

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA**

Friday, April 29, 2022 – 1:00 p.m. (via zoom)

**If you are not a member of the Board and wish to attend the virtual meeting, please email
Board Chair, Jeanette Boerner, jeanette.boerner@hennepin.us**

1. Approval of Minutes of January 28, 2022, Lawyers Board Meeting (Attachment 1)
2. Introduction of New Board Members- Jordan Hart and Clifford Greene
3. LPRB Reports
 - a. Committees
 - i) Diversity and Inclusion-Michael Friedman
 - ii) Rules and Opinions-Dan Cragg
 - iii) Training, Education and Outreach-Landon Ascheman
 - b. Chair
 - i) Updated Panel and Committee Assignments (Attachment 2)
 - ii) Complainant Appeals -stats for 2022
 - iii) Panel Hearings- scheduling orders
4. New Business
 - a. ABA update- Justice Hudson, Supreme Court Liaison
 - b. OLPR report (Attachment 3)- board member questions
 - c. Covid Court operations update (Attachment 4)
-format and schedule of future meetings-discussion
5. Open discussion

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**MINUTES OF THE 197th MEETING OF THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

January 28, 2022

The 197th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, January 28, 2022, electronically via Zoom. Present were: Board Chair Jeanette Boerner and Board Members Landon J. Ascheman, Benjamin J. Butler, Daniel J. Cragg, Michael Friedman, Virginia Klevorn, Tommy A. Krause, Mark Lanterman, Paul J. Lehman, Kristi J. Paulson, William Z. Pentelovitch, Andrew N. Rhoades, Susan C. Rhode, Geri C. Sjoquist, Mary L. Waldkirch Tilley, Antoinette M. Watkins, Bruce R. Williams, Allan Witz, and Julian C. Zebot; Board members Peter Ivy and Katherine Brown Holmen joined later. Present from the Director's Office were: Director Susan M. Humiston, Managing Attorney Binh T. Tuong, Senior Assistant Directors Krista D. Barrie, Karin K. Ciano, and Deanna N. Natoli, and Assistant Director Joseph A. Ambroson. Also present were Minnesota Supreme Court Justice Natalie Hudson, Jeff Meitrodt, Nicholas Ryan, and Kevin Slator.

**1. APPROVAL OF MINUTES OF OCTOBER 29, 2021, LAWYERS BOARD
MEETING (ATTACHMENT 1).**

A motion was made by Bruce Williams and seconded by Allan Witz to approve the minutes of the October 29, 2021, Board meeting. The motion was unanimously approved.

2. BOARD MEMBER UPDATES.

a. Resignation of Susan T. Stahl Slieter.

Jeanette Boerner noted that Ms. Stahl Slieter resigned shortly before the end of her term due to other commitments. Ms. Boerner thanked Ms. Stahl Slieter for her service and being a voice of reason on the Board, and the Board wished her well.

b. Reappointment of Returning Board Members (Attachment 2).

Ms. Boerner congratulated the Board members who were up for reappointment and had been reappointed for another term. Those members were: Landon Ascheman, Katherine Brown Holmen, Tommy Krause, Kristi Paulson, Bill Pentelovitch, and Bruce Williams. Ms. Boerner thanked them for their continued service.

Ms. Boerner also noted that the Minnesota Supreme Court notified her that she will be continuing as Chair of the Board. Ms. Boerner said she is thankful and honored to serve, and that her term as Chair will end when her regular term would have ended in January 2023.

c. Board Vacancies (One Public Member and One Lawyer Member).

Ms. Boerner stated that there is one public vacancy (Ms. Stahl Slieter) and one attorney vacancy (her regular position now that she is Chair) and the posting closes today (January 28, 2022). Ms. Boerner noted that interviews will be done to make sure everyone has a fair chance to serve.

d. Updated Panel and Committee Assignments.

Ms. Boerner stated that there will be no changes to the Panels until the open Board positions are filled, but she welcomes feedback from Board members regarding Panel assignments.

3. COVID-19 UPDATE.

Susan Humiston provided an update on the Office and COVID: Ms. Humiston stated that most people in the Office are now working remotely if they are able to do consistent with the requirements of their position and with the guidance of the Judicial Branch. As previously discussed, the Office had fully moved into a hybrid work environment, but with the increase in the community spread of COVID, it is safer for everyone to try to limit the number of people in the Office. Members of the public continue to visit the Office, and the Office has ordered higher quality masks (*e.g.*, N95 and KN95 masks) for people who may need them. The Office continues to hold hearings and meetings remotely to the extent possible and consistent with Judicial Branch guidance. The increase in community transmission rates of COVID did impact Office staffing in January 2022. Even with these difficulties, however, the Office has been able to stay open and accessible to the public.

Antoinette Watkins asked about the number of visitors who come to the Office and Ms. Humiston estimated that at least one person comes to the Office each day and that the amount of foot traffic has been consistent with pandemic numbers, but is less than pre-pandemic numbers.

Ms. Klevorn inquired as to how many staff are in the Office at any one time and Ms. Humiston estimated that there at least 5 people (out of 32) who are regularly in the Office each day and that the number of people varies every day.

Mr. Rhoades asked if the Office has enough technology and equipment to handle the increased level of remote work. Ms. Humiston explained that this had been an issue at the beginning of the pandemic, but now everyone has a laptop from the Judicial Branch. In addition, staff members can take the printer from their workspace home for use during remote work, however, the Office does not have any extra printers for that purpose. Ms. Humiston noted that the Office has made great strides in technology and equipment since the start of the pandemic and that people have been able to successfully work remotely to the extent that it is consistent with their job requirements.

Andrew Rhoades asked if staff are as productive working remotely as they are working in the Office. Ms. Humiston stated that Office staff have been very productive while working remotely and that the Office had been studying this issue from September to December 2021 when the Office had been fully hybrid. The hybrid model presented some issues, such as needing to take materials back and forth, but the hybrid schedule went well and allows for the maximization of the benefits of both in-office and remote work. Ms. Humiston noted that the Office can link everyone through Skype, which has proven to be an easy collaboration tool during remote work and this has allowed for the flexibility to return to remote work for the safety of everyone and to minimize the risk to staff whose positions require that their work be performed in the Office. Ms. Humiston believes that a hybrid work schedule will be the future and will be the option that maximizes job satisfaction as well.

4. COMMITTEE UPDATES.

Ms. Boerner stated that Peter Ivy would be joining the meeting later and asked to present the Committee Updates out-of-order until Mr. Ivy was present.

- a. Training, Education, and Outreach Committee—Mr. Ascheman.
 - (i) Panel Manual and Board Training Manual Updates—The Committee has been working on the training manual and the manual should be out soon.
 - (ii) DEC Chairs Symposium—This is a half-day event and is scheduled for May 13, 2022. Mr. Ascheman stated that Ms. Paulson have been

working very hard on this event and a lot of good topics have been planned.

- (iii) Annual Seminar—This is a full day event scheduled for September 16, 2022. Mr. Ascheman asked the Board for their suggestions regarding areas that should be covered during the seminar.
- (iv) Collaboration with other Committees—Mr. Ascheman stated that the Committee has been working with the Equity, Equality, and Inclusion Committee to improve diversity of perspectives in training. Mr. Ascheman stated that it is important to keep attention on the goal of growing diverse perspectives on the Board. The Committee is also working on reaching out to the DECs to discuss recruiting new DEC members and developing training on how the DECs can grow rather than have people move from the DECs to the Board.

b. Equity, Equality, and Inclusion Committee – Mr. Friedman.

Mr. Friedman stated that the Committee has met twice since the last Board meeting; the Committee has created short-term work on each of its projects and has assigned a Committee member to take the lead on this short-term work.

- (i) Data Collection
 - (1) Value Statement—The Committee realized that a predicate for the data collection project is to create a core value statement that would explain what data the Committee has chosen to collect and how the data will be used.
 - (2) Complainant Data—The Judicial Branch currently collects complainant data, however, this data seems to be more focused on racial bias and the Board may want to expand this to other areas of potential bias. Upon review, it was found that no other state currently tracks complainant data to analyze for potential bias so there would be questions of how to do this. The OLPR is creating a committee that would be parallel to this Committee and there will likely be an OLPR liaison for this Committee.

- (3) Respondent Data—Respondent data presents the issue of how and when to ask for it. The Committee would like to be proactive on this issue, but there are challenges in requesting this data especially in cases with summary dismissals because there is no real interaction with respondents in these cases. California recently paid for a study on respondents' data to study whether there is any bias in the ethics system related to respondents. California's study was a multi-year study led by law professors, however, so there would most likely need to be outside resources to do a study of that scope here.
 - (4) Website/Publication of Data—Mr. Friedman discussed a possible Judicial Branch website to publish this data. However, there would be consistent work involved in such a website—for example, work to maintain the site and make sure the information remains current. This means this would ultimately need to be an OLPR staff project and would be a long-term commitment.
- (ii) Ethics Rules Review—The Committee would like to review all the rules related to the disciplinary process for possible bias. This is a long-term project and two OLPR attorneys will be helping with this. Although this project could be something done solely by OLPR attorneys, Mr. Friedman stated that he is very interested in this project because he has worked as a volunteer for Legal Aid and wants to take this work on and be involved in the process.
 - (iii) Recruitment—Mr. Friedman noted that the deadline for applications for the open Board positions is today and the Committee had been working on creating a list of people to notify when there are Board openings. The Committee had received a list of people from current Board members before the deadline for applications and all the people who had been recommended were contacted before the application deadline if the Committee had been able to find contact information for them. The letters were sent by him and Ms. Boerner and, from these notifications, at least two people showed interest in the open Board positions and expressed that they had not been aware of the openings until

receiving the letter. The letters appear to have been received well and several people have indicated that they have applied. The letters emphasized that the Minnesota Supreme Court makes the ultimate decision, but the letters appear to have accomplished the goal of increasing applications from people who may not have otherwise applied. Mr. Friedman also thinks that another consequence of the letters is that people who are not ultimately selected for Board positions could be encouraged to volunteer at the DECs and that the Committee could work with the Training, Education, and Outreach Committee on that potential benefit.

Ms. Boerner stated that she is very appreciate of Mr. Friedman's work and the work of this Committee. Ms. Boerner expressed that she is especially impressed with the work that has been done regarding recruitment and recognizes that the Committee did a large amount of work in very little time. Ms. Boerner thanked Mr. Friedman and all the members of this Committee for all their work.

Benjamin Butler joined in Ms. Boerner's thanks and reiterated that the Board is very appreciative of this work, especially regarding recruitment. The efforts of this Committee has made him think of the Board in a new way and as more proactive. Mr. Butler stated that he thinks the Board should do more in this area going forward, and gave kudos to everyone on the Committee for this important work.

Ms. Paulson also thanked the Committee and stated that someone had reached out to her to talk about the Board, and had mentioned the Committee's letter specifically. Ms. Paulson and this individual spoke for an hour and the letters have encouraged people to apply.

c. Rules and Opinions Committee—Mr. Ivy.

- (i) Comments Received and Public Hearing on Petitions to Amend Rules 7, MRPC, and Rule 20, RLPR—January 26, 2022
(Attachment 3).

The petitions to amend Rule 7 and Rule 20 were filed with the Court on June 17, 2021. A hearing was held January 26, 2022. Daniel Cragg appeared in support of the Rule 7 petition and Ms. Humiston appeared in support of the Rule 20 petition. Mr. Ivy

stated that the hearing went very well and asked Mr. Cragg and Ms. Humiston to speak further about the hearing.

Mr. Cragg added: In opposition to the petition's proposed changes to the certification of specialists, a significant First Amendment issue for commercial speech was raised. The Court will apply more than rational basis but less than intermediate scrutiny in deciding this issue and there is good case law for our position. For example, the case law requires a record that the speech is misleading and the only record of this is an old survey from 2006 that the bar association paid for, and the survey questions were not vetted and were not good survey questions; rather, the questions simply primed the pump for responses that stated that certification is important when evaluating specialists and did not actually get to the fundamental point of whether the consumer is misled by the use of the word "specialist." The analogy is often made to doctors and doctors are allowed to call themselves specialists before they are board certified. Mr. Cragg is happy with how the argument went and he thinks the Court is with us.

