LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

April 28, 2023 – 1:00pm (in person and viz Zoom) – Minnesota Judicial Center

Lunch provided for Board members 12:00pm

Members of the public wishing to attend via Zoom are invited to contact Board Chair Benjamin Butler for information: Ben.Butler@pubdef.state.mn.us

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1. Approval of minutes of January 27, 2023, meeting (Attachment 1).

2. LPRB Reports:

    a. Justice Natalie Hudson – ABA report.

    b. Chair:

        i. Strategic Plan for April 2023 – April 2024 (attachment 2).
        ii. Draft media policy (attachment 3).

    c. Rules Committee – Dan Cragg

        i. Discussion of future of committee.
        ii. Status of projects referred to committee.

3. New business: working group formation for potential projects:

    a. Request from Great Northern Innocence Project to consider recommending amendments to Rule 3.8 (attachment 4).

    b. Request from Hennepin Co. Adult Representation Services to consider recommending amendments to Rule 1.8 (attachment 5).

    c. 2024 Public meeting dates – Two options (attachment 6).

4. Director's Report.

5. Open discussion.

6. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

JANUARY 27, 2023

OPEN MEETING MINUTES

Attendance

Board Members

- Jeanette Boerner, Chair
- Susan Rhode, Vice-Chair
- Antoinette Watkins, Executive Committee member
- Landon Ascheman
- Ben Butler
- Dan Cragg
- Michael Friedman (for first 20 minutes)
- Katherine Brown Holmen
- Peter Ivy
- Ginny Klevorn
- Tom Krause
- Mark Lanterman
- Paul Lehman
- Kristi Paulson
- Bill Pentelovitch
- Andrew Rhoades
- Geri Sjoquist
- Mary Waldkirch Tilly
- Bruce Williams
- Allan Witz
- Julian Zebot

Not present: Jordan Hart

Other Participants

- Minnesota Supreme Court Associate Justice Gordon L. Moore, III.
- Binh Tuong, Deputy Director, Office of Lawyers Professional Responsibility.

Minutes

Honoring Departing Board Members

Justice Moore, participating for Board liaison Justice Natalie Hudson, honored the Board members whose terms expire Jan. 31, 2023 – Chair Boerner, Mr. Zebot, Mr. Ivy, Ms. Klevorn, and Ms. Tilly. Justice Moore thanked the departing members on behalf of the Court. Particular thanks were given to Ms. Boerner for her steady and consistent leadership through a turbulent couple of years.

Approval of Prior Minutes

The Board approved the minutes from the October 28, 2022, open meeting.

Rules and Opinions Committee

Committee Chair Cragg updated the Board on the committee's consideration of ABA Opinion 502, which relates to model rule 4.2. The rule prohibits a lawyer, acting on behalf of a client, from communicating directly with a represented party about topic related to the representation. The ABA opined that this rule also prohibits a self-representing lawyer from communicating directly with a represented party. The dissent to the ABA opinion opined that the plain text of model rule 4.2 does not so prohibit a lawyer because the rule refers to a lawyer representing a client.

Mr. Cragg informed the Board that the committee had unanimously agreed to issue a Board opinion explaining that the Board agreed with the dissent's interpretation of rule 4.2 – that it does not prohibit a self-represented lawyer from communicating directly with a represented party about the subject of the representation. A draft opinion was included in meeting materials. Mr. Butler opined that the language of the draft opinion needed editing, and that Deputy Director Tuong had already been helpful in that regard. Mr. Butler suggested that the draft opinion be refined and re-presented to the Board at a later date.

Vice-Chair Rhode and Ms. Klevorn expressed concern that this position could allow harassment, particularly in family-law or domestic-abuse related cases. Ms. Tuong explained that OLPR interprets rule 4.2 in the same way that the ABA dissent and the Rules and Opinions Committee does. Ms. Tuong revealed that she had taken a call recently asking about OLPR's position regarding the ABA opinion. Ms. Tuong acknowledged the concerns about potential

harassment and said OLPR considers those concerns. Ms. Tuong also offered that OLPR Director Susan Humiston could write an article explaining OLPR's position on the matter.

