

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
MEETING AGENDA**

Friday, April 23, 2021 – 1:00 p.m.

Zoom meeting (invitation to follow for members)

**If you are not a member of the Board and wish to attend the virtual meeting, call the  
Office at 651-296-3952**

1. Approval of Minutes of January 29, 2021, Lawyers Board Meeting (Attachment 1)
2. Board Member Updates:
  - a. New Member, Antoinette Watkins
  - b. Panel and Committee Assignments (Attachment 2)
3. Committee Updates:
  - a. Rules Committee
    - (i) Status, Rule 7 Series Advertising Rule Petition
    - (ii) Status, Rule 20, RLPR, Petition
    - (iii) Status, Rule 1.8(e), MRPC, changes
    - (iv) Status, Rules 4-5, RLPR, comments (Attachment 3)
  - b. Opinion Committee
  - c. DEC Committee
    - (i) Chairs Symposium, May 2021 (Attachment 4)
    - (ii) Seminar, September 17, 2021
    - (iii) New Member Training Manual
  - d. Equity, Equality and Inclusion Committee
  - e. Panel Manual
4. Director's Report: (Attachment 5)
  - a. Statistics
  - b. Office Updates
  - c. 2022-23 Budget Update
5. Old Business
  - a. DEC, Board and OLPR consistency, efficiency
6. New Business

7. Quarterly Closed Session
8. Next Meeting, June 18, 2021

If you have a disability and anticipate needing an accommodation, please contact Susan Humiston at [lprada@courts.state.mn.us](mailto:lprada@courts.state.mn.us) or at 651-296-3952. All requests for accommodation will be given due consideration and may require an interactive process between the requestor and the Office of Lawyers Professional Responsibility to determine the best course of action. If you believe you have been excluded from participating in, or denied benefits of, any Office of Lawyers Professional Responsibility services because of a disability, please visit [www.mncourts.gov/ADAAccommodation.aspx](http://www.mncourts.gov/ADAAccommodation.aspx) for information on how to submit an ADA Grievance form.

**MINUTES OF THE 193<sup>rd</sup> MEETING OF THE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**January 29, 2021**

The 193<sup>rd</sup> meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, January 29, 2021, electronically via Zoom. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Daniel J. Cragg, Thomas J. Evenson, Michael Friedman, Katherine Brown Holmen, Peter Ivy, Shawn Judge, Virginia Klevorn, Tommy A. Krause, Mark Lanterman, Paul J. Lehman, Kristi J. Paulson, William Pentelovitch, Susan C. Rhode, Susan Stahl Slieter, Mary L. Waldkirch Tilley, Bruce R. Williams, Allan Witz, and Julian C. Zebot. Present from the Director's Office were: Director Susan M. Humiston and Managing Attorneys Jennifer S. Bovitz and Binh T. Tuong. Also present was Minnesota Supreme Court Associate Justice Natalie E. Hudson.

Board Chair Robin Wolpert opened the meeting with a welcome noting that it has been a full year since the Board has met in person. Ms. Wolpert stated that she will be working diligently to create a space to meet virtually to share personal and skills connections and leverage talents particularly since new Board members are joining.

**1. APPROVAL OF MINUTES (ATTACHMENT 1).**

The minutes of the September 25, 2020, Board meeting were unanimously approved.

**2. FAREWELL TO RETIRING BOARD MEMBERS THOMAS EVENSON, GARY HIRD, SHAWN JUDGE AND GAIL STREMEL.**

Justice Hudson acknowledged the tremendous service of the outgoing Board members and thanked the members from the entire Supreme Court for their service to the lawyer discipline system, noting it is a difficult and important job.

Justice Hudson acknowledged each outgoing Board member. Justice Hudson noted that Tom Evenson has been a Board member since 2015, is an MSBA nominee, a Panel Chair, a shareholder at Lind Jensen, and a steady and reliable presence on the Board. Gary Hird is also an MSBA nominee, has been a member since 2014, and has served as Chair of the Opinion Committee. Justice Hudson observed that Mr. Hird brought a unique perspective to the Board with his experience in poverty law. Shawn Judge is a public member who has served the Board since 2015, is now on the Executive Committee and is president of The Speaker's Edge. Justice Hudson commented that the Court will be following up with Ms. Judge's work relating to bias. Gail Stremel, also a public member, brought public administration expertise and took her Board position

seriously and diligently completed tasks. Each member has enriched the Board. Justice Hudson thanked each departing member for sharing his and her time and talents and noted that each will receive his/her certificate shortly.

Ms. Wolpert added that Ms. Stremel is quietly powerful and believes a public member needs to be heard, but also steps back to understand. Ms. Wolpert commented that Mr. Hird has a huge heart for public service and is unstoppable in his ability to give. Ms. Wolpert recognized Ms. Judge as a significant powerful voice with a generous view of humanity. Ms. Wolpert noted in this system, Ms. Judge provides an important context that everyone is doing the best they can. In recognizing Mr. Evenson, Ms. Wolpert recognized his strong litigation experience and solid dependable work. Ms. Wolpert thanked everyone for their contributions.

**3. WELCOME NEW MEMBER, WILLIAM PENTELOVITCH.**

Ms. Wolpert noted she has known Mr. Pentelovitch since 2001 and acknowledged that he is a tremendous leader with an understanding of governance. Mr. Pentelovitch noted that he is partners with Julian Zebot and has also enjoyed working with Shawn Judge on SPCPA. Mr. Pentelovitch noted that he has tried cases all over the country in the area of civil rights and reproductive freedom and has been involved with the ACLU and engaged with Board service for ACLU-MN. Mr. Pentelovitch is retired from the Maslon Board partnership and has an interest in transgender rights litigation.

a. Reappointment of Returning Board Members.

Justice Hudson remarked that the Court issued the reappointment Order today.

b. New Appointments (Public/MSBA); Open Position (Attachment 2).

Ben Butler, Geri Sjoquist and Andrew Rhoades were appointed and the appointments are effective February 1, 2021.

Ms. Wolpert updated that there is still a public member opening and the Executive Committee is taking lead on recruitment. Thank you to Shawn Judge and Bruce Williams for working on an updated posting to help make the position more accessible to public members. The application period ends in mid-February. Justice Hudson observed that the position could potentially be considered on a special term calendar, at the latest at the March meeting, before the April Board meeting.

4. NEW PANEL AND COMMITTEE ASSIGNMENTS.

Ms. Wolpert reported that everyone was emailed new assignment information. Ms. Judge is leaving the Executive Committee and Tommy Krause has agreed to join the Executive Committee, but will stay on a Panel until new Panel members are appointed by the Court. A new public member will take Mr. Krause's position on Panel 6 once appointed.

Ms. Wolpert is having conversations with all Board members regarding committee duties, and assignments made should reflect that.

5. COMMITTEE UPDATES:

a. Rules Committee.

Peter Ivy, Rules Committee Chair, thanked the Committee and Binh Tuong.

(i) Status, Rule 7, Advertising Rule Petition.

Mr. Ivy reported that the Board previously voted to approve the petition related to Rule 7 amendments and that the petition is ready to go to the Court. The MSBA is preparing a separate petition and will be incorporating a new rule proposal related to Rule 1.8(e)(4), MRPC. The MSBA petition will include both Rules 7 and 1.8(e)(4). The Board is holding its petition to coordinate with the MSBA timing.

(ii) Status, Rule 20, RLPR, Petition.

Mr. Ivy reported that the Rule 20, RLPR, petition is also ready and its content is about how data is collected and disclosed. The MSBA is not filing any competing petition, but may file some commentary.

(iii) New Item, Rule 1.8(e) (Attachment 3).

Mr. Ivy introduced the Rule 1.8(e) discussion by explaining that amendments are geared toward giving clients more meaningful access to courts. Mr. Ivy opined that the ABA proposal is sound and that the Rules Committee recommends the ABA proposal. Mr. Ivy noted that the MSBA also approved, but made language changes.

Mr. Ivy discussed the concept of champerty that one cannot contribute to a lawsuit to gain greater proceeds should the suit be successful.

Mr. Ivy also stressed that the proposal is that there are no strings attached—assistance is viewed as gifts, not loans. Mr. Ivy views the MSBA as simplifying the ABA’s proposal.

Mr. Ivy proposed three options: (1) Vote to adopt the ABA proposal; (2) Vote to adopt the MSBA proposal; or (3) Defer and refer back to the Rules Committee.

Ms. Wolpert commented that the Committee has not met to discuss the MSBA version and inquired what version, as Chair of the Rules Committee, is supported? Mr. Ivy explained the MSBA version was written by Bill Wernz and the ABA version has the benefit of uniformity. Mr. Ivy stated he finds the MSBA language attractive.

Landon Ascherman stated he likes the simplicity of the MSBA rule explaining that the MSBA proposal is much more straightforward.

Mr. Evenson asked: Aren’t people going to be competing for clients?

Mr. Ivy responded that champerty held the rule back and if it turns out to be a competition issue, it could be addressed later.

Michael Friedman, who is a public member, stated he prefers the MSBA version, but has a question regarding advertising restriction and its impact to non-profits using third party funds who may want/need to advertise how the funds are being used.

Mr. Pentelovitch added that the Minnesota Supreme Court abolished champerty in the *Maslowski* case.

Daniel Cragg stated that champerty deals with a third party interest, not the lawyer’s interest. Mr. Cragg added that another MSBA committee is looking into that issue, but this rule is here because the ABA changed the Model Rules.

Ms. Wolpert added that the way the rule is written is to prohibit financial transactions with a client with various exceptions.

Mr. Pentelovitch posed: Does Rule 1.8 survive the abolishment of champerty?

Ms. Wolpert asked for the Office’s position.

Susan Humiston replied that she supports the MSBA position and worked with Mr. Wernz. Ms. Humiston stated she has not looked at Rule 1.8 from a conflict perspective regarding champerty and is aware that there is a lot of push back on loans and there will be continued reflection on Rule 1.8(e).

Mr. Williams added that, as a public defender, he has provided clothing items on a routine basis and asked if anyone did a comprehensive analysis?

Virginia Klevorn commented that the language helps further the cause of justice by allowing people to show up. If we push this back down for further analysis, are we delaying positive outcomes?

Jeanette Boerner added that the Board needs to discuss Mr. Friedman's point regarding advertising.

Ms. Wolpert asked Mr. Ivy to respond to the policy position regarding preventing advertising.

Mr. Ivy stated it likely relates to competing for clients.

Mr. Cragg added that the Committee should have done a commercial speech analysis and that was not done.

Ms. Wolpert explained that the ABA focuses on minimizing financial stakes and that rule amendments in other jurisdictions have resulted in litigation.

Mr. Pentelovitch made a motion to adopt the MSBA language and refer the matter further to the Rules Committee to consider champerty and the advertising issue.

Ms. Wolpert added that the MSBA and the LPRB understand the urgency, but that we should not forward it to the Supreme Court unless satisfied.

Mr. Ivy agreed that it is a great idea to go back and look at those issues.

Mr. Cragg observed that the MSBA assembly has already approved the proposal, but meets again in April. Mr. Cragg will check to determine if there can be a delay.

Mr. Friedman clarified that he did not raise a First Amendment issue, but is concerned about the chilling effect in not being able to tell clients that funds are available and for a particular purpose. Specifically, can organizations publicize for the sake of programs provided?

Ms. Wolpert identified the issues as: (1) Whether the 2020 decision on champerty has any impact on the proposal being made to the Court related to Rule 1.8; (2) First Amendment Questions—do the limitations violate the First Amendment?; (3) Access to Justice—do non-profits—whether they are not permitted to advertise their full scope of service they provide to their full constituency?

Ms. Wolpert cautioned that the Board is not meeting again until April and there is an urgency surrounding these issues. Procedurally, how should this be handled?

Mr. Cragg posed that the inquiries be sent back to the Rules Committee.

The majority requests that the matters concerning Rule 1.8 and related concerns be sent back to the Rules Committee, but no formal vote was taken.

Mr. Ascherman asked if (and) in (ii) is required or should it be an [or]? The Director concurred this was a good observation and should be added to the renewed consideration of Rule 1.8(e).

Mr. Williams asked whether this applies just in civil cases?

Ms. Wolpert responded it also applies to criminal matters.

Mr. Ivy stated he will send the next Rules Committee date to the entire Board.

Ms. Wolpert encouraged that if people want to help, they should feel free to lend their expertise.

b. Opinions Committee.

Chair Mark Lanterman advised that there are no matters pending before the Opinions Committee and added that, if there are issues you would like the Committee to consider, let the Committee know.



c. DEC Committee.

(i) Chairs Symposium, May 2021.

Chair Allan Witz reported the Chairs Symposium is scheduled for May 14, 2021, and will be virtual.

(ii) Seminar, September 17, 2021 (New Date).

Ms. Humiston reported that the OLPR reserved the Earle Browne Heritage Center, which is a good space with a lot of ventilation, which we can cancel and we are monitoring cancellation dates. Changing the Seminar date also led to discussion with the Executive Committee for a new fall Board meeting date.

(iii) New Meeting Date, October 29, 2021 (Attachment 4).

Ms. Wolpert reported that given the constraints of Earle Browne, and the need to move the Seminar date, the Board meeting date will be moved after hearing no further comments. Paul Lehman did seek clarification on the firmness of the Seminar and Board meeting dates. The fall Board date is October 29, 2021.

(iv) New Member Training Manual.

Mr. Witz provided an update on the Board training manual, explaining the manual will have eight separate sections and will be drafted from the perspective of a Board member. The manual will contain less direct reference to rules and more practical assistance. An example is the area of reinstatements. Mr. Witz also intends to include excerpts. Mr. Witz stated the manual is still in process and will be another few months before it is ready to use.

Ms. Wolpert commended Mr. Witz for this significant undertaking and noted it is a tremendous stand-alone contribution. Ms. Wolpert stated the deadline for the manual is September. Given the workload of the manual, the other portion of the Committee workload, the DEC workload, will be led by Kristi Paulson as Vice-Chair.

(v) Panel Manual.

Ms. Humiston reported that the Panel Manual revisions expand on Rule 9, RLPR. Historically, users have found it difficult to work with. Ms. Humiston explained that the intent of the Panel Manual is different

than that of the Board Training Manual, which is to provide subject matter knowledge. The Panel Manual speaks to respondent and their counsel as to the procedure of Rule 9, RLPR. The Office has undertaken the task of substantially reorganizing and streamlining the Panel Manual. The goal is to provide guidance and fill in the gaps. Currently, the document is out with the Panel Chairs, and we are seeking and welcome feedback, and we are working on a schedule to get Panel Chair feedback and then will get other feedback. The goal is not to make a treatise.

d. Malpractice Insurance Ad Hoc Committee.

Ms. Wolpert reported that when Justice Lillehaug was the liaison, Ms. Wolpert was in the process of addressing this topic at the request of the Court, but was advised it was not a priority item. Ms. Wolpert reported that pursuant to Justice Hudson's direction, there was no longer a need to have a committee. Ms. Wolpert will prepare a report and submit it to the Court.

Justice Hudson indicated she had nothing to add, stating she agreed to the stated course of actions and it was not a high priority.

e. Equity, Equality and Inclusion Committee.

Ms. Wolpert reported that the Committee is an Ad Hoc Committee and has had two Committee meetings. In addition, the Executive Committee has focused on attracting diverse members to our Board. Ms. Wolpert thanked Ms. Klevorn, Ms. Judge, Mr. Lanterman and the Court for their work in this area. The Committee is also concerned with other issues which raises the question of whether to create a permanent Committee of the Board.

Mr. Ascheman replied that he is in favor of creating a DE & I Committee and believes it needs to have its own standing committee stating without a standing committee members lose consistency and historical information. Mr. Ascheman further added that we could reach out and try to understand why we are failing in recruitment.

Mr. Williams replied that a standing committee is long overdue. Mr. Williams also said that he has personally reached out to Antoinette Watkins and added that there needs to be a dedicated body to broaden our perspectives.

Mr. Williams made a motion to make the Equity, Equality and Inclusion (E, E & I) Committee a standing committee. Mr. Lanterman seconded the motion.

The motion passed unanimously.

Ms. Wolpert explained that she will reduce the size of the Opinions Committee to allow service across committees. Board members interested in serving should email Ms. Wolpert.

Ms. Paulson added that it would be helpful to have notice of all Committee business.

Ms. Wolpert explained that she expects that Ms. Humiston and the Executive Committee will be part of the Equity, Equality and Inclusion standing committee.

Mr. Ascheman asked whether the E, E & I Committee be authorized to be up and running before the next meeting? Ms. Wolpert was hopeful it would be.

**6. COURT-PROPOSED AMENDMENTS TO RULES 4 AND 5, RLPR (ATTACHMENT 5).**

Justice Hudson explained that a number of concerns were raised to the Court regarding the appropriate relationship between the Board and the Office and concerns the Court had. As a result, the Commissioner researched the relationship between volunteer Boards and discipline offices similar to the OLPR. The goal of the Court is to clarify roles in terms of the oversight role and the performance of the Director. Justice Hudson noted that very few states operate the way we do in Minnesota and the structure we have is not a common one. Specifically, Rule 5, RLPR, puts the Director's performance evaluation under the auspice of the Board. Most states have a structure like us where the Director is an employee of the Court. It seems odd to have the Board having employment responsibilities. Justice Hudson explained that the proposed amendments are very much in line with what Wisconsin does. The Rule 4, RLPR, amendments attempts to move the Board into the most appropriate area of responsibility—oversight, not supervision. This is more than appropriate and includes caseload management, productivity and efficiency. Administrative oversight is more than appropriate and is a significant role. The change you see in Rule 4, RLPR, is reflective of that. Rule 5, RLPR, as Ms. Wolpert and the Court have discussed, removes the Board from human resources responsibilities. Justice Hudson stated that performance evaluations should be with the State Court Administrator, who has that responsibility including for other Boards, such as BLE. When the rules were originally drafted, the Branch did not have robust human resources as it has now. Additionally, the Liaison Justice used to participate in evaluation. The Court should not be in that role, and the Court has removed themselves from that role. The changes you see here are reflective. The Court believes this will make for a more efficient and cleaner

working relationship and allows performance evaluation to be shifted to the State Court Administrator. The last change in Rule 5(c), RLPR, is a reflection of the fact that the Director and the Court are responsible for hiring and salaries. The Court wanted to get thoughts and input and will put the proposals out for public comment.

