(d).

IV. Sanction

We must determine the appropriate sanction for Gansler's violations of MRPC 3.6MRPC 3.6 and MRPC 8.4(a)MRPC 8.4(a). This case marks the first time in Maryland that we have disciplined an attorney for a violation of MRPC 3.6MRPC 3.6. We remain guided, however, by the well established principles determining the sanction for an attorney who failed to meet our State's standards of professionalism. In sanctioning an attorney, we seek "to protect the public, to deter other lawyers from engaging in violations of the Maryland Rules of Professional Conduct, and to maintain the integrity of the legal profession." *Attorney Grievance Comm'n v. Awuah,* 374 Md. 505, 526, 823 A.2d 651, 663 (2003) (quoting *Attorney Grievance Comm'n v. Webster,* 348 Md. 662, 678, 705 A.2d 1135, 1143 (1998)). To protect the public adequately, we impose a sanction that is "commensurate with the nature and gravity of the violations and the intent with which they were committed." *Id.* (quoting *Attorney Grievance Comm'n v. Awuah,* 346 Md. 420, 435, 697 A.2d 446, 454 (1997)). Our sanction, therefore, "depends upon the facts and circumstances of each particular case, including consideration of any mitigating factors." *Id.* (citing *Attorney Grievance Comm'n v. Atkinson,* 357 Md. 646, 656, 745 A.2d 1086, 1092 (2000); *Attorney Grievance Comm'n v. Gavin,* 350 Md. 176, 197–98, 711 A.2d 193, 204 (1998)).

Bar Counsel recommends that we issue a reprimand. On numerous occasions, Gansler spoke outside of court about matters that had a substantial likelihood of depriving several criminal defendants of fair trials. Gansler presented no evidence of mitigating circumstances. The appropriate sanction ***702** in this case is one "which demonstrates to members of this legal profession the type of conduct that will not be tolerated" and which maintains the integrity of the Bar by preventing Gansler's transgressions "from bringing its image into disrepute." *Attorney Grievance* ****575** *Comm'n v. Culver,* 371 Md. 265, 277, 808 A.2d 1251, 1258 (2002) (quoting *Attorney Grievance Comm'n v. Garfield,* 369 Md. 85, 98, 797 A.2d 757, 764 (2002)). A reported reprimand satisfactorily communicates to Gansler and other members of the Bar that improper extrajudicial statements dangerously jeopardize the foundational principles of our system of criminal justice. Accordingly, Gansler is hereby reprimanded.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING THE COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE 16–715(C), FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST DOUGLAS F. GANSLER.

All Citations

377 Md. 656, 835 A.2d 548

COUNTIES

ATTORNEYS – EVIDENCE – PUBLIC INFORMATION ACT – "CLIENT" OF ST. MARY'S COUNTY ATTORNEY – APPLICATION OF ATTORNEY-CLIENT AND OTHER PRIVILEGES TO DOCUMENTS PREPARED BY COUNTY ATTORNEY

December 16, 1997

The Honorable Roy Dyson
Maryland Senate

You have requested our opinion concerning the assertion of the attorney-client privilege by the County Attorney for St. Mary's County. Specifically, you ask whether the clients of the county attorney are, as you put it, "the County Commissioners and not the citizens of St. Mary's County." You also ask whether written material prepared by the county attorney for a county agency may be withheld from public disclosure as privileged.

Our opinion is as follows:

1. The corporate entity that is St. Mary's County is the client of the St. Mary's County Attorney. The county commissioners are not individually the clients of the county attorney. However, to the extent that the commissioners and other elected and appointed officials and employees of the county are carrying out the functions of the corporate entity in accordance with law, they are the agents of the client and may be viewed by the county attorney as entitled to speak for the client. Although the county attorney should act with due regard for the public interest, an attorney-client relationship as such does not ordinarily exist between the county attorney and the citizens of the county.