Ms. Boerner said her sense was that a Board opinion would be helpful but that the details of that opinion were not yet ready.

Mr. Ascheman moved to send the matter back to the Rules and Opinions Committee for further consideration. Mr. Williams seconded the motion and offered a friendly amendment, asking that the referral include a suggestion that the committee consult with OLPR on the matter. Mr. Ascheman agreed to the amendment. The Board unanimously approved the motion.

Chair Reports

Ms. Boerner provided statistical updates. Of note is that complainant appeals had increased in 2022 from 2021.

Ms. Boerner explained that in the past several months and going forward, appeals of DNWs without investigation and DNWs with investigation would be considered separately for assignment. This should make complainant-appeal assignments more equitable.

Ms. Boerner explained that the Minnesota Supreme Court had appointed several new Board members to begin Feb. 1, 2023. As a result, the Executive Committee had organized the Board into five panels of four members each (as opposed to six panels of three members each). The goal was to help the new members become acclimated to Board work.

New Business

Ms. Boerner and Mr. Butler presented an updated and streamlined set of Executive Committee policies. Ms. Boerner thanked the OLPR, in particular Director Humiston and Ms. Tuong, for their help in redrafting the policies.

Mr. Lehman suggested changes to three policies: removal of the word "simply" from Policy #3, changing a reference to "his, her, or their" to "their" in Policy #4, and clarification to the scope of the policy regarding complaints against Board members in Policy #5. Several members supported Mr. Lehman's position on the first two matters. Ms. Boerner opined that clarification to Policy #5 was not necessary because the policies all relate to attorney and not

public Board members, since the OLPR has no jurisdiction over the latter. Mr. Ascheman moved that the Board accept the new policies while incorporating Mr. Lehman's suggested changes to policies # 3 and 4, but not Policy # 5. Mr. Williams seconded the motion. Ms. Klevorn thanked Mr. Lehman for bringing his concerns to the Board's attention. The Board unanimously approved the motion.

Director's Report

Ms. Tuong presented statistics on OLPR's work in 2022. Of note was that more lawyers than usual had multiple complaints filed against them. This resulted in more open files but fewer lawyers subject to those files.

Ms. Tuong explained office practice was generally to not close a file involving a lawyer while another file involving the same lawyer was under investigation. Ms. Tilly, Mr. Rhodes, and Mr. Ascheman questioned whether this policy allowed serially offending lawyers to rack up multiple violations before OLPR moved against them. Ms. Tuong acknowledged the concern and said that every case was evaluated on its merits. She explained that if OLPR thinks public discipline may be warranted, then it wants to gather as much evidence and present as many charges at the same time as possible. Ms. Boerner clarified that OLPR always moves expeditiously in serious cases but questioned why it seems like OLPR often takes considerable time to investigate before presenting public-discipline charges.

Ms. Tuong noted that advisory opinions were notably down in 2022. Mr. Williams asked about record-keeping in such cases. Ms. Tuong explained that OLPR keeps records on each advisory-opinion call including the name of the caller and the subjects discussed. Ms. Tuong also noted that in her experience people who seek advisory opinions do not want to know how close to the line they can get, but want to know where the line is so they do not go anywhere near it. Mr. Pentelovitch noted that the advisory-opinion feature was very valuable and wondered why the ABA suggested it be removed from OLPR. Ms. Tuong did not know but agreed that OLPR values the service. Ms. Tuong said she guessed that the Director may oppose that recommendation.

Ms. Boerner brought up ABA Opinion 503 regarding "reply all" emails to lawyers and clients and rule 4.2. Ms. Boerner asked the Rules and Opinions Committee to consider the opinion and its application in Minnesota. She explained that this situation is often a problem in child-protection and related

cases in which social workers and similar personnel are considered the government's "client."