Ms. Wolpert asked about the timing of feedback.

Justice Hudson replied that the Court was hoping to get feedback before public comment.

Ms. Wolpert asked if comment could be provided within one week?

Ms. Klevorn asked if we had a Director that we had a problem with, how would that flow?

Justice Hudson replied that the conversation would flow between the Board and Jeff Shorba. Mr. Shorba could then forward it to the Court. Justice Hudson stated the Court wants to get out of the direct performance role.

Mr. Pentelovitch stated he likes the concept but when you describe the purpose, he does not see language squaring with concept. He did not realize it was a substantive change.

Justice Hudson thanked those providing comments and added that the amendments move us a little closer to get the Board away from the human resources function. The term supervisory has a very human resources function. Oversight focuses on case management and efficiency areas the Court wants to be further developed.

Ms. Boerner commented that she hears that it is more advisory than supervisory.

Justice Hudson agreed stating, maybe advisory is a better word.

Mr. Pentelovitch replied that advisory is the first word that came to him.

Ms. Wolpert added that the purpose is accountability of the OLPR and the LPRB to the Court and that each entity is answerable to the Court.

Justice Hudson commented that this was a helpful thought.

Mr. Evenson asked what is the general theme across the U.S.?

Justice Hudson explained there is a delicate balance and that is why we had the Commissioner do research. The research revealed that only a few states, including

Maryland, North Dakota, and Tennessee, have court-appointed Board evaluations of the chief disciplinary authority. It was also notable that only three other states function in the way we do. The majority function in the manner that is being proposed through the amendments. The amendments were modeled off of Wisconsin and Arkansas, also very similar.

Susan Stahl Slieter added that as Justice Hudson pointed out, the rules were written in 1986, prior to the unification of trial courts, and she thinks this is long overdue and a good move and asked Ms. Humiston if she had any thoughts on the proposal.

Ms. Humiston responded that she has stayed out of it. Ms. Humiston further remarked that she goes through a performance review with the Branch and also with the Board. Ms. Humiston thanked the Court for taking up the issue and making sure it is clear from a human resources perspective because things can be muddled. Board members will always be stakeholders and she is reviewed quite a bit. Ms. Humiston appreciates what the Court is doing and also appreciates what the Board has done.

Ms. Wolpert requested that comments be emailed to Ms. Wolpert so they can be forwarded to Justice Hudson within one week.

Justice Hudson requested Board input by February 4, 2021, and thanked all.

## 7. COURT-PROVIDED PANEL TRAINING.

Ms. Wolpert discussed that closed sessions have address consistency across Panels. In scrutinizing our own jobs and because the Board work goes up to the Court, our job is to help the Court make the best use of the information. The issue was discussed with Justice Hudson and it is a very useful time to have large substantive training for Panels, particularly with significant turnover. Justice Hudson has suggested Judge McBride as someone who might conduct training for Panels. Scheduling is likely early to mid-April.

Justice Hudson added the purpose of training was gathered as Justice Hudson joined the Board meeting in September and heard the frustrations, particularly surrounding the *Trombley* decision. The Court thought it would be a good idea, particularly to focus on reinstatements. Justice Hudson stated it is important to remember the standard of reviews. The training will be a two to three-hour training, and will look at the most recent precedent, standards of review, and good findings of fact. In considering the training, Judge McBride came to the top of the list, as he was an outstanding Tenth Judicial District Court judge. He knows how to write an order and FOF. He also knows what it is like to be reversed. Justice Hudson also knows what is

like to be reversed. Justice Hudson expressed she is happy to put the training together and thinks it will be helpful.

Ms. Wolpert stated that once the date is set, she will let members know and it will be critical to attend.

8. **DIRECTOR'S REPORT:**

a. **Year-End Statistics (Attachment 6).**

Ms. Humiston reported a strong, yet challenging year. The word for the year was resilience. The Office demonstrated resilience and flexibility. Pivoting was a challenge, but the Office delivered. Complaints were down 73 year over year. Advisory opinions were down by 240, primarily March-May, but are well up to normal standards now. Public discipline remained the same. There were fewer admonitions, but more private probations, and more DNWs along with five disability transfers in lieu of discipline. We continue to have a number of potential disability cases in process illustrating wellbeing issues along with seeing more noncooperation issues. A few more trusteeships are in process with three in process now. There is also more serious misconduct and more lawyers charged with crimes. There was a public hearing yesterday of a lawyer convicted of a federal crime with robust viewership. Public matters are streamed on You Tube. CLEs are also picking up. The OLPR ended the year with more cases over one year than we wanted. We are making significant movement on matters. A lot of great work is being done and Ms. Humiston applauded the work of managers Binh Tuong and Jennifer Bovitz, who are helping their direct reports meet their goals.

b. **Personnel Updates.**

Ms. Humiston reported that Karin Ciano is starting on Monday. Ms. Ciano's background includes working at Mitchell Hamline running the incubator program, serving on the 4<sup>th</sup> DEC, and experience as a probate litigator. We are thankful we were able to hire despite a hiring freeze. The Office was down the functional equivalent of two lawyers, much of the last quarter. A 34-year staff member retired and we did not back fill due to efficiencies gained from our new database file management system. Additionally, we will have two paralegals retiring in this year, one of which will be replaced with a forensic auditor.

c. Office Updates.

Ms. Humiston reported that the Office has three new office departments: Wellbeing Committee (a prior ad hoc committee); Training & Education; and Diversity, Equity & Inclusion. The OLPR also moved office locations and we are now in Town Square Towers. The new location includes safety features, including secured glass and a conference room with technology and video security.

d. Litigation Report.

The OLPR has been sued in state court (Office only) by an individual who has been denied reinstatement. The Attorney General is representing the Office.

The OLPR, the Board, employees, and specific Board members have been named in federal proceedings by an individual going through disciplinary proceedings. We are working to keep the discipline and pending federal lawsuit separate. The Attorney General's Office is representing the OLPR members and Board members.

Mr. Williams asked what was the case yesterday? There seems to be an influx of cases in federal court.

Ms. Humiston replied the case yesterday was Sutor, involving the use of chiropractors and use of runners, there are other matters that are not yet public.

Mr. Evenson stated that is what he was talking about—that case—economic incentives.

Ms. Humiston explained that for a long time people have tried to get runners—kickbacks and it has been a perennial challenge. What has changed is the Department of Commerce got people on cameras.

Mr. Ascherman asked in cases where there is a lawsuit, is the Office notifying the Board member if there has been a confrontation with a complainant.

Ms. Humiston responded that we are not raising those issues. When we know of an instance that a public member will be attending that may be a risk, private security has been hired in the past.

9. **OLD BUSINESS.**

a. **Livestreaming of Board Meetings.**

The way this works, public notices are posted on the OLPR website and anyone is permitted to attend. With the pandemic, notice is posted on the website, and attendees need to contact the Office to obtain a link. Do we want to livestream?

Justice Hudson inquired whether anyone has talked to Mike Johnson, who handles public access issues?

Ms. Wolpert stated she will reach out to him. Ms. Wolpert and Ms. Humiston will have a joint call surrounding the issue.

b. **Remote Panel Hearing Update.**

The Chief Justice has extended her order to March 15, 2021. Hearings must be remote unless specific approval otherwise.

10. **NEW BUSINESS (NOT ADDRESSED).**

a. **DEC, Board and OLPR Consistency.**

b. **DEC, Board and OLPR Efficiency.**

11. **NEXT MEETING.**

The next meeting of the Board will be held on April 23, 2021, via Zoom.

12. **QUARTERLY CLOSED SESSION.**

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

Thereafter, the meeting adjourned.

Respectfully submitted,

*Jennifer S. Bovitz* Bovitz, Jennifer  
Apr 8 2021 10:24 AM

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Jennifer S. Bovitz  
Managing Attorney

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



EXECUTIVE COMMITTEE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(d), Rules on Lawyers Professional Responsibility, provides:

The Executive Committee, consisting of the Chair, and two lawyers  
and two non-lawyers designated annually by the Chair.

The following members of the Lawyers Professional Responsibility Board are appointed to the Executive Committee for the period February 1, 2021, through January 31, 2022:

Robin Wolpert, Chair  
Jeanette Boerner, Vice-Chair  
Virginia Klevorn  
Tommy Krause  
Bruce Williams

**Jeanette Boerner**, Vice Chair, shall receive reports from the Director's Office of tardy complainant appeals in accord with Executive Committee Policy & Procedure No. 10; 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.

**Bruce Williams** will oversee the Executive Committee process for reviewing file statistics, and the aging of disciplinary files.

**Virginia Klevorn** will consider former employee disqualification matters in accord with Executive Committee Policy & Procedure No. 3.

**Robin Wolpert**, 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 accord with Rule 4(f) and Executive Committee Policy & Procedure No. 2.

Effective April 12, 2021

*/s/ Robin M. Wolpert*

Robin M. Wolpert, 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 February 1, 2021, through January 31, 2022, are:

LANDON ASCHEMAN

BEN BUTLER

KATHERINE BROWN HOLMEN

DANIEL CRAGG

MICHAEL FRIEDMAN

PETER IVY

MARK LANTERMAN

PAUL LEHMAN

KRISTI PAULSON

WILLIAM PENTELOVICH

ANDREW RHOADES

SUSAN RHODE

GERI SJOQUIST

SUSAN STAHL SLIETER

MARY WALDKIRCH TILLEY

ANTOINETTE M. WATKINS

ALLAN WITZ

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 April 12, 2021

*/s/ Robin M. Wolpert*

Robin M. Wolpert, Chair

Lawyers Professional Responsibility Board

DEC AND TRAINING COMMITTEE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee charged with working with the District Ethics Committees (DECs) to facilitate prompt and thorough consideration of complaints assigned to them, to assist the DECs in recruitment and training of volunteers, and to assist the Office in training Board members, shall be constituted with the following members:

Allan Witz, Chair  
Landon Ascherman  
Katherine Brown Holmen  
Andrew Rhoades  
Antoinette M. Watkins

Effective April 12, 2021

*/s/ Robin M. Wolpert*  
Robin M. Wolpert, Chair  
Lawyers Professional Responsibility Board

EQUITY, EQUALITY & INCLUSION COMMITTEE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee for evaluating and making recommendations for ways in which the Lawyers Professional Responsibility Board can enhance equity, equality and inclusion within the attorney disciplinary system, shall be constituted with the following members:

Robin Wolpert, Chair  
Jeanette Boerner, Vice Chair  
Bruce Williams  
Virginia Klevorn  
Tommy Krause  
Landon Ascheman  
Michael Friedman  
Mary Waldkirch Tilley  
William Pentelovitch

Effective February 5, 2021

*/s/ Robin M. Wolpert*

Robin Wolpert, Chair  
Lawyers Professional Responsibility Board

OPINION COMMITTEE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee for making recommendations regarding the Board's issuance of opinions on questions of professional conduct, pursuant to Rule 4(c), Rules on Lawyers Professional Responsibility, shall be constituted with the following members:

Mark Lanterman, Chair  
Dan Cragg  
Michael Friedman  
Kristi Paulson  
Geri Sjoquist  
Susan Stahl Slieter

Effective April 12, 2021

*/s/ Robin M. Wolpert*

Robin M. Wolpert, 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.

The following Panels are appointed. Those with a single asterisk after their names are appointed Chair, and those with a double asterisk are appointed Vice-Chair.

Panel No. 1.

- \* Katherine Brown Holmen
- \*\* Julian C. Zebot
- Mark Lanterman (p)

Panel No. 4.

- \* Kristi J. Paulson
- \*\* William Z. Pentelovitch
- Susan T. Stahl Slieter (p)

Panel No. 2.

- \* Susan C. Rhode
- \*\* Ben Butler
- Michael Friedman (p)

Panel No. 5.

- \* Allan Witz
- \*\* Mary L. Waldkirch Tilley (p)
- Antoinette M. Watkins (p)

Panel No. 3.

- \* Landon J. Ascheman
- \*\* Daniel J. Cragg
- Andrew Rhoades (p)

Panel No. 6.

- \* Peter Ivy
- \*\* Geri Sjoquist
- Paul J. Lehman (p)

Effective April 12, 2021

*/s/ Robin M. Wolpert*

Robin M. Wolpert, Chair  
Lawyers Professional Responsibility Board

\* Chair

\*\* Vice Chair

(p) Public member



RULES COMMITTEE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee 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, shall be constituted with the following members:

Peter Ivy, Chair  
Julian Zebot  
Ben Butler  
Susan Rhode  
Daniel Cragg  
Paul Lehman

Effective February 5, 2021

*/s/ Robin M. Wolpert*

Robin Wolpert, Chair  
Lawyers Professional Responsibility Board



BASSFORD REMELE

RECEIVED

APR 05 2021

OFFICE OF LAWYERS  
PROF. RESP.

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ATTORNEY  
Licensed in MN, NY and WI  
T 612.376.1663  
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ACHUDASAMA@BASSFORD.COM

March 30, 2021

*SERVICE VIA U.S. MAIL*

Lawyers Professional Responsibility Board  
1500 Landmark Towers  
345 St. Peter Street  
St. Paul, MN 55102-1218

Re: Comments of the MSBA Professional Regulation Committee on Proposed Amendments to Rules 4 and 5 of the Rules on Lawyers Professional Responsibility

Dear Lawyers Professional Responsibility Board:

As Chair of Minnesota State Bar Association's Professional Regulation Committee (PRC), I am writing to inform you that the PRC filed comments with the Minnesota Supreme Court regarding the proposed amendments to Rules 4 and 5 of the Rules on Lawyers Professional Responsibility and to provide you with a copy of the same.

Very truly yours,

Anu Chudasama

AC:rk  
Enclosure

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042

**COMMENTS OF THE MSBA PROFESSIONAL REGULATION COMMITTEE  
ON PROPOSED AMENDMENTS TO RULES 4 AND 5 OF THE  
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY**

These comments are filed by the Professional Regulation Committee (PRC) of the Minnesota State Bar Association (MSBA). The PRC meets regularly to consider and address regulations involving the legal profession, including the Rules of Professional Conduct and the Rules on Lawyers Professional Responsibility (RLPR). At its meeting on February 23, 2021, the PRC considered and approved filing comments as solicited by the February 16, 2021, Order of the Minnesota Supreme Court.

For the reasons explained below, the PRC supports the proposed amendments insofar as they relate to administrative functions of the Director of the Office of Lawyers Professional Responsibility (OLPR), such as human relations and financial functions. However, the PRC recommends that the Court continue to rely on the Executive Committee of the Lawyers Professional Responsibility Board (LPRB) to supervise the handling of discipline, disability, and reinstatement cases and investigations by the Director and OLPR.

The PRC has the following understandings. The proposed amendments were drafted by the Court and were discussed by LPRB at its January 29, 2021, meeting. The main impetus for the amendments was a concern that the LPRB and its Executive Committee are not well-suited to supervise the human relations function of the Director and OLPR. A survey conducted by the Court revealed that the human relations function in the great majority of jurisdictions is supervised by the Court rather than a board. The amendments are also meant to clarify relationships the Director has with the Court, the LPRB, and the Executive Committee.

PRC members Kenneth L. Jorgensen and William J. Wernz, both former OLPR Directors, recalled for the PRC the circumstances that led to the adoption of current Rules 4 and 5, RLPR.<sup>1</sup> In 1984-86, there was great concern and controversy regarding the manner in which a past Director ran OLPR. Among the issues was whether the Director acted too aggressively and too independently in certain investigations and cases. The

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<sup>1</sup> It is worth noting that much institutional memory of the discipline system has been lost due to retirements and turnover in the discipline system. The longest-tenured attorney in the Director's Office has about 27 years' experience; only two other attorneys have more than 10 years' experience in that Office.

reputation of the lawyer discipline system among attorneys and the public suffered greatly. The Court appointed a committee (“the Dreher Committee”) to study the lawyer discipline system and make recommendations for improvement.

The Dreher Committee recommended several changes to enhance supervision of the Director by the Executive Committee. Most important among these was that the Executive Committee become responsible for supervising OLPR. To ensure that there was no conflict between these supervisory duties and the LPRB’s responsibilities for discipline and reinstatement case adjudications, Rule 4(d) was amended to provide, “Members shall not be assigned to Panels during their terms on the Executive Committee.”

The Dreher Committee recommendations regarding Rules 4 and 5, RLPR were approved by LPRB, OLPR, MSBA, and the Court. Regarding the personnel functions of OLPR, it now appears that the provision for Executive Committee supervision has become outmoded. However, it appears to the PRC that the provision for Executive Committee supervision of the Director’s handling of cases and investigations remains the best arrangement.

The proposed amendments of Rules 4 and 5 would remove the supervisory authority of the Executive Committee but would not reassign that authority. The Executive Committee would have an “advisory” function regarding the Director, but the Director would be free to disagree with the advice. The Director would remain “responsible to the Board,” but what this responsibility consists of is not specified. The Director would become “responsible and accountable” to the Court, but would no longer be “responsible and accountable” through the LPRB to the Court.

The PRC has concluded that the amendments would produce several serious problems.

