

MINUTES OF THE 184th MEETING OF LAWYERS PROFESSIONAL RESPONSIBILITY BOARD JUNE 8, 2018

The 184th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, June 8, 2018, at the Town and Country Club, St. Paul, Minnesota. Board members present were: Board Chair Robin Wolpert, and Board members Joseph Beckman, Jeanette Boerner, James Cullen, Thomas Evenson, Roger Gilmore, Christopher Grgurich, Mary Hilfiker, Gary Hird, Peter Ivy, Bentley Jackson, Virginia Klevorn, Mark Lanterman, Michael Leary, Cheryl Prince, Gail Stremel, Bruce Williams, and Allan Witz. Present from the Director's Office were Director Susan Humiston, Deputy Director Timothy Burke, Senior Assistant Director Cassie Hanson and Assistant Director Rebecca Huting.

1. APPROVAL OF MINUTES.

The Minutes of the April 27, 2018, Board meeting were unanimously approved.

2. 2018 ANNUAL REPORT DRAFT.

Susan Humiston reported that this year's annual report continues her efforts to provide a more streamlined annual report, and talks about the key activities and functions the OLPR performs. Ms. Humiston stated that the report would be filed shortly after July 1, 2018, once the final statistics through June 30, 2018, are completed. Ms. Humiston also stated that the Executive Committee had asked Ms. Humiston to, and she did, elaborate in the annual report on the increased number of, and time committed by the Office's lawyers to, CLE seminars.

Ms. Humiston noted one interesting statistic, that between 2016 and 2017 more female lawyers were disciplined. Mary Hilfiker asked what proportion of lawyers are female. Ms. Humiston stated that she did not have that information immediately available, but that this information was maintained by the Board of Law Examiners. Virginia Klevorn inquired whether the increase appeared to be tied to an increase in issues such as substance use disorders. Ms. Humiston stated that she did not believe so. Ms. Humiston invited any additional recommendations for edits to the annual report before submission to the Supreme Court.

Bruce Williams discussed information contained in the annual report regarding the overdraft notification program. He noted that the number of trust account overdraft notifications received from banks has been declining, and that some of the overdrafts were caused by bank errors. Ms. Humiston confirmed that

although there may be bank errors in other instances, only when a bank error triggers an overdraft is there an overdraft notification to the Office.

Ms. Humiston confirmed the Office has spent significantly less time over the past couple of years on overdraft notifications. In 2015, the Office received 75 overdraft notifications from financial institutions; in 2016, the Director's Office received 52 such notifications; and in 2017, the Office received 43 such notifications.

Cassie Hanson observed that in the past year Ms. Humiston has prioritized education on trust account recordkeeping requirements and wondered whether this has helped prevent overdrafts. Ms. Humiston stated that she hoped this was the case, and also noted that the Office receives a number of requests for advisory opinions on this topic, as well. Ms. Humiston expressed her continued desire to do a trust account school, particularly for newer lawyers. By way of example of the demand for such education, Ms. Humiston reported that recently she did a trust account CLE with a representative of Minnesota Lawyers Mutual at which there were more than 300 attendees and over 60 questions.

Mr. Williams opined that the most unrecognized trust account rule was the requirement to perform monthly reconciliations. This is particularly true of solo practitioners who view this type of administrative requirement as last on the list of things to do.

Mr. Williams stated that he had read the draft annual report, found the report quite detailed and comprehensive, and thanked Ms. Humiston for her time and effort in preparing the report. Ms. Humiston thanked Mr. Williams for his comments and also noted that each lawyer in the Office writes the section of the report that relates to their particular department assignment.

Robin Wolpert noted the decline in complaints in recent years. Ms. Humiston stated that the decline in complaints from 2016 to 2017 was nine percent, and that there was a similar decline year over year from 2015 to 2016. Ms. Humiston stated that the decline in complaints appears to be a national trend, not one limited to Minnesota. Ms. Humiston also noted that, although the trend appears to be toward fewer complaints, there is not a substantial change in the total number of disciplines, particularly public disciplines. Anecdotally, this appears to be true nationally, as well. Ms. Humiston noted that the Minnesota trend toward fewer complaints appears to be continuing through the first five months of 2018.

