

MINUTES OF THE 181ST MEETING OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

September 29, 2017

The 181st meeting of the Lawyers Professional Responsibility Board convened at 3:00 p.m. on Friday, September 29, 2017, at the Earle Brown Center, Brooklyn Center, Minnesota. Board members present were: Board Chair Stacy Vinberg, Jeanette Boerner, James Cullen, Thomas J. Evenson, Roger Gilmore, Christopher Grgurich, Gary Hird, Peter Ivy, Virginia Klevorn, Cheryl Prince, Susan Rhode, Gail Stremel, Bruce Williams, Allan Witz, and Robin Wolpert. Present from the Director's Office were Director Susan Humiston and First Assistant Director Timothy Burke.

1. APPROVAL OF MINUTES

The minutes of the June 9, 2017, Board meeting, and the minutes of the September 8, 2017, Special Board meeting, were approved.

2. WELCOME TO BRUCE WILLIAMS

Stacy Vinberg welcomed Bruce Williams as a new member of the Board and expressed her anticipation of his service on the Board. Ms. Vinberg noted that Mr. Williams has been added to a Panel.

3. DEC SEMINAR FEEDBACK

Ms. Vinberg expressed her belief that the seminar was an excellent program as usual. She noted that in particular the final few presentations should be very helpful to district ethics committee members. Susan Humiston reminded Board members to complete an evaluation of the seminar.

4. COMMITTEE UPDATES

a. Rules Committee

Ms. Humiston stated that the Board had responded to the Minnesota State Bar Association Rules of Professional Conduct Committee's (committee) proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct. Ms. Humiston stated that at the September 26, 2017, committee meeting, the two items on which the committee and the Board agreed were referred to the MSBA Judiciary Committee to put on the agenda for the General Assembly meeting in December. The first item was an additional exception in Rule 5.5 to allow representation of family members. The second

item was the Board's addition of a notification requirement to the committee's proposed change to Rule 5.5 to allow a lawyer residing but not licensed in a jurisdiction to undertake representation of a client on a matter involving the jurisdiction in which the lawyer is licensed. Ms. Humiston reported that the committee tabled discussion of the remaining proposed amendments to Rule 5.5 to its next meeting at the end of October 2017.

Ms. Humiston provided an update on an item, not on the Board's agenda, regarding proposed changes to Rule 1.6(b), MRPC. Ms. Humiston reported that the committee had adopted a proposal to amend Rule 1.6(b) in response to Board Opinion No. 24, which Ms. Humiston summarized. She stated that the committee had a subcommittee which looked at the issue covered by Opinion No. 24, which noted the prevalence of social media and concern about negative on-line comments by clients. The committee adopted a proposal to effectuate changes to Rule 1.6(b), MRPC, and that this proposal was distributed to the Board members today. Ms. Humiston said that although the committee wanted the Board's input, the committee chair wanted the matter on the agenda for the MSBA General Assembly meeting in December, which made the timing tight.

Cheryl Prince reported on the LPRB Rules Committee's initial review of the proposed changes. The LPRB Rules Committee had discussed the matter, but had not reached the point of making a recommendation to the Board yet. Ms. Prince reported that all but one jurisdiction that considered this issue does not allow a lawyer to reveal client confidences in response to a negative social media post by a client. Ms. Prince noted that most LPRB Rules Committee members recognize the issue but believe more discussion is needed, trying to achieve a balance between the fact that social media can impact a lawyer's practice and reputation and concern about traditional notions of client confidentiality and that adopting this proposal may move the profession in a direction regarding client confidences that we as lawyers do not want.

Ms. Prince summarized the changes set forth in the committee's proposal. She noted that proposed Rule 1.6(b)(9), MRPC, is largely similar, but not identical, to current Rule 1.6(b)(8), MRPC. Ms. Prince reported that the committee appears to believe that the proposed Rule 1.6(b)(9) is an improvement to the current Rule 1.6(b)(8) language. However, as to the proposed 1.6(b)(8) from the committee, the Board's Rules Committee had no consensus yet.

Ms. Humiston asked about the timing of any rules committee response. Ms. Prince inquired whether the Board should request the MSBA to defer its consideration of these changes so that the Board would have time to respond. Ms. Humiston stated that it was her understanding that the MSBA committee did not wish to delay. Ms.

Prince stated that given the timing, she did not believe the Board would be able to give the matter full consideration, and noted that the Board could comment during any public comment period requested by the Supreme Court after the MSBA filed a petition to amend the rules.

Robin Wolpert said that she believed the Court wants to hear from the Board, and that the MSBA had incentive to get the best proposal in front of the Court and the maximum possible consensus on a proposal. She stated that she believed the Court would want full input from the Board to get a complete sense of the views of the legal community and of those involved with protection of the public. That said, Ms. Wolpert was not urging the Board to have a special meeting, and recommended the Board consider this issue at its January 2018 meeting.

Ms. Humiston inquired whether the Board's Rules Committee could have a recommendation for the full Board to consider at its January 2018 meeting. Ms. Prince stated she saw no reason why that would not be possible.