First, the Court and the State Court Administrator are not well-placed to supervise the substantive work of OLPR. Approximately 80 to 90 percent of complaints reviewed and investigated by the Director’s Office result in dismissal, a private admonition, or a stipulated private probation. Except for the few appeals heard by the Court, neither the Court nor the State Court Administrator has any direct knowledge of how those cases and investigations are handled. The LPRB, in contrast, considers about 200 complainant appeals of private dispositions as well as additional admonition appeals that are not appealed to the Minnesota Supreme Court. The LPRB chair reviews and approves all stipulated private probations. The Executive Committee reviews the Director’s requests to initiate investigations that were not the subject of a complaint. If a Director lacked appropriate zeal in protecting the public or was otherwise improperly handling the Office’s docket, the Executive Committee would be far better placed than the Court to review files, interview assistant directors, and generally assess the problem.

The State Court Administrator is not well-placed to make recommendations to the Court “concerning the continuing service of the Director,” except as to administrative functions. Under the amended rule, the Administrator must consult with the Board, but the Administrator is responsible for making her own recommendation. The Board’s current responsibilities would be reduced.

Second, for the Director to be “accountable” to the Court (and not to the LPRB), the Court must have knowledge of the Director’s handling of private cases and investigations. If the Court were to seek more knowledge of cases and investigations, and involve itself in evaluating how they were handled, the Court would run the risk of mixing judicial and prosecutorial functions. The Court cannot be both umpire and coach.

In recent memory, the Court identified the tardiness of the Director’s investigation and resolution of files as an issue that required remediation. Indeed, that was an important finding of the 2007-08 Supreme Court Advisory Committee to Review the Lawyer Discipline System, led by attorney Allen Saeks. Following the recommendations of that committee, the Court directed the Executive Committee to monitor case processing statistics and hold the Director accountable for moving cases forward. Under the amended rules, the Court and the State Court Administrator do not have the resources or the vantage point to engage in a similar sort of supervision.

Third, the amendments would greatly reduce the role of public members in the Minnesota lawyer discipline system. The RLPR requires that two members of the Executive Committee be public, i.e. nonlawyer, members. No members of the Supreme Court or the State Court Administrator are public members. In the half-century since the creation of its professional responsibility system, Minnesota has always justifiably taken pride in the important role played by public members. The amendments would demote the public members from supervisors to advisors. No explanation has been provided as to how this demotion would benefit a system whose goal is to protect the public.

The amendments also reduce the role of the public through the manner in which they have been proposed. The Dreher Committee had public members. The LPRB, with which the Dreher Committee worked closely in coming to consensus regarding recommendations, had public members. So far as the PRC knows, the Court drafted the proposed amendments to Rules 4 and 5 without any consultation with the public. The Court has ordered a period for public comment, but it has not provided the public with any explanation of why the amendments are desirable and how the amendments continue meaningfully to involve the public in the function of protecting the public.

Fourth, the problems the Dreher Committee sought to solve through the Executive Committee’s supervisory function—lack of control over a Director who was too aggressive, or insufficiently aggressive, or who did not manage files well—would not be addressed. Indeed, the amendments would leave the public less well protected than in the period before the Dreher Committee, because then the LPRB as a whole had supervisory

authority over the Director.

Fifth, the amendments are apparently intended to clarify relationships, but the governance model implied in the amendments is that *no one supervises the Director*. The Director would be “responsible and accountable” to the Court, but the Court cannot effectively supervise the Director. The Director would be “responsible to the Board,” but the nature of that responsibility is unclear. The proposed rule revisions terminate the supervisory authority of the Executive Committee and remove the requirement that the Director be “accountable” to the Board. The Executive Committee would be authorized to *advise* the Director, but advising is far from supervising. Presumably, the Director could decline to follow the Executive Committee’s advice. Does the Director’s “responsibility” to the Board include being bound to take directions from the Board? There is no clear answer.

Under the amended rules, the Executive Committee could advise the Director how to do better, but apparently could not control the Director. If the Director did not heed the Executive Committee’s advice, the Board could “order” a report from the Director, but otherwise neither the Executive Committee nor the Board has any authority to instruct the Director to take any action or refrain from any action. Implied in the amendments is a judgment that the Director does not need the proximate supervision that the Executive Committee has been providing for the last thirty-five years. Another implied judgment is that problems with the Director’s performance in handling cases can be managed through advice and through declining to reappoint a Director. Judgments like these could well lead to a repetition of the problems addressed by the Dreher Committee.

Current Rules 4 and 5 both assign responsibilities “for the proper administration of the Office of Lawyers Professional Responsibility and these Rules.” The PRC agrees that the Director should be “responsible and accountable” to the Court and its agents for the “proper administration” of OLPR. The PRC urges the Court to consider whether the “proper administration of . . . these Rules” would remain best supervised by the Executive Committee, insofar as “investigations and proceedings shall be conducted in accordance with these Rules.” Rule 2, RLPR. The PRC’s position could be readily implemented by beginning Rule 4(c) and (d), and 5(b) with the phrase, “Except for personnel, fiscal, and other administrative matters, . . . .”

The PRC appreciates the opportunity to provide these comments for the Court’s consideration.

Dated: March 30, 2021

PROFESSIONAL REGULATION  
COMMITTEE OF THE MINNESOTA  
STATE BAR ASSOCIATION

By s/ Anuradha Chudasama  
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STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042

COMMENTS OF FORMER LPRB CHAIRS  
ON PROPOSED AMENDMENTS TO RULES 4 AND 5 OF THE  
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

These comments are filed by Greg Bistram<sup>i</sup>, Charles Lundberg<sup>ii</sup>, Kent A. Gernander<sup>iii</sup>, and Judith Rush<sup>iv</sup> each of whom served as a member and Chair of the Minnesota Lawyers Professional Responsibility Board (LPRB). Our tenures as LPRB Chair spanned 25 years from 1992 through 2016. Based on our experiences, we believe – as does the Professional Regulation Committee of the Minnesota State Bar Association - that the lawyer discipline system benefits from supervision of the Office of Lawyers Professional Responsibility (OLPR) by the LPRB and its Executive Committee, and that their supervisory roles as to substantive matters should not be diminished by changes to Rules 4 and 5.

As members of the LPRB, we became familiar with its responsibilities and functions. We served on panels hearing charges and admonition appeals, and reviewed complainant appeals. We attended quarterly meetings of the Board dealing with administration of the OLPR and the Rules. We served on committees dealing with changes to Rules and Opinions of the Board. Each of us also served on the Executive Committee of the Board, which was responsible for general supervision of the OLPR. Because of that responsibility, during our terms on the Executive Committee we did not serve on panels or perform other adjudicatory functions of Board members.

As chairs of the LPRB, we led, on behalf of the Board and Executive Committee, the general supervision of the OLPR. This involved frequent – sometimes daily – meetings or conversations with the Director, and communications as needed with other OLPR staff. We discussed the work of the OLPR, including the handling of complaints and charges, and measures of efficiency such as case progress statistics. Many of the matters dealt with by the Director involved considerations of policy and public interest as well as prosecutorial discretion. Consultation allowed the Chair to give advice or direction to the Director, or to refer the matter to the Executive Committee or Board for its consideration if appropriate. Consultation gave the Director support on matters that might be doubtful or controversial.

Issues on which the Board has given advice or direction include, for example:

- Investigating claims of lawyer malpractice;
- Investigating claims of excessive fees;



- Deferring investigation of claims pending the outcome of other proceedings addressing the issues;
- Whether a reported IOLTA account overdraft should prompt an investigation of other account transactions;
- Prosecuting challenged Rules governing judicial candidate conduct and speech;
- Responding to inquiries and information requests from media and the public;
- Responding to litigation challenging actions of the OLPR.

Some of these issues were recurring and led to adoption by the Board of policies guiding OLPR prosecution. Others involved ad hoc consultation, often between Director and Chair. The significant point is that consultation and direction gave guidance to the OLPR from the perspectives of the profession and the public. This guidance may be lacking if prosecutors are left to their own motives and perspectives. Moreover, such guidance cannot be provided appropriately and adequately by the Court and its Administrator. Those who are to judge discipline proceedings should not direct the prosecutors, nor receive information as to a case that may come before the Court. They will not have information that may guide discretion - for example, how similar matters may have been handled privately.

As to the appointment of the Director, the proposed change to Rule 5(a) removes language calling for the Board to review the performance of the Director and make a recommendation to the Court concerning continuing service of the Director. Instead, the changed language requires the Administrator to consult with the Board and to make the recommendation as to continued service. Under the current Rule, the Board has typically asked the Director to prepare a self-evaluation of performance, consulted Assistant Directors and staff for evaluations, examined performance statistics, and considered any positive or negative comments from others; after which the Board has prepared a report and recommendation and submitted it to the Court through the Administrator. The Board and Director have taken the evaluation and recommendation seriously, and viewed them as an important component of the Board's overall supervision of the OLPR.<sup>1</sup> Removing the provisions calling for the Board's performance review and recommendation will alter unnecessarily the relationship between the Board and Director. The Court has, of course, the authority of appointment and removal, and may look to the Administrator for additional evaluation and recommendation, whether required by rule or not.

We therefore respectfully urge the Court to retain unchanged the language of Rule 4, providing for general supervision of the OLPR by the Board, and the language of Rule 5(a), requiring the Board to review the performance of the Director and to make a recommendation concerning the

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<sup>1</sup> In at least two instances, when Board members became aware of staff and public concerns about OLPR policies and performance, the Chair and Executive Committee were able to gather facts and views and present recommendations to the Court that led to resolutions.

Director's continuing service. We do not oppose the other proposed changes, nor would we oppose any change to clarify the Director's accountability to the Court and Administrator for personnel and administrative matters.

Respectfully submitted,

/s/ Kent A. Gernander

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s/s Greg Bistram

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<sup>i</sup> Greg Bistram is a Minnesota lawyer admitted to practice since 1977. He was a member of the LPRB for eleven years and its chair from 1992-1998.

<sup>ii</sup> Charles Lundberg is a Minnesota lawyer admitted to practice since 1975. His practice includes advising and representing lawyers on matters of professional responsibility, and he has appeared before the Court in lawyer discipline cases and other matters. He has taught, written and lectured on professional responsibility and led professional organizations dealing with the law of lawyering. He has served on MSBA and Court-appointed committees dealing with lawyer discipline rules and their administration. He was a member of the LPRB for 12 years, including six years as its chair from 1998 through 2003.

<sup>iii</sup> Kent Gernander is a Minnesota lawyer admitted to practice since 1966. His practice includes consultations with lawyers on matters of legal ethics, and he has taught, written and lectured on profession responsibility. He has led professional organizations, including the MSBA, and has served on MSBA and Court-appointed committees dealing with lawyer discipline rules and their administration, and with judicial standards. He was a member of the LPRB for 12 years, including six years as its chair from 2004 through 2009.

<sup>iv</sup> Judith Rush is a Minnesota lawyer admitted to practice since 1991. She directs the Mentor Externship program at University of St. Thomas School of Law. She previously taught professional responsibility and legal advocacy as an adjunct for 15 years, and her practice included advice, consultation, and expert testimony in ethics and professional liability matters. She lectures regularly on professional responsibility and has served as a member and chair of MSBA and ABA committees. She served on the Court's Advisory Committee to Review the Lawyer Discipline System ("Saeks Committee"). She was a member of the LPRB for 12 years, including seven years as its Chair from 2010 through 2016.

Thomas C. Vasaly

**FILED**

602 Third Ave. N.E.  
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April 14, 2020

The Honorable Justices of the Minnesota Supreme Court  
305 Minnesota Judicial Center  
25 Rev. Dr. Martin Luther King, Jr. Blvd.  
St. Paul, MN, 55155

Re: Proposed Amendments to Rule 4 and 5, RLPR  
File No. ADM10-8042

Dear Members of the Court:

Based on my experience with the Lawyers Board and other professional oversight boards,\* I believe that the Court's proposed rule change is ill-advised.

First, the need for the rule change has not been explained. It cannot be determined that the proposal is the right solution when the problem has not been clearly identified.

Second, the proposal would reduce supervision over the Director and her Office. The Board is in a much better position than the State Court Administrator to supervise the Director's Office and evaluate the Director's performance. Further, the proposal could upset the proper balance between the Court's administrative responsibilities for the operation of the lawyer discipline system and the Court's role as adjudicator in discipline cases. Although the proposal seeks to clarify the supervisory structure, the effect would be to weaken the supervisory structure and create ambiguity about the responsibilities of the Board and the State Court Administrator.

Third, before creating a new supervisory structure, the Court should attempt to address its concerns using the current structure.

The Court presently has considerable authority over the operation of the Lawyers Board. The Board Chair and the Director serve at the pleasure of the Court. If the Court, through its liaison, identified its concerns, the Board and the Director will listen.

The Board's Executive Committee is responsible for the general supervision of the Director's Office and can ask the State Court Administrator's Office for assistance. Rule 3(d), RLPR. If the Court wants the Executive Committee to be more engaged in supervising the Director's Office, or wants the State Court Administrator's Office to have more involvement, the Court should notify the Board and give the Board an opportunity to address the Court's concerns.

If the issues require a more formal approach, the Court has several options. The Court can direct the Board to consider the Court's concerns as part of an evaluation of the Director pursuant to Rule 5(a), RLPR, which provides: "The Board shall review the performance of the

Director every 2 years *or at such times as this Court directs* and the Board shall make recommendations to this Court concerning the continuing service of the Director.” (Emphasis supplied.)

Depending on the issues, the Court also has the option of appointing an advisory committee to evaluate the discipline system, as it has periodically done in the past.

An attempt by the Court to use the present structure to address its concerns may well be successful. If such an attempt is not successful, the Court will be in a better position to determine whether a change in the structure is necessary.

Thank you for considering my comment.

Sincerely,

*s/ Thomas Vasaly*

Thomas Vasaly

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\* First Assistant Director of the Lawyers Board, 1987-93; Assistant Minnesota Attorney General representing various professional licensing boards, 1993-2000; Member of Court’s Advisory Committee to Review the Lawyer Discipline System, 2007-09; Executive Secretary of the Judicial Board, 2013-17 (retired).

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042

**FILED**

April 15, 2021

**OFFICE OF  
APPELLATE COURTS**

**COMMENTS OF WILLIAM J. WERNZ  
ON PROPOSED AMENDMENTS TO RULES 4 AND 5 OF THE  
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY**

These comments are filed by William J. Wernz. I am a former Director (1985-1992) of the Office of Lawyers Professional Responsibility (OLPR). I am a former member (2011-19) and chair of the Board on Judicial Standards. I am the author of *Minnesota Legal Ethics*, a treatise hosted by the Minnesota State Bar Association (MSBA). I am a member of the MSBA Professional Regulations Committee (PRC), which has also filed comments in this matter. I concur in those comments. I am also the author of *Diminishing the Public's Role in Professional Oversight*, Minn. Law., Apr. 6, 2021, a copy of which is attached as Exhibit 1 and incorporated by reference.

As my article indicates, I believe that the proposed amendments to Rules 4 and 5, RLPR unwisely diminish the role of the public. About forty percent of the Lawyers Board and Executive Committee members are public members. The transformation of the role of the Board and Executive Committee from “supervisory” to “advisory” would be a substantial demotion.

The Court should consider how the reduced public role created by the amendments would compare with other State of Minnesota professional boards. I am very familiar with the Board on Judicial Standards (BJS) and the Board of Law Examiners (BLE), and I have some knowledge of the Board of Medical Practice (BMP). All these boards have substantial public membership. These boards’ public members participate in decision-making on individual cases.

In the early years of the Lawyers Board, members participated more in case dispositions than they now do. The OLPR Director had the title “Administrative Director” until 1983, when the current title was adopted. The original title reflected a role in which the Director was subsidiary to the Board. Two developments led to substantial changes in the relations of the Board and the Director.

First, by the mid-1980s, the number of cases had increased so greatly that substantial Board involvement in numerous cases became unwieldy. Second, in 1984, the Court and the Board recognized that a substantial portion of the bar had lost confidence in the OLPR’s fair administration of the Rules. To deal with both the

systemic and the personnel issues, the Court appointed an outside review committee (“the Dreher Committee”). On the Dreher Committee’s recommendation, the Court created a Board Executive Committee, which would not perform adjudicative functions, but would act for the Board, and indirectly for the Court, in supervising the Director.

In my years on the Board on Judicial Standards, that Board dealt with cases in which the issue was whether a judge had coached or prompted a lawyer or party in a way that was inconsistent with the judge’s adjudicative duty. The Dreher Committee was mindful of the tension created by overlapping supervisory and adjudicative duties when it recommended creation of an Executive Committee that would not have adjudicative duties. The Executive Committee is properly positioned so that it can be familiar with the Director’s administration of the Rules in cases without danger of compromising a judicial duty. The Executive Committee’s lawyers and public members have the broad experience needed to assess the Director’s performance and to provide guidance.

I was the first Director to be supervised under this arrangement. I worked closely with the Board and its Executive Committee. For example, on my recommendation, the Board adopted Summary Dismissal Guidelines for the OLPR, which have been used effectively for several decades. Another example was the announcement of a more systematic policy on discipline for attorneys who were suspended for delinquent attorney registration fees. My article reported the policy being adopted, “After consultations with the LPRB executive committee, the CLE board, and a representative of the IOLTA board, . . .” I believe the supervisory role of the Board helped restore confidence in the Director’s administration of the rules.

A related problem with the proposed amendments is that the supervisory responsibilities over OLPR that have been exercised by the Board and its Executive Committee would not be transferred but instead would be nearly abandoned. The word “supervisory” would be twice deleted in favor of “advisory,” in Rule 4, in describing the Board’s duties. In amended Rule 5, the word “supervisory” is not found in the descriptions of the roles of the Court. Quite literally, *no one would supervise the Director*.

Instead of regular supervision, the Director would be subject to infrequent, presumptively biennial, review. The Director would continue to be “responsible and accountable” to the Court, but no longer through the Board. Proposed Rule 5(b). The State Court Administrator would assume the Board’s present responsibility to make recommendations as to the Director’s continuing service. Proposed Rule 5(a). The new arrangements, however, would not provide any regular “supervision” of the Director.