2. A document is not confidential as a matter of law merely because it is prepared by the county attorney. Many documents prepared by the county attorney, however, are privileged because of

their content and therefore are not disclosable under the Maryland Public Information Act.[1]

I

Identity of the County Attorney's "Client"

Article 25, §1 of the Maryland Code begins as follows: "The county commissioners of each county in this State are declared to be a corporation ...." The corporate status of the county commissioners is confirmed by the case law. *See Neuenschwander v. Washington Suburban Sanitary Comm'n,* 187 Md. 67, 48 A.2d 593 (1946); *Jay v. County Commissioners,* 120 Md. 49, 87 A. 521 (1913).[2] Therefore, the attorney for a county represents the corporate entity.[3]

In the course of representing that corporate entity, a county attorney is subject to the Maryland Rules of Professional Conduct. One of these, Rule 1.13, addresses the responsibility of a lawyer to an organizational client. Under Rule 1.13(a), "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." As the comment to the rule points out, "an organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents." In this rule, the term "constituents" does not have the political meaning of those who elect the governing officials. Rather, the term "constituents" refers to those who, in the structure of the organization, are entitled to act for it. When the corporation is a county, these "constituents" include the county commissioners, appointed officials, and employees and agents of the county.

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[1] The status of documents and other records is determined under the Public Information Act, rather than the St. Mary's County Open Meetings Law, Article 24, Title 4, Subtitle 2.

[2] Likewise, counties that have adopted charter home rule are also corporations. *See* Article 25A, §1.

[3] In charter home rule counties, the charter may delineate a more specific role for the county attorney – that is, whether the county attorney represents both the executive and legislative branches of government or only the executive branch. *Compare, e.g.,* §213 of the Montgomery County Charter *with* §403(b) of the Harford County Charter.

The comment to the rule recognizes that "defining precisely the identity of the client and prescribing the resulting obligations of [government] lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the act or failure to act involves the head of a bureau, the department of which the bureau is a part or the government as a whole may be the client for the purposes of this rule." In other words, the county attorney must consider the extent to which, under applicable law, the official or employee is authorized to act on behalf of the county. Within the scope of lawful authority, the official or employee is an agent of the corporate entity and is entitled to speak on behalf of, and exercise the privileges of, the client.

Certainly, a county attorney, like other public lawyers, has a responsibility to consider the public interest. As the comment to the rule points out, for example, "when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that [a] wrongful official act is prevented or rectified, for public business is involved." Nevertheless, the county attorney generally does not have an attorney-client relationship with members of the public, for they are neither the corporate entity that is the client nor agents of the county authorized by law to act on its behalf.

II

Attorney-Client Privilege – Invocation

A governmental entity is no less entitled to the protection of the attorney-client privilege than any other client. This protection exists both under the common law and by statute.

The attorney-client privilege has ancient origins and was established as a matter of English common law long before the independence of the United States. *See Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981); *United States v. (Under Seal)*, 748 F.2d 871, 873 (4th Cir. 1984). As one court observed, "the privilege is intended to encourage the client in need of legal advice to tell the lawyer the truth. Unless the lawyer knows the truth, he or she cannot be of much assistance to the client." *Samaritan Foundation v. Goodfarb*, 862 P.2d 870, 874 (Ariz. 1993).

In Maryland, the attorney-client privilege has been described as "deeply rooted in the common law." *State v. Pratt*, 284 Md. 516, 519, 398 A.2d 421 (1979). Therefore, the privilege is preserved under Article 5 of the Declaration of Rights, which declares that "the Inhabitants of Maryland are entitled to the Common Law of England ... according to the course of that Law ...." The common law privilege is also given statutory recognition: "A person may not be compelled to testify in violation of the attorney-client privilege." §9-108 of the Courts and Judicial Proceedings Article.

The common law privilege has always been understood to be available to government agencies. *See, e.g., Hearn v. Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975) ("Federal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state."). As the D.C. Circuit recently observed, "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). *See also, e.g., In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997) (recognizing federal government's entitlement to claim attorney-client privilege while rejecting applicability of privilege to notes taken by in-house presidential counsel during meetings with First Lady and her private counsel).