In re Udanei – Referral from Justice Thissen

Mr. Butler presented on *In re Udanei*. On January 25, 2023, the Minnesota Supreme Court issued an order disbarring Mr. Udanei. Justice Paul Thissen issued a concurring opinion in which he wrote, "I suggest that the Lawyers Professional Responsibility Board review the question of whether the recent practice of bringing in noncooperation with disciplinary proceedings through the back door of aggravating circumstances is appropriate and whether the rules should be clarified on that issue." Justice Thissen also referenced his concurring opinion in *In re Nelson*, 933 N.W.2d 73, 75-77 (Minn. 2019) (Thissen, J., concurring).

Mr. Butler suggested that the Board accept Justice Thissen's invitation to consider the issue. Ms. Watkins questioned what exactly the concern was. Mr. Butler recited what appeared to be Justice Thissen's concerns as expressed in the two opinions. Ms. Tuong opined that OLPR distinguishes between pre-petition noncooperation, which it views as a separate violation, and post-petition noncooperation, which is views as a factor aggravating the alleged violations. Mr. Pentelovitch questioned whether noncooperation could be a Fifth Amendment violation, and Mr. Ivy wondered if OLPR ever issues a "Garrity warning" to lawyers under investigation. Mr. Williams opined that noncooperation would not usually be a Fifth Amendment violation because a lawyer would be required to affirmatively invoke the protections of the Fifth Amendment, which is not the type of "noncooperation" at issue here. Ms. Rhode expressed concern about the Board taking on a considerable about of work. Ms. Boerner opined that the Board out of respect for the Court should accept Justice Thissen's invitation.

Mr. Cragg suggested that the Rules and Opinions Committee consider the issue. Ms. Boerner pointed out that the committee has no permanent members. Mr. Ascheman suggested that solicitation of interest wait until at least Feb. 1, 2023, so new Board members could have the chance to participate. Mr. Butler said he would email the Board as it will exist of Feb. 1, 2023, to solicit interest in joining Mr. Cragg as an ad hoc committee to consider the issue.

Final Matters

Mr. Rhodes asked why rules enforcement is focused on the attorney/client relationship. He questioned whether a member of the public could report ethical violations by a lawyer without an attorney/client relationship. Mr. Butler and Ms. Tuong discussed how anyone can report a potential ethics violation but that many rules relate specifically to attorneys' relationship with and conduct towards their clients. Mr. Rhodes asked about attorneys who had committed crimes. Ms. Boerner clarified that OLPR can and does *sua sponte* investigate such cases following a conviction and can and does seek Executive Committee approval to *sua sponte* investigate such cases before a conviction. Justice Moore pointed out that much of Rule 4 is devoted to attorneys' relationships with and conduct involving non-clients. For example, an attorney's conduct regarding an unrepresented party in a deposition could result in charges.

Ms. Boerner closed the meeting by thanking the supreme court and the Board members for her experience. The Board again expressed its sincere thanks and congratulations to Ms. Boerner.

Mr. Butler moved to adjourn, Mr. Williams seconded, and the Board unanimously approved the motion.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

STRATEGIC PLAN APRIL 2023 – APRIL 2024

External (public-facing) matters

- Advisory opinion on Minn. R. Prof. Conduct 4.2 in light of ABA advisory opinion 502 – can self-representing lawyers contact represented parties about the litigation? **Referred to Rules and Opinions committee.**

- Referral from Justice Thissen regarding potential double-counting of non-cooperation as grounds for a violation and grounds for an aggravating factor. **Referred to Rules and Opinions committee.**

- Consideration of and response to Report of ABA Standing Committee on Professional Regulation. **Response filed Feb. 1, 2023. Hearing held March 14, 2023.**

- Petitioning Minnesota Supreme Court for approval of changes to Rules of Lawyers Professional Responsibility, including to streamline reinstatement hearings. **Petition filed. Minnesota Supreme Court deferred consideration until after ABA-report resolution.**

- **Potential working group project:** Consider recommending adoption of ABA Model Rule 1.8(e) regarding gifts from attorneys to indigent clients.