Ms. Humiston added: Ms. Humiston began with extending kudos to Mr. Cragg for his argument at the hearing and stated that the Office is thankful for all his work on this project. Ms. Humiston noted that the petition's proposed changes to Rule 20 should be evaluated in the context of access to records and the Minnesota Supreme Court's perspective includes this context. Ms. Humiston noted additionally that, even with these proposed changes that would narrow public documents to be consistent with the Data Practices Act, Minnesota would still be one of the most open states on this issue. In addition, it would still be more open than the Attorney General's Office and many county attorney's offices. The proposed changes would protect people who get caught up in our matters and would also reconcile case records and public access rules.

- (ii) MSBA Parental Leave Resolution—At the last meeting, the Board voted to oppose the proposal as drafted. After the last Board meeting, the Committee met with the state bar association to have a more robust discussion on the proposal. The bar association will

soon be submitting a petition based on the proposal. The Committee has concluded that this proposal will be sweeping and would require amending almost all the current rules of procedure. The Committee learned from the bar association that other states such as Florida, Texas, and North Carolina have policies similar to this proposal, that these measures have a lot of support, and that such policies discourage the stigma surrounding leave. Under the proposal, the requirements to qualify for the leave are: a qualifying event; a good faith declaration about the event and that the leave is not being requested for the purposes of delay; that the requesting attorney has had substantial involvement in the case; and that the client has given informed consent to the leave. Once a request for leave has been made, the proposal provides 14 days for an objection. The proposal would apply to all motions and trials, and no further record of the qualifying event would be required from the requesting attorney.

Following the meeting with the bar association, the Committee remained unconvinced and maintains its objection to the proposal as drafted. There are many reasons for this objection, such as: the informed client consent is not real consent given the relationship between attorney and client; the Committee believes that the courts will be reluctant about the proposal especially in light of the backlog in cases caused by the COVID pandemic; and the proposal appears to put lawyers' interests and well-being above that of clients. The Committee does not believe that this is a good proposal and will be prepared when the time comes to submit public comments if the Board decides to do so.

Ms. Boerner confirmed that the full Board had voted at the last meeting to not support the proposal so there was no need for another vote. Ms. Boerner also added her thanks and compliments to Mr. Cragg regarding his work on the Rule 7 petition.

- (iii) Model Rules 3.8(g) & Rule 3.8(h)—The Committee had a discussion with a law professor affiliated with the innocence project regarding an amendment to this rule to make it consistent with the ABA model rules. The model rule applies to criminal prosecutors who receive information or evidence that someone convicted of a crime did not actually commit the crime and uses “knows” as the *mens rea*

requirement. This debate and amendment is going on in New York and 27 other states in some form or another and it is unclear why the previous movement to amend the rule in Minnesota did not go anywhere. The professor said that no complaints have been made where this rule has been enacted and a comment to the rule states that if a prosecutor exercises his or her professional judgment that the new evidence is not clear and convincing of innocence, and that later turns out to be wrong, that judgment is not a violation of the rule.

- (iv) Amendment to Rule 9—This amendment was addressed and had been approved by the Board at the last meeting.

5. BAR EXAM WORK GROUP—MR. ZEBOT.

Julian Zebot stated that the working group was just beginning its work and that Mr. Williams may be joining the group as well. The group has learned that New Hampshire has a unique program—in New Hampshire, there is no bar exam because the law school certifies its students instead. The group also learned from Mr. Pentelovitch that Wisconsin may have a similar program.

Ms. Humiston noted that the OLPR had designated attorney Jennifer Peterson for this group and that Ms. Peterson will bring a client-centered approach concerned with quality representation from her 20 years of experience as a public defender to this issue. The Minnesota Supreme Court denied the bar association's petition to form its own task force on this issue because the bar association had identified the same stakeholders as the current working group, and it is incumbent on the group to get input from all of the stakeholders. Oregon has been working on this issue and their Supreme Court has embraced different tracks to attorney licensure including an internship type system.

Mr. Williams added that he did receive notification and will be joining the group; he will be in the working group in another one of his capacities, and will not be representing the Board.

Mr. Ascheman noted that he is also on the work group in his capacity as a bar admission advisory, and not representing the Board. He asked if there is an articulation of what the issue is that the working group is meant to fix or address. He stated that the working group is well-intentioned, but he is concerned that you cannot find a solution if you do not know what the problem is.

6. **DIRECTOR'S REPORT (ATTACHMENT 8).**

a. **New OLPR Introductions.**

New OLPR staff were present and introduced themselves as follows.

Deanna Natoli, Senior Assistant Director: Ms. Natoli explained that she started at the OLPR about two months ago and was a criminal prosecutor for over 11 years. Ms. Natoli stated that she was in Dakota County for the last five years and was also a prosecutor in Michigan. She said she is excited to be working to keep the legal profession a great profession.

Joseph Ambroson, Assistant Director: Mr. Ambroson stated that he has been at the OLPR for two months and was at SMRLS in St Paul before that. He said that he has been learning about the Office and wanted to continue to work to uphold the profession. He stated that he appreciates the high level of work that is done at the OLPR and is happy to be part of ensuring the tradition of quality legal work in Minnesota.

Ms. Humiston added that Mr. Ambroson and Mr. Zebot are in-laws—Mr. Zebot's sister is married to Mr. Ambroson. Ms. Humiston explained that the Office has instituted a process to keep any matters involving Mr. Ambroson and Mr. Zebot separate so that there will be no conflicts. Ms. Humiston stated that the new attorneys have hit the ground running and she has enjoyed working with them.

b. **Statistics.**

Ms. Humiston discussed the year-over-year numbers and noted that there were five Panel hearings for contested matters, nine referee trials, five oral arguments at the Minnesota Supreme Court, and one non-oral argument to the Minnesota Supreme Court. Ms. Humiston stated that the Office has been very busy and a lot of great work has been done, notwithstanding the turnover in 2021, especially towards the end of the year. Ms. Humiston noted that the Office is in a terrific spot.

Ms. Humiston stated that she has been working on the article detailing the public discipline cases from 2021 and a lot of work was done to close these cases. Ms. Humiston noted that it is difficult to assess and compare the amount of work that goes into different cases because cases are not apples-to-apples. Ms. Humiston said she is very pleased with the work that was accomplished by the

Office in 2021, and noted that the year-over-year numbers were positive especially as to older cases. Ms. Humiston advised that the Office moved a lot of cases in December to under advisement at the Minnesota Supreme Court; this means that a referee trial and oral argument were completed, or there was a stipulation. The Office moved from 14 to 21 matters in just that one month that were ready to be decided by the Minnesota Supreme Court. Ms. Humiston said that she is proud of all the work that was happening, especially at the end of the year.

Ms. Humiston explained that 2021 was an average year regarding public discipline and that these numbers were as expected. In addition, Ms. Humiston stated that the Office is now seeing a more normal amount of DEC activity—for most of the year, the DEC activity had been lower, but now it appears to be back up to normal numbers. Ms. Humiston noted that more cases have come in on a monthly basis, and she and the Office are very appreciative to the DECs for all of their work. Ms. Humiston stated that she expects that the case numbers will keep going up this coming year, although cases coming in during December were a little lower. Ms. Humiston stated that a lot of great work is being done by the Office.

c. Office Updates.

Ms. Humiston provided a case update on a federal lawsuit in which the Office and Board (collectively and some individual members) are defendants; the case was brought by a respondent currently involved in a discipline case. Ms. Humiston stated that the federal case has been dismissed and the federal court awarded \$50,000 in sanctions against respondent and to the co-defendants. Ms. Humiston explained that sanctions were not requested on behalf of the Office or the Board because the Attorney General's Office (which was handling representation of the Office and the Board in the lawsuit) has a policy of not seeking sanctions. Ms. Humiston stated that respondent has appealed the dismissal and, in respondent's disciplinary matter, the referee trial was just completed and spanned over eight days of trial testimony. Ms. Humiston noted that this was likely the longest trial the Office has done because, since our matters are not jury trials, they are usually tried more quickly.

Ms. Humiston also provided an update on the addition of referees for our matters and Justice Hudson's work on this issue. Ms. Humiston explained that referees are senior district court judges and we currently have a roster of thirteen referees. The Minnesota Supreme Court makes these appointments, and there

were some scheduling challenges in 2021 when referees were requested, but none were available. Recently, two new referees have joined the roster, and it is hoped to add four more referees soon. There is also a referee who is retiring. Ms. Humiston extended her thanks and compliments to the referees for all of their work.

Ms. Humiston also discussed the upcoming transitions in the DECs—there are four DEC Chairs (out of 21) that will be ending their terms this June. Ms. Humiston stated that the DECs have been doing excellent jobs with their succession plans and are working on identifying and training the new Chairs. Ms. Humiston thanked all the DEC Chairs and members for their service and their work in transitioning to these new Chairs.

Ms. Humiston noted that there is a posting for an open attorney position in the Office and the posting is in SharePoint. Ms. Humiston encouraged the Board to share the posting with anyone they know who might be interested. Ms. Humiston stated that it is a gem of a job. Ms. Humiston also noted that the Office is working on filling the Managing Attorney position as well and is very close to finalizing this position.

Ms. Klevorn asked about the Office's process of observing oral arguments and mooting oral arguments, how this is used for training, and how much of a time commitment this is. As an example of this process, Ms. Humiston discussed Binh Tuong's recent oral argument. Ms. Humiston explained that when an attorney is preparing for an oral argument before the Minnesota Supreme Court, we will prepare a mock-up of an active panel and allow the attorney to give their argument with simulated panel questions. Ms. Humiston explained that if you are part of this process, you read the case materials, prepare questions, and help refine the arguments. Ms. Humiston explained that this process helps the attorney to prepare for their argument and also aids in training because it allows other people to see cases, learn about issues and possible questions, and helps them be more prepared to handle their own cases because the more we see, the better we do. Ms. Humiston also explained that all Court oral arguments are live streamed and archived so they can be watched at any time. Ms. Humiston stated that this mock-up process helps the attorneys get to know the questions the Court may ask during oral argument, what questions respondents may ask, how we can respond to these questions, and what will be persuasive to the Court. Ms. Humiston explained that, since the Office does not specialize, attorneys follow their cases so someone will not know if they will get an oral argument so this process helps provide some of that experience. Ms. Humiston noted that

there are attorneys in the Office with much experience in this area, for example, Tim Burke has done over 40 oral arguments before the Supreme Court.