The Director is responsible both for administration of OLPR and for administration “of these Rules.” Rule 5(a), RLPR. The State Court Administrator, however, has no basis for making a recommendation to the Court as to the Director’s continued service based on the Director’s track record for administration of “these Rules”

as to cases. Under the amendments, the Administrator would “consult” with the Board, but the Administrator has the responsibility for making his own recommendation. The Administrator has no basis or expertise for evaluating the Board’s recommendation insofar as it pertains to cases. The Administrator could discount or reject the Board’s views on the Director’s case-related performance. The Court would keep its own Board and the Board’s informed views beyond arms’ length from the Court and at arms’ length from the Director.

The most important criterion for continuing a Director’s service is whether the Director has been effective in protecting the public. Neither the Court nor the Administrator has any information on this subject as it relates to the eighty to ninety percent of cases which are privately resolved. By the amendments, the Court would remain without direct contact as to the best source of this information – the Board. The Court might well ask itself and others, “If the problems of 1984-85 were to recur, would the public, the bar, and the Court be better served by the current or the amended Rules 4 and 5?”

I am not well-informed regarding how exactly other states operate their lawyers professional responsibility systems. The great majority of states have integrated bars. An integrated bar model may well not be as conducive to public participation as a non-integrated bar like Minnesota’s. In reviewing other states’ systems, an important question would be whether other states have had systems in which the public has been assigned important roles, but then decided to reduce the public’s role. Another question would be whether other states have decided to change a system in which the Director was closely supervised to a system in which the Director’s only supervision was by a biennial review, with the only recommendation coming from an administrator who had no direct knowledge of the Director’s performance of the office’s most important function.

I served as President of the Association of Professional Responsibility Lawyers (APRL), a nationwide organization of hundreds of lawyers who practice in the fields of professional responsibility, legal malpractice, and the like. For many years I attended APRL meetings, and heard descriptions of other states’ professional responsibility systems. When I described Minnesota’s system, APRL lawyers often expressed admiration for our system’s fairness, its respect for due process, its openness, and other qualities. Those who have served over the last several decades on the Board, or as Director, have taken great pride in Minnesota’s system. They have regarded its unique features as a source of strength, not as a problem to be solved by copying some supposed majority pattern.

It may well be appropriate to formally assign to the Administrator such matters as Human Relations and finance. In practice, the Administrator has long been the main supervisor of such matters. However, Rule 4(c) removes from the Board and the Executive Committee not only supervisory responsibility over “administration” of OLPR, but also supervisory responsibility of OLPR for administration of “these rules.” As to



ethics complaints and disability matters, “investigations and proceedings shall be conducted in accordance with these Rules.” Rule 2, RLPR.

I believe that the proposed amendments would create radical changes – a Director without regular supervision, a Board and Executive Committee with greatly diminished responsibilities, a transfer from authorities with public representation to authorities without such representation, an assignment to a Court Administrator that the Administrator has no foundation for carrying out.

Not only are the proposals radical, they are made without due consideration. The Court’s February 16, 2021 Order does not include any statement of need. The Order invites comments without providing a rationale for the proposed amendments. The Order does not provide for a hearing. The Order effectively treats the amendments as if they were minor matters that do not need extensive examination. If the Court deems such radical changes to be necessary, they should not be carried out without a detailed statement of need and without a public hearing.

I believe that the problems that led to the crisis in 1984-85 could much more easily recur under amended Rules 4 and 5 than they could under the current system, which was specifically designed to deal with such problems and prevent their repetition. I understand that comments are being filed by several former Board Chairs and by several former Directors. I understand that they unanimously regard the amendments as unwise. I urge the Court to heed the comments filed by these Chairs and Directors, and by the MSBA. They know the professional responsibility system best and they have the wisdom borne of long observation and consideration.

I appreciate the opportunity to comment on the proposed amendments.

Dated: April 15, 2021

By s/William J. Wernz  
William J. Wernz (#011599X)

[REDACTED]

# Exhibit 1

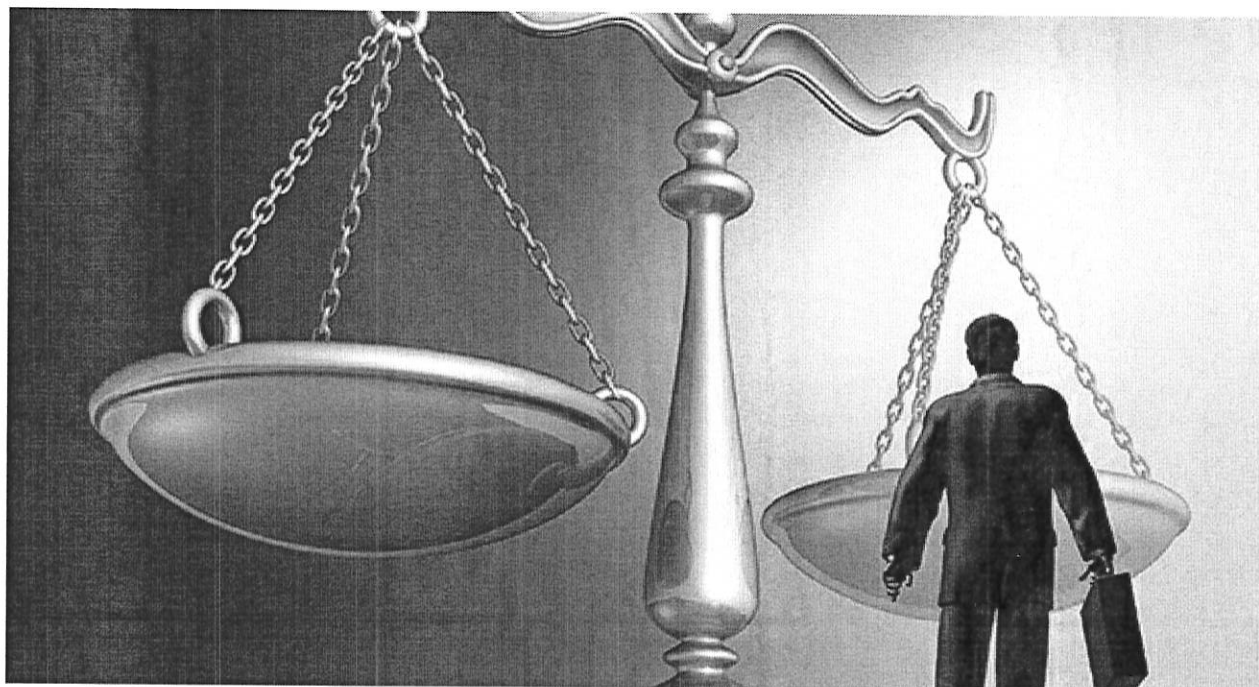


Image: Deposit Photos

## **Quandaries & Quagmires: Diminishing the public's role in professional oversight**

By: William J. Wernz © April 6, 2021

The essential roles of the public in the Minnesota professional responsibility system have long been familiar. The purposes of the system are to protect the public and to foster public confidence in the legal profession. The system is among the most open to public scrutiny. Public members comprise about forty percent of the members of the Lawyers Board and its Executive Committee. The Board and its Executive Committee supervise the Director of the

Supreme Court appoints an outside review committee, including public members, to review the system and report to the public. These public features have been a great strength of a system that is among the best in the United States.

Two current developments would, however, diminish the public's role. One development involves rule changes and the other involves outside review committees. No reason has been given for these developments.

On Feb. 16, 2021, the Minnesota Supreme Court issued an order for comments, to be filed by April 19, on amendments the Court proposed to Rules 4 and 5, R. Law. Prof. Resp. (Order Establishing Comment Period on Amendments to the Rules on Lawyers Professional responsibility, File ADM10-8042, Minn. Feb. 16, 2021) The amendments shift oversight of the Director and the Office of Lawyers Professional Responsibility (OLPR) from the Board and its Executive Committee to the Court and its Administrator. By greatly reducing the responsibilities of the Board and its Executive Committee, the amendments would diminish the role of the public.

The first oversight amendment would shift from the Board to the Court general oversight of personnel matters within OLPR. This amendment is apparently in line with national trends and appears to be noncontroversial. If, for example, an OLPR Assistant Director would be subject to internal discipline, or would complain of working conditions, Court Administration can better address the matters than the Board's volunteer members.

The second oversight amendment is controversial. It would shift from the Board and its Executive Committee oversight over the Director and OLPR with respect to their handling of discipline matters and general performance. The MSBA Professional Regulations Committee has filed comments with the Court explaining why the Committee thinks these changes are unwise. The Lawyers Board is considering whether to file comments.

Current Rule 4(d), RLPR, assigns to the Executive Committee responsibility “for the general supervision” of OLPR. Amended Rule 4(d) would assign to the Executive Committee only “general advisory responsibility” over OLPR. Under the amended rule, the Executive Committee could inform the Director, “We believe OLPR has a serious problem with delays in file dispositions and we advise that it should be corrected promptly.” The Director could respond, “While I appreciate your advice, I believe file age reduction is not a great priority.”

Two additional amendments further diminish the roles of the Board and the public. Under current Rule 5(a), the Board reviews the Director’s performance every two years and recommends to the Court regarding retention. Under amended Rule 5(a), the State Court Administrator would “consult” with the Board as to the Director’s performance and the Administrator would recommend to the Court as to retention. The Administrator has no direct knowledge of the Director’s performance regarding the Director’s most important function – dealing with ethics complaints.

Under current Rule 5(b), the Director is “responsible and accountable directly to the Board,” and through the Board to the Court. Under amended Rule 5(b), the Director would be “responsible” (but not “accountable”) to the Board, and “responsible and accountable” to the Court. Because the Executive Committee would have only “advisory responsibility” vis a vis the Director, it appears the Director’s “responsibility” would be only to give due weight to the Board’s advice.

The MSBA Committee comments object to shifting oversight of the Director and of OLPR’s handling of discipline complaints from the Board and its Executive Committee to the Court and its Administrator. One basis for this objection is that the shift would diminish the role of

A second MSBA Committee comment is that the Board and its Executive Committee are far better placed to observe the performance of OLPR and its Director than the Court. About eighty to ninety percent of all case dispositions are private, and unknown to the Court. A related comment is that the Court cannot very well be both umpire and coach as to discipline cases.

The Board has for many years played a far greater role vis a vis the Director than the "advisory" role that the amendments would provide. For example, in 1986 the Board issued "Summary Dismissal Guidelines" for OLPR, identifying classes of cases in which the presumptive disposition would be dismissal. These guidelines have been used for decades, promoting fairness and efficiency. At the few times since the system's creation in 1970 when the Director's performance has been problematic, the Board and its Executive Committee have been much better placed than the Court to take note.

If a Director were to be insufficiently zealous in handling complaints, the Board and Executive Committee would be far more likely to notice than the Court. One of the first Directors, Walt Bachman, once recalled that the Chief Justice told him to err on the side of charging violations, because the Court could act as a check on such cases, but could not act as to cases that OLPR never filed.

The order does not provide for a public hearing. No statement of need or other explanation accompanies the order for comments. Court administration apparently drafted the amendments. Whether the Court considered the effects of the amendments on public participation in the discipline system is unknown.

A second development that has already reduced the role of the public in the professional responsibility system is that the Court has not appointed a committee to review the status and performance of OLPR and the Board in 14 years. Since 1985, the Court has appointed such committees approximately every ten years, most recently in 2007. In addition, the Court appointed a similar committee to review the performance of the Board on Judicial Standards. The committees not only have had public members, they submitted public reports, thereby enhancing the accountability of the professional responsibility system to the public.

Review committees have contributed many important improvements in the lawyer and judicial discipline system. The Dreher Committee in 1986 recommended changes that

Summary Dismissal Guidelines, streamlining the probable cause determination system, and creating the Executive Committee to oversee the Director. The Saeks Committee reported in 2008 that OLPR had a serious problem with file aging. Unfortunately, systematic action was not taken to rectify the problem and indeed it became much worse. The committee that studied the judicial discipline system made recommendations that greatly enhanced the system's fairness, openness, and effectiveness.

Since the 1930s, the Court has claimed exclusive jurisdiction to regulate the legal profession. The Legislature has from time to time enacted statutes that implied that the Legislature shared such authority with the Court. Respect for the Court's claim implies a correlative duty for the professional responsibility system to be accountable to the public.

It may be said that a review committee is not needed when there are no evident serious problems to address. One reply to this view is that a committee report to the effect that the system is operating at an excellent level is an important assurance to the public, rather than a waste of time. Another reply is that there are now some important questions that deserve answers.

Are respondents' counsel justified in complaining that too many files are inactive for long periods and are too old at disposition? What features of the system have caused serious file aging problems? Why have there been so many employment turnovers among Assistant Directors recently? Has the greatly increased number of OLPR attorneys been matched with productivity? What goals and plans does OLPR have for knowledge management and how is implementation proceeding? Why has the Lawyers Board Panel Manual not been updated since 2007, when it purports to provide "guidelines" for how Panel matters should be handled in 2021?

The Committee could also consider how responsibility and accountability should be structured as among the Board, the Director, and the Court. In 1985-6, a committee provided answers that stood the test of time for more than 35 years. If the system is to be restructured — and especially if the restructuring reduces the public's role — a statement of need, a public hearing, and consultation with public representatives are essential.

For more than 50 years, the Minnesota Supreme Court has succeeded admirably in creating and maintaining an excellent professional responsibility system. Public participation and

professional committees report and recommendations for improving those to the Court and to the public. Continuing success will be fostered by retaining important functions for public members of the Board and its Executive Committee and by continuing regular appointments of review committees to study and report on the current effectiveness of the Minnesota professional responsibility system.

William J. Wernz is the author of the online treatise, "Minnesota Legal Ethics." He has been a member of the Board on Judicial Standards, and he has served as Dorsey & Whitney's ethics partner and as Director of the Office of Lawyers Professional Responsibility.

#### ABOUT WILLIAM J. WERNZ

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**FILED**

April 19, 2021

**OFFICE OF  
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
RULES COMMITTEE**

**COMMENTS ON MINNESOTA SUPREME COURT'S PROPOSED  
AMENDMENTS ON LAWYERS PROFESSIONAL RESPONSIBILITY  
RULES 4 AND 5**

On February 16, 2021, the Minnesota Supreme Court, issued an order establishing a public comment period regarding the Court's proposed amendments to Rules 4 and 5 of the RLPR.

Because the public comment period ends on April 19, 2021, four days before the next LPRB quarterly board meeting of April 23, 2021, the LPRB Rules Committee submits these comments in lieu of the entire Board.<sup>1</sup>

The LPRB Rules Committee opposes the proposed amendments on five grounds. First, the proposed amendments would bring uncertainty to the long-

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<sup>1</sup> The last quarterly meeting of the LPRB and OLPR was January 29, 2021. The full board, including new 2021 board members, has not had a full opportunity to discuss the proposed amendments at a board meeting. The LPRB Rules Committee met April 5, 2021, and the committee subsequently approved these comments.

established and clear system of governance in Minnesota attorney-discipline matters. Second, the proposed rules changes would leave the Director without supervision and eliminate public members and attorneys from their longstanding supervisory role in Minnesota's highly regarded attorney-discipline system. Third, the proposed rules changes assign the State Court Administrator (hereafter "SCA") the authority to consult with the Board regarding its recommendation of the Director's continuing service (hereafter "Director") on substantive issues, leaving the SCA without the most important information relevant to evaluating the Director's performance – the Director's day to day performance regarding case management, the exercise of discretion regarding investigations and disciplinary decisions, consistency in the application of the rules across cases, interactions with all stakeholders of the attorney-discipline system, and leadership capabilities. Fourth, the amendments would likely diminish interest in serving on the Board if it becomes an advisory body only. Fifth, the LPRB Rules Committee respectfully submits that such transformational change is not provident without either a new Supreme Court advisory committee to thoroughly study the issue or, at a minimum, a public forum to evaluate the true necessity and desirability of such changes.

First, the proposed amendments introduce significant uncertainty into the process. Under the current rules, the supervisory relationships between the

Minnesota Supreme Court, the Board, and the Director are clear, defined and easily understood. The current rules provide that the Board generally *supervises* the Director, that the Director is accountable directly to the Board, and, through the Board, the Director is then ultimately accountable to the Minnesota Supreme Court because the Director serves “at the pleasure of” the supreme court, not the Board. In other words, the Board *supervises* the Director’s performance, but decisions concerning the Director’s “continuing service” are exclusively made by the Minnesota Supreme Court. This effective system of checks-and-balances has ably served Minnesotans for decades.

The LPRB Rules Committee acknowledges the Court stated it is proposing these amendments to “clarify the Board’s supervisory responsibilities regarding the administration of the Office of Lawyers Professional Responsibility.” However, the Rules Committee is deeply concerned the proposed amendments will confuse, not clarify, these responsibilities. More specifically, the proposed amendment to Rule 4(c) eliminate the Board’s supervisory authority and would give the Board only “general advisory responsibility for the administration” over the Director. Similarly, the proposed amendment to Rule 4(d), using slightly different language, eliminate the Board’s authority of supervision and would give the Executive Committee only “general advisory responsibility over” the Director. Neither proposed rule change provides either comments or definitions

as to what constitutes “general advisory responsibility.” Nevertheless, whatever this term denotes, “advisory responsibility” duties must be considerably less than “supervisory authority” or “supervision” duties as currently provided.<sup>2</sup>

The proposed amendment to Rule 5(b) further confuse the relationship between the Director and the Board. Under this amendment, the Director would remain “responsible to the Board,” but would no longer be “responsible and accountable to the Board.” The amendment does not explain what this change would mean in practice, nor how the Director could be “responsible” but not “accountable” to the Board. Under these amendments, there is nothing that logically prevents the Director from simply disregarding *advice* given by the Board.