    - Referral from immediate past Chair Jeanette Boerner.

- **Potential working group project:** Consider recommending adoption of ABA Model Rule 3.8 regarding prosecutorial duty to disclose newly discovered evidence "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."

    - Referral from Great Northern Innocence Project.

Internal matters

- Develop and implement a media policy.

    - Consulted with MJB's Director of Public Affairs.
    - Goal: Present and vote April 2023.

- Writing training for Board members. **Completed March 17, 2023.**

- **August 2023:** Re-evaluate 5-panel system with potential move back to 6 panels in August 2023.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 7

MEDIA AND MEDIA RELATIONS

Goals

The goals of these policies and procedures are to protect confidential information from public dissemination, to allow the Board, when public comment is appropriate, to speak with one voice, and to protect the ability of Board members to speak publicly on matters unrelated to their service on the Board. Care in messaging is critical because of the confidential and sensitive nature of the Board's work.

Scope

The following policies and procedures govern members of the Lawyers Professional Responsibility Board. Board members are also governed by Minnesota Rule of Lawyers Professional Responsibility 20.

The requirements of these policies and procedures apply to all media outlets and representatives, regardless of platform, affiliation, or relationship to the Board member.

Policies and Procedures for Media Relations

- Any Board member who receives an inquiry from a media member regarding an attorney-discipline matter, Board service, or similar topic must initially decline to comment, on or off the record or on background.

- Any Board member other than the Chair must immediately refer all media inquiries, in writing, to the Board Chair or the Chair's designee.

- The Board Chair must immediately refer all media inquiries, in writing, to the Board's Executive Committee for discussion.

- Other than as described below, no Board member may provide information to a media member about an attorney-discipline matter, Board service, or similar topic without prior written permission of the Board Chair or the Chair's designee.

- The Board Chair may not provide information to a media member about an attorney-discipline matter, Board service, or similar topic without first consulting with the Board's Executive Committee about the potential media interaction.

GREAT NORTH INNOCENCE PROJECT

Benjamin Butler, Chair
Lawyers Professional Responsibility Board
445 Minnesota Street, Suite 2400
St. Paul, MN 55101

April 21, 2023

Dear Mr. Butler,

On behalf of the Great North Innocence Project ("GN-IP"), I write to encourage the Lawyers Professional Responsibility Board to recommend that the Minnesota Supreme Court amend Rule 3.8 of the Rules of Professional Conduct (Special Responsibilities of a Prosecutor) so as to add Rule 3.8 (g) and (h) of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules").

These provisions of the Model Rules address the responsibilities of a prosecutor when new evidence emerges that calls into question the validity of an existing conviction. Specifically, Model Rule 3.8(g) addresses scenarios where there is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense." In such cases, the prosecutor must promptly disclose the evidence to the appropriate court or authority. If the conviction was obtained in that prosecutor's jurisdiction, the prosecutor must go further and disclose the evidence to the defendant "unless a court authorizes delay" and undertake or cause further investigation into the validity of the conviction. Model Rule 3.8(h) addresses scenarios where the new evidence is stronger in nature, where there is "clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit." In such cases, that prosecutor must "seek to remedy the conviction."

Minnesota has adopted most of the Model Rules, including most of the remainder of Model Rule 3.8. Model Rules 3.8(g) and (h) represent a sensible extension of the existing rules and the underlying principle that the prosecutor occupies a unique role in our system of justice. Comment 1 to Minnesota Rule 3.8 notes as the basis for imposing special ethical obligations upon prosecutors that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." That principle motivates the obligation that prosecutors affirmatively disclose exculpatory evidence before trial. The same principle should lead an ethical prosecutor to take appropriate actions when new evidence comes light after trial that calls the integrity of the conviction into question.