Mr. Friedman asked about the old case statistics and noted that while there may be pressure regarding time and efficiency, the Board feels that it cannot look at efficiency alone and also needs to consider due process and quality of work. Mr. Friedman stated that it is very important to keep all of those components in mind, and not just time. Mr. Friedman asked about the OLPR category on the graph; this category seems to cover lots of different steps and he wondered how we monitor what step a case is in to know why certain things take longer (since we cannot do a bar code system). Ms. Humiston explained that the Office does have access to that information and can look at a case and know what step it is in—for example, if we are waiting on a response from a respondent—but there is currently no smaller phase within the OLPR investigation designation. Ms. Humiston explained that the Office and the management team work on the alignment of all these factors and the managing attorneys have monthly case meetings to further this alignment. Ms. Humiston stated that the management team knows the caseloads of each person in the Office and works to make sure that movement is happening in all cases. Ms. Humiston explained that we also have target deadlines and are working on ways the data may be reported better. Ms. Humiston stated that the management team works to ensure that we have a good handle on all cases and we use peer-to-peer review to reinforce this alignment. Ms. Humiston explained that she also meets quarterly with everyone, in addition to the monthly meetings between staff and their respective managing attorney. Ms. Humiston noted that she always welcomes suggestions regarding how to improve this process. Ms. Humiston noted that cases are moving and targets are moving, and some factors impacting the process are in our control and some things are not. Ms. Humiston stated that the Office works on helping people improve prioritizing their cases and tasks and the management team is looking ahead to the factors we can control. For example, if we see that someone is getting bogged down, we can add additional people or hold back from giving them new cases. Ms. Humiston stated that the management team spends a considerable amount of time on this issue and the LDMS, which launched in February 2020, has been a very helpful tool to be able to do this in a more collaborative way. Ms. Humiston explained that, with LDMS, everyone in the Office has access to every file and to any tasks associated with it; this means that anyone in the Office can help review drafts, for example. Ms. Humiston explained that having the perspective of the entire file has been a great improvement in balancing timeliness with thoroughness and quality. Ms. Humiston noted that part of this balancing is also

to think about how much effort and time to put into certain types of cases such as dismissals. Ms. Humiston explained that it is important that complainants know that the Office has heard them, that their issue was understood, and that their complaints were addressed even though discipline is not ultimately warranted; this is a reflective process and is also balanced with letting people know the result in a timely manner. Ms. Humiston stated that she often thinks of Judge Doty's rule in balancing these factors, and quality remains a constant priority because what you said is important, and so is how you said it. Ms. Humiston noted that the Board also needs well-written and well-researched dispositions when they review matters.

Mr. Williams asked about the Office law clerks for the fiscal year, and noted that no one is applying for law clerk positions in the Iron Range and they are having issues filling these spots. Mr. Williams asked if the Office has been able to fill its law clerk positions. Ms. Humiston stated that the Office has two law clerk positions and both are filled, although one of the law clerks is currently on leave to prepare for the bar exam. Ms. Humiston stated that she has been pleased with the law clerks and they have been a tremendous help to the Office.

Mr. Rhoades asked about case load, how the Office matches team members to cases, and if there was a way to match talent with specific cases to make sure that we are applying the right and best people to the cases to be the most efficient. Ms. Humiston stated that part of her job is to look at each case individually and balance the workload in the Office, and that getting cases to the right people based on what a case will need is part of this. For example, Ms. Humiston explained that different people in the Office have different experience that may be helpful in particular cases and she tries to match experience and background to cases, and more senior people will also get more public cases.

Mr. Rhoades asked if there has been any analysis of what happens if someone has more than their share of cases that are more than one year old and what to do to balance that workload. Ms. Humiston explained that the Office has weekly meetings to address that, and people step in when needed on matters as well. Ms. Humiston stated that there is an emphasis on notes that are maintained in LDMS so that people can seamlessly step into cases efficiently if needed. For example, we do not miss a beat when an attorney leaves, although it can still be a challenge. Ms. Humiston noted that one of the primary goals of the weekly management meeting is to go through the cases and keep cases moving.

7. **NEW BUSINESS.**

a. **New Referees.**

Justice Hudson updated the Board on adding more referees for our matters and noted that there had been some scheduling issues especially now that Judge Irvine has retired and is no longer available as a referee. Justice Hudson noted that the Court tries to have referees from all the districts and she is confident that the additional referees will be added and available soon.

b. **ABA Consultation.**

Justice Hudson stated that the ABA consultation will be April 18–22, 2022, and the first days will be spent in interviews of the stakeholders such as Director Humiston, all OLPR staff, and Chair Boerner. Justice Hudson explained that the ABA will likely want to talk to other members of the Board, and the members should work with Ms. Humiston to decide who speaks to the ABA team and to set up those interviews. Justice Hudson stated that the ABA team will report back to the Court orally on the last day of the consultation and that the team will have reviewed a ton of documents including the rules, case statistics, and similar materials before arriving. Justice Hudson explained that this consultation is about the process and the system as a whole, and not about individuals; the ABA team will be looking at the process, how this system works, how cases move through the system, where the delays are, what is causing delays, and how the delays could be addressed to be more effective and efficient in processing cases. Justice Hudson stated that this consultation will be helpful because it will be done by an outside team with neutrality, expertise, and knowledge of the model rules. Justice Hudson noted that the ABA team has worked with ethics offices across the nation so they have knowledge of best practices from all over and can take a broader, systemic look at our process. Justice Hudson explained that the ABA team will also likely speak to complainants, respondents, attorneys who represent respondents, reinstatement petitioners, bar association officials, referees, and DEC volunteers during the consultations; DECs are unique to Minnesota, so the ABA team will most likely have questions about the DECs. Justice Hudson encouraged everyone to please tell Director Humiston or Chair Boerner if there is someone in particular that the ABA team should talk to and reminded everyone that the interviews are confidential. Justice Hudson stated that the ABA team will prepare a confidential report to the Minnesota Supreme Court which will take approximately five months to prepare; the report is expected in September 2022.

Justice Hudson explained that it will then take time for the Court to review all the findings and recommendations and talk to the stakeholders about what to do with those recommendations.

Mr. Ascheman noted that the Utah evaluation was published and that publishing these reports is rare. Mr. Ascheman said that it was difficult for anyone to have an opinion on the recommendations if the report is not publicly available, and he hopes the Court is open to discuss whether or not to publicize the report. Justice Hudson explained that the ABA leaves it to the individual state whether to make the report public and that most states do not publicize the report, but some states do and some states even create task forces to make recommendations about the recommendations. Justice Hudson stated that the Court is open to the discussion and that the Court appreciates public comments generally. Justice Hudson stated that these discussions have not happened yet.

Mr. Cragg brought a motion to adjourn the meeting which was seconded by Mr. Williams. The motion to adjourn passed unanimously.

8. **QUARTERLY CLOSED SESSION.**

9. **NEXT MEETING – APRIL 29, 2022.**

Thereafter, the meeting adjourned.

Respectfully submitted,

Krista Barrie

April 19, 2022 1:53 PM

Krista Barrie
Senior Assistant Director

[Minutes are in draft form until approved by the Board at its next Board meeting.]

EXECUTIVE COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Pursuant to the Rules of Lawyers Professional Responsibility 4(d), the Executive Committee shall consist of the Board Chair, two lawyers and two public members appointed by the Chair annually. The following members of the Lawyers Professional Responsibility Board are appointed to the Executive Committee for the period of March 2022 through March 2023:

Jeanette Boerner, Chair

Susan Rhode, Vice-Chair

Allan Witz, attorney

Ginny Klevorn, public member

Antoinette Watkins, public member

Jeanette Boerner, in addition to the Chair's responsibility for oversight of the Board and OLPR as provided by the RLPR, will handle Panel Assignment matters in accordance with Rule 4(f) and Executive Committee Policy & Procedure No. 2.

Susan Rhode, Vice Chair, will manage the Board duties with regard to Complainant Appeals. She shall receive monthly reports from the Office of Lawyers Professional Responsibility of tardy complainant appeals in accord with Executive Committee Policy & Procedure No. 10. She shall review appeals to ensure they are of high quality. She shall be responsible for reviewing dispositions by the Director that vary from the recommendations of a District Ethics Committee; and shall be responsible for review of complaints against LPRB and Client Security Board members, the Director, members of the Director's staff or DEC members based solely upon their participation in the resolution of a complaint, pursuant to Section 4, Executive Committee Policy & Procedure No. 5. Ms. Rhode also will be the Executive Committee liaison to the Rules and Opinions Committee.

Allan Witz, Attorney member, will consider former employee disqualification matters in accord with Executive Committee Policy & Procedure No. 3. Mr. Witz also will be the Executive Committee liaison to the Training, Education and Outreach committee.

Virginia Klevorn, public member, will oversee the Executive Committee process for reviewing file statistics, and the aging of disciplinary files.

Antoinette Watkins, public member, will be the Executive Committee liaison to the Diversity and Inclusion Committee.

Effective March 18, 2022



Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

BOARD MEMBERS REVIEWING COMPLAINANT APPEALS
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Pursuant to Rule 8(e), Rules on Lawyers Professional Responsibility, the Chair appoints members of the Board, other than Executive Committee members, to review appeals by complainants who are not satisfied with the Director's disposition of complaints.

The reviewing Board members appointed for the period March 18, 2022 through January 31, 2022, are:

LANDON ASCHEMAN

BEN BUTLER

KATHERINE BROWN HOLMEN

DANIEL CRAGG

MICHAEL FRIEDMAN

CLIFFORD GREENE

JORDAN HART

PETER IVY

TOMMY KRAUSE

MARK LANTERMAN

PAUL LEHMAN

KRISTI PAULSON

WILLIAM PENTELOVITCH

ANDREW RHOADES

GERI SJOQUIST

MARY WALDKIRCH TILLEY

BRUCE WILLIAMS

JULIAN ZEBOT

If Board members are unavailable for periods of time the Board Chair may instruct the Director not to assign further appeals to such members until they become available.

Effective March 18, 2022



Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

DIVERSITY AND INCLUSION COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

The Diversity and Inclusion Committee is a standing committee of the Lawyers Professional Responsibility Board responsible for evaluating and making recommendations for ways in which the Board can enhance diversity and inclusion within the attorney disciplinary system. The Committee shall be constituted with the following members:

Michael Friedman, Chair
Clifford Greene, Attorney
William Pentelovitch, Attorney
Andrew Rhoades, Public member
Geri Sjoquist, Attorney
Mary Waldkirch Tilley, Public member

Effective March 18, 2022



Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

LAWYERS BOARD PANELS
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(e), Rules on Lawyers Professional Responsibility provides that the Chair shall divide the Board into Panels, each consisting of not less than three Board members and at least one of whom is a non-lawyer and shall designate a Chair and a Vice-Chair for each Panel.

Effective March 18, 2022, the following Panels are appointed:

Panel No. 1.

Daniel J. Cragg, Chair
Julian C. Zebot, Vice-Chair
Jordan Hart (p)

Panel No. 4.

Kristi J. Paulson, Chair
Cliff Greene, Vice-Chair
Mark Lanterman (p)

Panel No. 2.

Ben Butler, Chair
Geri Sjoquist, Vice-Chair
Michael Friedman (p)

Panel No. 5.

Bruce Williams, Chair
Mary L. Waldkirch Tilley (p), Vice-Chair
Tommy Krause, (p)

Panel No. 3.

Landon J. Ascheman, Chair
Katherine Brown Holmen, Vice-Chair
Andrew Rhoades (p)

Panel No. 6.

