

AMENDED MINUTES OF THE 189TH MEETING OF LAWYERS PROFESSIONAL RESPONSIBILITY BOARD JANUARY 31, 2020

The 189th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, January 31, 2020, at the Town and Country Club, St. Paul, Minnesota. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Jeanette M. Boerner, James P. Cullen, Thomas J. Evenson, Roger Gilmore (by phone), Gary M. Hird, Peter Ivy, Bentley R. Jackson, Shawn Judge, Virginia Klevorn, Tommy A. Krause, Susan C. Rhode, Susan T. Stahl Slieter, Gail Stremel, Bruce R. Williams and Allan Witz (by phone). Present from the Director's Office were: Director Susan M. Humiston, Managing Attorney Cassie Hanson, Senior Assistant Directors Jennifer S. Bovitz and Binh T. Tuong, and Assistant Director Jennifer Wichelman. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug and Kenneth L. Jorgensen.

1. APPROVAL OF MINUTES

The minutes of the September 27, 2019, Board meeting were unanimously approved.

2. FAREWELL TO RETIRING BOARD MEMBERS

Ms. Wolpert acknowledged and thanked Joseph Beckman, Mary Hilfiker, Bentley Jackson, James Cullen and Roger Gilmore, retiring Board members, for their service to the Board.

3. LPRB 50th ANNIVERSARY

Ms. Humiston provided an update on the LPRB 50th Anniversary. The first LPRB Board was appointed in 1970. Allen Saeks, who was admitted in 1956, continues to practice and is a tremendous source of knowledge. The Director's Office was established in 1971. Ms. Humiston encouraged Board members to read William Wernz's article, "Whence Lawyer Discipline?" included in the Board materials, which provides a good framework of the origin and evolution of Minnesota's lawyer discipline system. Ms. Humiston suggested that a portion of the annual seminar could be focused on celebrating the anniversary and encouraged members to begin thinking about that event and how to include others such as dignitaries. Ms. Wolpert pointed out that one such dignitary, Kenneth Jorgensen, was present at the Board meeting. Individuals are encouraged to contact Ms. Wolpert or Ms. Humiston with ideas surrounding the anniversary celebration.

4. UPDATED PANEL AND COMMITTEE ASSIGNMENTS

Ms. Wolpert reported there is no order yet from the Court regarding new Board appointments. Once an order is filed, Ms. Wolpert will file documents regarding Panel composition.

- Executive Committee Appointments: Ms. Wolpert reported that Jeanette Boerner will serve as Vice Chair and Bruce Williams, Shawn Judge and Virginia Klevorn will be appointed to the Executive Committee effective February 1, 2020.
- Committee Leadership: Ms. Wolpert reported that Peter Ivy will Chair the Rules Committee, Mark Lanterman will Chair the Opinions Committee and Allan Witz will Chair the re-named DEC & Training Committee, which will now include training of the Board. Mr. Witz and Mr. Ivy will put together training materials using materials previously used by Deputy Director Tim Burke with a goal of ensuring even implementation of the rules.
- Panel Composition: Ms. Wolpert addressed that if a matter is pending, the matter will stay with the currently assigned Panel. Ms. Wolpert also addressed that every Panel will be losing someone and Panel composition will change.
- Panel Status Updates: Ms. Wolpert reported that the prior week a disclosure was sent to Panel Chairs to update Chairs on the status of matters. Ms. Wolpert sought input and feedback from the Director on the form. Mr. Cullen responded that the form is a very good idea, that it is helpful and would appreciate a 90-day form to track with the Board meeting. Gary Hird also found the form helpful. Thomas Evenson asked if the update could be provided more frequently based on inquiries he receives. Ms. Humiston responded that it would not be a problem to provide updates more frequently and stated that Panels can always request status updates from both parties.

Mr. Cullen had questions about a specific notation that a respondent was taking a deposition. Mr. Cullen asked if this was being addressed in the Panel Manual? Mr. Cullen stated his concern was that to the extent there may be inconsistencies, it would be helpful for this issue to be addressed in the Manual. Ms. Wolpert responded that she is looking for input from Panel Chairs regarding the Panel Manual, which is a priority for this year. Ms. Wolpert identified that the Panel Manual is critical to communicate

procedures and often goes out to respondents who are *pro se*. Ms. Wolpert noted that comments from the Director's Office are still to be included and to look at the Panel Manual through a big picture lens. While Ms. Wolpert believes the Panel Chairs are the best place to start with the Panel Manual revisions, if anyone else should be included, contact Ms. Wolpert.