The Maryland Public Information Act ("PIA") likewise recognizes the attorney-client privilege as a basis on which a government agency may withhold documents from public inspection. Under §10-615(1) of the State Government ("SG") Article, Maryland Code, "a custodian shall deny inspection of a public record or any part of a public record if ... by law, the public record is privileged or confidential." In addition, under SG §10-618(b), "a custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit." This somewhat awkward provision, adapted verbatim from the federal Freedom of Information Act, has long been held to incorporate the attorney-client privilege. *See generally* Annotation, *Freedom of Information Act Exemption (5 U.S.C.S. §552(b)(5)) for Inter-Agency and Intra-Agency Memorandums or Letters as Applicable to Communications to or from Attorneys for the Government*, 54 A.L.R. Fed. 280 (1981).

In sum, St. Mary's County, acting through its agents, is entitled to invoke the attorney-client privilege. Unless an official authorized to do so has waived the privilege, the county attorney has a duty to assert it on behalf of the client entity.

III

Attorney-Client Privilege – Scope

"The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services.... The privilege also protects communications from attorneys to their clients if the communications 'rest on confidential information obtained from the client.'" *Tax Analysts v. IRS*, 117 F.3d at 618 (quoting *In re Sealed Case*, 77 F.2d 94, 99 (D.C. Cir. 1984)). *See generally Harrison v. State*, 276 Md. 122, 135, 345 A.2d 830 (1975).[4] Because the client in this situation, the county, is an organization, "the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communications." *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 253 n. 24 (D.C. Cir. 1977). Thus, the attorney-client privilege may be invoked for communications between a county attorney and agents of the county in circumstances where there is "actual confidentiality, limited distribution safeguards, real expectations of confidential status, and the functioning of the attorney as counsel to the agency .... Confidentiality must have been both expected at the time and carefully maintained to avoid disclosure." 1 James T. O'Reilly, *Federal Information Disclosure* §15.14 (2d ed. 1996).[5]

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[4] Under what is called the "joint defense" or "common interest" rule, the privilege can be preserved for communications not only with clients but also among "persons who share a common interest in litigation" and their attorneys. *In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990).

[5] Prudence suggests that documents within the privilege be identified as such. The failure to do so, coupled with unnecessary distribution of the documents, may suggest that confidentiality was not intended. *See Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693,

(continued...)

The privilege, however, "is not absolute; it does not restrict disclosure of every aspect of what occurs between the attorney and the client." *In re Criminal Investigation No. 1/242Q*, 326 Md. 1, 11, 602 A.2d 1220 (1992). For example, facts that the attorney may develop independently from sources other than the client are not privileged, even if those facts are included in the lawyer's communication to the client. *See Allen v. West Point-Pepperell, Inc.*, 848 F. Supp. 423, 427-8 (S.D.N.Y. 1994); *Smith v. Conway Organization, Inc.*, 154 F.R.D. 73, 78 (S.D.N.Y. 1994); *Carte Blanche (Singapore) P.T.E., Ltd. v. Diners Club Int'l*, 130 F.R.D. 28, 33 (S.D.N.Y. 1990). Moreover, a document that is not itself privileged does not gain privileged status merely because it passes through the attorney's hands or is attached to an attorney's communication to the client. *See, e.g., Pacamor Bearings, Inc. v. Minebea Co. Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996).

At times, a government lawyer may be assigned the role of articulating an agency's view of the law. If, for example, an agency lawyer provides "neutral, objective analyses of agency regulations," these documents may fall outside the privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). When the attorney in effect becomes the decision maker for the agency, the documents embodying the decision are not privileged. *Schleffer v. United States*, 702 F.2d 233 (D.C. Cir. 1983).

IV

Other Privileges

The attorney-client privilege is not the only one that might be available to maintain the confidentiality of documents prepared by a county attorney. As a matter of both common law and the PIA, a county attorney may assert the work-product privilege to keep certain material confidential. In general, "documents ... prepared in anticipation of litigation or for trial" are the attorney's work product.