Bill Pentelovich
Peter Ivy, Vice-Chair
Paul J. Lehman (p)

Dated: March 18, 2022



Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

RULES AND OPINIONS COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

The Rules and Opinions Committee is a standing committee of the Lawyers Professional Responsibility Board responsible for making recommendations regarding the Board's positions on possible amendments to the Minnesota Rules of Professional Conduct and the Minnesota Rules on Lawyers Professional Responsibility, and regarding the Board's issuance of opinions on questions of professional conduct, pursuant to Rule 4(c), Rules on Lawyers Professional Responsibility. This committee shall be constituted with the following members:

Dan Cragg, Chair
Ben Butler, Attorney
Peter Ivy, Attorney
Mark Lanterman, Public member
Kristi Paulson, Attorney
Julian Zebot, Attorney

Effective March 18, 2022



Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

TRAINING, EDUCATION AND OUTREACH COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

The Training, Education and Outreach Committee is a standing committee of the Lawyers Professional Responsibility Board responsible for all education and training content related to or promoted by the Board. This committee shall develop and maintain effective onboarding and training programs to orient new members to the Board; develop recommendations, implement, and monitor continuing education and training activities for current Board members; and promote and participate in outreach programs addressing ethics and ethical policies for the general public. The committee shall be constituted with the following members:

Landon Ascheman, Chair
Katherine Brown-Holmen, Attorney
Jordan Hart, public member
Tommy Krause, public member
Paul Lehman, public member
Bruce Williams, Attorney

Effective: March 18, 2022



Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

OLPR Dashboard for Court And Chair

	Month Ending March 2022	Change from Previous Month	Month Ending February 2022	Month Ending March 2021
Open Files	465	-13	478	429
Total Number of Lawyers	330	-17	347	331
New Files YTD	253	70	183	233
Closed Files YTD	269	83	186	246
Closed CO12s YTD	29	6	23	35
Summary Dismissals YTD	133	44	89	105
Files Opened During March 2022	70	-25	95	101
Files Closed During March 2022	83	-16	99	91
Public Matters Pending (excluding Resignations)	40	1	39	39
Panel Matters Pending	9	1	8	14
DEC Matters Pending	90	0	90	69
Files on Hold	3	-2	5	13
Advisory Opinion Requests YTD	428	154	274	531
CLE Presentations YTD	15	5	10	18
Files Over 1 Year Old	131	9	122	118
Total Number of Lawyers	84	3	81	84
Files Pending Over 1 Year Old w/o Charges	67	4	63	47
Total Number of Lawyers	49	3	46	33

	2022 YTD	2021 YTD
Lawyers Disbarred	2	1
Lawyers Suspended	4	7
Lawyers Reprimand	0	2
TOTAL PUBLIC	8	11
Private Probation Files	0	1
Admonition Files	24	27
TOTAL PRIVATE	24	28

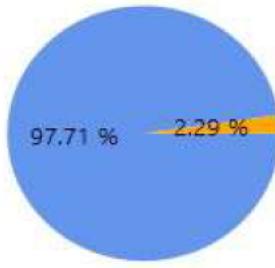
FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	Total
2017-03				1	1				2
2018-04					1				1
2018-06					1				1
2018-07					2				2
2018-08					2				2
2018-10	2								2
2018-12	1				1				2
2019-03					2		1		3
2019-04	4								4
2019-05					3				3
2019-06	1				1				2
2019-07	1				1	1			3
2019-08	1								1
2019-09					3				3
2019-10	1		1		1		2		5
2019-11	1								1
2019-12	1								1
2020-01	4								4
2020-02	3					2			5
2020-03	1				1	1			3
2020-04					1				1
2020-05	1				3				4
2020-06	1				1	1			3
2020-07	1					2			3
2020-08	3		1		3		1		8
2020-09	4				2	2			8
2020-10	7				1				8
2020-11	1	1					2		4
2020-12	5				2		1		8
2021-01	10				1		2		13
2021-02	3	1			1			1	6
Total	67	2	2	2	36	1	19	2	131

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	112	39
Total Cases Under Advisement	19	19
Total Cases Over One Year Old	131	58

Active v. Inactive

- Active 128
- Inactive 3



All Pending Files as of Month Ending March 2022

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2017-03							1	1						2
2018-04								1						1
2018-06								1						1
2018-07								2						2
2018-08								2						2
2018-10				2										2
2018-12				1				1						2
2019-03								2		1				3
2019-04				4										4
2019-05								3						3
2019-06				1				1						2
2019-07				1					1	1				3
2019-08				1										1
2019-09								3						3
2019-10				1		1		1		2				5
2019-11				1										1
2019-12				1										1
2020-01				4										4
2020-02				3						2				5
2020-03				1				1		1				3
2020-04								1						1
2020-05				1				3						4
2020-06				1				1		1				3
2020-07				1						2				3
2020-08				3		1		3		1				8
2020-09				4				2		2				8
2020-10				7				1						8
2020-11				1	1					2				4
2020-12				5				2		1				8
2021-01				10				1		2				13
2021-02				3	1			1			1			6
2021-03				10			1	2		1	1			15
2021-04				16	1		1			2				20
2021-05				24	1									25
2021-06				26						1		1		28
2021-07	3			7				1			1			12
2021-08				29								1		30
2021-09	5			17										22
2021-10	9			13										22
2021-11	10	3	13		1									27
2021-12	16			15							1			32
2022-01	21			11								1		33
2022-02	6	12		11										29
2022-03	17	14		13							2	8		54
Total	23	90	3	262	4	3	3	37	1	22	6	8	3	465

ALL FILES PENDING & FILES OVER 1 YR. OLD	
SD	Summary Dismissal
DEC	District Ethics Committees
REV	Being reviewed by OLPR attorney after DEC report received
OLPR	Under Investigation at Director's Office
AD	Admonition issued
ADAP	AdmonitionAppealed by Respondent
PROB	Probation Stipulation Issued
PAN	Charges Issued
HOLD	On Hold
SUP	Petition has been filed.
S12C	Respondent cannot be found
SCUA	Under Advisement by the Supreme Court
REIN	Reinstatement
RESG	Resignation
TRUS	Trusteeship

PUBLIC DISCIPLINE in 2021

BY SUSAN HUMISTON

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SUSAN HUMISTON
is the director
of the Office of
Lawyers Professional
Responsibility and
Client Security
Board. Prior to her
appointment, Susan
worked in-house at
a publicly traded
company, and in
private practice as a
litigation attorney.

Public discipline plays an important role in lawyer regulation. Its purpose is not to punish the involved attorney. The goal of public discipline is to protect the public, the legal profession, and the judicial system, and to deter further misconduct by the disciplined attorney and other attorneys. An attorney's public discipline record—including all cases cited in this article—is available by searching the attorney's name on our website (www.lprb.mncourts.gov) using the "Lawyer Search" button.

Each year I take this opportunity to provide an overview of public discipline imposed by the Minnesota Supreme Court in the prior year. Like many of you, I find it hard to credit that an entire year has passed since I last wrote a similar article. So much has happened, and yet time has lost so much meaning in the pandemic. While 2021 continued to cause havoc in our lives, the discipline system—like many of you—soldiered on, resulting in 28 individuals receiving public discipline.

Disbarments

The most serious discipline—disbarment—is reserved for the most serious misconduct. Four attorneys were disbarred in 2021, compared to three disbarments in 2020.

Barry Blomquist, Jr., Howard Kleyman, Nicholas Schutz, and William Sutor were disbarred in 2021. Like last year, these disbarments were notable primarily because the conduct in each went beyond the "normal" intentional misappropriation of client funds that typically leads to disbarment.

Mr. Blomquist (admitted to practice in 1980) was disbarred for misappropriating and converting trust assets for his personal use in violation of his fiduciary duties as trustee (he loaned himself \$800,000 from the trust of which he was a trustee to allegedly invest in five start-up companies he claimed to have formed), refusing to comply with court orders, and failing to cooperate with the Director's investigation. Interestingly, while Mr. Blomquist was found to have failed to cooperate with the Director's investigation, he did vigorously dispute the claims asserted against him throughout the disciplinary process. Mr. Blomquist also argued that the discipline proceedings were moot because he wanted to resign his license. The Court rejected this argument because lawyers may not

resign their licenses while discipline proceedings are pending. Finally, Mr. Blomquist's case is notable because when asked at oral argument by the Court if he acknowledged *any* misconduct, he replied, "None whatsoever."

Howard Kleyman was admitted to practice law in Minnesota in 1971. Fifty years later, almost to the month, he was disbarred for serious misconduct that included misappropriating client funds, knowingly misusing his client trust account to further fraudulent schemes, knowingly making false statements to the Director, and failing to cooperate during the disciplinary investigation. The scheme involved in Mr. Kleyman's case was his use of his trust account as an escrow account, taking in what were ultimately determined to be fraudulent checks, and disbursing the funds to the payee before they cleared the originating bank. This is a common scheme that lawyers have unwittingly gotten involved in by failing to conduct appropriate diligence on client transactions. Mr. Kleyman, however, was a willing participant because he continued to engage in the same conduct with the same fraudulent principals despite being advised of the scheme and long criminal history background of certain principals of the payor, and because he lied to the Director about whether he had stopped the misconduct. While the Director's Office was investigating the fraudulent scheme, we uncovered "normal" misappropriation in Mr. Kleyman's bankruptcy practice, where he routinely misappropriated filing fees from clients to pay other business expenses. One of the most interesting aspects of this case is that the complainant was a Japanese citizen who was defrauded, figured out how to complain to us, and originally thought the scheme was legitimate because his funds would be in an American lawyer's trust account. After Mr. Kleyman was disbarred, the Securities and Exchange Commission filed a civil complaint against Mr. Kleyman for his role in acting as a "paymaster" in lending schemes to defraud investors, the same transactions involved in his disbarment.

Nicholas Schutz, admitted to practice in 2005, was disbarred for practicing law while on a disciplinary suspension and engaging in dishonest conduct. This misconduct is unfortunately not particularly notable. But the background leading to the disbarment is. Mr. Schutz was originally suspended in 2014 (less than 10 years after his admission)

SEVENTEEN LAWYERS WERE SUSPENDED IN 2021, AS COMPARED TO 24 SUSPENSIONS IN 2020. MOST OF THE SUSPENSIONS IN 2021 WERE LENGTHY, AND MOST ALSO INCLUDED A REQUIREMENT THAT THE ATTORNEY GO THROUGH A RENEWED FITNESS INVESTIGATION CALLED A REINSTATEMENT HEARING.

for failing to maintain books and records for his trust account. This is not that unusual. What was unusual was that because he would not provide or recreate the required books and records (and we could only see a portion of the activity in the account from the bank statements we subpoenaed), he stipulated to a 90-day suspension, where his reinstatement was conditioned on a reinstatement hearing and provision of the books and records that would allow the Director to perform an audit that could not be performed in 2014.

In 2018 Mr. Schutz petitioned for reinstatement, providing the previously requested trust account books and records, and unsurprisingly, the Director discovered intentional misappropriation of client funds. At the time, I was most troubled by the fact that Mr. Schutz only acknowledged the misappropriation when directly confronted with his misconduct. At that point, I considered disbarment due to the lack of candor upon initial petitioning for reinstatement (he had to know what we were going to find, right?), but did not believe the Court's case law (absent express dishonesty) supported such a position, particularly in light of the fact that Mr. Schutz had been out of practice for five years at this point. Mr. Schutz stipulated to an additional three-year suspension and the Court approved that disposition. Proving the axiom that you should trust your initial instincts, we soon saw Mr. Schutz again when we received a complaint regarding the immigration work he was doing. Non-lawyers can do a lot of immigration-adjacent work; they just need to be clear they are not acting as attorneys and should not cross the line into practicing law. Mr. Schutz failed to respect that line, and he ultimately stipulated to disbarment after we made it clear that no other option was on the table for him.

Finally, William Sutor (admitted to practice in 2010) was disbarred following his indictment and guilty plea to felony conspiracy to commit health care fraud. Mr. Sutor's conviction related to his personal injury practice and involved the use of "runners" to direct patients to chiropractors and clients to the firm by paying referral fees to those runners disguised as legitimate expenses. As a felony, this was undisputedly a serious crime. Mr. Sutor did not agree that disbarment was the appropriate disposition, however. Mr. Sutor argued that because he was remorseful, no individual client was harmed, and he fully cooperated with law enforcement and the Director's Office, a suspension would be more appropriate than disbarment. The referee disagreed, finding that Mr. Sutor lied to both law enforcement and the Director's Office, and continued to minimize his unlawful activity at the referee hearing—in part by providing false testimony at the hearing. Mr. Sutor stipulated to disbarment following the referee's recommendation for disbarment.

Suspensions

Seventeen lawyers were suspended in 2021, as compared to 24 suspensions in 2020. Most of the suspensions in 2021 were lengthy, and most also included a requirement that the attorney go through a renewed fitness investigation called a reinstatement hearing, which also requires court approval before the attorney may be reinstated to the practice of law. This too is unusual; in a typical year we will have more cases with suspensions of less than 90 days. (Suspensions of more than 90 days trigger the reinstatement hearing requirement unless it's waived by the Court.) In 2021, the Court also imposed its first 10-day suspension (usually the minimum suspension is 30 days) on condition that the lawyer permanently resign his license following the suspension. In combination, and under the unique facts presented, the Court agreed with the referee that the unusual arrangement adequately served the purposes of discipline.