Ms. Humiston reported that she has asked to be allowed to attend the MSBA's Judiciary Committee meeting regarding the proposed changes to Rule 5.5, MRPC, and that at that time she could inform the Judiciary Committee that the Board has not had a chance yet to consider the proposed changes to Rule 1.6(b), MRPC, and would be able to do so at its January 2018 Board meeting. From there, the MSBA Judiciary Committee could decide whether to put the matter on the agenda for the General Assembly's December 2017 meeting or to defer consideration to a later date. There was consensus that this was a good idea, and that the Board should not rush its consideration.

Ms. Vinberg inquired whether Ms. Wolpert would be willing to make such a request to the MSBA on behalf of the Board, as she is the incoming Board Chair and has a working relationship with the Chair of the committee. Ms. Wolpert agreed to do so.

James Cullen stated his belief that the timing should be close on the consideration of the proposed changes to both Rule 1.6(b) and Rule 5.5. Gary Hird agreed but noted that the timing is different because the calendars of the MSBA and the Board do not connect well. Mr. Cullen stated that he believed that the Board should inform the MSBA that the Board is interested in the 1.6(b) issue, but is limited on timing until 2018.

b. Opinions Committee

There was no report from the Opinions Committee.

c. DEC Committee

Ms. Humiston reported that there was no formal report from the DEC Committee. Ms. Humiston said that the Committee is working on the idea of a standardized application for DEC members and the idea of standardized due diligence for applicants to become DEC members. The Committee is considering this issue because of the varying approaches of the various DEC's to appointing new members. Ms. Humiston also noted that Josh Brand is now the Director's Office liaison to the DEC Committee.

5. DIRECTOR'S REPORT

Ms. Humiston reported that the rate of complaints filed with the Director's Office is on track year-over-year. She further reported that the total number of files being handled is less than 500, even though the statistics state the number is slightly greater than 500, because 24 of those files are summary dismissals in the process of being drafted and finalized.

Ms. Humiston noted that there are a number of public and Panel matters pending, and that the number of disciplines is shaping up to be a high average year, comparable to last year.

Ms. Humiston reported that the Office pushed to get all cases under investigation for more than one year completed (that is, no longer under investigation) by September 1, but was unsuccessful. Ms. Humiston stated that much had been accomplished and much had been learned about bottlenecks and where she could help to allow files to move more quickly. Ms. Humiston noted that there are certain types of files that simply will not be able to have the investigation completed within one year, such as matters involving serial complaints against lawyers, files involving noncooperation, and files involving multiple requests for extensions. The Office is down to a small percentage of files under investigation for greater than one year, which the Office is working through. Overall, Ms. Humiston is pleased with the progress and liked how all staff members embraced the challenge of this goal.

Ms. Humiston reported that Tim Burke will become the Deputy Director upon the retirement of Pat Burns. Cassie Hanson will supervise the junior hires, to allow her to ease into management. There are a number of new assignments: Josh Brand will become the Office's liaison to the Board's DEC Committee, Siama Brand will become the Office liaison to the Second DEC after Craig Klausing retires, Jennifer Bovitz is now the Office liaison to the First and Sixth DEC's, and Ms. Hanson is now the Office liaison to the Fourth DEC.

Ms. Humiston reported that the Office is investing substantially in training. Recently the lawyers and paralegals in the Office attended a two-hour training on frequent issues in immigration practice, a presentation which was excellent and interesting and made clear some challenges unique to the practice of immigration law. Ms. Humiston wants to offer additional training where there is not substantial in-house expertise, such as in the areas of real estate and probate law.

Three lawyers from the Office, Kevin Slator, Megan Engelhardt, and Ms. Hanson, will attend the COLAP conference in October 2017 in Kansas City. Ms. Humiston attended the COLAP conference in 2016 and found it very beneficial. These lawyers are attending as they are the lawyers who work with probationers, and many probations involve issues of substance use and/or mental health.

In October 2017, Amy Mahowald and Binh Tuong will attend the NOBC/NITA training, an intense one week litigation training seminar.

Ms. Hanson will present at an upcoming National Organization of Bar Counsel conference on the topic of trust account books and records.

The Office is working on in-house training, and also training for persons not in the Office. The Office has a plan for creating a series of DEC training videos. The Office is working on breaking down topics and scripting various videos. These videos will be taped and available to DEC members on a private YouTube channel. Likely topics include but are not limited to an overview of the system, the life cycle of a complaint, how to deal with a non-cooperative respondent, the definition of "isolated and non-serious" misconduct, what constitutes a lack of diligence, and what constitutes a fee agreement which complies with Rule 1.5, MRPC.

The Office also will be investing more in Board member training. Mr. Burke will take over training of incoming Board members and is working on ideas to help with the onboarding of new Board members. Also, the Panel Manual is in the process of being updated.

Ms. Humiston reported that the strategic planning process is about to commence. Her idea of a tagline for the Office is "Protecting the Public and the Legal Profession." As part of the strategic planning process, a survey has been put together, Board members will be interviewed either by phone or through Survey Monkey, and a broad group of other stakeholders will be surveyed. Among other things, the Committee will look at the five drivers of change and develop a three-year plan for the Office. The strategic planning process is expected to occur over the next four months.