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[5] (...continued)
696 n.6 (E.D. Va. 1987); *Hardy v. New York News, Inc.*. 114 F.R.D. 633, 644 (S.D.N.Y. 1987).

Maryland Rule 2-402(c). This work product is ordinarily not discoverable in civil litigation: "We do not think that discovery in civil cases ... goes to that which is in essence the work product of the attorney accumulated in the preparation of the case." *Wagonheim v. Maryland State Board of Censors*, 255 Md. 297, 309, 258 A.2d 240 (1969), *aff'd*, 401 U.S. 480 (1971). The privilege is intended to keep confidential the "attorney's legal strategy, his intended lines of proof, his evaluation of strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses." *Sporck v. Peil,* 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985).

In addition, the PIA protects from disclosure client confidences covered by Rule 1.6 of the Maryland Rules of Professional Conduct. This rule prohibits a lawyer from revealing "information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation," and except as otherwise authorized in the rule or other law. If disclosure of information would place a county attorney in violation of Rule 1.6, then the information is "privileged and confidential" for purposes of a request under the PIA. *Harris v. Baltimore Sun Co.*, 330 Md. 595, 625 A.2d 941 (1993).

Finally, a writing from the county attorney might also be exempt from disclosure if it falls within the executive or governmental privilege aspect of SG §10-618(b). *See generally Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980); 66 *Opinions of the Attorney General* 98 (1981). This privilege protects materials that are deliberative in character and that were created during the process leading up to a decision. *See* Office of the Attorney General, *Public Information Act Manual* 24-26 (7th ed. 1997).

V

Conclusion

In summary, it is our opinion that St. Mary's County, as a corporate entity, is the client of the St. Mary's County Attorney, and the County Attorney may, under appropriate circumstances, invoke the attorney-client and other privileges to maintain the confidentiality of documents encompassed by those privileges.[6]

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

[6] Subsequent to your request for an opinion, your office provided material from a constituent that, in the constituent's view, evidenced too broad an assertion of privilege by St. Mary's County when certain documents were requested under the PIA. Because the Attorney General's Office has not been granted authority to adjudicate disagreements about the status of records under the PIA, we must limit ourselves to the guidance provided in this opinion and decline to consider whether the County responded correctly to particular requests for documents.

COUNTIES

ATTORNEYS – WHETHER LAWYERS IN COUNTY ATTORNEY'S OFFICE MAY ACT AS ADVISER TO ADMINISTRATIVE TRIBUNAL AND ADVOCATE BEFORE SAME TRIBUNAL

August 27, 2002

John B. Norris, III, Esquire
County Attorney for St. Mary's County

Your predecessor asked whether it would be a "conflict of interest" for one attorney from the Office of the County Attorney to represent a County official or agency in an administrative appeal before the County Board of Appeals while another attorney from that Office advises the Board of Appeals.

Issues of legal ethics, as well as due process concerns, may be raised when two attorneys from the same government office act, respectively, as adviser to an administrative tribunal and as advocate before that tribunal in the same matter. However, in our opinion, those concerns are resolved if the County Attorney's Office employs procedures designed to ensure the fairness of the administrative process.[1]

I

Background

A. Board of Zoning Appeals

The St. Mary's County Board of Appeals is established under the zoning enabling law set forth in the Annotated Code of

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[1] In connection with his request for this opinion, your predecessor also directed us to the St. Mary's County Code of Ethics, Chapter 158 of the St. Mary's County Code, and in particular to §158-6, captioned "Conflicts of Interest." While it does not appear that this section bears on the question considered in this opinion, interpretation of the County Ethics Code is appropriately vested in the St. Mary's County Ethics Commission, §158-4, rather than the Office of the Attorney General.

Maryland, Article 66B, §§4.07, 14.07(d) and the St. Mary's County Comprehensive Zoning Ordinance ("Zoning Ordinance"), §20.3.[2] The Board consists of five members, and one alternate, appointed by the Board of County Commissioners. Zoning Ordinance §20.3.