Public reprimands

Seven attorneys received public reprimands in 2021 (three reprimands-only, four reprimands and probation), up from six in 2020. A public reprimand is the least severe public sanction the Court generally imposes. One of the most common reasons for public reprimands is failure to maintain trust account books and records, leading to negligent misappropriation of client funds. However, once again, 2021 proved to be unusual in that only one of the seven attorneys received a reprimand for books and records violations resulting in negligent misappropriation of client funds. The remaining attorneys received public discipline for client neglect, failure of communication, and, in one case, lack of diligence and competence that allowed a statute of limitations to run.

Finally, one attorney received a public reprimand for engaging in the practice of law while on restricted status for several years. This is of course a cautionary tale for us all—timely pay your annual registration fee and make sure you timely report your CLE compliance. The Minnesota Lawyer Registration Office and the CLE Board do a lot to remind lawyers of their non-compliance, but at the end of the day, it is the responsibility of each of us to ensure pro-active compliance, and that starts with always having your updated mailing and email addresses on file with the Lawyer Registration Office! As a gift to yourself in the new year, please double check that your information with the Lawyer Registration Office (www.lro.mn.gov) is current and that you understand any upcoming CLE reporting deadlines and have an up-to-date email address in OASIS (www.cle.mn.gov).

Conclusion

The OLPR maintains on its website (lprb.mncourts.gov) a list of disbarred and currently suspended attorneys. You can also check the public disciplinary history of any Minnesota attorney by using the "Lawyer Search" function on the first page of the OLPR website. Fortunately, very few of the more than 25,000 active lawyers in Minnesota have disciplinary records.

As they say, "there but for the grace of God go I." May these public discipline cases remind you of the importance of maintaining an ethical practice, and may they also motivate you to take care of yourself, so that you are in the best possible position to handle our very challenging jobs. Call if you need assistance—651-296-3952. ▲

PRIVATE DISCIPLINE in 2021

BY SUSAN HUMISTON  susan.humiston@courts.state.mn.us

SUSAN HUMISTON
is the director
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Lawyers Professional
Responsibility and
Client Security
Board. Prior to her
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worked in-house at
a publicly traded
company, and in
private practice as a
litigation attorney.

In 2021 the Director's Office closed 88 complaints with admonitions—a form of private discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are viewed as isolated and nonserious. This number was comparable to, but slightly higher than, the prior year (82).

The rule violations that lead to private discipline run the gamut, and a table of admonition violations by rule can be found in the annual report issued each July (which is available on our website). It is always true that a significant number of admonitions are due to lack of diligence (Rule 1.3) and lack of communication (Rule 1.4). Last year was no exception. In fact, there were 43 communication violations contained in the 88 admonitions. (I should mention that this doesn't mean that half of the admonitions were for communications violations, as some admonitions contain multiple rule violations—but it nonetheless shows the scope of communication failures.) Although it's easier said than done, the single best advice I can offer to avoid complaints is to work on your files and communicate with your clients. Much will be forgiven by clients if they feel you are paying attention to their matter, and you keep them up to date on what is happening. This is not only good customer service but an effective risk management tool.

Like last year, a high number of admonitions arose out of termination of representation (there were 19 citations to Rule 1.16(d) in 2021 admonitions) and numerous errors (also 19) related to failing to handle unearned fees correctly—mostly in flat fee arrangements (Rule 1.15(c)(5)). A high number of admonitions (13) contained violations of Rule 1.5(b)(3)—impermissibly calling a fee nonrefundable or earned upon receipt.

Let's look at a few specific rules and situations that tripped up lawyers in 2021.

Nonrefundable fees and other retainer agreement errors

Please, please take this opportunity to pull out your standard retainer agreement and review it against the ethics rules. Two areas frequently lead to private discipline—describing a fee as nonrefundable and failing to follow the rules related to compliant flat fee agreements.

Since 2011, Rule 1.5(b)(3), MRPC, has stated, "Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance fee payment as the lawyer's

property subject to refund." If your agreement uses the term *nonrefundable* to describe your fee or calls an advance flat fee payment earned upon receipt, delete that language! You will receive an admonition if we see this impermissible language in a fee agreement, even if the client does not raise the issue or your fee is not in dispute in a complaint. Fifteen percent of admonitions in 2021 stemmed from this rule violation. You are expected to be familiar with the ethics rules applicable to your practice.

Flat or fixed fee arrangements are very common and are ethically permissible. If you use this type of fee arrangement, review Rule 1.5(b), MRPC, and its subparts in detail. There are several requirements, none of them onerous, that need to be met to satisfy the rules if you wish to treat the advance flat fee payment as your property subject to refund (and thus place it into your business account rather than your trust account). Make sure you know what the rules are and comply with them. Many admonitions annually are issued for these failures.

Ethically withdrawing from representation

In 2021, an unusually high number of admonitions (19) involved violations of Rule 1.16(d), MRPC, which provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred.

One common failure to act led to several admonitions in 2021—namely, failing to provide notification to the court that an attorney withdrew. In civil matters, unlike criminal ones, permission from the court to withdraw is not needed, but take care: Because of efilings and eservice, if you fail to provide notice to the court that you have withdrawn (and no substitution of counsel or certificate of representation is filed by successor counsel), you and not your client will receive case notifications. This is an example of a step you should take to protect your client's interest upon termination of the representation—your client needs to get notices from the court. While opposing counsel might serve your client if they receive notice of your withdrawal, failing to notify the court runs the risk of leaving your client without

information necessary to handle their case on their own (in this instance, timely receipt of court notices).

Several admonitions were also issued due to unreasonable delays in providing the client a copy of their file upon request after termination. I'm not sure why this happens, but happen it does. Please make sure you or your staff attend to this task when requested, because it can prejudice the client and is clearly required by the rules. Note too that although Rule 1.16(d) does not contain the word *prompt*, Rule 1.15(c)(4) does. Providing a copy of the client's file upon request and doing so promptly is a practical—and required—step you can take to protect the client's interest in their legal matter when you withdraw.

Some admonitions were issued for failing to refund unearned fees on a flat fee representation, even though the services were not completed at the time of withdrawal. If you do not complete the representation, some amount of refund is due, because by definition you have not earned the full fee—the fee is fixed for specified services. Note also that Rule 1.5(b)(3), MRPC, requires that “[i]f a client disputes the amount of the fee earned, the lawyer shall take reasonable and prompt action to resolve the dispute.” This is slightly different than if the fees were originally in trust—as Rule 1.15(b), MRPC, requires the disputed portion of the fees to be returned to trust until the dispute is resolved. Your obligation to timely resolve the dispute is the same whether it involves a flat fee or withdrawal of an advance fee retainer, and failure to do so can result in discipline.

Finally, the timing of the notice of your withdrawal can

lead to discipline. While you may have a right or obligation to withdraw under Rule 1.16(a) and (b), MRPC, the rule requires you to give reasonable notice to the client of that withdrawal. While what is reasonable will depend upon the circumstances, providing no notice usually is problematic, as is doing so sufficiently close to key events when work is left incomplete and no extension has been secured.

Withdrawing from representation sometimes occurs in high-conflict circumstances. When that happens, take time to review Rule 1.16 in its entirety to make sure you have your bases covered. There are also several articles on our website on the topic of withdrawing from representation, which can be found at lprb.mncourts.gov/articles, and withdrawal is a frequent topic for our ethics hotline.

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. Most attorneys care deeply about compliance with the ethics rules, but it is important to remember that ethical conduct involves more than refraining from lying or stealing; the rules contain specific requirements. You cannot go wrong by taking a few minutes each year to re-read the Minnesota Rules of Professional Conduct. They can be found on our website and in the Minnesota Rules of Court. You will find the time well spent. And remember, we are available to answer your ethics questions: 651-296-3952. ▲



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Protecting Your Practice is Our Policy.®

ABA OPINION 500 takes on language access in the client-lawyer relationship

BY SUSAN HUMISTON

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SUSAN HUMISTON
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litigation attorney.

Minnesota's Rules of Professional Conduct are based on the Model Rules of Professional Conduct established by the American Bar Association Standing Committee on Ethics and Professional Responsibility. Each year, the ABA Standing Committee publishes formal opinions interpreting the Model Rules; these opinions provide guidance to practitioners in interpreting the Model Rules and, by extension, the Minnesota Rules. In October 2021, the ABA issued Formal Opinion 500: *Language Access in the Client-Lawyer Relationship*.¹

Competence and diligence are critical

Once representation has commenced, lawyers must be prepared to communicate effectively with clients who have limited proficiency in the lawyer's native language or are not able to hear, speak, or read without accommodation. As the opinion makes clear, a lawyer's foundational duties of competence (Rule 1.1) and communication (Rule 1.4) do not change simply because communication may be more challenging or costly due to language barriers or the need for a disability accommodation. When language barriers or non-cognitive disabilities impede effective communication, Rules 1.1 and 1.4 require the lawyer to facilitate better communication—specifically, to "take steps to engage the services of a qualified and impartial interpreter and/or employ an appropriate assistive or language-translation device to ensure that the client has sufficient information to intelligently participate in decisions relating to the representation and that the lawyer is procuring adequate information from the client to meet the standards of competent practice."

The duty to communicate with your client requires effective communication, no matter their primary language or physical abilities—and effectiveness includes comprehension.

When must a lawyer affirmatively facilitate communication?

The mode of communication is ordinarily a mutual decision between client and lawyer. Opinion 500 makes clear that "[a] lawyer may not... passively leave the decision to the client or thrust the responsibility to make arrangements for inter-

pretation or translation entirely upon the client."² Rather, "it is the lawyer's affirmative responsibility to ensure the client understands the lawyer's communications and that the lawyer understands the client's communications."³ When there is doubt about whether either side understands what is being said, it falls to the lawyer to resolve that doubt in favor of facilitating communication through an interpreter, translator, or assistive device.

According to U.S. Census data from 2015, more than 100 languages besides English are spoken in Minnesota, and about half a million Minnesotans speak languages other than English at home.⁴ Of that half-million, slightly less than half speak Spanish; tens of thousands more speak Hmong, Cushite (a language family including Oromo and Somali), German, Vietnamese, and Chinese.⁵ Also in 2015, the Minnesota State Demographic Center reported that 193,400 Minnesotans lived with a hearing disability.⁶

Demonstrating the potential gap, the Minnesota State Bar Association's online lawyer directory lists 85 members who speak Spanish, 26 who speak German, 12 who speak Chinese, three who speak Hmong, two who speak Vietnamese, one who speaks Somali, and two who communicate through American Sign Language (ASL).⁷ While this is undoubtedly an undercount—not all MSBA members list their language skills, and there are of course other attorneys within the state who are not MSBA members who have proficient language skills—the data suggest an imbalance between demand and supply for legal services in languages other than English. The Minnesota courts publish forms in several languages—including Spanish, Hmong, Somali, and Karen—but the forms must be completed in English. Many Minnesotans may need help communicating their legal needs across a language or disability barrier, and the English-speaking lawyers who serve them may be ethically (as well as legally) required to provide that help.

Who is qualified to facilitate communication?

Opinion 500 uses "interpreter" for spoken language and "translator" for written language; I will refer to both as "communication facilitators." Whichever the mode of communication, a communication facilitator must be (1) qualified to

Mitchell Hamline alum reflects on year working in the White House

BY TOM WEBER

Christopher Garcia '16 never imagined he'd work at the White House. Then, he purchased a DVD of the show "The West Wing" and was hooked.

"I'm going to make it there one day," Garcia recalls thinking at the time. "I don't know how it's going to happen, or what I'm going to do, but that's going to be me."

Within a decade, he was one of President Biden's first 100 appointees, being named a senior legislative affairs advisor in the White House Office of Legislative Affairs. As the president marked his first year in office, Garcia reflected on his journey that started, arguably, in a Jimmy John's restaurant.

The 36-year-old didn't attend college immediately after high school; he worked at one of the sandwich chain's shops. There, he gained experience as a general manager and motivation before going to college in his mid-20s.

Garcia graduated in the top of his class and then became the first person in his family accepted to law school. "Mitchell Hamline will always have a soft spot in my heart."