5. **COMMITTEE UPDATES**

A. **Opinions Committee.**

i. Amended Opinion 21 (Attachment 2).

Committee Chair Gary Hird provided the Committee report and Kenneth Jorgensen was present to provide the MSBA position. Mr. Hird stated there has been a long odyssey with Opinion 21 advising that a draft was circulated and also sent to the MSBA Rules Committee which was attached to the Board materials. Mr. Hird reported that after receiving comments from Fred Finch and a letter from William Wernz, the Committee met and discussed input and discussed changes to the proposed opinion. Mr. Hird reported that the Opinions Committee adopted some of the suggestions from Mr. Finch's letter relating to the 3(b) insert, "reasonably should know," and the Committee believed that would be a good addition to the opinion. Mr. Hird reported that the Committee also focused on 3(c) and removing "determines," stating "knows or reasonably should know" should be used to be consistent.

Managing Attorney Cassie Hanson reported that the purpose of the opinion is to give guidance to the average practitioner and when the Committee thought about Rule 1.4, MRPC, it is clear that it is a comprehensive set of obligations on the practitioner and they are informed, however, paragraph (b) represents the client perspective and that the average practitioners should be thinking about the client perspective. Ms. Hanson provided perspective that she recalls when the original Opinion 21 was adopted that a lot of thought was put into it, and if paragraph (b) was removed, the client perspective would be removed. Mr. Beckman, an Opinions Committee member, reported that Ms. Hanson was accurately reporting the Committee's thoughts.

Mr. Jorgensen on behalf of the MSBA reported that for 22 years he was in the Director's Office and in the last ten years, he spent a significant

amount of time counseling lawyers, and was the original staff to the Opinions Committee. Mr. Jorgensen stated when the Opinion first came out, it was very controversial and he was happy to see changes in responses, but it was a bit like doing cosmetic surgery on someone who was having a heart attack. Mr. Jorgensen stated that the standard is subjective and has no place in jurisprudence and remarked that the ABA's broad policy pronouncements were a problem because they are not tied to existing state legal standards. Mr. Jorgensen stressed that lawyers need to be able to rely on jurisprudence and focused his position on that the Opinion needs to be objective and that if not objective, the standard moves depending on the field of law. Mr. Jorgensen stated that historically the ABA stayed away from issues such as this and this Opinion addresses the breach of fiduciary duty stating if you do not do it you have liability which creates all sorts of quagmires.

Mr. Jorgensen urged that another thing to keep in mind is the purpose of opinions is not to add protection to clients, but to guide lawyers, to help lawyers to comply. Mr. Jorgensen provided the example of Opinion 13 where the Supreme Court specifically stated that the Opinion applied standards that were beyond what the rules require. Mr. Jorgensen also provided an example of Opinion 11 relating to liens on homesteads and associations with debt collection agencies, both of which were repealed. Mr. Jorgensen stated that the LPRB and the Director's Office observed that they were outside of their lanes and the opinions no longer exist because they were outside of their lane.

Mr. Jorgensen emphasized that the Opinion, as written, is going to create a bigger burden for certain lawyers, in particular, criminal and family lawyers. Mr. Jorgensen provided an example of confidential communication going to places that it should not. Mr. Jorgensen provided an example of such issues happening daily, for example, with clients who are sophisticated, this does not have to be disclosed, however, other types of clients, for example, defendants or volatile family law clients, the standard may vary based on the practice area. Mr. Jorgensen emphasized that from his perspective this is not fair.

Mr. Jorgensen continued to question what the utility of the Opinion is. Mr. Jorgensen also emphasized that the cases the Office is charging are easy violations of Rule 1.4 and an opinion is not necessary from an enforcement perspective. Mr. Jorgensen provided the background that

initially when working at the Director's Office, he was the only attorney who did advisory opinions for five years and that he did thousands and was never asked during those requests for opinions if an attorney needed to disclose. Mr. Jorgensen stressed that despite all its hard work, is the Board really staying in its lane? Mr. Jorgensen pointed out what is the standard to consider firing; firing is subjective, considering is even more subjective.

Mr. Williams asked Mr. Jorgensen if his suggestion was to eliminate Opinion 21? Mr. Jorgensen replied that he would, it was not a tool that he used very often.