A motion was made to approve the draft Annual Report included as Attachment 2 to the materials for the meeting, subject to completion based on the statistics as of the end of June 2018. Ms. Wolpert stated that she would add a note from the Board Chair to accompany delivery of the report to the Supreme Court, addressing topics such as the trend of a reduction in the number of complaints, the number of files in the disciplinary system, staff turnover, the strategic plan, and the like. The motion was seconded and passed unanimously.

3. COMMITTEE UPDATES.

A. Rules Committee.

Christopher Grgurich reported that the Board's Rules Committee will meet in June 2018 on a number of proposed rule changes, none of which appear to be objectionable, for presentation to the Board at its September meeting. Ms. Wolpert reported that the Minnesota State Bar Association expects to submit its petition on the MSBA's proposed changes to Rules 1.6(b) and 5.5, Minnesota Rules of Professional Conduct, at the end of this summer.

B. Opinions Committee.

Joseph Beckman reported that the ABA had issued Opinion No. 481, which addresses a lawyer's duty to self-report to current clients material errors. The Opinions Committee is considering whether Board Opinion No. 21 should be modified in light of ABA Opinion No. 481. Mr. Beckman, speaking for himself and not the Opinions Committee, opined that a change to Board Opinion No. 21 appears appropriate. Ms. Wolpert noted that given the interplay between ABA Opinion 481, Board Opinion No. 21, and the Rules of Professional Conduct, this issue may affect multiple areas.

Ms. Humiston and Mr. Beckman summarized the issue. ABA Opinion No. 481 requires disclosure of any material error to a current client. Opinion No. 21 also involves disclosure to current clients, but is limited to errors which could constitute malpractice. Additionally, ABA Opinion No. 481 gives greater clarity to the definition of "materiality."

Ms. Hanson noted that ABA Opinion 481 also gives guidance on defining the difference between a current and former client. Mr. Beckman stated that it may be appropriate to give similar guidance if the Board is

modifying Opinion No. 21. Ms. Wolpert stated that this issue would be on the agenda for the Board's fall meeting.

Ms. Humiston reported that she had talked with Ms. Hanson, as the Office's liaison to the Board's Opinions Committee, on two additional topics for the Committee to examine the appropriateness of a Board opinion. One topic is the issue of representing both parties in a dissolution matter, which presents a non-consentable conflict of interest in the view of the Office. The other topic relates to defining availability fees. Ms. Humiston noted that the Office still sees misuse and confusion regarding the definition of availability fees and believes that a Board opinion addressing this issue could help lawyers on this topic. Ms. Humiston stated that the Office will look at what other states have done on this issue.

Thomas Evenson inquired about the issue of representing both parties in a dissolution matter. Ms. Humiston noted that the Office had seen situations or received advisory opinion requests regarding situations where a lawyer says that the lawyer can represent both parties to a divorce, but could not help both parties if a dispute arose between the jointly-represented parties. However, by its very nature, a divorce is a dispute. More fundamentally, a lawyer may not represent opposing parties in a litigation matter. A dissolution matter is a litigation matter between parties, one spouse versus the other spouse.

Ms. Humiston also noted that similar concerns are seen with mediators who undertake to memorialize in writing agreements reached at mediation.

Mr. Williams stated that he understood that without doubt a lawyer can only represent one party to a dispute, not both. Thus, if an agreement is reached between a party represented by counsel and a *pro se* party, then the *pro se* party needed to execute some form of a waiver of counsel in connection with the stipulated agreement.

Cheryl Prince stated that as a family law practitioner, she has seen an increase in situations where *pro se* parties to a divorce want an attorney as the third party neutral. In such situations, the *pro se* parties can misunderstand the role of a neutral, believing the neutral can provide legal advice to a party, or the neutral may cross the line from acting as a neutral to providing legal advice to one or both parties.