The jurisdiction of the Board of Appeals is limited to land use matters. It decides applications for special exceptions, conditional uses, and variances as a matter of first impression. *See* Article 66B, §4.07(d)(2), (3); Zoning Ordinance, Figure 20.1.[3] In other proceedings, the Board of Appeals acts as an appellate body, reviewing the administrative and enforcement decisions of County officials and agencies. *See* Article 66B, §4.07(d)(1); Zoning Ordinance, Figure 20.1; §§20.3(4), 23.1.

The Board of Appeals conducts quasi-judicial hearings that are open to the public and at which any person may testify. The Chairman of the Board is authorized to administer oaths and compel attendance of witnesses. Zoning Ordinance §20.3(5). We understand that a typical appeal is conducted as a *de novo* adversarial hearing. The Planning Director presents a planning staff report that outlines the basis for his or her decision. Testimony and other evidence is received from applicants and other interested parties. Witnesses are cross-examined. Closing statements are usually made. In addition, the floor is opened to general public comment.

Following the hearing, the Board of Appeals may affirm, reverse, or modify, in whole or in part, the order or decision under review.[4] In addition, the Board may issue its own order or decision as it has "all the powers of the administrative officer from whom the appeal is taken." Article 66B, §4.07(h); Zoning Ordinance §20.3(6). A decision of the Board is a final administrative decision that may

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[2] The Zoning Ordinance is available on the County's web site at: http://www.co.saint-marys.md.us/planzone/docs/5-8zoningordinance/index.htm.

[3] Certain administrative variances may be obtained directly from the Planning Director in lieu of applying to the Board of Appeals. *See* Zoning Ordinance §22.5. A person aggrieved by the decision of the Planning Director may appeal to the Board of Appeals. *Id.*, §22.5(7).

[4] The Board of Appeals is to render a final written decision within 60 days after the hearing. Zoning Ordinance §§20.3(7), 23.5.

be appealed to the circuit court. *See* Article 66B, §4.08; Zoning Ordinance §§20.3(7), 23.5.

In light of the complexity of land use decisions and the importance of ensuring proper administrative proceedings, the assistance of counsel is valuable and, in some cases, essential for both the County agencies that participate in the proceedings and the Board of Appeals itself.

B. Office of the County Attorney

The County Attorney's Office is small. In recent years it has consisted of two or three full-time attorneys. The Office represents the Board of County Commissioners, the County governing body, as well as the agencies, boards, and commissions that are part of the County government. Included among those entities are agencies involved in land use – the Board of Appeals, the County Planning Commission, and the Department of Planning and Zoning.

When a decision of a County agency such as the Planning Department is appealed to the Board of Appeals, both the agency and the Board generally require the assistance of counsel. We understand that, typically, the senior attorney in the County Attorney's Office advises the Board of Appeals and another attorney from the Office represents the County agency whose decision is the subject of the appeal. On occasion, however, when the budget permits, the Office of the County Attorney has engaged the services of a contract attorney to advise the Board of Appeals in place of a full-time attorney from the County Attorney's Office.

II

Analysis

We are not aware of any Maryland authority addressing the propriety of one member of a county attorney's office advising a county board of appeals while another attorney from the same office appears as an advocate before the board on behalf of a county agency. Potential conflicts involving attorneys are usually resolved by reference to the ethical rules governing attorneys. In addition, a possible conflict affecting an administrative decision-maker may call into question the fairness of the administrative process and raise due process concerns.

A. Rules of Professional Conduct

The ethical rules governing Maryland attorneys are set forth in the Maryland Rules of Professional Conduct, as adopted by the Court of Appeals. Maryland Rule 16-812, Appendix. There is no question that an attorney for a government entity, such as St. Mary's County, is subject to those rules.