Second, the LPRB Rules Committee opposes the amendments because they leave the Director without supervision. This creates the risk that the principal (Supreme Court) lacks the information regarding the agent’s (Director) behavior to avoid the most significant problems associated with the delegation of public power in a democracy – incentives and opportunities for the agent to act against the principal’s interests without fear of retribution. The Director should not have

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<sup>2</sup> *Supervision* may be defined as “a critical watching and directing (as of activities or course of action).” *Webster’s Ninth New Collegiate Dictionary* (1987) p. 1185. In contrast, *Advisory* may be defined as “containing or giving advice” and wherein to *advise* may be defined as a “recommendation regarding a decision or course of conduct.” *Id.* p. 59.

the authority to exercise public power without having to answer for performance, devoid of public participation. As a fundamental matter, under the proposed amendment to Rule 5(b), the Director would no longer be “responsible and accountable directly to the Board” and the Director’s ultimate accountability to the Court would no longer run “through the Board.”

These changes would be transformational by recasting the Board into merely an advisory role. This is undesirable for two reasons. First, the Board has the proven ability to effectively monitor, manage, and supervise the Director and do so in an open and transparent manner. Importantly, and particularly with respect to the LPRB Executive Committee, this supervision generally occurs concurrently with the Director’s ongoing caseload, permitting proactive supervision. Finally, the LPRB Chair and Executive Committee share certain information directly with the Court’s Liaison so that the Court is informed and may ensure that its delegated power is exercised appropriately.

While performing their work, Board members gain detailed, nuanced information about the current performance of the Director across many contexts. The Board has information regarding the Director’s day to day performance regarding case management, the exercise of discretion regarding investigations and disciplinary decisions, consistency in the application of the rules across cases, interactions with all stakeholders of the attorney-discipline system, and

leadership capabilities, including integrity, diligence, temperament, and legal knowledge. Board meetings, closed Board meetings, Executive Committee meetings, and interactions between the Director and Chair and Vice Chair are devoted to addressing a plethora of issues associated with the operations of the OLPR and LPRB. In this manner the Board and its Executive Committee are best positioned to stem incipient issues before those issues become significant impediments. In obtaining such relevant information on a timely basis, the Board gainfully leverages this information to provide the best guidance and supervision to the Director, thereby helping to provide the very best service to complainants, respondents, the entire disciplinary system, and the Court.

If the Board is to lose its supervisory role, then it appears likely the Board may also lose access to certain crucial information since the Board could no longer direct the Director to provide desired information. Such loss of access may create the unnecessary risk that the Court will not have the complete information it needs to fully assess the Director's performance, nor will the Court have any reliable method to ascertain what information is in fact missing. This creates the risk that the agent (Director) is unanswerable to the principal (Supreme Court) and the Court lacks the information to ensure ultimate control of its delegated public powers to the Director.

In contrast, the longstanding practice under the current rules is the beneficial sharing of information between the Board and the Court so the Court may proactively learn what is happening and promptly address any issue before it becomes an ingrained problem. This process enhances the critically important perception that the Court's attorney disciplinary system is fair, equitable, and efficient. Rather than cutting itself off from such information through these rule changes, the better approach is to maintain the current system, so the Court can continue to receive germane, pertinent information from the Board, giving that information the weight the Court deems appropriate.

Third, the SCA lacks the information needed to evaluate the performance of the Director. The LRPB Rules Committee readily acknowledges that the SCA is best suited to manages various personnel and fiscal issues concerning the Director and, in particular, individual members of the OLPR staff. For this reason, the LRPB Rules Committee would not oppose amendments clarifying that the SCA has primary responsibility as to administrative matters such as finance and HR. The SCA, however, lacks nuanced subject matter expertise on the actual caseload of the Director. Even if the SCA did have the requisite subject matter expertise, nothing to date indicates that the SCA has the time or resources to delve into the Director's actual casework to obtain the information it needs to make a recommendation regarding the continuing service of the Director.

Indeed, the SCA periodically sends the LPRB board members a survey to complete to gather information on the Director's performance. The most recent survey, a five-question general survey, sent out on April 14, 2021 and due on April 21, 2021, before the Board's next meeting of April 23, 2021, is limited in its ability to gather information regarding the Director's performance. In sum, the Board is more objectively qualified and has superior information than the SCA to promote greater uniformity and consistency in the disposition of ethical matters pursuant to the Minnesota Rules on Lawyers Professional Responsibility.

Fourth, the proposed rule changes are undesirable because they remove the public from a direct supervisory role. Eliminating public members from their direct supervisory role may well tend to erode public trust and transparency in the attorney disciplinary system. In fact, the Board's dedicated, altruistic public members have been proved invaluable because their unique and varied perspectives concerning the performance of the Director, helping to ensure that Office remains efficient, fair, and appropriately transparent. Public supervision of the Director - long a cornerstone of Minnesota's esteemed self-policing attorney discipline system - is essential to maintaining the credibility and legitimacy of the process, a particularly important notion to both complainants and respondents when both parties who are entitled to rigorous due process.



The LPRB Rules Committee is concerned that if these rules are adopted, the changes may significantly decrease volunteer interest in serving on the Board charged only with an advisory role. For many serving on the Board, particularly for those members active on committees, LPRB service is a part-time, 20-hour-per-week job. For members of the Executive Committee, the time commitment is even greater. Highly qualified people make this significant time commitment because they are committed to actually regulating through actual supervision, thereby protecting and improving Minnesota's attorney discipline system. The LPRB Rules Committee is concerned that these proposed rules changes implicitly suggest that the significant time invested by volunteer Board members, and the tremendous information that comes from that work, is not valuable to the Court, that Board input may or may not be seriously considered by the Court in evaluating the Director. As it is, it is difficult to attract qualified public members, these rule changes are likely to further depress public interest in serving on the Board, if not for volunteer attorneys as well.

Fifth, if the Court intends to amend these rules, the LPRB Rules Committee suggests that such momentous changes should take place only after due diligence and deliberation. The LPRB Rules Committee respectfully suggests that is an appropriate time for the Court to appoint an independent advisory committee to thoroughly evaluate Minnesota's current attorney-discipline

system to best assure the proposed changes would actually remedy perceived systematic deficiencies. Such an advisory committee could, for example, make holistic, informed recommendations as to which personnel or fiscal matters are best handled by the SCA and, in contrast, which substantive supervisory matters are best handled by the Board.<sup>3</sup> Non-lawyer members of the public can and should serve on such an advisory committee. As the MSBA has already articulated, the Court has appointed such commissions several times in the past but has not done so since 2007.

Should the Court decline to establish a new advisory committee, then, again in the pursuit of due diligence, the LRPB Rules Committee believes the Court should hold a full public hearing on the proposed amendments. That way, the Court can better consider varied input from stakeholders, interested parties, and members of the public regarding the impact of these proposed changes on Minnesota's attorney-discipline system.

The LBRB Rules Committee notes that Minnesota's attorney-discipline model has always been unique in several ways, including having local volunteer committees (our District Ethics Committees) investigate and recommend discipline in a large number of cases as well as having public participation in

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<sup>3</sup> For example, the 1985 Supreme Court's Advisory Committee provided the *Dreher Report on Lawyer Discipline* that resulted in the issuance of LPRB Panel Manuals, greatly contributing to more even consistency between LPRB panels.

local committees and the LPRB. The Minnesota bench and bar has long pointed with pride to the differences between our approach and that used in other states. In short, Minnesota has always been a leader, not a follower, on attorney-discipline matters. The LPRB Rules Committee respectfully submits that current differences between Minnesota's current model and supervisory arrangements in other jurisdictions utilizing judicial employees are insufficient to support changes in Minnesota's proven and successful attorney discipline system.

The LPRB Rules Committee appreciates this opportunity to provide this input.

Respectfully Submitted,

Dated: April 19, 2021

/s/ Peter Ivy

By: Peter Ivy

Chair, Rules Committee

Lawyers Board of Professional Responsibility

**DEC Chairs Symposium**  
**May 14, 2021**  
**Zoom Meeting**

**Agenda**

- 8:30-8:45**     **Welcome, Introductions and Update from the Board** (Robin Wolpert, Chair LPRB)
- 8:45-9:15**     **Update from the Director** (Susan Humiston, OLPR)  
This session will discuss current disciplinary trends and noteworthy decisions from an enforcement perspective.
- 9:20-10:20**    **Anatomy of an Investigation** (Josh Brand & Bryce Wang, OLPR; Corinne Ivanca, Fourth DEC Vice Co-Chair; Susan Rhode, LPRB)  
A step-by-step training via modules through a DEC investigation including investigation roadblocks—handling sensitive information, claims of privilege/confidentiality, communication barriers, accessing necessary records, and navigating a challenging witness.
- 10:20-10:30**   *Break*
- 10:30-11:30**   **Uncovering [Un]Wellness** (Joan Bibelhausen, LCL & Karin Ciano, OLPR)  
Identifying how and when mental health issues may present in disciplinary investigations. This session will cover how to demystify well-being and mental health issues, who to contact, and what resources are available. The impact of stigma and resulting bias will underlie all elements of this program. Because of this stigma and bias, lawyers do not ask for help or raise mitigating factors that may be available. This can impact an investigation and whether the lawyer ultimately receives the help they may need. DEC members may be reluctant to offer help because of a lack of understanding of mental health issues and their impact on the discipline system.
- This program will include identification of specific violations/rules where mental health issues may be more likely to be present and offer a basic understanding of how some of those issues may appear in an investigation. The presenters will lead a discussion on how to talk to someone who may be struggling and the resources available, while

following the requirements of DEC roles. The full range of LCL services will also be presented.

**11:35-12:05 Leadership & Continuity Planning** (Robin Wolpert, Chair LPRB; Michelle Horn, First DEC Chair; Jennifer Bovitz, OLPR)

This session will focus on honing DEC Chair leadership skills and assist Chairs in implementing a continuity plan and identifying and developing other leaders within DEC's.

**12:05-12:15 Break**

**12:15-1:00 Working Lunch. Leadership Continued: Managing a DEC** (Moderated by Robin Wolpert, LPRB; Allan Witz, LPRB; Jennifer Bovitz, OLPR; MSBA Representative, TBD)

This session will provide practical advice about managing DEC investigations and investigators within your district. The session will offer practical guidance including tracking deadlines, tracking assignments, providing positive feedback and messaging to non-responsive or delinquent investigators. We will also have a moderated conversation about keeping track of Chair tasks, like how to make sure you have all you need for the annual report.

**1:05-1:35 Supreme Court Update** (Justice Hudson)

This session will cover hot topics and recent decisions from the perspective of OLPR/LPRB Liaison Justice.

**1:40-2:40 Fees – the Most Commonly Misunderstood Rules** (Amy Halloran, OLPR)

This session will discuss the intersection and application of Rules 1.5 and 1.15 as well as Rule 7.2, MRPC. The presenter will discuss flat fees, availability fees, fee sharing, the ethics of referral fees and funds improperly held in business accounts.

### **Presenter Biographies:**

**Robin Wolpert:** Robin Wolpert is an accomplished appellate practitioner, business litigator, and white-collar criminal defense attorney at Sapia Law Group in Minneapolis. Her 20-year career began in BigLaw, and she went on to serve as a prosecutor and Senior Counsel of Compliance & Business Conduct at 3M. Robin uses her unique blend of government, private-sector, and in-house experience to address legal, policy, leadership, and organizational challenges for a wide variety of clients. Robin handles a diverse mix of criminal and civil lawsuits and appeals, focusing on constitutional law, business fraud and money laundering, cyber-harassment and defamation, Title IX, and business compliance. She represents clients in litigation involving private parties or the government, including cases with parallel criminal and civil proceedings, civil and criminal appeals, and investigations.

Before becoming a lawyer, Robin earned her Ph.D. in political science from the University of Chicago. Her areas of expertise include constitutional law, judicial politics, cognitive and behavioral economics, and political and organizational psychology. Robin was Visiting Instructor at Georgetown University and Assistant Professor of Government & International Politics at the University of South Carolina. She earned her B.A. from Colby College and her J.D. from Cornell Law School.

Robin is passionate about public service. She oversees Minnesota's lawyer disciplinary system as Chair of the Lawyers Professional Responsibility Board. Robin is Secretary of the National Conference of Bar Presidents, Treasurer of the Institute for Well-Being in Law, Member of the ABA House of Delegates, and past President of the Minnesota State Bar Association. She served on the National Task Force on Lawyer Well-Being from 2018-20.

**Susan Humiston:** Susan Humiston is the Director of the Office of Lawyers Professional Responsibility and Client Security Board in Minnesota. Susan has more than 25 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment as Director in 2016, Susan was Vice-President and Assistant General Counsel for Alliant Techsystems Inc. and its public company spin-off Vista Outdoor Inc., and was a litigation partner at Leonard, Street and Deinard, now Stinson LLP. She clerked for U.S. District Court Judge David S. Doty, is an honors graduate of the University of Iowa College of Law, and received her B.A. with honors from the University of Nebraska-Lincoln.

**Susan Rhode:** A prominent family law practitioner known for managing the “tough stuff” in divorce and related parenting cases, Susan Rhode uses her legal leadership to smooth and resolve the transitional challenges that many of her clients experience. She has represented clients in several of Minnesota’s leading cases concerning non-marital property, spousal maintenance, and premarital agreements.

Susan also works extensively as a mediator, consensual special magistrate, arbitrator, neutral evaluator, and parenting coordinator. The well-being of children in divorce is an area of particular care and concern for Susan, a reflection of her prior experience as an educator and her commitment to children’s issues.

**Joshua H. Brand:** Joshua H. Brand is a Senior Assistant Director with the Office of Lawyers Professional Responsibility. In addition to speaking to and with various groups about ethics issues related to the practice of law, his primary responsibilities include the review, investigation, and prosecution of complaints of unprofessional conduct against lawyers. He received his B.A. from Grinnell College and his J.D. from the University of St. Thomas School of Law.

**Bryce Wang:** Bryce Wang joined the Minnesota Office of Lawyers Professional Responsibility as an Assistant Director in March 2019. In his role at the OLPR, Bryce is responsible for investigating complaints and prosecuting lawyer misconduct as proscribed under the Minnesota Rules of Professional Conduct. Prior to joining the OLPR, Bryce clerked for the Honorable Jerome B. Abrams in Dakota County, Minnesota for two years.

Bryce received his B.A. from Concordia College in Moorhead, Minnesota in 2013. He received his J.D. from Mitchell Hamline School of Law in 2016. While attending law school, Bryce interned/clerked at a number of organizations, including a reinsurance broker and a small law firm primarily practicing in insurance law.

**Corinne Ivanca:** Corinne G. Ivanca is a partner with Geraghty, O’Loughlin & Kenney, P.A. in St. Paul. She focuses her practice on the defense of professionals in malpractice and licensing matters, and also handles business, privacy, and general tort litigation. Corinne practices in the state and federal courts of Minnesota and Wisconsin. She serves as the co vice chair of the Fourth District Ethics Committee.

**Joan Bibelhausen:** Joan Bibelhausen has served as Executive Director of Lawyers Concerned for Lawyers since 2005. She is an attorney and is nationally recognized for her work in the lawyer assistance and diversity and inclusion realms. Joan has significant additional training in counseling, mental health and addiction, diversity, employment issues, and management. She has spent more than two decades working with lawyers, judges, and law students at a crossroads because of mental illness and addiction concerns and well-being, stress, and related issues.

Joan has developed and presented numerous CLE and other programs throughout Minnesota and nationally and has written on mental health and addiction, implicit bias and mental health, career and life balance and satisfaction, stress, diversity and inclusion, marketing, and other issues of concern to the legal profession. She is active in the MN State Bar Association, Hennepin and Ramsey County and American Bar Associations, and MN Women Lawyers. She has served on the ABA Commission on Lawyers Assistance Programs (CoLAP) and its Advisory Commission. She has chaired CoLAP's Education Committee and its 2016 Conference Planning Committee. She has chaired the MSBA Life and the Law Committee and the HCBA Solo and Small Firm Practice Section and has co-chaired the HCBA Diversity Committee. She represents the disability perspective on many bar-related diversity committees and initiatives, including the MSBA Diversity and Inclusion Council. Joan also served on the MSBA Board of Governors, HCBA's Strategic Planning and Leadership Institute task forces, and the Northstar Problem Gambling Alliance board.

Joan coauthored "Stress and Resiliency in the US Judiciary" for the ABA 2020 Journal of the Professional Lawyer, "Reducing the Stigma—William Mitchell College of Law—Spring 2015," published in the Mitchell Hamline Law Review (Vol. 41, Issue 3), and frequently writes for Minnesota and national bar publications. Minnesota Lawyer recognized her with a 2017 Diversity and Inclusion Award for her work regarding implicit bias and mental health in the legal profession.

**Karin Ciano:** Before joining the OLPR in February 2021, Karin Ciano volunteered as an investigator for the Fourth District Ethics Committee. Karin practiced law for nearly 25 years as a solo and small-firm lawyer, a big-firm associate, and a federal career clerk. She teaches the Solo Practice Residency at Mitchell Hamline School of Law and serves on the board of LegalWise, a nonprofit solo-practice incubator affiliated with Mitchell Hamline. She is the incoming President of the Saint Paul Sunrise Rotary Club.



A notorious legal writing nerd, Karin has taught legal writing and drafting courses at three law schools, has presented CLEs for many groups, and for several years wrote Minnesota Lawyer's "Legal Writing Notebook" column. When not thinking about legal ethics, Karin enjoys biking, gardening, and pickling vegetables. She looks forward to the day when she can sing in a choir again.

**Michelle Horn:** After obtaining a degree in Psychology, Michelle earned her law degree from William Mitchell College of Law. Michelle has dedicated her professional career to assisting Minnesota families struggling with family law issues. Michelle lives and practices primarily in Dakota County. Michelle volunteered for two terms on the First District Ethics Committee as an Investigator and was appointed to the position of Chair in October 2021.