Mr. Williams noted the significant increase in the number of *pro se* parties in dissolution actions. In particular, he noted a statistic provided at the Family Law Institute that 87% of the parties in dissolution proceedings are *pro se*. Ms. Humiston stated that district court self-centers see family law as the largest area in which they receive requests for assistance, as well.

James Cullen inquired whether the Office had received any requests for advisory opinions on whether a lawyer could represent more than one defendant in a criminal matter. Mr. Cullen noted that when he was a member of the Fourth District Ethics Committee, a number of complaints were investigated involving a lawyer representing multiple defendants in a criminal matter. Mr. Cullen expressed his opinion that such a situation creates a non-waivable conflict of interest.

Ms. Humiston stated that the Office has received complaints arising out of this situation, which presents a more difficult question. Jeanette Boerner concurred that such situations can be difficult. Ms. Humiston stated that at times a conflict of interest in representing multiple defendants in a criminal matter may be consentable. This is in contrast to family law matters, in which the parties have direct claims against each other, making any conflict non-waivable. Ms. Humiston further stated that the Comments to Rule 1.7 noted that in most instances conflicts in criminal matters are not waivable. Ms. Boerner agreed but stated that in some instances a waiver may be permissible. Mr. Cullen suggested that this topic could be added to the discussion of an opinion regarding conflicts in family law matters, and further noted that in federal criminal matters, the courts do not allow representation of multiple defendants in the same matter.

C. DEC Committee.

Ms. Wolpert congratulated the DEC Committee and Joshua Brand of the Office for putting on a terrific program at the recent DEC Chairs Symposium. Peter Ivy reported that the Symposium was a team effort. Mr. Ivy hoped that the Symposium helped DEC Chairs network, learn substantive information, and receive additional motivation for their work. Mr. Ivy also noted that preparations are underway for the DEC Seminar in September.

Mr. Ivy reported on the May DEC statistics. In particular, Mr. Ivy was happy to report that overall the DEC's (with the exception of the Fourth

DEC) are conducting their investigations in less than five months. Ms. Humiston opined that the DECs do a great job in meeting the established timelines for investigations.

Roger Gilmore inquired as to the status of the position of Chair of the Fourth DEC. Ms. Humiston reported that the issue was on the calendar for the Supreme Court's June 2018 meeting. During the past year, the current Chair has been unable to perform the responsibilities as Chair for health reasons, and the two Vice-Chairs have been handling those responsibilities. Recently the Hennepin County Bar Association requested the Supreme Court appoint a new Chair and recommended Lisa Spencer, who currently is one of the Fourth DEC Vice-Chairs.

Ms. Wolpert reported on the feedback received in the surveys of attendees at the DEC Chairs Symposium. Ms. Wolpert reported that all presentations were viewed very favorably.

Ms. Wolpert reported that Ms. Humiston is working on the agenda for the DEC Seminar and requested Board members to let Ms. Humiston or Mr. Ivy know of any ideas for topics for the seminar. As to the DEC Seminar, Ms. Humiston stated that a hypothetical scenario, similar to that presented at the DEC Chairs Symposium, will be utilized at the DEC Seminar. She hoped that attendees would be able to work with other attendees from their DECs. Ms. Humiston is also considering an "Ethics Jeopardy" or similar presentation. Ms. Wolpert noted that at a recent seminar she attended, pop-up topics of about 15 minutes at length were interspersed. Ms. Humiston stated this was under consideration for the DEC Seminar, as well. Gary Hird stated that he recently went to a seminar which had interactive feedback from an audience, and advised that it must be ensured in advance of the seminar the technology works smoothly.

Mr. Ivy inquired how many people usually attend the DEC Seminar. Ms. Humiston reported that attendance is usually about 130. Ms. Humiston also informed Board members that in the near future they will receive a request for nominations for the Volunteer of the Year Award.