1. Conflicts of Interest

Rule 1.7 sets forth the general rule on conflicts of interest:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.
>
> (c) The consultation required by paragraphs (a) and (b) shall include explanation of the implications of the common representation and any limitations resulting from the lawyer's responsibilities to another, or from the lawyer's own interests, as well as the advantages and risks involved.

In some circumstances, even the appearance of a conflict may result in a violation of Rule 1.7. *Attorney Grievance Comm'n v. Hines*, 366 Md. 277, 292, 783 A.2d 656 (2001).

Subject to limited exceptions, when a lawyer is disqualified under Rule 1.7 from representing a client, other lawyers in the same law firm are also disqualified. *See* Rule 1.10.[5] "Firm" or "law firm" is defined for purposes of the Rules as "a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation *or other organization* and lawyers employed in a legal services organization." Maryland Rules of Professional Conduct, *Preamble: Terminology*; Rule 1.10 *comment* (emphasis added). A county attorney's office appears to come within this definition. *See* Maryland State Bar Association, Committee on Ethics, Ethics Docket 89-3 (concluding that county attorney's office is a "firm" for purposes of Rule 1.10 in addressing conflict involving county attorney's part-time private practice).

2. Application of Conflicts Rules to Government Attorneys

The Maryland Rules of Professional Conduct, however, acknowledge that the conflicts rules may not apply to government lawyers in the same way they do to attorneys in private practice. The introductory section of the rules states that "lawyers under the supervision of [government legal officers] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These Rules do not

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[5] Rule 1.10 reads, in pertinent part:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 ...
>
> . . .
>
> (d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

Other portions of the rule concern the imputation of conflicts when an attorney leaves or joins a firm.

abrogate any such authority." Maryland Rules of Professional Conduct, *Preamble: Scope.* Disqualification by imputation is an area where government law offices have traditionally been afforded different treatment.[6] This is due, at least in part, to the nature of the government client.

3. Identifying the Government Attorney's Client

For a government attorney, the "client" may be viewed more broadly than the specific agency or official that the lawyer is representing or advising. Rule 1.13 of the Rules of Professional Conduct concerns organizational clients. It provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13(a). The rule further provides that a lawyer representing an organization may also represent its constituents, subject to the conflict rules in Rule 1.7. Rule 1.13(e). The commentary to Rule 1.13 states that, while the rule generally applies to government organizations, the "duties of lawyers employed by the government ... may be defined by statutes and regulation." Rule 1.13 *comment.* The commentary also acknowledges that "defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole." *Id. See also* 2 *Restatement (Third) of the Law Governing Lawyers* §97 *Comment c* (2000) ("client" of government attorney may vary, depending on circumstances such as terms of attorney's employment, scope and nature of services, particular regulatory arrangements relevant to attorney's work, and history and tradition of the office).

In a prior opinion, this Office discussed the "client" of the St. Mary's County Attorney. 82 *Opinions of the Attorney General* 15

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[6] Although Rule 1.10 does not explicitly except government attorneys, the official comment notes that "government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11." However, the latter rule only addresses successive government and private practice. (In contrast to the Maryland rule, the comment that follows Rule 1.10, as adopted by the District of Columbia Court of Appeals, explicitly states that the definition of "firm" does not extend to a government agency or other government entity.)

(1997). That opinion primarily concerned whether the County Attorney could appropriately invoke the attorney-client privilege to withhold information from public disclosure. Citing Rule 1.13, the opinion concluded that the corporate entity – that is, the County government as a whole – is the County Attorney's client, that various officials and employees of the County are agents of that entity when acting within the scope of their authority, and that, under appropriate circumstances, the County Attorney may be required to assert the attorney-client privilege or other privileges on behalf of the County. However, that opinion did not address whether the County Attorney might have a conflict in representing diverse units of County government, such as the Board of Appeals and a County department whose decision is at issue before the Board.