Soon after graduating from Mitchell Hamline in 2016, Garcia returned to San Antonio, where he grew up, to work on the campaign of former U.S. Rep. Pete Gallego. Campaign staffers often are hired to work for candidates after an electoral win, which had Garcia thinking about a possible move to Washington.

But Gallego lost the race.

Even so, Garcia still wanted to move to D.C. and packed his bags (and life savings). In Washington, he slept on a friend's couch—a classmate from Mitchell Hamline!—while job searching. After several interviews, Garcia was finally offered an unpaid internship. In accepting the gig, Garcia asked himself "How bad do you want this dream?"

The internship eventually led to jobs with Minnesota Senator Amy Klobuchar; Congresswoman Deb Haaland, who is now interior secretary; the Biden-Harris transition team; and finally, the appointment to President Biden's administration in 2020.

Garcia vividly remembers getting the call to work in the White House. "I thought about the sacrifices that my single mom made to get me here," he said. "I thought of my culture and every Mexican-American person who has come to this country and tried to make another life for their kids."

Garcia has spent the year working with members of Congress to pass the administration's priorities, including a \$1.9 trillion coronavirus relief bill and an infrastructure bill that passed with bipartisan support.

Now that Garcia is working his dream job daily alongside members of Congress and the president, he wants more representation from all cultures and genders. "It's important



"I thought about the sacrifices that my single mom made to get me here," he said. "I thought of my culture and every Mexican-American person who has come to this country and tried to make another life for their kids."

Christopher Garcia

to me because I'm one cog on the wheel who can trailblaze a change so when I'm 80 or 90, there's a higher percentage of people of color serving the highest level of our government."

Garcia says he's still in awe that he works at the White House. His office is in the East Wing, just a short walk from the West Wing that inspired him on the small screen.

"Embrace the ambiguity," he suggests for aspiring attorneys, but always "start with kindness."

facilitate communication in the language or mode required, (2) “familiar with and able to explain the law and legal concepts” in that mode, and (3) “free of any personal or other potentially conflicting interest that would create a risk of bias or prevent the individual from providing detached and impartial” services.⁸ The opinion is primarily focused on human communication facilitators, but acknowledges that existing and emerging technologies may also be appropriate for consideration.

It is the lawyer’s duty to assess the qualifications of the communication facilitator (or communication technology). Opinion 500 recommends hiring an outside professional, but acknowledges that other options may suffice if appropriate precautions are taken. One option is to look to a multilingual firm employee, bearing in mind the greater risk of inaccuracies if the person is not a professional. Another option is to allow a client’s friend or family member to facilitate communication. Lawyers relying on friends and family to facilitate communication must proceed cautiously because, as Opinion 500 notes, “an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation.”⁹ It may also be challenging to ensure that a friend or family member maintains the client’s information in confidence as required by Rule 1.6, and there may be privilege issues as well.

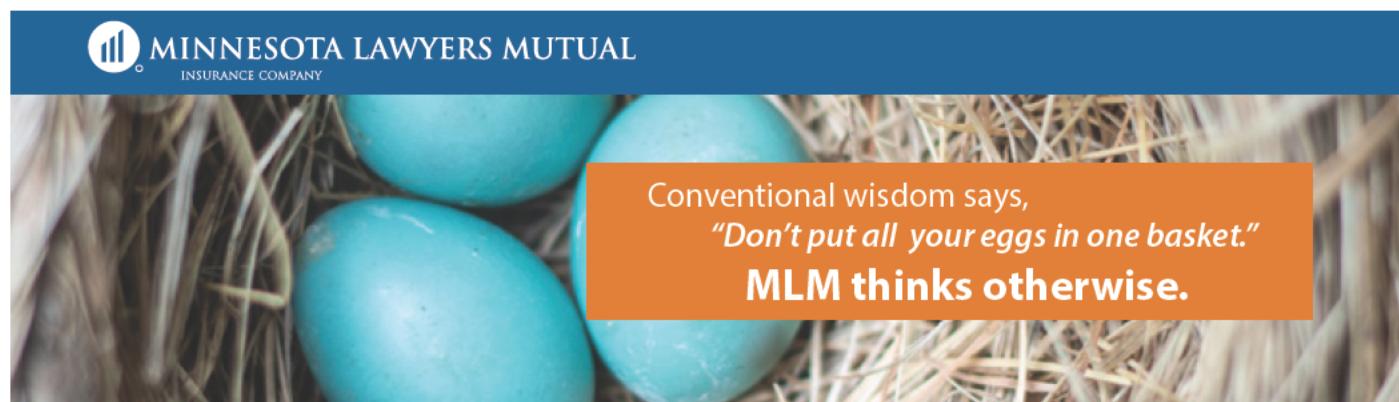
What if adequate communication services are not available, or prove too costly for the lawyer or client? Opinion 500 states that the lawyer should ordinarily decline or withdraw from

representation, or associate with another lawyer or firm that can supply the necessary services. Please be mindful that anti-discrimination statutes such as the Americans with Disabilities Act and the Minnesota Human Rights Act also regulate the provision of services to people with disabilities; if they apply to your firm, they may require greater accommodation efforts than do the Minnesota Rules of Professional Conduct and may prohibit passing along costs associated with the accommodation.

In exigent circumstances, Opinion 500 permits the lawyer to render emergency legal assistance to the same degree permitted for a client with diminished capacity under Rule 1.14, comment [9].

How should a lawyer supervise a communication facilitator?

The short answer: exactly the same as any other nonlawyer service provider. Rule 5.3 requires a lawyer to ensure that the conduct of a nonlawyer service provider—such as a communications facilitator—is consistent with the lawyer’s professional obligations. In the context of communications facilitators, Opinion 500 calls out the obligation to keep client information confidential under Rule 1.6. It is the lawyer’s burden to ensure that the facilitator understands the nature of the lawyer’s duty of confidentiality and the nature of the attorney-client privilege, and agrees to protect client information to the same degree the lawyer would. Obtaining this agreement in writing—whether or



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not the facilitator is a professional—may help ensure that they understand and comply with the lawyer's professional obligations. It's one way to demonstrate the measures you have in place for supervision.

What about communicating across cultural differences?

Perhaps the most intriguing aspect of Opinion 500 is its acknowledgment that professional competence includes cultural competence. “[T]he ability to understand, effectively communicate, gather information, and attribute meaning from behavior and expressions are all affected by cultural experiences.”¹⁰ To practice law competently across cultural differences, Opinion 500 recommends (i) identifying these differences, (ii) seeking to understand how they affect the representation, (iii) being aware of cognitive biases (such as implicit bias) that can distort understanding, (iv) framing questions with the client's cultural context in mind, (v) explaining the matter in multiple ways to help clients understand better, (vi) scheduling longer meetings and asking confirming questions of the client to be sure there is mutual understanding, and (vii) seeking out additional resources when necessary to ensure effective communication.¹¹

Conclusion

“Communication is a two-way street.”¹² Opinion 500 helps lawyers understand that our side of the street includes facilitating communication effectively with clients across language and

disability barriers. As always, if you have questions regarding how the ethics rules should guide your practice, please call our advisory opinion service at 651-296-3952. And thank you to Karin Ciano, OLPR managing attorney, for assistance with this month's column. Karin has a passion for supporting solo and small office lawyers in their practices and is a great resource. ▲

NOTES

¹ The most recent 12 months of formal opinions may be accessed on the ABA's website at no charge whether or not you are a member of the ABA. See https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/

² ABA Formal Op. 500 at 5-6.

³ ABA Formal Op. 500 at 6.

⁴ Ibrahim Hirsi, *Minnesotans speak more than 100 languages at home, new data finds*, MinnPost, 11/5/2015, available at <https://www.minnpost.com/new-americans/2015/11/minnesotans-speak-more-100-languages-home-new-data-finds/> (last visited 2/3/2022).

⁵ *Id.*

⁶ Andi Egbert, *Minnesotans with Disabilities: Demographic and Economic Characteristics*, Minnesota State Demographic Center Population Notes (March 2017) at 2.

⁷ See <https://www.mnbar.org/member-directory/find-a-lawyer> (last visited 2/3/2022).

⁸ ABA Formal Op. 500 at 7.

⁹ *Id.*

¹⁰ ABA Formal Op. 500 at 9.

¹¹ *Id.*

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 501

April 13, 2022

Solicitation

ABA Model Rule of Professional Conduct 7.3(a), amended in 2018, contains a narrowed definition of what constitutes a “solicitation.” Rule 7.3(b) delineates the type of solicitation that is expressly prohibited. Rules 8.4(a) and 5.3 extend a lawyer’s responsibility for solicitation prohibitions not only to actions carried out by the lawyer directly but also to the acts of persons employed by, retained by, or associated with the lawyer under certain circumstances.

Rule 5.3(b) requires lawyer supervisors to make reasonable efforts to ensure that all persons employed, retained, or associated with the lawyer are trained to comply with the Rules of Professional Conduct, including Rule 7.3(b)’s prohibition. Partners and lawyers possessing comparable managerial authority in a law firm must make reasonable efforts to ensure that the firm has training that reasonably assures that nonlawyer employees’ conduct is compatible with the professional obligations of lawyers. Under Rule 5.3(c), a lawyer will be responsible for the conduct of another if the lawyer orders or with specific knowledge of the conduct ratifies it, or if the lawyer is a manager or supervisor and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 8.4(a) makes it professional misconduct for a lawyer to “knowingly assist or induce another,” to violate the Rules or knowingly do so through the acts of another. Failing to train a person employed, retained, or associated with the lawyer on Rule 7.3’s restrictions may violate Rules 5.3(a), 5.3(b), and 8.4(a).

Many legal consumers obtain information about lawyers from acquaintances and other professionals. The Model Rules of Professional Conduct are rules of reason. Recommendations or referrals by third parties who are not employed, retained, or similarly associated with the lawyer and whose communications are not directed to make specific statements to particular potential clients on behalf of a lawyer do not generally constitute “solicitation” under Rule 7.3.

Introduction

In 2018, the American Bar Association adopted amendments to ABA Model Rule of Professional Conduct 7.3, defining solicitation in the text of the rule and creating new exceptions to the general prohibition against live, person-to-person solicitation of legal services where a significant motive is “pecuniary gain.”¹ The definition of solicitation under the current amended version of Model Rule 7.3 is:

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling. This opinion addresses solely the ABA Model Rules. Lawyers should consult the rules, opinions, and cases of the jurisdiction(s) in which they are practicing. Some states

a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.²

The ABA also amended the prohibition on solicitation to clarify that it applies only to “live person-to-person contact.”³ The reason for restricting such in-person face-to-face, live telephone, or other real-time communications between a lawyer and potential client is set forth in Comment [2] to Rule 7.3:

A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

In addition to the other changes, the 2018 amendments broadened the exceptions to prohibited solicitation, and the Rule in paragraph (b) now permits solicitation by live person-to-person contact if the person contacted is a:

- (1) lawyer;
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

The Rule prohibits live person-to-person solicitation even when otherwise allowed if the person has made clear that the person does not want to be solicited by the lawyer or if “the solicitation involves coercion, duress or harassment” under paragraphs (c)(1) and (2).

have not adopted or have modified the ABA Model Rule and their definition of solicitation may differ. *See, e.g.*, Fla. Bar R. 4-7.18(a), which prohibits any in-person or telephone solicitation with a significant motive of pecuniary gain of any person with whom the lawyer has no prior family or professional relationship, regardless of whether the lawyer knows the person needs legal services.

² MODEL RULES OF PROF’L CONDUCT R. 7.3(a). Both “knows” and “reasonably should know” are defined terms in Rule 1.0 of the Model Rules. Knows means “denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Reasonably should know means “that a lawyer of reasonable prudence and competence would ascertain the matter in question.”

³ MODEL RULES OF PROF’L CONDUCT R. 7.3(b).