4. DIRECTOR'S REPORT.

Ms. Humiston began with the budget update. The Office is in the middle of its biennial budget cycle, so in June the Office is providing a status report and Ms. Humiston will meet with the Supreme Court.

Overall, the Office's budget is doing well. Ms. Humiston noted that since the written update provided with the materials for the meeting was produced, revenue from lawyer registration fees has increased, so that the Office will be fine on revenue.

As to expenses, Ms. Humiston reported that most of the \$355,000 in savings are deferred expenses. These include items such as security upgrades, courtroom upgrades, and equipment required in connection with the Office's database management project. Savings have also been realized from the hiring of new lawyers at salaries lower than the salaries of the lawyers they replaced.

Ms. Humiston reported that the Office is approaching the end of the database project. It is coming in approximately on budget, although a few months behind schedule. Ms. Humiston noted that a number of change recommendations, totaling approximately \$50,000, have been proposed. Questions to be considered in connection with these change orders are whether the change orders cover services already included in the contract specification, and whether the Office wants the additional functionality. There is sufficient funding in the budget to pay for any of these change orders if approved.

Ms. Humiston summarized that income from all sources covers Office salaries, but rent, supplies and all other operating costs are paid from reserves.

Mr. Williams asked about the proposed courtroom upgrade. Ms. Humiston replied that there are two types of upgrades. One set of upgrades is to improve the ADA audio functionality in the courtroom. The other set of upgrades relates to technology. Ms. Humiston observed that the Office has many out-of-state witnesses who could testify remotely. If the testimony is through the Court system's ITV network, then the parties, judge and court reporter have to leave the courtroom and go to another conference room in the Minnesota Judicial Center which has ITV capability. The telephone audio in the courtroom is poor, and there is no freestanding technology in the courtroom.

Mr. Williams asked about the Office's annual rent payment on the courtroom. Ms. Humiston stated that the Office pays approximately \$24,000 per year, plus had paid the cost of building the courtroom when it was constructed in approximately 2002. There was then some discussion about why the Office paid rent on the courtroom and whether other judicial branch users could be charged for their occasional use of the courtroom, but also recognition that from time to time the Office uses other portions of the Minnesota Judicial Center for free.

Ms. Humiston noted that although the Minnesota Judicial Branch's ITD had stated it would bill the Office for services in fiscal year 2018 and despite multiple requests, no invoices have been received and it therefore appears the Office may not be charged for those services this fiscal year.

Ms. Boerner inquired whether there was a conflict of interest in the Office seeking to collect judgments, akin to concern about fees for public defender services included on matters. Ms. Humiston stated that no one had raised any such concerns, and that the amount of costs collected was a small percentage of the Office's budget.

Ms. Prince inquired whether there had been any talk of increasing the amount of costs awarded in lawyer discipline proceedings. Tim Burke stated that he has been considering this idea. The present amount of \$900 in costs was established in 1997. Mr. Burke reported that in today's dollars, that translates into approximately \$1,350. Ms. Prince inquired as to the process to change the amount of costs awarded. Ms. Humiston replied that this would require a rule change. Additionally, the New Jersey lawyer discipline office is in the process of finding out what other jurisdictions receive for cost awards. We will receive those results, and those results should provide substantial insight as to what, if any, change in the amount of costs awarded would be appropriate.

Mr. Cullen asked that as part of the scheduling of hearings in Panel matters, whether a conference room at the Minnesota Judicial Center could be reserved for the Panel members to use to then confer. Ms. Humiston stated that she would see if this would be possible.

Mr. Williams asked when the budget presentation would be made to the Supreme Court. Ms. Humiston stated that she would meet with the Court on or about June 20, 2018.

Ms. Humiston asked Rebecca Huting of the Director's Office to introduce herself, and she did so.

Ms. Humiston reported that May was a particularly busy month for the Office. Reviews were conducted in May for all Office personnel. Ms. Humiston reported that most reviews were quite positive and stated that she is extremely pleased with the team currently in place. In particular, Ms. Humiston stated that the newly hired lawyers are working very hard and working out very well.