In general, a unit of county government, such as a planning department, is considered an agent of the county and not a distinct client for purposes of conflict of interest analysis. However, the courts have recognized an exception to this general rule "when the agency lawfully functions independently of the overall entity." *See Civil Service Comm'n of San Diego County v. Superior Court*, 163 Cal.App. 3d 70, 78, 209 Cal.Rptr. 159 (1984) (disqualifying county counsel from representing county in dispute with quasi-independent civil service commission that county counsel had also advised); *cf. Zoning Hearing Bd. of Uniontown v. City Council of Uniontown*, 720 A.2d 166, 168-79 (Pa. Cmwlth. 1998), *appeal dismissed*, 560 Pa. 556, 746 A.2d 1116 (2000) (municipal zoning board, rather than city council, entitled to select separate counsel because, under Pennsylvania law, zoning board is an adjudicatory tribunal independent of city council). *See also* Maryland State Bar Association, Committee on Ethics, Ethics Docket No. 88-35 (declining to decide whether there was conflict of interest in attorney's simultaneous representation of both local planning board and local board of zoning appeals, on ground that relationship between the two boards was a question of law beyond the purview of the committee).

While the St. Mary's County Board of Appeals is a County agency, it is not an agent of the County Commissioners in the same respect as the Planning Department. Although the members of the Board of Appeals are appointed by the County Commissioners, the Board is a quasi-judicial body that exercises independent decision-

making authority.[7] Only a court can reverse a decision of the Board of Appeals.

Thus, a reasonable argument can be made that the Board should be considered a separate client from the Planning Department. If the County Attorney's representation of the Board were "directly adverse to" or "materially limited by" the Office's representation of the Planning Department, there likely would be a conflict within the meaning of Rule 1.7. But that conclusion would not resolve the propriety of dual representation.

Even if two government entities are considered separate clients under the Rules of Professional Conduct, other law creating a government law office or describing its duties may authorize or require dual representation. Moreover, the "conflict" addressed by those rules concerns only the possibly divergent interests of the two government entities – a conflict that can be waived by the government entities themselves. The Rules of Professional Conduct do not address the separate issue of fairness to third parties who are involved in an administrative proceeding involving the two entities.

B. Fairness of Administrative Process

The propriety of the simultaneous representation by a government law office of several agencies does not depend entirely on whether possibly distinct agency clients might have divergent interests that the law recognizes. In particular, the propriety of one lawyer from a county attorney's office advising an administrative tribunal, while another lawyer acts as advocate before that tribunal, may depend on whether the dual representation undermines the integrity of the administrative process.

In a 1974 opinion, Attorney General Burch considered whether it was proper for one Assistant Attorney General to act as legal adviser to the State Board of Public Accountancy while another presented evidence before the Board during an administrative proceeding. After reviewing the constitutional role of the Attorney General and a statutory requirement that agencies obtain legal representation from the Attorney General's Office, he concluded that

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[7] A member of the Board of Appeals may be removed by the County Commissioners only for cause, following written charges and an opportunity for a public hearing. *See* Article 66B, §4.07(a)(5); *see also* Zoning Ordinance §20.3(3).

"[t]he roles of presenter of evidence and legal adviser ... are duties imposed by law and *without impropriety when there is no unfairness in fact.*" 59 *Opinions of the Attorney General* 10, 14 (1974) (emphasis added), *citing Reddick v. State Commissioner of Personnel*, 213 Md. 195, 200, 131 A.2d 464 (1957).[8]

The Court of Special Appeals reached a similar conclusion nine years later in *Comm'n on Medical Discipline v. McDonnell*, 56 Md. App. 391, 407, 467 A.2d 1072 (1983), *rev'd on other grounds*, 301 Md. 426, 483 A.2d 76 (1984). In that case, a physician had been sanctioned by the Commission on Medical Discipline following an administrative proceeding. He sought reversal of the sanction on the ground, among others, that the Attorney General's Office had acted as both administrative prosecutor and adviser to the Commission. The Court noted that the dual role of the Attorney General, as both adviser to the Commission and prosecutor of cases before that body, was mandated by the State Constitution and statutes. The Court also noted that the Attorney General had separated the two roles by assigning certain assistants to serve as advisers and other assistants to act as prosecutors in adjudicatory hearings, and by issuing guidelines to ensure that each group was independent of the other. Citing *Reddick*, the Court held that "[d]epending upon the nature of those guidelines and the extent to which they were followed ..., such separation of functions may have been sufficient to avoid unfairness." 56 Md. App. at 407. *See also Consumer Protection Div. v. Consumer Publishing Co.*, 304 Md. 731, 763, 501 A.2d 48 (1985) (combination of both investigative and adjudicatory functions within the Consumer Protection Division did not violate due process where individuals responsible for adjudicatory function did not participate in investigation stage of proceeding).