Under the current regime, prosecutors in Minnesota lack clarity concerning their ethical obligations when they become aware of exculpatory evidence concerning a prior conviction. Model Rules 3.8(g) and (h) would provide that clarity. In so doing, these rules would not impose any undue burden on prosecutors. The rules do not require prosecutors to affirmatively seek out new evidence related to existing convictions. Instead, the rules merely address scenarios in which prosecutors become aware of such evidence. Once they do, it is not too much to ask that prosecutors disclose and take appropriate actions in light of such evidence. As of November 2022, 24 states have adopted

some form of Model Rule 3.8(g), and 19 state have adopted some form of Model Rule 3.8(h). We hope that Minnesota will soon add its name to this list.

Thank you for your consideration. Please do not hesitate to reach out if you have any questions or if GN-IP can be of any assistance in this process.

Sincerely,

Sara Jones
Executive Director

To: Ben Butler, Chair, LPRB
From: Jeanette Boerner, Hennepin County Adult Representation Services
Re: Minn. R. Prof. Conduct 1.8(e)

As you know, I am the Director of Hennepin County Adult Representation Services. We are an independent county organization that provides advocacy to clients experiencing poverty in civil matters where they are entitled to an attorney. We connect our clients to resources to support them in achieving self-sufficiency and serve as advocates to protect their rights both in and outside of court.

My department received a federal grant (our project is called HELP- Health Equity Legal Project) to support pregnant parents with the goal of avoiding child protection engagement. We provide legal and social service support and have a parent mentor with lived experience assigned to each client. It's exciting and I am hopeful it will change the trajectory for BIPOC families who are grossly overrepresented in the child-protection and housing justice system.

I struggle with the ethical rules on gifts and want to make sure we are walking a clear line on this. We have restrictions with the grant but are permitted to provide a host of services to clients that involve paying for basic needs such as respite childcare, transportation, phone service, temporary housing, etc. We will not distribute this money directly to the clients either using a contracted vendor or paying the business directly. But to me, this could be interpreted as a gift even though it is our agency not the attorney giving the money. Providing temporary economic resources is key to the success of our program.

Minnesota Rule of Professional Conduct 1.8(e) provides that:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

I respectfully request that the Board consider recommending that the Minnesota Supreme Court replace our rule with the ABA Model Rule version of Rule 1.8(e). That rule provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;
(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and
(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

I submit that the ABA Model rule is much more compassionate and realistic than Minnesota's rule. Adopting it would allow our agency and similar agencies to dramatically improve the lives of indigent Minnesotans. Thank you for your consideration.

LAWYERS PROFESSIONAL RESPONISBILIY BOARD

2024 PUBLIC MEETING DATES – OPTIONS

Option A – Status Quo

January 26, 2024

April 26, 2024

July 26, 2024

October 25, 2024

Option B – Skip Summer

January 26, 2024

May 24, 2024

September 13, 2024

December 13, 2024

OLPR Dashboard for Court And Chair

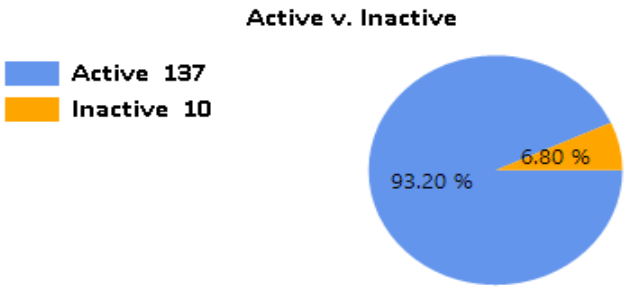
	Month Ending March 2023	Change from Previous Month	Month Ending February 2023	Month Ending March 2022
Open Files	506	17	489	462
Total Number of Lawyers	356	7	349	327
New Files YTD	262	104	158	247
Closed Files YTD	228	87	141	266
Closed CO12s YTD	62	22	40	27
Summary Dismissals YTD	105	39	66	130
Files Opened During March 2023	104	26	78	68
Files Closed During March 2023	87	20	67	81
Public Matters Pending (excluding Resignations)	34	-4	38	41
Panel Matters Pending	15	-2	17	9
DEC Matters Pending	104	-8	112	90
Files on Hold	10	-3	13	3
Advisory Opinion Requests YTD	454	168	286	428
CLE Presentations YTD	5	1	4	15
Files Over 1 Year Old	147	-1	148	132
Total Number of Lawyers	83	-4	87	85
Files Pending Over 1 Year Old w/o Charges	77	4	73	67
Total Number of Lawyers	52	2	50	49