Ms. Humiston reported that the statistics in May remained about the same. Ms. Humiston stated that Ms. Wolpert had shared the thoughts of the Board and Justice Lillehaug on case processing goals.

The Board has established two case processing targets for the Office for files in the disciplinary system. One is a total of no more than 500 open files, and the other is a total of no more than 100 files over one year old. Ms. Humiston believes these are appropriate targets.

Ms. Humiston noted that she keeps one additional target in mind. This is the number of cases on which the Office can complete investigation within one year of the complaint being filed. It is extremely rare to have a litigated public discipline matter completed within one year of when the complaint was filed. Ms. Humiston noted that certain types of files, particularly complex files such as files involving audits or multiple complaints which are received across time, can take more than one year to complete the investigation.

All that said, Ms. Humiston believes the targets are appropriate. The question therefore is whether the discipline system can get to no more than 100 files more than one year old in the near term. When analyzing a path as to what can be accomplished by the end of September, and then by the end of December, Ms. Humiston noted of the files more than one year old at this time, 16 are on hold, and 17 are the subject of proceedings pursuant to Rule 12(c), Rules on Lawyers Professional Responsibility, by which a lawyer is suspended for a year, with no proceedings occurring, and then proceedings return. Thus, there are at least 33 files which the Office cannot move.

Additionally, trusteeships consume a substantial amount of the Office's resources. Currently, there are five trusteeship files in the Office. Some involve more than 100 boxes of client files which must be inventoried. Thus, Ms. Humiston has been inquiring as to what really does the Office have to do to get to achieve the targets in light of these factors.

Mr. Williams opined that the target of 100 does not really give the Office much breathing room at all. Ms. Humiston replied that at this time she is unable to tell how realistic the target of 100 is in light of the fact that she does not know what the full capacity of the Office is. Factors causing this include attorney turnover, as a result not knowing what the full Office case management capabilities are until the Office has 12 full-time employees who are up to speed. Part of that development is providing skill training on multiple case handling of up to 50 files, which is currently the senior lawyer file assignment.

Mr. Hird inquired whether additional categories with different targets should be reported in light of the fact that certain cases simply cannot be completed or charged out within one year. Mr. Gilmore noted that years ago the Board had talked about deferring establishing firm goals until a new Director was in place and had time to assess the Office and implement changes. A new Director is on board, but given all the recent changes we are not in that position yet.

Ms. Prince opined that the Board should redefine what files are over one year old and over which the OLPR has control or responsibility (files not on hold, under advisement, etc.). This would narrow the categories for which the Office is responsible to the ones on which the Office is able to achieve movement on the files. To Ms. Humiston, she believes that getting the investigation completed on 80 percent of files within a year would feel successful.

Mr. Beckman agreed with Ms. Prince's comment, that the Board understands what the various categories of files are. Thus, is there a way to dashboard that to focus on subcategories the Office can control? Ms. Humiston noted that two files are with the Supreme Court right now. Ms. Boerner opined that the reports should be broken out in a way that recognizes the types of cases the Office cannot control and focuses on the cases the Office needs to be processing.

Ms. Prince stated that she understands this to be the focus of the Supreme Court, that the Board should encourage the Court to focus on what the Office can control and on what Ms. Humiston is trying to make movement on and what she is accomplishing. The way to do this may be through different reporting to track the movement of files the Office can control. This will give Ms. Humiston and the Office the credit they deserve for the progress which has been made. Ms. Prince noted that the Supreme Court likes the target of no more than 100 files in the system that are more than one year old, so suggested that 100 be defined by the types of cases on which the Office has the capability to make progress. Reports could be revamped or put into a different format to be consistent with this.

Mr. Gilmore stated that he believed it would be useful if Ms. Humiston came up with ideas as to how the reports could be modified, and met with the Executive Committee. Then, the Executive Committee could report to the Board at its next meeting.

Ms. Humiston reported that the Office has a plan for case management, there are many challenges to the plan, but overall the plan looks good, and she is pleased with what the Office is and will be accomplishing.