However, the prohibition does not preclude any communication “authorized by law or ordered by a court or other tribunal,”⁴ nor does it prohibit a lawyer from being part of a group or prepaid legal service plan owned by someone other than the lawyer that enlists new members or sells subscriptions via live person-to-person contact where it is not known the persons need the services covered by the plan.⁵ The latter exception also existed in the pre-2018 version of Rule 7.3.

Despite the 2018 clarifications, ambiguity remains concerning a lawyer’s ethical responsibility for the lawyer’s actions and for the actions of others who engage in live, person-to-person solicitation with specific individuals. The scope of “others” who might solicit on behalf of a lawyer could include, for instance, current employees of the lawyer, marketing firms hired by the lawyer, existing clients, former clients, friends and family of the lawyer, or even professional colleagues such as bankers, real estate agents, and accountants. Traditionally, lawyers often have obtained new clients because the firm’s existing clients tell their friends, business colleagues, or family members about positive lawyer-client experiences.⁶ Many of these communications do not fall within the Rule 7.3 definition of “solicitation.”

When analyzing the actions of others and whether the lawyer is responsible for those actions, Rule 8.4 and Rule 5.3 are relevant. Rule 8.4(a) provides that it is professional misconduct for a lawyer to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” In other words, a lawyer cannot do through another person that which the lawyer could not do directly. Rule 8.4(a) does not impose responsibility on a lawyer who has no knowledge of someone else’s actions. For culpability the lawyer must “knowingly assist or induce another,” or knowingly do so through the acts of another, which means, for the purpose of solicitation, the lawyer must knowingly permit, ask, direct, or encourage someone to solicit on the lawyer’s behalf.

The Committee interprets Rule 8.4(a) as subjecting a lawyer to discipline for the conduct of another only if the lawyer knows of the other person’s conduct and in some way requests or authorizes the conduct. This reading is consistent with agency principles. It would be manifestly unfair and illogical to hold a lawyer responsible for another’s actions that the lawyer does not even know about. This reading is consistent with both *The Restatement of Law Governing Lawyers* § 5, *Professional Discipline*, and Hazard, Hodes & Jarvis, *The Law of Lawyering* § 69.05, 4th ed.

Model Rule 5.3 addresses a lawyer’s responsibilities regarding nonlawyer assistance by persons employed or retained by or associated with the lawyer. Model Rule 5.3(b) requires lawyers with direct supervisory authority over a nonlawyer whom the lawyer employs, retains, or is associated with (collectively referred to as “employees” in this opinion for ease of reading) to make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer. Lawyers who are managers of firms⁷ must ensure that the firm “has in effect measures giving reasonable assurances that the nonlawyer’s conduct is compatible with the

⁴ MODEL RULES OF PROF’L CONDUCT R. 7.3(d).

⁵ MODEL RULES OF PROF’L CONDUCT R. 7.3(e).

⁶ See, e.g., 2019 Clio Legal Trends Report, CLIO (2019), <https://www.clio.com/resources/legal-trends/2019-report/> (noting that thirty-two percent of consumers surveyed sought lawyer referrals from friends and family and sixteen percent sought referrals from a lawyer).

⁷ MODEL RULES OF PROF’L CONDUCT R. 1.0(c) (definition of a “firm”).

professional obligations of the lawyer.”⁸ A lawyer is responsible for ethics violations of an employee, according to Rule 5.3(c), but only if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Thus if a lawyer knows of specific unethical conduct by an employee and either directed that conduct, ratifies the conduct after the fact, or fails to take reasonable remedial measures after the fact, the lawyer violates Rule 5.3(c), among other rules.

Under Rule 5.3, a lawyer with supervisory responsibility over the nonlawyer employees must discuss ethical rules with these employees to ensure that they understand the limitations on their conduct imposed by the fact of their employment with the law firm. Just as a supervisory lawyer must explain the ethical duty of confidentiality to employees, the supervisory lawyer must likewise explain the requirements of Rule 7.3 to refrain from improper solicitation on behalf of the lawyer. However, what constitutes a prohibited “solicitation” on behalf of the lawyer versus merely making a recommendation about the lawyer can be complicated.

This opinion examines various solicitation scenarios, some of which involve employees and agents of lawyers, in light of the 2018 amendments to Model Rule 7.3, and provides guidance for lawyers in determining what activities are permissible.

Hypothetical 1

A lawyer obtains a list from the local sheriff of persons arrested within the last week, calls them on the telephone, and offers to provide general legal services. None of the arrestees are lawyers. The lawyer also does not personally or professionally know, nor is lawyer related to, any of the arrestees. Does the conduct violate Rule 7.3?

Answer: Yes. The conduct is prohibited solicitation under Rule 7.3(b). The communication was initiated by the lawyer. It was directed to specific persons whom the lawyer knows or reasonably should know need legal services in a particular matter. The communication offers to provide, or reasonably can be understood as offering to provide, legal services. The offer to provide “general legal services” reasonably can be understood by a prospective client as offering to provide legal services for a particular matter of which the lawyer has knowledge, i.e., the arrest. The communication by telephone was live and person-to-person, falling within the ambit of the Rule⁹ and was made for the lawyer’s pecuniary gain. None of the exceptions in Rule 7.3(b) are applicable. Therefore, the lawyer’s conduct is prohibited solicitation.

⁸ MODEL RULES OF PROF’L CONDUCT R 5.3(a).

⁹ MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. [2].

Hypothetical 2

A lawyer with direct supervision over a law firm's marketing department hires a professional lead generator to obtain client leads. The lawyer signs an agreement with the lead generator to pay a flat monthly fee for leads in mass tort cases. The agreement includes no information on how the lead generator obtains leads, nor does the lawyer provide any direction or limitation on how the lead generator does so.

The lead generator pays its employees to "lurk" in online chat rooms set up for family members and survivors of aviation disasters, medical device and drug product liability matters, and other possible mass torts. The lead generator also pays its employees to research the family members and survivors and telephone those persons to inform them of the lawyer's experience and availability in mass tort cases. The lead generator also asks these same persons if they would like to be represented in their cases.

The lawyer receives a report from the lead generator with a list of 10 new clients and says to the lead generator, "I don't know what you are doing, and I don't care! Keep 'em coming!" The lead generator responds, "We just call the people who are online discussing accidents." The lawyer does not inquire further, signs the clients sent by the lead generator, and continues to use the lead generator. Does the conduct violate any rules?

Answer: Yes. The telephone calls were initiated by the lead generator on behalf of the lawyer based on the contractual relationship between the lawyer and the lead generator. The telephone calls were directed to specific persons who the lawyer knows needed legal services in a particular matter. The lead generator's communications offered to provide, or reasonably could be understood as offering to provide, legal services for the matter.

The communications were live and person-to-person and made for the lawyer's pecuniary gain. Therefore, the communications were prohibited solicitations and did not qualify for any of the exceptions under Rule 7.3(b). The lawyer learned that the lead generator offered to provide legal services on the lawyer's behalf, using impermissible direct telephone solicitation, and still accepted the client leads. The lawyer therefore is responsible for the lead generator's conduct under Rules 7.3(b) and 8.4(a) when the lawyer accepted the clients, knowing they were obtained in contravention of Rule 7.3.

The lawyer, with direct supervision over the lead generator, has made no effort to ensure that the lead generator, specifically hired to generate clients, understood and would conform its actions to be compatible with the lawyer's professional obligations. By failing to train the lead generator concerning the limitations on direct solicitation contained in Rule 7.3, the lawyer violated Rule 5.3(b), and by accepting the leads, knowing they were generated through prohibited solicitation, the lawyer ratified the conduct of which he had knowledge and violated Rule 5.3(c).¹⁰ If the lawyer also was a partner or a lawyer with comparable managerial authority in the firm, Rule 5.3(a) would require the lawyer to "make reasonable efforts to ensure that the firm has in effect measures giving

¹⁰ The Committee notes that in Formal Op. 491 this Committee found a lawyer to have "knowledge" when the lawyer consciously, deliberately failed to inquire into the facts of a matter.

reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."

Hypothetical 3

A paralegal at a law firm works as a paramedic on weekends. As part of the paralegal's employment agreement with the firm, the paralegal lists the paramedic work as outside employment. To explain away any perceived conflict, the paralegal maintains that "not only does the outside employment not conflict with law firm work, but *it also contributes by bringing in new firm business.*"

No lawyer at the law firm apprised the paralegal of any prohibitions or limitations on soliciting firm business. The paralegal hands the law firm's business cards to injured people transported by the ambulance from accident scenes and states that the firm handles accident cases and is available to help them. When the firm agrees to represent new clients, the firm requests that the new clients list where they heard about the firm. Several new clients state they received business cards from the paralegal during the paralegal's paramedic work.

After being told by the paralegal of how the law firm's cards were being distributed, the paralegal's direct supervisory lawyer congratulated the paralegal on bringing in new business and promised a bonus as a reward. Does the conduct violate any Rules?

Answer: The conduct is a prohibited solicitation under Rule 7.3(b). The paralegal initiated live person-to-person contact, on behalf of the law firm employer, with injured persons being transported from an accident scene whom the paralegal knew had a specific need for legal services. Further, the law firm ratified this solicitation by knowing how the clients were solicited and still accepting clients from the paralegal's solicitation. The paralegal's communications were for the pecuniary gain of the law firm, and the injured persons could reasonably have understood the communications as offering legal services.

None of the exceptions to the prohibition on live person-to-person solicitation in Rule 7.3(b) are present - employment as a paramedic is not the type of existing business or professional relationship that permits live, person-to-person solicitation.

No lawyer at the firm made any effort to train or ensure that the paralegal's conduct comported with the professional obligations of a lawyer. In fact, the paralegal's supervisory lawyer has knowledge of the specific conduct and has ratified the conduct by speaking of it approvingly and suggesting the paralegal would receive a bonus for bringing in new clients. Therefore the supervisory lawyer has violated Rules 5.3(b) and (c).

Because no partner or managing lawyer has in place measures giving reasonable assurances that nonlawyers' conduct is compatible with the professional obligations of the lawyer, they have violated Rule 5.3(a).¹¹

¹¹ For a full discussion of Rule 5.3 and the duties of partners, managers, and supervisory lawyers working with nonlawyer assistance, see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

Again, lawyers have an obligation to train employees of a law firm on the ethical obligations of the lawyers so that the nonlawyer employees' conduct comports with those ethical obligations. All employees of a law firm need training on such ethics topics as confidentiality, conflicts of interest, communication requirements, diligence, avoiding the unauthorized practice of law, *and* refraining from impermissible "solicitation," among other things.

Because the supervisory lawyer has knowledge of the paralegal's actions, the supervisory lawyer also has violated Rule 8.4(a) by knowingly violating Rule 7.3 through the acts of another.¹²

Hypothetical 4

A lawyer asks a personal friend and colleague who is a banker to provide the lawyer's name and contact information to any banking customer or employee that the banker thinks might need an estate plan. Does the lawyer violate any Rules?

Answer: The conduct does not violate Rule 7.3 because the actions are not solicitation as defined by paragraph (a). The lawyer did not target a specific person the lawyer knew or reasonably should have known was in need of legal services in a particular matter, nor communicate or direct communications with that person. The lawyer has no authority over the banker's conduct, does not control either the content of any communication the banker makes nor even whether any communication occurs at all. The banker's communication with bank customers should not reasonably be construed as an offer to provide legal services, because the banker is not authorized to make that offer on behalf of the lawyer. The communication, if one occurs at all, is a recommendation, the type of "word-of-mouth" referral that is permissible under Rule 7.3. Moreover, because the lawyer is not directing what the banker should say and the banker's customers are not speaking directly to the lawyer, the lawyer's request to the banker is permissible.¹³

Similarly lawyers who build their practices based on referrals by satisfied clients may suggest to clients that if they are happy with the lawyer's services, the clients should give the lawyer a favorable review online and let their friends and family know about the lawyer. Such satisfied client recommendations to the public or directly to the client's friends and family are permissible.