**Jennifer Bovitz:** Jennifer Bovitz joined the Office of Lawyers Professional Responsibility in 2017 as a Senior Assistant Director and is currently serving as a Managing Attorney. Jennifer earned her J.D. from William Mitchell College of Law in 2001 and served as a felony prosecutor prior to her employment at the OLPR. Jennifer serves as adjunct faculty at Mitchell Hamline College of Law and enjoys her time away from the law kayaking on a western Wisconsin lake.

**Allan Witz:** Allan Witz practiced law in South Africa from 1986 until he emigrated to the USA in 2001. He is licensed to practice law in Minnesota, Florida and Michigan. He currently chairs the LPRB DEC and Training Committee. He served three years on the Third District Ethics Committee and has been President of the Olmsted County Bar Association and President of the Third District Bar Association. His principal practice areas are business law, estate planning and immigration law.

**Justice Natalie Hudson:** Justice Natalie Hudson joined the Minnesota Supreme Court in 2015 by appointment of Governor Mark Dayton. She was elected in 2016 and her current term expires January 2023. Justice Hudson served on the Minnesota Court of Appeals from 2002-2015.

Justice Hudson was a staff attorney with Southern Minnesota Regional Legal Services (1982-1986); an associate attorney at Robins, Kaplan, Miller, and Ciresi (1986-1988); Assistant Dean of Students at Hamline University School of Law (1989-1992); St. Paul City Attorney (1992-1994); and an Assistant Attorney General at the Office of Minnesota Attorney General, Criminal Appellate Division (1994-2004).

Justice Hudson received her B.A. from Arizona State University and her J.D. from the University of Minnesota Law School.

Justice Hudson is a member of the American Bar Association, Minnesota State Bar Association, Ramsey County Bar Association, Minnesota Women Lawyers, Minnesota Association of Black Lawyers, Minnesota Association of Black Women Lawyers, and Warren E. Burger Inn of Court. She also serves on the Board of Advisors for the University of Minnesota Law School.

**Amy Halloran:** Amy joined the Office of Lawyers Professional Responsibility in 2015 as an Assistant Director. Amy earned her J.D. from William Mitchell College of Law in 2012. Upon graduation from law school, Amy worked as an associate attorney at a Twin Cities law firm representing employers and insurers in workers' compensation administrative proceedings. Amy is currently an adjunct professor at Mitchell Hamline School of Law and the University of St. Thomas School of Law.

### OLPR Dashboard for Court And Chair

	Month Ending March 2021	Change from Previous Month	Month Ending February 2021	Month Ending March 2020
<b>Open Files</b>	428	11	417	461
<b>Total Number of Lawyers</b>	331	8	323	332
<b>New Files YTD</b>	234	101	133	241
<b>Closed Files YTD</b>	247	90	157	261
<b>Closed CO12s YTD</b>	37	14	23	60
<b>Summary Dismissals YTD</b>	105	36	69	122
<b>Files Opened During March 2021</b>	101	37	64	62
<b>Files Closed During March 2021</b>	90	-5	95	105
<b>Public Matters Pending (excluding Resignations)</b>	39	6	33	35
<b>Panel Matters Pending</b>	14	-7	21	12
<b>DEC Matters Pending</b>	70	2	68	89
<b>Files on Hold</b>	13	-2	15	9
<b>Advisory Opinion Requests YTD</b>	531	199	332	490
<b>CLE Presentations YTD</b>	18	7	11	11
<b>Files Over 1 Year Old</b>				
	117	-8	125	128
<b>Total Number of Lawyers</b>	83	-9	92	82
<b>Files Pending Over 1 Year Old w/o Charges</b>	47	-8	55	64
<b>Total Number of Lawyers</b>	33	-8	41	51

	2021 YTD	2020 YTD
<b>Lawyers Disbarred</b>	1	0
<b>Lawyers Suspended</b>	8	7
<b>Lawyers Reprimand &amp; Probation</b>	1	1
<b>Lawyers Reprimand</b>	2	0
<b>TOTAL PUBLIC</b>	<b>12</b>	<b>8</b>
<b>Private Probation Files</b>	1	4
<b>Admonition Files</b>	27	21
<b>TOTAL PRIVATE</b>	<b>28</b>	<b>25</b>

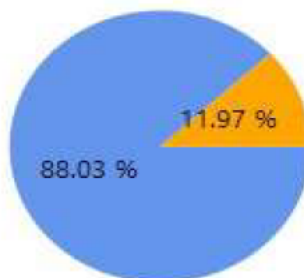
# FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	ADAP	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2017-02				1							1
2017-03					1	1					2
2017-09	1										1
2017-11						1					1
2017-12						1					1
2018-01	1										1
2018-03		1						1			2
2018-04						2					2
2018-06						1		1			2
2018-07	1					1					2
2018-08	1					3		1			5
2018-10					2			1			3
2018-11						1					1
2018-12	1					2					3
2019-01	2				1						3
2019-02		1									1
2019-03	2			1		2					5
2019-04	3				3	1	1				8
2019-05	2			1		2					5
2019-06					1	1					2
2019-07	1					5	1				7
2019-08	1					1					2
2019-09	3					1					4
2019-10	4		1	1		1		2			9
2019-11	4		1	1	1	1					8
2019-12	4				1	3					8
2020-01	6					1				1	8
2020-02	5	1			2	2			2		12
2020-03	5	2				1					8
<b>Total</b>	<b>47</b>	<b>5</b>	<b>2</b>	<b>5</b>	<b>12</b>	<b>35</b>	<b>2</b>	<b>6</b>	<b>2</b>	<b>1</b>	<b>117</b>

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	111	40
Total Cases Under Advisement	6	6
<b>Total Cases Over One Year Old</b>	<b>117</b>	<b>46</b>

Active v. Inactive

■ Active 103  
■ Inactive 14



## All Pending Files as of Month Ending March 2021

Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2017-02							1								1
2017-03								1	1						2
2017-09				1											1
2017-11									1						1
2017-12									1						1
2018-01				1											1
2018-03					1						1				2
2018-04									2						2
2018-06									1		1				2
2018-07				1					1						2
2018-08				1					3		1				5
2018-10								2			1				3
2018-11									1						1
2018-12				1					2						3
2019-01				2				1							3
2019-02					1										1
2019-03				2			1		2						5
2019-04				3				3	1	1					8
2019-05				2			1		2						5
2019-06								1	1						2
2019-07				1					5	1					7
2019-08				1					1						2
2019-09				3					1						4
2019-10				4		1	1		1		2				9
2019-11				4		1	1	1	1						8
2019-12				4				1	3						8
2020-01				6					1					1	8
2020-02				5	1			2	2			2			12
2020-03				5	2				1						8
2020-04				10	1				1			1			13
2020-05				7			1				1	1			10
2020-06				15	2				3						20
2020-07		1	1	21					1						24
2020-08		2		23					1						26
2020-09		4		21					3						28
2020-10		3		15	2			1	1						22
2020-11		6	1	13											20
2020-12		14	2	17								1			34
2021-01		11	1	16								1		1	30
2021-02		9	1	10								1			21
2021-03	13	20		20								1	8	1	63
<b>Total</b>	<b>13</b>	<b>70</b>	<b>6</b>	<b>235</b>	<b>10</b>	<b>2</b>	<b>6</b>	<b>13</b>	<b>45</b>	<b>2</b>	<b>7</b>	<b>8</b>	<b>8</b>	<b>3</b>	<b>428</b>

**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	Admonition Appealed 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

## FY2022/23 Budget Request MN Lawyers Professional Responsibility Board

Appropriation: J650LPR

v4 - 4/6/2021	Account	FY18 Actual	FY19 Actual	FY20 Actual	FY21 Budget	FY21 Receipts Through 2/22/2021	FY21 Projected	FY22 Projected	FY23 Projected
		a	b	c	d	e	e	f	g
	Reserve Balance In	2,911,444	2,346,087	2,035,996	1,469,760	1,469,760	1,469,760	1,277,918	437,887
	Revenue:								
	Law Prof Resp Attny Judgmnts 512416	24,001	28,310	29,548	24,628	25,281	34,031	35,052	36,104
	Other Agency Deposits 514213	26,899	24,168	24,164	25,770	16,271	24,271	24,999	25,749
	Law Prof Resp Misc 553093	49,880	42,771	25,138	56,138	13,666	27,666	28,496	29,351
	Attorney's Registration 634112	3,150,783	3,352,084	3,446,296	3,424,032	1,928,892	3,436,392	3,424,656	3,447,582
	Law Prof Resp Bd Prof Corp 634113	72,425		67,350	75,663	57,000	65,500	67,465	69,489
	Subtotal Revenue	3,323,988	3,447,332	3,592,496	3,606,230	2,041,110	3,587,860	3,580,668	3,608,275
	Expenditures:	3,889,345	3,757,422	4,158,733	4,479,932	2,371,445	3,942,343	\$4,420,700	\$4,435,440
	Reserve Balance Out (Ending Cash Balance)	<b>2,346,087</b>	<b>2,035,996</b>	<b>1,469,760</b>	<b>596,058</b>	<b>1,139,425</b>	<b>1,277,918</b>	<b>437,887</b>	<b>(389,278)</b>

25% Reserve      \$1,105,175      \$1,108,860  
50% Reserve      \$2,210,350      \$2,217,720

Notes:

- \* Revenue assumptions FY22/23 3% over FY21 projected amounts
- FY21 Projected based on revenue received during the same time period in FY20
- FY22/23 3% over FY21 projected amounts
- Atty. Reg. Assump ions: FY22 29,874 (23,511 @ \$128; 3,958 @ \$89; 1,583 @ \$32; 822 @ \$15)
- FY23 30,074 (23,668 @ \$128; 3,985 @ \$89; 1,594 @ \$32; 827 @ \$15)

## FY2022/23 Budget Request MN Lawyers Professional Responsibility Board

Appropriation: J650LPR  
Findept. ID: J653500B

v3 - 4/6/2021	Account	FY18 Actual Expenditures	FY19 Actual Expenditures	FY20 Actual Expenditures	FY21 Budget Expenditures	FY21 Expenditures Through 2/22/2021	FY21 Projected Expenditures	FY22 Projected Expenditures	FY23 Projected Expenditures	
		a	b	c	d	e	e	f	g	
	Full Time	41000	2,815,371	2,800,141	3,241,787	3,544,341	1,894,117	2,883,394	\$3,374,853	\$3,587,398
	PT, Seasonal, Labor Svc	41030	200,379	220,535	138,417	124,038	96,450	186,806	\$97,942	\$101,361
	OT Pay	41050	3,022	2,845	283	3,000	532	1,063.42	\$3,000	\$3,000
	Other Benefits	41070	66,139	41,688	11,384	30,000	10,272	39,236.09	\$25,797	
	<b>PERSONNEL</b>		<b>3,084,910</b>	<b>3,065,209</b>	<b>3,391,870</b>	<b>3,701,379</b>	<b>2,001,371</b>	<b>3,110,499</b>	<b>\$3,501,591</b>	<b>\$3,691,759</b>
	Space Rental, Maint., Utility	41100	344,225	352,573	359,420	367,361	195,804	245,010	371,448	379,448
	Printing, Advertising	41110	9,896	10,537	10,694	14,680	2,045	5,627	10,000	10,625
	Prof/Tech Services Out Ven	41130	27,957	28,339	26,991	31,160	6,811	73,817	86,915	33,850
	IT Prof/Tech Services	41145	165,964	41,108	149,599	64,500	38,856	165,212	79,175	29,500
	Computer & System Svc	41150	38,835	41,483	51,782	56,576	23,970	64,502	94,720	52,370
	Communications	41155	22,556	24,870	23,237	28,655	10,001	58,744	23,690	25,160
	Travel, Subsistence In-St	41160	13,630	8,309	5,617	15,169	476	1,283	7,700	8,150
	Travel, Subsistence Out-St	41170	18,998	16,925	16,414	40,864	-		17,400	18,450
	Employee Dev't	41180	20,002	9,723	11,596	11,964	4,663	7,888	9,225	9,525
	Agency Prov. Prof/Tech Svc	41190		-						
	Claims Paid to Claimants	41200		-						
	Supplies	41300	60,435	48,326	55,932	68,335	26,993	48,231	93,375	98,128
	Equipment Rental	41400	3,035	3,513	3,036	4,000	4,042	4,544	2,150	2,275
	Repairs, Alterations, Maint	41500	6,921	11,218	6,652	9,056	7,932	36,480	32,810	8,425
	State Agency Reimb.	42030		-						
	Other Operating Costs	43000	69,636	47,776	40,728	62,300	34,171	75,663	40,500	42,775
	Equipment Capital	47060	1,386	45,572					25,000	
	Equipment-Non Capital	47160	960	1,943	5,165	3,933	14,310	44,844	25,000	25,000
	Reverse 1099 Expenditure	49890								
	<b>OPERATING</b>		<b>804,435</b>	<b>692,214</b>	<b>766,862</b>	<b>778,553</b>	<b>370,074</b>	<b>831,844</b>	<b>919,108</b>	<b>743,681</b>
	<b>TOTAL</b>		<b>3,889,345</b>	<b>3,757,422</b>	<b>4,158,733</b>	<b>4,479,932</b>	<b>2,371,445</b>	<b>3,942,343</b>	<b>\$4,420,700</b>	<b>\$4,435,440</b>

Notes:

FY2022/23 assumptions: 5.32%/5.35% insurance increases and 0.0%/3.0% compensation increases (which could change depending on what % increase is appropriated by the Legislature).



# Public discipline summary for 2020

Each year I take this opportunity to provide an overview of public discipline. While the year was certainly an unusual one due to the pandemic and the havoc it wrought, public discipline in 2020 was very similar to 2019, with 33 attorneys receiving public discipline as compared to 35 the year prior.

## Discipline in 2020

Public discipline is imposed not to punish the attorney, but to protect the public, the profession, and the judicial system, and to deter further misconduct by the attorney and others. Besides the 33 attorneys who received discipline in 2020, the year was also remarkable for the number of transfers to disability status in lieu of public discipline proceedings. Five attorneys had discipline files placed on administrative hold due to disability. Many disability transfers are due to lawyers practicing longer than their mental or physical health suggests they should—primarily due to financial reasons. As the profession continues to age and the economy struggles, I worry that we will see this trend continue.

Three attorneys were disbarred in 2020: Paul Hansmeier, Daniel Lieber, and Thomas Pertler. Each disbarment is notable in its own way but they are striking collectively because none involved the intentional misappropriation of client funds, which remains the most common cause of disbarment. Mr. Hansmeier was disbarred for committing bankruptcy fraud, following a lengthy prior suspension for engaging in sanctionable litigation misconduct that included lying to the courts. Mr.

Pertler was disbarred for prosecutorial misconduct, discussed at length in my November 2020 column. Tragically, Mr. Pertler died on November 16, 2020, at the age of 56. His obituary reports he fell ill last autumn while looking for a retirement home in Alabama.

Daniel Lieber's permanent disbarment was a first in Minnesota. Mr. Lieber was originally disbarred in July 2005. Disbarment, however, is not generally permanent. A disbarred lawyer, after a minimum of five years, may retake the bar exam and petition for reinstatement. They have a heavy burden to prove fitness, but can be reinstated. The Court determined that Mr. Lieber met that burden in 2013, and reinstated him to the practice of law, placing him on probation.

Mr. Lieber then engaged in additional misconduct similar to his prior misconduct, namely failure to properly maintain his trust account books and records, which was found to be willful.

In an interesting decision in early 2020, the Court issued the unusual discipline of a "stayed disbarment," as opposed to the lengthy 18-month suspension recommended by the referee, and the three-year suspension recommended by the Director.<sup>1</sup> In its decision, the Court took into consideration the significant mitigation that Mr. Lieber offered, including the serious illness of his daughter. The Court noted it hoped to never see Mr. Lieber again. Alas, Mr. Lieber had engaged in additional misconduct, and ultimately stipulated to permanent disbarment in September 2020. As he did following his prior disbarment. Mr. Lieber continues to work in the legal field as nonlawyer staff at his former law firm.

## Suspensions

Twenty-four attorneys were suspended in 2020, a number very similar to 2019 (22 attorneys). The 24 cases reflect no particularly noteworthy trend but include several interesting ones. Kent Strunk was suspended for five years for his five felony convictions for possession of child pornography. Felony criminal convictions will always lead to public discipline but do not always lead to disbarment if the convictions are for conduct outside the practice of law. In Mr. Strunk's case, the referee recommended to the Court a three-year suspension with credit of one year for voluntarily stopping the practice of law upon his arrest, and with the suspension to terminate upon successful completion of Mr. Strunk's criminal conviction. The Director challenged this recommended disposition on the grounds that a five-year suspension was more consistent with the Court's prior case law and the seriousness of the crimes committed. The Supreme Court agreed, but reiterated that disbarment is the presumptive discipline for a felony conviction and that the disposition in such cases is "fact intensive, and considers numerous factors, including the nature of the criminal conduct, whether the felony was directly related to the practice of law, and whether the crime would seriously diminish public confidence in the profession."<sup>2</sup>

Duane Kennedy received a lengthy suspension for sexually harassing his young client, attempting to have a sexual relationship with his client, making false statements to police and the Director about his misconduct, and failing to provide accurate trust account books and records as part of his probation.<sup>3</sup> Mr. Kennedy was taped soliciting sex from a client in a criminal matter who was 22 years old and approximately 50 years his junior. The client reported the attempt to law enforcement. The county attorney ultimately declined to prosecute Mr. Kennedy for bartering for sex, but referred the matter to the Director.

Mr. Kennedy denied the misconduct, claiming the audio reflected consensual sexual banter and that any unprofessionalism warranted at most a 30-day suspension. The Court rejected his arguments, concluding that sexual harassment of a client is serious misconduct. Mr. Kennedy's lewd comments were persistent and pervasive and took advantage of a trust relationship. In light of respondent's disciplinary history (which included



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admonitions, a public reprimand, and several short suspensions) and the seriousness of the misconduct (sexual harassment and lies), the Court imposed a suspension of two years.