Mr. Hird stated that the reports currently do not show this. Ms. Prince stated that reports should be formatted to show this.

Mr. Beckman stated that everyone is pleased with how the Office is performing, and understands that the priority on cases is by the harm being caused.

Ms. Humiston stated that the Office is focused on these types of cases, and

Mr. Beckman stated that the Board supports Ms. Humiston in this effort.

Ms. Wolpert appreciated the substantial input the Board members provided on the details of the Office's reports. She stated that the Executive Committee can discuss what reports are generated and what information is in the reports, including whether to separate or to categorize matters based on those within or not within the Office's ability to take action on the matters. Notwithstanding the foregoing, Ms. Wolpert reminded the Board that Justice Lillehaug wants to see the case processing targets met by the end of the year. Therefore, Ms. Wolpert asked Board members to generate ideas on how cases can be moved and how the Office can meet the targets of the Supreme Court. Ms. Humiston has informed Ms. Wolpert that this will be difficult to accomplish, and therefore conversations among the Board members and Ms. Humiston should occur about how the case processing targets can be met. At this time, Ms. Wolpert does not believe a reevaluation of whether the case processing targets are realistic is appropriate. Only if after further discussion and deliberation it is determined the case processing targets are not achievable, then the Board can decide such is the case and have discussions with Justice Lillehaug. Ms. Wolpert reiterated that the Board and Office are not at that position yet. Mr. Beckman reiterated his opinion that it is important to separate in the reporting matters over which the Office has no control.

Ms. Humiston reiterated that the Office had a path toward meeting the case processing targets. As part of this, she has prepared a calendar for herself with deadlines for every separate case in the Office, and she has also redistributed work to achieve these targets.

Mr. Cullen asked about the expunction of wills the Office takes possession of during trusteeship matters. Mr. Cullen stated that he understands that after a period of time, the Office will destroy such wills. He is wondering whether these wills could be scanned before destruction. Ms. Humiston replied that substantial labor expense is involved in any such project. For example, in one matter alone, the Office has more than 700 wills in the trusteeship proceeding. Ms. Humiston is comfortable with the process the Court has put in place, because often the wills are of persons who died long ago. Ms. Humiston also reported that the Office

attempts to find people and return original wills; the wills under discussion are those of people the Office was unable to locate. Mr. Cullen and Mr. Hird inquired whether the wills, instead of being destroyed, could be delivered to the Department of Commerce as unclaimed property. Ms. Humiston stated that she would look into this issue.

5. **OTHER BUSINESS.**

Ms. Wolpert directed the Board's attention to the proposed 2019 meeting dates, and noted that the first Board meeting of 2019, currently scheduled for February 1, 2019, may be changed.

Ms. Wolpert also offered a preview of the July 27 Board offsite. There will be two presentations, each approximately 45 minutes in length, followed by a period for questions. There will then be a socialization period and lunch provided. The event will be at the Minnesota Judicial Center. The presenters are on the forefront of how law ought to be practiced and how it will be practiced in the future. Based on her recent attendance at a conference, Ms. Wolpert believes that Minnesota is technologically behind many areas of the country in the practice of law. The presenters at the Board offsite will talk about what people are and will be doing in the future in the practice of law. This will stimulate a conversation about how the Board and Office can get ahead of thinking about the professional responsibility issues arising from advances in technology.

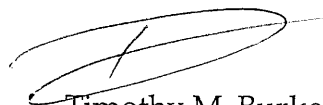
Ms. Wolpert stated that the third Board offsite will be a joint presentation with the Office to put together a plan to promote lawyer well-being for the lawyers of Minnesota. Ms. Wolpert wanted staff to be present at the July 27 Board offsite as she believes Office staff will benefit greatly from the technology presentations.

6. **QUARTERLY BOARD DISCUSSION.**

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

Thereafter, the meeting adjourned.

Respectfully submitted,



Timothy M. Burke
Deputy Director

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