¹² This opinion only addresses application of the ABA Model Rules to these scenarios. Lawyers also should be cognizant of any statutes or other law addressing solicitation. Solicitation can be barred or limited by law as well as rule. See, e.g., 49 U.S.C. §1136(g)(2) (banning solicitation of victims or family members of air carrier accidents occurring in the U.S. by lawyers or their employees, agents, or representatives within 45 days of the accident); Fla. Stat. §877.02 (barring solicitation on behalf of lawyers by certain persons including a person "in any capacity attached to any hospital, sanitarium, police department, wrecker service or garage, prison or court, or for a person authorized to furnish bail bonds, investigators, photographers, insurance or public adjusters").

¹³ See MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. [7] ("This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.").

The Rule's concern about a potential client feeling pressured by live, person-to-person contact by a lawyer is not present where the banker's customers or the former clients' acquaintances receive information about the lawyer's services.

Many legal consumers obtain information about lawyers from acquaintances and/or other professionals such as bankers, accountants, and real estate agents.¹⁴ The Rules of Professional Conduct are "rules of reason."¹⁵ Recommendations or referrals by third parties who are not employees of a lawyer and whose communications are not directed to make specific statements to particular potential clients on behalf of a lawyer do not constitute "solicitations" under Rule 7.3. To suggest that Rule 7.3 prohibits a lawyer's colleagues in other professions or satisfied clients from providing information about a lawyer's services to other people is not realistic or consistent with the purpose of the Rule.

Conclusion

The current version of Model Rule 7.3(a) contains a narrowed definition of what constitutes a "solicitation." It is a "communication initiated by or on behalf of a lawyer that is directed to a specific person" that is known, or reasonably should be known, to be in need of "legal services in a particular matter *and* that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter."

Rule 7.3(b) delineates the type of solicitation that is expressly prohibited—"live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain"—unless the potential client is one of the noted exceptions to that prohibition.

The prohibition applies not only to actions carried out by a lawyer directly but also to persons employed by, retained by, or associated with the lawyer under certain circumstances.

Lawyers with supervisory responsibility have a duty to supervise and train all persons employed, retained, or associated with the lawyer to ensure compliance with the Rules of Professional Conduct, including Rule 7.3(b)'s prohibition. Partners and lawyers possessing comparable managerial authority in a law firm must make reasonable efforts to ensure that the firm has training that reasonably assures that nonlawyer employees' conduct is compatible with the professional obligations of lawyers. This includes training employees to refrain from impermissible solicitation of potential clients on a lawyer's behalf.

Under Rule 5.3, a lawyer will be responsible for the conduct of another if the lawyer orders, or with specific knowledge of the conduct ratifies it, or if the lawyer is a manager or supervisor and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

¹⁴ See 2019 Clio Legal Trends Report, *supra* note 6 (showing that nine percent of consumers surveyed found lawyer referrals from other professionals).

¹⁵ MODEL RULES OF PROF'L CONDUCT, PREAMBLE [14].

Under Rule 8.4(a) a lawyer must not “knowingly assist or induce another,” to violate the rules or knowingly do so through the acts of another, which means, for the purpose of solicitation, that the lawyer must not knowingly permit, ask, direct, or encourage someone to engage in impermissible solicitation on the lawyer’s behalf.

Satisfied clients or third parties not employed by the lawyer may share with others their opinions and recommendations about the lawyer. The lawyer may even request such appropriate communications by clients and others. Such satisfied client recommendations to the public or directly to the client’s friends and family are permissible.

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CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

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FILED

STATE OF MINNESOTA

IN SUPREME COURT

April 19, 2022

ADM20-8001

**OFFICE OF
APPELLATE COURTS**

**ORDER GOVERNING THE CONTINUING OPERATIONS OF THE
MINNESOTA JUDICIAL BRANCH**

O R D E R

The operations of the Minnesota Judicial Branch have been governed by the order filed on June 28, 2021, which was extended and modified in part by orders filed on July 30, 2021, and October 18, 2021. *See* Order Governing the Continuing Operations of the Minnesota Judicial Branch, No. ADM20-8001 (Minn. filed June 28, 2021) (setting out COVID-19 prevention practices affecting case processing, court facilities, public access, and court administration); Order Governing the Continuing Operations of the Minnesota Judicial Branch, No. ADM20-8001 (Minn. filed July 30, 2021) (modifying provisions of the June 28 order and extending that order indefinitely); Order Governing the Continuing Operations of the Minnesota Judicial Branch, No. ADM20-8001 (Minn. filed Oct. 18, 2021) (modifying provisions of the June 28 and July 30 orders). Since the onset of the COVID-19 pandemic, the Judicial Council has authorized in-person proceedings for certain cases and hearings and remote appearances for others. Because the Judicial Branch is now arriving at the other side of the pandemic, the Judicial Council, through Judicial Council Policy 525, has identified the presumptive format for cases and hearings in the district courts—either in person or remote—going forward. The presiding judge can depart from the presumptive format, either on the court’s own motion or a party’s motion, if exceptional circumstances for that departure exist.

The purpose of the presumptive format standards is to provide statewide consistency for parties and district courts. Statewide consistency will also be beneficial in applying the exceptional circumstances standard. Court rules that govern criminal and civil proceedings do not expressly establish standards for hearing formats or, if the rules do so, do not establish standards for exceptions to that format. Until such rules defining “exceptional circumstances” are in place, this order will govern the district court’s analysis of whether to grant exceptions to the presumptive hearing format.

IT IS HEREBY ORDERED THAT:

1. Effective June 6, 2022, the hearing format standards set out in Judicial Council Policy 525 shall apply to all proceedings in the district courts unless the particular case type or proceeding is expressly excluded from those standards. The presiding judge may depart from the presumptive format only if the judge determines that exceptional circumstances exist in light of the particular needs of the case or the parties, or concerns of economy or efficiency. The parties’ agreement to depart from the presumptive format alone does not satisfy the exceptional circumstances requirement.

2. District courts may consider the following factors when determining whether exceptional circumstances exist, either on their own motion or on the motion of any party, **to allow one or more parties to appear in person for a presumptively remote hearing:**

- i. All parties, and the court, agree that the hearing should be held in person (this factor, by itself, does not constitute exceptional circumstances);
- ii. A party lacks access to technology to participate remotely, and the party cannot reasonably be expected to gain access to such technology before the hearing;
- iii. The importance and complexity of the proceeding;
- iv. There are too many participants in the hearing to easily keep track of them all on a computer screen;

- v. For an evidentiary proceeding, whether appearing remotely would allow for effective examination of the witness and maintain the solemnity and integrity of the proceedings and thereby impress upon the witness the duty to testify truthfully;
- vi. Any undue surprise or prejudice that would result; and
- vii. Such other factors, based upon the specific facts and circumstances of the case, as the court determines to be relevant.

District courts may consider the following factors when determining whether exceptional circumstances exist, either on their own motion or on the motion of any party,

to allow one or more parties to appear remotely for an in-person hearing:

- i. All parties, and the court, agree that the hearing should be held remotely (this factor, by itself, does not constitute exceptional circumstances);
- ii. Holding the hearing in person would cause a hearing participant to reasonably fear for their safety;
- iii. The cost and time savings to any party;
- iv. A hearing participant would need to travel unreasonably far to the hearing location or it would be unduly burdensome for a hearing participant to secure transportation to the hearing;
- v. A hearing participant is in custody or residential treatment and cannot physically travel to the hearing but can participate remotely;
- vi. Inclement weather conditions make travel to an in-person hearing a risk to the personal safety of any hearing participants;
- vii. Unavoidable scheduling conflicts of the parties preventing the matter from moving forward in a more timely way;
- viii. The importance and complexity of the proceeding;
- ix. For an evidentiary proceeding or trial, whether appearing remotely would allow for effective examination of the witness and maintain the solemnity and integrity of the proceedings and thereby impress upon the witness the duty to testify truthfully;
- x. Any undue surprise or prejudice that would result; and
- xi. Such other factors, based upon the specific facts and circumstances of the case, as the court determines to be relevant.

3. Civil commitment proceedings that are before the Commitment Appeal Panel established under Minn. Stat. § 253B.19, subd. 1 (2020), shall continue as scheduled by the panel. The panel may conduct any proceedings or hearings using remote technology.

4. The Office of Lawyers Professional Responsibility and the Board of Law Examiners shall continue to conduct the business of those offices consistent with the sound discretion of the Directors of those offices and the rules that govern the work of and proceedings before those offices. The Directors are authorized to use remote technology or exposure prevention measures as needed or if appropriate for the operations of the office and for proceedings held by the office or before the boards or panels of those offices under the applicable rules. Panels of the Lawyers Professional Responsibility Board and referees appointed by this court to conduct public hearings under the Rules on Lawyers Professional Responsibility shall decide whether a hearing will be held in person or by remote means.

5. Rules of procedure that prohibit holding court proceedings remotely or that constrain the use of remote technology to conduct court proceedings, specifically Minn. R. Crim. P. 1.05, Minn. Gen. R. Prac. 131, Minn. Gen. R. Prac. 309.02, Minn. Gen. R. Prac. 359, Minn. R. Juv. Prot. P. 11, Minn. R. Adoption P. 12, and Minn. Spec. R. Commit. P. 14, are suspended to the extent that those rules contradict the terms of this order or Judicial Council Policy 525.

6. The Supreme Court Advisory Committees on the General Rules of Practice for the District Courts, the Rules of Civil Procedure, the Rules of Criminal Procedure, the Rules of Juvenile Delinquency Procedure, the Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act, and the Rules of Juvenile Protection Procedure are directed to review the rules that govern the format for proceedings in the district courts. Those committees are directed to consider whether amendments to the rules are necessary to implement the presumptive format for hearings reflected in Judicial Council Policy 525 that are governed by those rules, as well as the exceptional

circumstances standard. Those committees are also directed to consider whether amendments to the rules are necessary to address electronic service of process, eFiling options for self-represented litigants, and livestreaming of proceedings in contemplation of the long-term use of remote hearings. The committees' respective reports and recommendations must be filed with this court on or before December 30, 2022.

7. Self-represented litigants may continue to submit filings by email, and the State Court Administrator's order regarding payment of fees for these filings remains in effect.

8. This order supersedes the orders filed on June 28, 2021, July 30, 2021, and October 18, 2021, which governed the continuing operations of the Minnesota Judicial Branch. The order filed on March 3, 2022, which governs face coverings, remains in effect.

9. This order is effective June 6, 2022. All hearings scheduled on or after the effective date of this order shall be held remotely, in person, or in hybrid as described in Judicial Council Policy 525 and the terms of this order. Hearings scheduled prior to the effective date of this order shall be held remotely or in person as initially noticed to parties, unless an exception is granted by the district chief judge.

Dated: April 19, 2022

BY THE COURT:



Lorie S. Gildea
Chief Justice

Approved by LPRB at October 2021 Meeting:

4(f) Assignment to Panels. The Director Chair shall assign matters to Panels ~~in rotation randomly~~. The Executive Committee may, however, redistribute case assignments to balance workloads among the Panels, appoint substitute panel members to utilize Board member or District Committee member expertise, and assign appeals of multiple admonitions issued to the same lawyer to the same Panel for hearing.

Proposed Conforming Change for Appeal Assignments:

8(e) Review by Lawyers Board. If the complainant is not satisfied with the Director's disposition under Rule 8(d)(1), (2) or (3), the complainant may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the lawyer of the appeal, and the Chair or a member of the Executive Committee designated by the Chair, shall assign the matter ~~by rotation~~ to a board member, other than an Executive Committee member, ~~appointed by the Chair~~. The reviewing Board member may:

- (1) approve the Director's disposition; or
- (2) direct that further investigation be undertaken; or
- (3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or
- (4) in any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional conduct for submission to a Panel other than the Board member's own.

The reviewing Board member shall set forth an explanation of the Board member's action. A summary dismissal by the Director under Rule 8(b) shall be final and may not be appealed to a Board member for review under this section.