Mr. Cullen commented that he is not on the Opinions Committee but is a part of the MSBA, and has listened to William Wernz, Ken Jorgensen and Eric Cooperstein and is totally confused regarding Opinion 21 and believes it needs to be studied with all of the criticisms expressed and the Committee needs to digest it more and commented that all of what Mr. Jorgensen said is right, and Bill Wernz is right. Mr. Cullen says some are saying to confirm to the ABA, others are saying no. Mr. Jorgensen responded that the ABA does not have to be enforced, that the ABA ignores the law in the jurisdiction and gave the example of ABA Opinion 489 which ignores partnership law and stated that we cannot address the problem with a simple solution when the issue is more complicated. Mr. Williams asked if the Opinion would cause more litigation? Mr. Jorgensen replied that Opinion 21 will be pled in affidavits in civil litigation. Mr. Jorgensen opined that he has not seen plaintiffs assert Opinion 21, but now could.

Ms. Klevorn responded that as a public member, she has heard the arguments from Mr. Jorgensen and believes that the perspectives being presented are those from the lawyers' perspectives. Mr. Jorgensen replied that the rules are for the protection of the public and that Opinion 21 does not assist with that.

Mr. Beckman posed a question seeking precedent confirmation for the repeal of Opinion 13 and confirmed that it was Panel Matter 99-42 (2001).

Justice Lillehaug asked what the standard of care was for disclosing when an attorney has committed malpractice. Mr. Jorgensen replied if

there has something to do with prejudice. Justice Lillehaug followed up inquiring whether Opinion 21 informs as to the standard of care. Mr. Jorgensen replied his concern is that plaintiffs are going to use Opinion 21 as the standard of care.

Senior Assistant Director Binh Tuong cited to Rule 1.4(b), MRPC, stating that Rule 1.4(b), MRPC, requires an informed consultation with clients focusing on attorneys' relationships with clients and that attorneys are required to know what is important to clients to allow them to make informed decisions. Ms. Tuong stated that Opinion 21 is to remind, not to expand or overreach, that everyday attorneys have to make decisions to communicate conflicts and other rules may come into play and that the purpose is how to best protect the client under the rule.

Ms. Boerner asked whether it was about the client and that the standard is very difficult. Ms. Boerner expressed that it was difficult to provide guidance to 200 lawyers and that it appears very irrational. Ms. Tuong responded that it is one of many decisions, isn't it the client's decision? Ms. Boerner replied that Opinion 21 seems to be about the free market world, not the appointed lawyer world. Ms. Tuong replied whether we want to be left with the ABA Opinion with the obligation already in the rules?

Mr. Hird contributed that some people are missing the reasonableness standard in the Opinion and are looking for absolutes. Mr. Hird stated he does not think the rules are absolutes and stated that he did spend 30 years representing the clients Mr. Jorgensen is talking about and still thinks it is important for clients to have trust in their lawyers and for lawyers to communicate with their clients.

Mr. Beckman opined that Opinion 21 is not used for discipline purposes but Mr. Jorgensen is opining that Opinion 21 will create a market for legal malpractice claims.

Managing Attorney Cassie Hanson pointed out that mistakes occur along a continuum, that this is an issue for the Bar, and the current Opinion 21 is not correct and has been under debate for two years and not taken lightly by the Committee and encouraged the Board to keep in mind that the current Opinion is not accurate.

Mr. Jorgensen reinforced his concerns that the MSBA is concerned about malpractice. Mr. Cullen asked Managing Attorney Cassie Hanson if she agreed with Senior Assistant Director Binh Tuong. Ms. Hanson stated she did agree with Ms. Tuong.

Mr. Cullen then inquired why do we need Opinion 21? Mr. Cullen then stated: It seems like the OLPR wants Opinion 21 when the ABA issued Opinion 481, the point is lawyers are frequently defaulted to be protectionists.

Landon Ascherman stated he had been listening and the harm and prejudice in (a) material errors increase costs, missing hearings, struggling to think of a situation where (b) would be guiding and is struggling to see where this would play out.

Mr. Ivy added that the aspirations in (b) are valuable but would be a challenge to enforce and would be really hard if it came before a Panel, assuming clients are going to be reasonable and inquired what if the Board just went with (a) with a further definition of harm/prejudice.

Mr. Hird asked what if a lawyer is just sloppy and the judge let the lawyer get away with it, shouldn't the client get notice and the Opinion provide guidance? Ms. Wolpert closed the discussion.

Mr. Hird moved for the adoption of Opinion 21, Susan Rhode seconded the motion.

During discussion, Mr. Beckman commented that the Opinion does have the potential to be abused with the stamp of an affidavit when Rule 1.4, MRPC, already has the same duty. Ms. Judge inquired who does the Board serve and stated that she is grappling with that.

Mr. Ascherman provided a clarification if there is no harm that does not meet the standard if the judge gives you a pass for missing a deadline.