A similar conclusion was reached in a California decision, which held that an asserted conflict of interest within a government law office would be resolved if appropriate screening mechanisms were adopted. *Howitt v. Superior Court*, 3 Cal.App.4th 1575, 5 Cal.Rptr.2d 196 (1992). In that case, a deputy sheriff challenged his transfer and suspension before the county employment appeals board, a quasi-independent administrative tribunal charged with adjudicating disputes between the county and county employees. At

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[8] In *Reddick*, the Court of Appeals did not find it necessary to decide the dual representation issue, since the Deputy Attorney General involved was present at the hearing as a potential witness rather than as counsel. 213 Md. at 200.

the hearing, the sheriff's department was represented by the deputy county counsel, while the appeals board was advised by the county counsel. The deputy sheriff sought to have the county counsel disqualified from advising the board.

The California Court of Appeal held that the county counsel's office could represent a county agency in an adversarial hearing while, at the same time, serving as legal adviser for the decision-maker, provided that the representation followed certain guidelines. 3 Cal.App.4th at 1579. The court derived those guidelines, not from the state rules of professional conduct for lawyers, but from due process principles requiring an impartial decision-maker.[9] *Id.* at 1580. The court concluded that one attorney from the county counsel's office could advise the administrative decision-maker while another attorney from the same office acted as advocate before the tribunal, "only if there are assurances that the adviser for the decision-maker is screened from any inappropriate contact with the advocate.... [T]he burden of providing such assurances must rest on the law office performing the dual roles..." 3 Cal.App.4th at 1586-87. The court added that the county need not create "functionally separate offices to advocate and advise. It should be sufficient if the lawyer advising the Board has no potential involvement in or responsibility for the preparation or presentation of the case." 3 Cal.App.4th at 1587 n.4.

C. Summary

In our view, the Rules of Professional Conduct do not preclude one attorney in the County Attorney's Office from representing the County Planning Director or the Planning Department before the Board of Appeals while another attorney from that Office serves as counsel to the Board. Although the County Attorney is not a constitutionally created office, the County Attorney's function within the County government is analogous to the role of the Attorney General in State government. In our view, that function justifies a county law office's dual roles in administrative

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[9] The court reasoned that the ethical rule addressing conflicts of interest was not designed to address the conflict in question. The court noted that a conflict generally may be waived by the informed consent of the parties, but that a waiver by the two agencies involved "does precious little for the remaining party who must face an adversary with unequal access to the tribunal." 3 Cal. App. 4th at 1580.

proceedings at the county level, provided there are procedures to ensure the fairness of the administrative process.

To avoid the appearance of a conflict or actual unfairness, the County Attorney's Office could adopt and follow certain protocols when one attorney in the Office acts as adviser to the Board while another represents a county agency in an appeal before the Board. For example, such protocols could proscribe *ex parte* communications between the two attorneys regarding issues of the law or facts related to a particular matter before the Board, provide for each attorney to maintain separate files on Board matters that would not be accessible to the other attorney, and ensure that support staff protect confidentiality. The protocols should be designed to separate the roles of agency advocate and Board adviser and to preserve the integrity of the administrative process.

III

Conclusion

In our view, an attorney in the County Attorney's Office may represent a County official or agency before the Board of Appeals while another attorney in the same Office serves as counsel to the Board. However, procedures should be employed to separate the two roles and to ensure the fairness of proceedings before the Board.

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