The Court also suspended attorney Ignatius Udeani for misconduct across multiple client matters.<sup>4</sup> Mr. Udeani was an immigration attorney and his conduct involved violations of almost every rule of ethics—including a pattern of incompetent representation, neglect, failure to communicate with clients, and failure to return unearned fees; failing to properly supervise a nonlawyer assistant and failing to take reasonable steps to prevent the known misconduct of the nonlawyer assistant, which resulted in the theft of client funds; failing to safeguard client funds and maintain all trust-account-related records; representing a client with a conflict of interest; and failing to cooperate in multiple disciplinary investigations. Mr. Udeani was suspended for three years, but two justices thought Mr. Udeani should be disbarred due to the vulnerable nature of his immigrant clients and the persistent nature of his misconduct, much of which occurred while on probation for prior misconduct and while being supervised by an experienced probation supervisor who was trying to help Mr. Udeani with his practice.

### Public reprimands

Six attorneys received public reprimands in 2020 (one reprimand-only, five reprimands and probation). 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. Four of

the six reprimands related in some manner to trust account issues. As always, ensuring that you accurately maintain your trust account records and are very careful with client funds is a fundamental ethical obligation of lawyers. We have a lot of resources on our website to assist with this important duty, and are always available to answer questions if you are uncertain.

### Conclusion

The OLPR maintains on its website ([lprb.mncourts.gov](http://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 these cases also motivate you to take care of yourself, so that you are in the best position possible to handle our very challenging jobs. Call if you need us—651-296-3952. Please also note that we have moved to a new location in St. Paul after 20 years at our old office: Our new address is 445 Minnesota Street, Ste. 2400, St. Paul, MN 55101. Emails, fax, and telephone numbers remain the same. ▲

### Notes

<sup>1</sup> *In re Lieber*, 939 N.W.2d 284 (Minn. 2020).

<sup>2</sup> *In re Strunk*, 945 N.W.2d 379 (Minn. 2020).

<sup>3</sup> *In re Kennedy*, 946 N.W.2d 568 (Minn. 2020).

<sup>4</sup> *In re Udeani*, 945 N.W.2d 389 (Minn. 2020).



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# Private discipline in 2020

In 2020 the Director's Office closed 82 complaints with admonitions—a form of private discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. This number was down substantially from 2019, when 107 admonitions were issued. Overall, approximately 8 percent of file closings in 2020 were due to the issuance of an admonition. Another 20 complaints were closed with private probation, a stipulated form of private discipline approved by the Lawyers Board chair. Private probation is generally appropriate where a lawyer has a few nonserious violations in situations that suggest supervision may be of benefit. More files resulted in private probation dispositions in 2020 than in 2019, when 14 files closed with private probation. Notably, the pandemic was generally not a material factor in admonitions from 2020.

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. Generally, the most violated

rules are Rule 1.3 (Diligence) and Rule 1.4 (Communication), with communication violations being more frequent in 2020 than diligence. Other frequently violated rules, particularly in the private discipline context, involve declining or terminating representation (Rule 1.16), making fee arrangements (Rule 1.5), and safekeeping client property (Rule 1.15), although 2020 also saw a higher number

than usual of no-contact rule violations (Rule 4.2) and confidentiality violations (Rule 1.6). Let's look at a few specific rules and situations that tripped up lawyers in 2020.

## Safekeeping client property

As I wrote in my December 2020 column, safekeeping client property is an important obligation, and it is particularly important that fees paid in advance of being earned and filing fees be held in trust. (Rule 1.15(a), MRPC; Rule 1.15(c)(5), MRPC.) Clients will frequently pay advance fee retainers and expense deposits by credit card. If you have not already done so, make sure you are using a credit card service provider that allows you to deposit advance fees and filing fees directly into your trust account, while separately withdrawing any service fees or disputed fees from your operating account. LawPay comes to mind, but there are numerous other solutions, many of which integrate with other client management software solutions you might use already.

If you do not use such a service, you can deposit credit card advances in your operating account and then transfer them over to trust—see Rule 1.15(h), Appendix 1(I)(10)—but you then need to have good internal processes to make sure that happens “immediately” as referenced in the appendix. If you don't have a good process, you can inadvertently leave money that belongs in trust in your operating account. This is what happened to one attorney who received an admonition in 2020. While on vacation, the attorney accepted a new engagement, and the client paid an advance retainer by credit card. Because she was on vacation, however, the attorney did not transfer that advance fee into her trust account though it remained unearned, and through a continued oversight, the advance fee remained in her business account for a fair amount of time. Because the funds were not in trust, the lawyer failed to safekeep client funds and received an admonition for Rule 1.15(a), MRPC.

## No-contact rule

In 2020, four attorneys received admonitions for violating Rule 4.2, MRPC. Rule 4.2 is seemingly straightforward:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

As one would expect, the circumstances surrounding the Rule 4.2 admonitions in 2020 were distinct. One involved a father-in-law repeatedly contacting a represented soon-to-be ex-daughter-in-law regarding a dissolution, as he assisted his son, on and off, with the divorce. When one is personally involved, it is easier than you might think to fail to remember rules that you would ordinarily never disregard. Other Rule 4.2 cases involved lawyers attempting to narrowly define the matter in issue in order to contact the opposing party, when they know full well that counsel is involved. This is an area that really bothers both opposing counsel and opposing parties, so it frequently draws complaints. Sometimes Rule 4.2 violations occur when civil proceedings arise out of facts that also give rise to criminal actions. Four in one year is a lot of admonitions for Rule 4.2, MRPC. Please take note.

## Prejudicial conduct

Rule 8.4(d), MRPC, makes it professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. This is a broad rule with various applications. One action that the Office has consistently found to fall within this provision is a prosecutor's failure to comply with victim-notification statutes. Minnesota law places special obligations on prosecutors, particularly in domestic abuse cases.



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Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline.

For example, Minn. Stat. §611A.0315, subd. 1(a), provides that prosecutors shall make every reasonable effort to notify victims in domestic assault cases of a decision not to file charges or to dismiss pending charges. In 2020, a prosecutor received an admonition under this rule, affirmed by a panel of the Board, for failing to notify the victim—a minor child and her custodial parent—of dismissal of misdemeanor assault charges against the non-custodial parent. In prior years, there has been a push from various stakeholders to amend Rule 3.8, MRPC, to include reference to prosecutors' victim-notification obligations due to a concern about uneven compliance. The response has historically been that Rule 8.4(d), MRPC, covers such conduct and that a more specific rule is not needed. For new prosecutors or those who are unaware, please note.

### Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. As I noted in my column on this same subject last year, 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. 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 are 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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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 497**

**February 10, 2021**

## **Conflicts Involving Materially Adverse Interests**

*Rules 1.9(a) and 1.18(c) address conflicts involving representing a current client with interests that are “materially adverse” to the interests of a former client or prospective client on the same or a substantially related matter.<sup>1</sup> But neither Rule specifies when the interests of a current client are “materially adverse” to those of a former client or prospective client. Some materially adverse situations are typically clear, such as, negotiating or litigating against a former or prospective client on the same or a substantially related matter, attacking the work done for a former client on behalf of a current client, or, in many but not all instances, cross-examining a former or prospective client.<sup>2</sup> Where a former client is not a party to a current matter, such as proceedings where the lawyer is attacking her prior work for the former client, the adverseness must be assessed to determine if it is material. General economic or financial adverseness alone does not constitute material adverseness.*

### **Introduction**

ABA Model Rule of Professional Conduct 1.9(a) addresses conflicts between current clients and former clients of a lawyer. It reads:

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

(Emphasis added).

Model Rule 1.18 addresses prospective clients and its paragraph (c) similarly requires analysis when a lawyer subsequently represents another person with “interests materially adverse to those of the prospective client.” Rule 1.18(c) provides:

(c) A lawyer subject to paragraph (b) shall not represent a client *with interests materially adverse to those of a prospective client* in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph,

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<sup>1</sup> 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.

<sup>2</sup> Typically, the lawyer does not perform legal work for a prospective client, and therefore it is unlikely the lawyer would “attack” work done for a prospective client.

no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(Emphasis added). This Opinion addresses how to construe the language “interests [that] are materially adverse to the interests of the former client” in Rule 1.9(a) and similar language used in Rule 1.18(c).

### I. The origins of the “materially adverse” standard

The language “interests [that] are materially adverse to the interests of the former client” has roots in Canon 6 of the ABA’s 1908 Canons of Ethics. Canon 6 prohibited, in relevant part, “the subsequent acceptance of retainers or employments from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.”

Under the ABA Model Code of Professional Responsibility, “there was no direct corollary to” Model Rule 1.9(a).<sup>3</sup> Instead, “former client conflicts were sometimes treated under Canon 9 of the Code under the appearance of impropriety standard.”<sup>4</sup> The current language was crafted by the 1977 Commission on the Evaluation of Professional Standards, frequently referred to as the Kutak Commission. Initial ideas appear in the Commission’s January 1980 and May 1981 Reports, but the current formulation was not proposed until the August 1982 draft, with non-substantive wording changes made in advance of final adoption of Rule 1.9 in August 1983.<sup>5</sup> Rule 1.18 was adopted in 2002 and appears simply to have borrowed the language “materially adverse to those [the interests] of the former client” from Rule 1.9(a).

As adopted in 1983, Comment [1] to Rule 1.9 stated that “[t]he principles in Rule 1.7 determine whether the interests of the present and former client are adverse.”<sup>6</sup> Citing this language, ABA Formal Op. 99-415 (1999) concluded that “a lawyer must look to Rule 1.7 to determine . . . whether the interests of the parties are materially adverse.”

Rule 1.7 prohibits the representation of interests that are “directly” as opposed to “materially” adverse. As a result, ABA Op. 99-415 concluded that “only direct adverseness of interest meets the threshold of ‘material adverseness’ sufficient to trigger the prohibitions established in Rule

<sup>3</sup> Peter Geraghty, *Ethics Tip - August 2017*, A.B.A. (Aug. 1, 2017).

[https://www.americanbar.org/groups/professional\\_responsibility/services/ethicssearch/ethicstipaugust2017/](https://www.americanbar.org/groups/professional_responsibility/services/ethicssearch/ethicstipaugust2017/).

<sup>4</sup> *Id.*

<sup>5</sup> The January 1980 and May 1981 drafts proposed that lawyers be prohibited from representing clients in the same or substantially related matters where the interest of the client “is adverse in any material respect to the interest of the former client.” See, e.g., A.B.A. COMM’N ON EVALUATION OF PROFESSIONAL STANDARDS DISCUSSION DRAFT, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_1-80.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_1-80.pdf) (Jan. 30, 1980); A.B.A. COMM’N ON EVALUATION OF PROFESSIONAL STANDARDS PROPOSED FINAL DRAFT [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_5-81.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.pdf) (May 30, 1981); A.B.A. COMM’N ON EVALUATION OF PROFESSIONAL STANDARDS REPORT TO THE HOUSE OF DELEGATES, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_8-82.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_8-82.pdf) (last visited Jan. 26, 2021). See also A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, 901 (Art Garwin ed. 2013) [hereinafter A LEGISLATIVE HISTORY] (Rules as adopted).

<sup>6</sup> A LEGISLATIVE HISTORY, *supra* note 5, at 901.

1.9.”<sup>7</sup> However, as part of the Ethics 2000 revisions to the Rules, Comment [1] to Rule 1.9 was changed. The sentence relied upon in ABA Op. 99-415 in Comment [1] to Rule 1.9—that Rule 1.7 governed the issue of adverseness—was deleted, without specific explanation.<sup>8</sup>

## II. Subsequent interpretation of the language “materially adverse to the interests of the former client” in Rule 1.9

Subsequent to the Ethics 2000 amendments, courts, regulatory authorities, and ethics scholars have interpreted the meaning of “material adverseness” in Rule 1.9. These authorities have generally concluded that “material adverseness” includes, but is not limited to, matters where the lawyer is directly adverse on the same or a substantially related matter. While material adverseness is present when a current client and former client are directly adverse, material adverseness also can be present where direct adverseness is not.

However, “material adverseness” does not reach situations in which the representation of a current client is simply harmful to a former client’s economic or financial interests, without some specific tangible direct harm. In *Gillette Co. v. Provost*, the court concluded that “[w]ith respect to the ‘material adverse’ prong of Rule 1.9, representation of one client is not ‘adverse’ to the interests of another client, for the purposes of lawyers’ ethical obligations, merely because the two clients compete economically.”<sup>9</sup> As noted in New York State Bar Association Ethic Opinion 1103, “[j]ust as competing economic interests do not create [a Rule 1.7 conflict] so they do not create a ‘material adverse’ interest within the meaning of Rule 1.9(a).”<sup>10</sup> Thus, a lawyer does not have a Rule 1.9 conflict solely because the lawyer previously represented a competitor of a current client whose economic interests are adverse to the current client. Material adverseness, referred to by the *Gillette* court, “requires a conflict as to the legal right and duties of the clients, not merely conflicting or competing economic interests.”<sup>11</sup>

As the Court of Appeals for the Eighth Circuit explained in *Zerger & Mauer LLP v. City of Greenwood*:

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<sup>7</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 99-415 (1999).

<sup>8</sup> The minutes of the Commission’s December 12, 1998, meeting note that one member observed: “that the organization and content of the comment to Rule 1.9 should be revised.” He noted the illogical organization of the comment, the irrelevance of some comments (e.g., Comments [4] and [5] regarding legal history), the use of the term ‘material adversity’ with no explanation, and the incomplete definition of ‘substantial relationship’. See Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), *Meeting Minutes Friday Dec. 11 & Saturday Dec. 12, 1998*, A.B.A. (last visited Jan. 26, 2021),

[https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/121198mtg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/121198mtg/).

The next reference to Rule 1.9’s Comment [1] by the Ethics 2000 Commission was in the Minutes from the May 7, 2000 meeting: “A member noted that two stricken sentences in Comment [1] were relied on in a recent ethics opinion, 99-415. The Commission felt that no action was necessary in response.” But there was no explanation about why the two sentences (including the reference to “direct adversity”) were stricken. See Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), *Meeting Minutes Friday May 5 – Sunday May 7, 2000*, A.B.A. (last visited Jan 26, 2021),

[https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/050500mtg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/050500mtg/).

<sup>9</sup> *Gillette Co. v. Provost*, 2016 WL 2610677 (Mass. Feb. 11, 2019).

<sup>10</sup> N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. 1103 (2016).

<sup>11</sup> See *Gillette Co.*, 2016 WL 2610677, at \*3.

Generally, whether a former client and current client have materially adverse interests is not a difficult question, as the situation usually involves a new client suing a former client. However, the question is more complicated when a former client, “although not directly involved in the [current] litigation may be affected by it in some manner. When such is the case . . . a fact-specific analysis is required in order to evaluate ‘the degree to which the current representation may actually be harmful to the former client.’ This analysis focuses on ‘whether the current representation may cause legal, financial, or other identifiable detriment to the former client.’”<sup>12</sup>

Such detriment has its limits, otherwise the concept of materiality would have no meaning. Further, in the absence of direct adverseness, generalized financial harm or a claimed detriment that is not accompanied by demonstrable harm to the former or prospective client’s interests does not constitute “material adverseness.”

The following are types of situations where “material adverseness” may be found.

#### **A. Suing or negotiating against a former client**

Suing a former client or defending a new client against a claim by a former client (*i.e.*, being on the opposite side of the “v” from former client) on the same or on a substantially related matter is a classic example of representing interests that are directly adverse and therefore “materially adverse” to the interests of a former client.<sup>13</sup> In assessing whether a lawyer has represented parties on both sides of the “v,” the analysis of who or what the lawyer at issue formerly represented may

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<sup>12</sup> *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 933 (8th Cir. 2014) (internal citations omitted). *See, e.g., Plotts v. Chester Cycles LLC*, 2016 WL 614023 \*7-8 (D. Ariz. Feb. 16, 2016) (stating that “[w]hile the existence of possible personal liability [as to a former client] would establish material adversity [in a substantially related matter], the non-existence of personal liability does not necessarily dictate a different result.”). In *Plotts*, an adverse financial impact on an entity in which the former client had an ownership interest and that had been the subject of the prior representation constituted material adverseness. *See also, In re Carpenter*, 863 N.W. 2d 223 (N.D. 2015). In *Carpenter*, an individual met with a lawyer about representation in a matter adverse to the Christian Science Church of Boston. Through extensive research, the prospective client had discovered that the mineral rights to 300 acres of North Dakota land had been left by a decedent to the Church and hoped for a fee or other compensation from the Church for bringing the information to its attention. The individual briefed the attorney on his research and conclusions. The attorney, after declining to represent the individual, promptly took the information that he had been given and contacted the Church, offering to represent it with respect to the mineral rights. The lawyer’s representation of the Church was found to be “materially adverse” to the prospective client’s interests. *Carpenter* was found to have violated Rule 1.18 and was suspended for 90 days.