Mr. Hird stated that the fact that you sent it by mistake makes it material, a lawyer who has made a mistake has the obligation.

Ms. Wolpert called the motion to adopt Opinion 21 failed. It was noted that the concern of the nay vote was (b). When the motion failed,

Ms. Wolpert sent the matter back to the Opinions Committee to evaluate the next steps, including rescission. There was a brief discussion about whether rescission was an option.

B. Rules Committee.

Committee Chair James Cullen reported that the Committee met in January. In addition to the identified areas of focus, the Committee is also seeking to address issues relating to respondents with ongoing civil or criminal matters.

i. Status, Advertising Rules Petition

Mr. Cullen reported that the MSBA took interest in reviewing Rules 7.1-7.3 and noted that the ABA enabled attorneys to use the term specialist without precondition. Mr. Cullen reported that Dan Cragg recommended the MSBA agree to amend its rules in two separate meetings occurring on April 26, 2019, and September 27, 2019. When the first meeting occurred, the MSBA had not yet had its assembly meeting, however, there was a belief that there would be a co-petition addressing the proposed amendments. Ultimately, the state bar assembly had a dispute regarding the specialist amendment with two votes carrying the state certification/specialist language defined differently from the ABA model rules. Mr. Cullen recapped the Board's September approval of the Board independently petitioning the Supreme Court to amend Rules 7.1-7.5, MRPC, to conform to ABA Model Rules 7.1-7.3. The Board will continue with the petition transitioning to the leadership of Mr. Ivy, who will be assisted by Mr. Cullen. Mr. Cullen acknowledged that the OLPR has different priorities right now, but following the Board's work on the petition, it will be turned over to the OLPR and ultimately there will be a co-petition between the LPRB and the OLPR.

ii. Status, Rule 20, RLPR, Changes

Mr. Cullen reported that the OLPR proposed amendments to Rule 20, RLPR, and that most of the proposed amendments were acceptable. Mr. Cullen identified that Mr. Wernz raised very persuasive comments regarding the potential abuse of the amendments surrounding Rule 20(f)(3), RLPR. Mr. Cullen and Ms. Humiston are reviewing the national practice and there is an entirely new proposal that is too new to

report at this meeting. The new proposal will be referred over to Mr. Ivy who will now be chairing the Rules Committee.

iii. Access to Justice *Pro Bono* Reporting Proposal

The Access to Justice Committee of the MSBA has been working on a mandatory *pro bono* reporting requirement that is going to the MSBA assembly in April. Ms. Humiston has been attending from a regulation perspective.

C. DEC Committee.

Mr. Ivy reported that Mr. Witz will be taking over as Chair. Mr. Ivy stated he advised Mr. Witz that Jennifer Bovitz, staff liaison to the Committee, is knowledgeable and approachable. The Committee will now handle new member training.

Ms. Wolpert reminded the Board that six new members will require onboarding and there may be a gap in time with the training. Ms. Wolpert encouraged Panel Chairs to look out for new members and coordinate appropriately.

Mr. Witz requested that Board members who are transitioning off the Board email Mr. Witz with training suggestions or if they are interested in assisting with training.

D. Mandatory Malpractice Insurance Committee.

Ms. Wolpert reported that she has had several conversations with leading practitioners and academics on the subject of mandatory malpractice, and is considering coordinating presentations with outside experts with the MSBA.

6. DIRECTOR'S REPORT

Ms. Humiston directed the Board to Attachment 3 as a high level summary of 2019. Ms. Humiston reported a strong ending to 2019 with 481 open files and 119 files over one year old, which was the result of a lot of hard work. New complaints were down by 104, but the same number of matters were investigated, for example, in 2018, 572 cases were investigated, and in 2019, 566 were investigated, with more complaints in 2019 meeting the threshold for investigation. Referee trials in 2019 increased to 11 as compared to four in 2018. Panel work remained consistent with ten matters in 2019 compared to eight in 2018.

Ms. Humiston discussed that in reviewing discipline over the decades, the 1990s had the largest number of disbarments and in 2010 there was overall higher discipline. Mr. Williams and Ms. Klevorn inquired what the number of licensed attorneys was over those time periods? Ms. Humiston responded that she does not think lawyers are behaving less badly, but believes the Court is treating cases differently. Ms. Humiston also noted there have been fewer public discipline matters this year, perhaps due to the timing of trials.

Ms. Humiston directed the Board to Attachment 4, illustrating how MARS has been updated to reflect current disciplinary status for public view. The update also provides a hotlink to the OLPR website, and identifies those not carrying malpractice insurance, identified in red.