Finally, Ms. Humiston reported that the Supreme Court approved the Board's proposed budget for the Office without change.

Mr. Williams inquired about the status of outstanding judgments entered in favor of the Office. Ms. Humiston reported that many judgments are turned over to Revenue Recapture for collection. Ms. Humiston noted that although on one level the amount of outstanding judgments may seem large, it is but a small fraction of the outstanding debt owed to the Client Security Board (although much of that debt is uncollectible). Ms. Humiston noted that Revenue Recapture is the best method for collecting against people in Minnesota who pay Minnesota taxes and seek to collect Minnesota tax refunds. Ms. Humiston also noted that historically many of the debts may not be collectable, but that the Office did plan to review best practices regarding its collection efforts.

6. OTHER BUSINESS

a. Noteworthy Decisions

Ms. Vinberg noted that Mr. Burns and Justice David Stras talked during the seminar about *In re Panel No. 41310*. Ms. Humiston noted that the case brings out nuances between what the DEC saw as a violation as opposed to what the Panel saw as a violation, and then the Court also expressed its opinion as to the conduct which constituted a violation.

Ms. Humiston noted the two main procedural takeaways from that case. First, if a Board member reviews a determination that discipline is not warranted which has been appealed by a complainant, by rule the Board member must state the reasons for the Board member's decision that discipline is warranted. Second, if a Panel issues an admonition after hearing, the Panel must make findings of fact and conclusions of law, but is not required to do any analysis or memorandum.

Ms. Vinberg noted that there had been an issue since the last regular Board meeting involving an admonition, as to whether the actual finding was of both isolated and non-serious misconduct. Ms. Vinberg noted that if the Panel is issuing an admonition, then the Panel should clearly state on the record that the misconduct was both isolated and non-serious.

b. Scanning of Wills

Ms. Humiston reported back on an inquiry made previously by the Board. As part of its trusteeship responsibility, the Office has thousands of wills, some of which go back as far as 1960. It would cost several thousands of dollars to have the wills scanned.

The Office does not have the labor resources to do so, and therefore an outside vendor would have to be retained. As a result, the Director's Office determined to do as the Supreme Court order requires. The Office will make every effort to find and track down involved people, would keep the originals as long as possible, and then beyond that, the documents would be destroyed pursuant to court order.

c. **Panel Protocol**

Ms. Vinberg identified a couple of issues arising in Panel matters.

First, Ms. Vinberg reminded Panel members that all communications regarding a matter before a Panel must be with both parties. Substantive issues must be discussed with both parties; there may not be *ex parte* communications. Ms. Vinberg encouraged Panel members that, if there was any doubt as to procedural questions, to contact their Panel Chair and that, if questions remained, to call Ms. Humiston or Mr. Burke.

Second, Ms. Humiston also reminded Board members that, if communicating with a represented party, then communication must be through and with counsel. In a recent matter involving a complainant appeal, one of the parties had counsel on the appeal, but the Board member directed the determination to the represented party.

Chris Grgurich noted that in a Panel matter recently assigned to his Panel, which was withdrawn before hearing, the respondent lawyer provided a submission to the Panel, but the Panel was unable to determine if the lawyer had also provided that submission to the Director. Mr. Grgurich wrote to the respondent, asking about the issue, and sent a copy of that communication to the Director. The Director's Office confirmed that the respondent lawyer had originally copied the Director's Office on the submission to the Panel. Mr. Grgurich inquired whether he needed to copy other Panel members on such correspondence he writes. Ms. Vinberg stated that it was the responsibility of the Panel Chair to handle such preliminary and procedural issues, and Ms. Humiston expressed her appreciation for how Mr. Grgurich handled the situation.

Thomas Evenson inquired whether a way existed to be sure all Panel members received documents such as a respondent's answer to charges. Ms. Humiston stated that the Director's Office upon receiving a respondent's answer would review it to see if it could be determined whether the respondent had submitted the answer to all Panel members or just the Chair, and to ensure that the respondent sent the answer and other materials or filings to all Panel members.

Mr. Cullen noted that earlier this year, his Panel had changed how it operates so that all Panel members were involved in all communications that Mr. Cullen as Chair

had with parties, and that the Director's Office seemed to routinely ensure that all of a respondent's submissions were submitted to all Panel members.

d. 2018 Meeting Dates

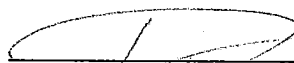
Ms. Humiston noted that the date of the June 2018 Board meeting had been changed. Ms. Vinberg stated that the next meeting would be conducted on January 26, 2018, at 1:00 p.m. and that, because Ms. Vinberg is resigning as Board Chair, Ms. Wolpert would chair that meeting. Ms. Vinberg congratulated Ms. Wolpert on her appointment by the Supreme Court as Board Chair.

7. QUARTERLY BOARD DISCUSSION

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

Thereafter, the meeting adjourned.

Respectfully submitted,



Timothy M. Burke
First Assistant Director

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