	2023 YTD	2022 YTD
Lawyers Disbarred	1	2
Lawyers Suspended	8	4
Lawyers Reprimand & Probation	1	2
Lawyers Reprimand	0	0
TOTAL PUBLIC	**10**	**8**
Private Probation Files	5	0
Admonition Files	11	23
TOTAL PRIVATE	**16**	**23**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2018-06						1			**1**
2018-07				1		1			**2**
2018-08				1					**1**
2018-10	2								**2**
2018-12	1								**1**
2019-03						2			**2**
2019-04	1								**1**
2019-05				1		1			**2**
2019-06			1						**1**
2019-07	1			1		1			**3**
2019-08	1								**1**
2019-09				1					**1**
2019-11				1					**1**
2020-01	1			3					**4**
2020-02	1			1		1			**3**
2020-04						1			**1**
2020-05	1			1					**2**
2020-06				2					**2**
2020-07		1							**1**
2020-08	1								**1**
2020-09	1	1		1		2			**5**
2020-10				1	1				**2**
2020-12						1			**1**
2021-01	3	1		3					**7**
2021-02				1					**1**
2021-03	3	1	1						**5**
2021-04	4			2		2			**8**
2021-05	6		1	1					**8**
2021-06	7								**7**
2021-07	4			2					**6**
2021-08	7		1	4				1	**13**
2021-09	3			1					**4**
2021-10	6			1	1				**8**
2021-11	7								**7**
2021-12	3			1	2	1			**7**
2022-01	4	2	1	1				1	**9**
2022-02	1	2	1	1		1			**6**
2022-03	8			1			1		**10**
Total	**77**	**8**	**6**	**34**	**4**	**15**	**1**	**2**	**147**

	Total	**Sup. Ct.**
Total Cases Under Advisement	15	15
Sub-total of Cases Over One Year Old	132	41
Total Cases Over One Year Old	**147**	**56**



All Pending Files as of Month Ending March 2023

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	**Total**
2018-06										1				**1**
2018-07								1		1				**2**
2018-08								1						**1**
2018-10				2										**2**
2018-12				1										**1**
2019-03										2				**2**
2019-04				1										**1**
2019-05								1		1				**2**
2019-06							1							**1**
2019-07				1				1		1				**3**
2019-08				1										**1**
2019-09								1						**1**
2019-11								1						**1**
2020-01				1				3						**4**
2020-02				1				1		1				**3**
2020-04										1				**1**
2020-05				1				1						**2**
2020-06								2						**2**
2020-07						1								**1**
2020-08				1										**1**
2020-09				1		1		1		2				**5**
2020-10								1	1					**2**
2020-12										1				**1**
2021-01				3		1		3						**7**
2021-02								1						**1**
2021-03				3		1	1							**5**
2021-04				4				2		2				**8**
2021-05				6			1	1						**8**
2021-06				7										**7**
2021-07				4				2						**6**
2021-08				7			1	4					1	**13**
2021-09				3				1						**4**
2021-10				6				1	1					**8**
2021-11				7										**7**
2021-12				3				1	2	1				**7**
2022-01				4		2	1	1					1	**9**
2022-02				1		2	1	1		1				**6**
2022-03				8				1			1			**10**
2022-04				23				2			1			**26**
2022-05				19			1	1		1				**22**
2022-06			1	19	1		1			1			1	**24**
2022-07				16				1						**17**
2022-08		1		25							1			**27**
2022-09		3	2	20				1						**26**
2022-10		4		19										**23**
2022-11		10	2	13				1						**26**
2022-12		16	3	13										**32**
2023-01		20		8							2			**30**
2023-02		30		15			2				1			**48**
2023-03	10	20		25								3		**58**
Total	**10**	**104**	**8**	**292**	**1**	**8**	**10**	**40**	**4**	**17**	**6**	**3**	**3**	**506**