Thank you notes contained in Attachment 4 were also noted, the first being a thank you received by Ms. Bovitz from an advisory opinion caller and a thank you Ms. Humiston received from the Hmong Bar Association, which she presented at and included non-lawyers.

Ms. Humiston provided Office updates, including the addition of Senior Assistant Director Jennifer Wichelman, who was in attendance. Ms. Wichelman brings 20 years of litigation experience to the Office, most recently at Bowman & Brooke, where she practiced in the area of products liability. Ms. Humiston also discussed that Gina Brovege has been hired as an investigator, a new position for the OLPR, and that she has a good skill set that is serving the Office well. Ms. Humiston also reported that Casey Brown has started law school and loves it. Ms. Humiston provided an update that the new Office database will be launching on February 19, 2020.

Ms. Humiston reported on Office challenges including three team members losing family members serially and a number of medical leaves impacting the Office. Ms. Humiston reported that one of those leaves includes Deputy Director Timothy Burke who has been out since November 2019.

Ms. Humiston reported on a mistake in the Mulligan petition that included two mistaken rule references. Ms. Humiston thanked Ms. Boerner for bringing the issue forward. Ms. Humiston stated she is taking responsibility for the mistake, is moving to amend the petition and she appreciates how many people outside the Office review the Office's work.

Ms. Humiston also updated the Board that the Office's current lease expires on July 31, 2020. The current landlord's proposal was a three year lease with an automatic out during the first year, which was a non-starter for negotiations. The landlord is

participating in the DEED RFQ, resulting in the terms the current landlord is proposing. Ms. Humiston is working with the state real estate leasing unit.

7. DIRECTOR'S REAPPOINTMENT

Ms. Humiston noted she prepared remarks and upon request of Board members, addressed her reappointment. Ms. Humiston stated there are many things to celebrate, including successfully driving numbers, in a sustainable way. Ms. Humiston stated that she tried to encourage results in a way that skills were learned while not neglecting other responsibilities, including integration of the strategic plan. Ms. Humiston reported that the Office continued to show progress and strengthened the quality of work product. Ms. Humiston shared that Referee Nelson, upon retirement, advised her that work product under her tenure was notably improved and that he was impressed with the talent the OLPR was recruiting.

Ms. Humiston reported that she has focused office culture on teamwork and accountability with the theme of rising and falling together, a message that is consistent with the Court's emphasis on continuous improvement and the mission of protecting the public. Ms. Humiston has required all staff to provide innovation suggestions as a part of the review process. In the vein of innovation, lawyers have been attending the CoLAP conference, increasing education and awareness on lawyer wellness issues. Attorney training has increased, including ensuring that every attorney has a mentor. Ms. Humiston also celebrated the success in creating the investigator position despite initial pushback from a segment of the Office.

Ms. Humiston reported on other updates to the Office including a revised probation department, updated DEC training, revised workflows, expanding collaboration with LCL, increased Office representation on MSBA committees, and an engaged Wellbeing Committee. Ms. Humiston documented expanded outreach with more staff members presenting at CLEs, Mr. Lanterman providing three separate presentations to the National Organization of Bar Counsel (NOBC), Ms. Humiston will be presenting on a panel at the Austin NOBC conference in February and Ms. Humiston was asked to join the NOBC subcommittee on regulation in the public interest.

Ms. Humiston closed her remarks by stating she is grateful for the opportunity to lead the Office, that it is her favorite job, that she finds it challenging and pulls on many different skills. Ms. Humiston commented that it is always a challenge and exciting to do every day, stating she works with a talented group of lawyers, that she is grateful and would love to be reappointed and is thankful for the opportunity to serve.

8. NEW BUSINESS

Mr. Ascheman reported on the early bar examination committee stating that the committee is compiling information from law schools to determine early bar exam impacts. The intent of the early bar examination is to allow students to take the examination before completing a JD with licensing occurring upon graduation, decreasing debt load.

Kyle Loven inquired how many other states have implemented an early exam? Mr. Ascheman responded that Georgia dropped the early exam, Arizona is fairly active with a 100% passage rate. Other states include Vermont and New York. New York allows applicants to take the exam early if 100 hours of *pro bono* work have been completed. Ms. Wolpert stated that once there is a final report it will be sent to the Rules Committee and the Board can make a decision.

9. QUARTERLY BOARD DISCUSSION

The Board, in a closed session, conducted its quarterly Board discussion.

Thereafter, the meeting adjourned.

Respectfully submitted,

Jennifer S. Bovitz

Bovitz, Jennifer
Jun 10 2020 11:19 AM

Jennifer S. Bovitz
Managing Attorney