<sup>13</sup> *See, e.g., Persichette v. Owners Insurance Co.*, 462 P.3d 581, 585-86 (Colo. 2020) (law firm representing plaintiff in lawsuit against former client was “materially adverse” to the interests of such former client); *Anderson & Anderson LLP v. North American Foreign Trading Corp.*, 3 N.Y.S.3d 284 (Sup. Ct. 2014) (“direct adversity in litigation meets the definition of ‘materially adverse interests.’”); *Jordan v. Philadelphia Housing Authority*, 337 F. Supp. 2d 666, 672 (E.D. Pa. 2004) (“There is no situation more ‘materially adverse’ than where a lawyer’s former client is in a suit against lawyer’s current client . . .”); *Disciplinary Counsel v. Broyles*, 49 N.E.3d 1238 (Ohio 2015) (lawyer disciplined for representing bank at a default hearing in a foreclosure case and then seeking to vacate the default on behalf of the property owners).



be important.<sup>14</sup> In addition, being across the table, so to speak, from a former client and negotiating against that former client in transactional matters typically constitutes “material adverseness.”<sup>15</sup>

### **B. Attacking lawyer’s own prior work**

Another type of “material adverseness” exists when a lawyer attempts to attack her own prior work.<sup>16</sup> For example, one court held that a lawyer cannot challenge a patent that the lawyer previously obtained for a former client.<sup>17</sup> Another court found that a lawyer may not challenge a real estate restrictive covenant for a new client that the lawyer previously drafted for the prior seller of the land.<sup>18</sup> When a lawyer represents a current client challenging the lawyer’s own prior work done for a former client on the same or a substantially related matter, the situation creates a materially adverse conflict.

Even when lawyers are not directly attacking their own prior work, but instead seeking to undermine that work or the result achieved for a former client, material adverseness may exist. These situations, however, do not lend themselves to a “bright line” test of when there is and is not material adverseness. An examination of the facts in three cases provides guidance as to what circumstances may constitute material adverseness.

In *Zerger & Mauer*,<sup>19</sup> the City of Greenwood prosecuted and settled a nuisance claim against Martin Marietta involving the latter’s truck traffic to a local quarry. As part of the settlement, the City could designate the specific route that Martin Marietta’s trucks took on the way to the quarry. The law firm of Zerger & Mauer represented the City in this litigation. Thereafter, Zerger & Mauer brought a private nuisance action against Martin Marietta on behalf of various individuals with property interests along the route designated by the City for Martin Marietta’s traffic to the quarry. The City was not a part of the private nuisance action but sought to disqualify Zerger & Mauer from representing the private plaintiffs in that case. The court disqualified the firm, finding that it

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<sup>14</sup> *Delso v. Trustees for the Retirement Plan for Hourly Employees of Merck*, 2007 WL 766349 \*10-11 (D. N.J. Mar. 6, 2007) (finding no past attorney-client relationship between current lawyer for plaintiff and the defendant); *see also* Pa. Bar Ass’n Legal Ethics & Prof’l Responsibility Comm. Op. 2005-61 (2005) (concluding that there was likely no conflict as law firm represented seller, not corporation being sold).

<sup>15</sup> Sylvia Stevens, *Conflicts Part II: Former Client Conflicts*, OR. STATE BAR BULLETIN (Dec. 2009) (“Where the current and former clients are opposing parties in litigation or in a transaction, the adversity of their interests is obvious.”), <https://www.osbar.org/publications/bulletin/09dec/barcounsel.html>.

<sup>16</sup> *Franklin v. Callum*, 146 N.H. 779, 782-83 (2001) (plaintiff’s lawyer disqualified because case “may require her to interpret” an agreement drafted by one of her partners for a non-party to the litigation). Typically, the lawyer does not perform legal work for a prospective client, so it is unlikely the lawyer could “attack” work done for such a client.

<sup>17</sup> *Sun Studs, Inc. v. Applied Theory Associates*, 772 F.2d 1557, 1566-68 (Fed. Cir. 1985); *Nasdaq, Inc. v. Miami International Holdings*, 2018 WL 6171819 \*4-6 (D. N.J. Nov. 26, 2018) (failure to disqualify law firm “would allow the same law firm that argued for the patentability of Nasdaq’s inventions to represent parties adverse to Nasdaq in this suit who are arguing those very same patents are invalid.”) (internal quotations omitted).

<sup>18</sup> *North Carolina Bar Association v. Sossomon*, 197 N.C. App. 261, 266-67, 676 S.E.2d 910 (2009) (lawyer who previously represented seller of land in drafting of restrictive covenant disciplined for, in part, violation of Rule 1.9 for materially adverse representation on the very same matter by attempting to negotiate a waiver of the restrictive covenant from the former client for a new client, without getting a waiver of the conflict of interest or even disclosing that he was representing the other party).

<sup>19</sup> 751 F.3d 928 (8th Cir. 2014).

was “advocate[ing] a position that contradicts a term in [the City’s] settlement.”<sup>20</sup> The court also found that Zarger & Mauer’s current clients “have an interest in . . . disrupting Martin’s use of the [City’s] designated route” and “there is a very real possibility that other routes will come into play.”<sup>21</sup> The City also “may demand that its former counsel not advocate positions that pose the serious threat of once again embroiling [it] in protracted litigation.”<sup>22</sup> The court upheld the lower court’s finding that the interests of the City and the private plaintiffs “remain[ed] materially adverse.”<sup>23</sup>

*National Medical Enterprises, Inc. v. Godfrey*,<sup>24</sup> is another example of circumstances in which a non-party, non-witness former client nevertheless had materially adverse interests to a lawyer’s current client.<sup>25</sup> In this case, a lawyer represented a former hospital administrator for National Medical Enterprises (NME). NME was accused of mistreating patients and defrauding insurers in a criminal investigation and parallel civil actions. The former client (the hospital administrator) had denied any wrongdoing, had not been charged with any crime, and had been dismissed from dozens of civil actions. About seventeen months after the lawyer and his firm withdrew from the representation of the former client, the lawyer’s firm brought an action against NME on behalf of some ninety former patients making the same types of allegations of physical and mental abuse at various NME facilities, including facilities under the administrative responsibility of the former client. The claims brought against NME did not include any allegations of misconduct by the former client. The lawyer for the former client was screened from the action against NME. The appellate court, reversing the district court, found the requisite adverseness to exist and ordered NME’s law firm disqualified citing the risk of renewed allegations or inquiries into the former client’s conduct as a result of the new action.<sup>26</sup>

Not every situation involving adverseness constitutes material adverseness. There is a threshold below which adverseness is not material. In *Simpson Performance Products, Inc. v. Robert W. Horn, PC.*,<sup>27</sup> for instance, seat belt manufacturer Simpson Performance Products (SSP) hired lawyer Horn to investigate and evaluate and the possibility of a lawsuit by SPP against NASCAR when NASCAR alleged that SSP’s defective product was partially responsible for the death of Dale Earnhardt at the NASCAR Daytona 500 in 2001. To preserve a good relationship with NASCAR, SSP decided not to bring suit to challenge NASCAR’s allegations that SSP’s product was at fault. Thereafter, however, the retired founder of the company hired lawyer Horn to represent the founder in a suit against NASCAR on his own. When SSP refused to pay Horn, he sued SSP for unpaid fees. In response, SSP alleged that Horn violated Rule 1.9(a). The court found no material adverseness existed because the record demonstrated that the manufacturer’s

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<sup>20</sup> *Id.* at 934.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 924 S.W.2d 123 (Tex. 1996)

<sup>25</sup> It is not entirely clear from the court’s opinion whether the former client would be a witness in the proceedings at issue, but the court’s analysis of material adverseness does not rely on potential testimony of the former client or cross-examination by the client’s former law firm.

<sup>26</sup> See also Ill. State Bar Ass’n Comm. on Prof’l Conduct Advisory Op. 16-03 (2016) (representation of a second spouse in child support proceedings was “materially adverse to the interests” of the first spouse, a former client previously represented by lawyer, because recovery for current client could reduce husband’s ability to pay support to former client).

<sup>27</sup> 92 P.3d 283, 287-89 (Wyo. 2004).

relationship with NASCAR had not been adversely affected by the founder's lawsuit—the very reason SSP declined to sue NASCAR—and that the “company is doing just fine.”<sup>28</sup>

### C. Examining a former client

Rule 1.9(c)(1) prohibits using information from a former client “to the disadvantage of the former client.” If a lawyer must use information relating to the former representation to the disadvantage of a former client to competently examine the former client, the lawyer has a conflict, unless that information has become “generally known.”<sup>29</sup> However, even if a lawyer ethically can use the information or does not need to use information, the lawyer still may have a conflict of interest in examining a former client under Rule 1.9(a) if the former client's interests are “materially adverse” to the current client *and* the current matter is substantially related to the prior matter. Courts have sometimes found “material adverseness” when the lawyer proposes to examine a former client, where no information from the prior representation will be used.<sup>30</sup>

In ABA Opinion 92-367, this Committee considered the question of whether examining a current client in another client's matter created a conflict under ABA Model Rule 1.7. Discussing adverseness, the Opinion stated that “[i]t should be emphasized that the degree of adverseness of interest involved . . . will depend on the particular circumstances in which the question arises.” In order to avoid this conflict, the current client could retain separate counsel from a different firm just for the cross-examination and screen the conflicted lawyer from the examination.<sup>31</sup> Similarly in the former client examination situation a lawyer may avoid the potential conflict altogether by having the current client retain separate counsel to examine the former client, and screen the lawyer

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<sup>28</sup> Comment [1] to Wyoming Rule 1.9 contained the sentence adopting Rule 1.7's “directly adverse” provision as the standard for the term “materially adverse” in Rule 1.9 that had been deleted from the Model Rules in 2002. The Court's analysis of “materially adverse” does not appear to hinge on that comment and the discussion in *Simpson* of the materially adverse issue has been noted by one commentator as unusual in its “care and precision.” FREIVOGEL ON CONFLICTS, FORMER CLIENT, PART I, available at <http://www.freivogelonconflicts.com/formerclientparti.html> (last visited Jan. 27, 2021).

<sup>29</sup> See Supreme Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2013-4 (2013) (lawyer may impeach former client with criminal conviction only if conviction is “generally known” under Rule 1.9(c)); Utah State Bar Ethics Advisory Opinion Comm. Op. 02-06 (2002) (permitting lawyer to cross examine former client if matters are not substantially related and lawyer does not disclose or use information from former client to such client's disadvantage); Ill. State Bar Ass'n Comm. on Prof'l Conduct Advisory Op. 05-01 (2006) (same). See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) for an explanation about what information is “generally known.”

<sup>30</sup> In *Illaraza v. Hovensa LLC*, 2012 WL 1154446 \*6-10 (D. V.I. Mar. 31, 2012), the plaintiffs' lawyer was disqualified from representing plaintiffs in action against their employer and others for wrongful discharge and defamation stemming from an incident in which plaintiffs and another employee-manager were prosecuted for grand larceny for stealing employer's property. The charges against the two plaintiffs were dismissed, but the third individual pled guilty to possession of stolen property. The plaintiffs' lawyer had represented the employee-manager in his criminal case. In the wrongful discharge and defamation action, the plaintiffs contended in their summary judgement submission that the employee-manager defamed them. The court found that this constituted “material adverseness” that could not be alleviated by various promises by the plaintiffs' lawyer not to use confidential information against the former client, employee-manager. The court rejected the lawyer's offer not to cross examine her former client on any topics in which the lawyer had confidential information.

<sup>31</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-367 (1992).

with the conflict from participating in the examination of the former client or sharing with separate counsel any information from the prior representation.<sup>32</sup>

### III. Waiver of materially adverse conflicts

If a reasonable lawyer reviewing the situation would conclude that the representation of a current client is “materially adverse” to a former client, the lawyer may still represent the current client, even if the current and prior matters are “substantially related,”<sup>33</sup> provided the lawyer obtains the informed consent of the former client (or prospective client), to waive the potential conflict of interest and that consent is confirmed in writing.<sup>34</sup> Thus, even if a lawyer is hired to sue a former client on behalf of a current client, or negotiate against a former client, or take the deposition of a former client on a substantially related matter, the lawyer may ask for the former client’s informed consent to waive the conflict and permit the lawyer’s representation of the current client. Informed consent to waive a conflict under Rule 1.9(a) will not, however, waive the lawyer’s obligation to maintain the confidentiality of all information learned during the prior representation. To allow the use or disclosure of information protected by Rule 1.6, the former client also must provide informed consent pursuant to Rule 1.6(a).

Similarly, if a lawyer seeks to represent a current client in a matter that is materially adverse to a prior prospective client in the same or substantially related matter on which that prospective client consulted the lawyer, and the lawyer has received “significantly harmful” information from the prior prospective client,<sup>35</sup> Rule 1.18(d)(1) permits representation of the current client if the current client and the prospective client give informed consent, confirmed in writing. Alternatively, the firm of the lawyer who received the “significantly harmful” information from the prospective client can represent the current client if the information-receiving lawyer is screened from the current representation and is apportioned no part of the fee from the representation and written notice is promptly provided to the prospective client pursuant to Rule 1.18(d)(2).<sup>36</sup>

### IV. Conclusion

“Material adverseness” under Rule 1.9(a) and Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on

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<sup>32</sup> See N.Y. City Bar Ass’n Formal Ethics Op. 2017-6 (suggesting that lawyer may associate with separate counsel to subpoena a current client).

<sup>33</sup> MODEL RULES OF PROF’L CONDUCT R. 1.9, cmt. [3] (2020). “Matters are ‘substantially related’ for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.”

<sup>34</sup> Informed consent may also need to be obtained from the lawyer’s current client if there is a “significant risk” that the lawyer’s representation of such client “will be materially limited” by the lawyer’s responsibilities to the former client. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2).

<sup>35</sup> See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 492 (2020) for a discussion of “significantly harmful information.”

<sup>36</sup> In addition, the information-receiving lawyer must have taken “reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client.” MODEL RULES OF PROF’L CONDUCT R. 1.18(d)(2).

behalf of a current client in the same or a substantially related matter.<sup>37</sup> It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client. “Material adverseness” may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client’s interests suffices.

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<sup>37</sup> Typically, the lawyer does not perform legal work for a prospective client and therefore there are unlikely to be situations where the lawyer “attacks” work done for such a client.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 498**

**March 10, 2021**

## **Virtual Practice**

*The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.<sup>1</sup> When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.*

### **I. Introduction**

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.<sup>2</sup>

### **II. Virtual Practice: Commonly Implicated Model Rules**

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.<sup>3</sup> A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer

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<sup>1</sup> 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.

<sup>2</sup> Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

<sup>3</sup> See generally MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although the ethics rules apply to both traditional and virtual law practice,<sup>4</sup> virtual practice commonly implicates the key ethics rules discussed below.

A. *Commonly Implicated Model Rules of Professional Conduct*

1. Competence, Diligence, and Communication

Model Rules 1.1, 1.3, and 1.4 address lawyers' core ethical duties of competence, diligence, and communication with their clients. Comment [8] to Model Rule 1.1 explains, "To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (*Emphasis added*). Comment [1] to Rule 1.3 makes clear that lawyers must also "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Whether interacting face-to-face or through technology, lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information. . . ."<sup>5</sup> Thus, lawyers should have plans in place to ensure responsibilities regarding competence, diligence, and communication are being fulfilled when practicing virtually.<sup>6</sup>

2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."<sup>7</sup> The following non-

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<sup>4</sup> For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

<sup>6</sup> Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "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 fee or expense that has not been earned or incurred." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

<sup>7</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

exhaustive list of factors may guide the lawyer’s determination of reasonable efforts to safeguard confidential information: “the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).”<sup>8</sup> As ABA Formal Op. 477R notes, lawyers must employ a “fact-based analysis” to these “nonexclusive factors to guide lawyers in making a ‘reasonable efforts’ determination.”

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client’s representation.<sup>9</sup> At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility “does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy.”<sup>10</sup> However, depending on the circumstances, lawyers may need to take special precautions.<sup>11</sup> Factors to consider to assist the lawyer in determining the reasonableness of the “expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.”<sup>12</sup> As ABA Formal Op. 477R summarizes, “[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access.”

### 3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct.<sup>13</sup> Practicing virtually does not change or diminish this obligation. “A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.”<sup>14</sup> Moreover, a lawyer must “act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent

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<sup>8</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [18].

<sup>9</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [19].

<sup>10</sup> *Id.*

<sup>11</sup> The opinion cautions, however, that “a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.” ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 477R (2017).

<sup>12</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [19].

<sup>13</sup> MODEL RULES OF PROF’L CONDUCT R. 5.1 & 5.3. *See, e.g.*, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). *See also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).

<sup>14</sup> MODEL RULES OF PROF’L CONDUCT R. 5.3 cmt. [2].



or unauthorized disclosure by the lawyer *or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.*"<sup>15</sup> The duty to supervise nonlawyers extends to those both within and outside of the law firm.<sup>16</sup>

### B. *Particular Virtual Practice Technologies and Considerations*

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

#### 1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.<sup>17</sup> To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

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<sup>15</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

<sup>16</sup> As noted in Comment [3] to Model Rule 5.3:

When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

<sup>17</sup> For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

## 2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such “files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.”<sup>18</sup> Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients.<sup>19</sup>

## 3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer’s ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction.<sup>20</sup> Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation,<sup>21</sup> to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

## 4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers’ virtual document and data exchange platforms should ensure that

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<sup>18</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 482 (2018).

<sup>19</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 483 (2018) (“Even lawyers who, (i) under Model Rule 1.6(c), make ‘reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,’ (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients ‘reasonably informed’ and with an explanation ‘to the extent necessary to permit the client to make informed decisions regarding the representation.’”).

<sup>20</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 01-422 (2001).

<sup>21</sup> Pennsylvania recently highlighted the following best practices for videoconferencing security:

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to “Host Only;”
- Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).<sup>22</sup>

## 5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

## 6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.<sup>23</sup> Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

### a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.<sup>24</sup> This duty requires regular interaction and communication with, for example,

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<sup>22</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

<sup>23</sup> As ABA Formal Op. 477R noted:

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

<sup>24</sup> The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.

associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.<sup>25</sup>

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client-related information will be adequately and safely archived and available for later retrieval.<sup>26</sup>

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

#### b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,<sup>27</sup> and should ensure that all client-related information is secure, indexed, and readily retrievable.

### 7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.<sup>28</sup> The

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- Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

<sup>25</sup> See ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

<sup>26</sup> For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

<sup>27</sup> See, e.g., Mo. Bar Informal Advisory Op. 20070008 & 20050068.

<sup>28</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.15; See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust

lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

### III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

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accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.”).