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

2023 RESOLUTIONS—ETHICS EDITION

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

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

The new year presents an opportunity to take a fresh look at many aspects of our lives and practices, which is why resolutions are so popular. I love resolutions but try not to leave them to the new year—every day is a new day, right? But if you enjoy reflecting and resolving to make some changes in your life at the start of this new year, might I suggest a few ethics-related resolutions to integrate into your practice?

No. 1: Read the ethics rules

When was the last time you pulled out the rules and looked at them? They do change periodically, you know. For example, I didn't even know there was a rule dedicated to prospective clients (Rule 1.18) until I was hired for this job and reviewed the rules. The rule was adopted in Minnesota in 2005, long after I graduated from law school and last really looked at the rules (except for occasionally reviewing the conflict rules). It's a handy rule to know, one that comes up frequently on our ethics hotline.

In 2022, the Minnesota Supreme Court made several changes to the advertising rules, including elimination of the requirement that advertising must be labeled "Advertising Material." Did you know that? Other changes included the ability to provide nominal gifts as an expression of appreciation for a referral or recommendation. Sometimes changes are permissive and something you long thought to be required or prohibited isn't anymore.

Other times, lawyers learn some of the finer points of the rules when they are responding to an ethics complaint. Trust me, one hour reading through the rules and comments is time well-spent. And remember to read Minnesota's rules, not the ABA model rules. There are differences and I'm still surprised by how many people cite to us the model rules. You can find Minnesota's rules on our website or in your Minnesota Rules of Court (if you like hard-copy rule books). Resolve to read the ethics rules.

No. 2: Update your retainer agreement

I'm sorry to report that too few lawyers are familiar with the ethics rules that apply to retainer agreements. Every month we issue discipline for lawyers who are surprised to find that their retainer agreement (likely one they borrowed from a friend or pulled from the internet) is non-compliant. Does your agreement say that some form of payment is "non-refundable"? How about "earned upon receipt"? Both descriptions are prohibited under Rule 1.5(b)(3), Minnesota Rules of Professional Conduct (MRPC).

Do you accept flat fees? Do you always have a retainer agreement *signed by the client* (not the person who might be paying the flat fee) when you receive those funds? Is the retainer agreement compliant with the requirements of Rule 1.5(b)(1), MRPC? Do you know what the requirements of Rule 1.5(b)(1), MRPC, are? If you do not have a signed (and compliant) fee agreement, those unearned flat fees should be going into your trust account. The ethics rules (Rule 1.15(c)(5), MRPC) require that all funds received in advance of services being performed must go into trust—with only a limited exception for when you have a compliant and signed retainer agreement.

And those advance costs you get for filing fees or miscellaneous expenses? I cannot emphasize enough that those cost advances must go into your trust account. The ethics rules require you to safekeep other people's money that you hold (Rule 1.15(a), MRPC), and costs that are dedicated for use for a particular purpose are never the lawyer's money. Those dollars belong in trust until the expense is incurred.

Do you do contingency-fee work? If so, you must always have a written fee agreement in place, and you might want to look at it to make sure it clearly denotes whether expenses will be deducted before or after the contingency fee is calculated. Do you always issue written statements showing the outcome of the contingency matter, the recovery, and the method for determining the client's remittance? Rule 1.5(c), MRPC, explains these requirements.

What about fee-sharing with a lawyer who's not in your firm? There are specific requirements to follow in Rule 1.5(e), MRPC. Do you want to charge clients for copying their file? Make sure you include that in your retainer agreement. (*See* Rule 1.16(f), MRPC.) Resolve to review your retainer agreement and make sure it is easy to understand and compliant with the ethics rules.

No. 3: Talk to your team about ethics

Most lawyers work with some staff. Even many solo practitioners utilize non-lawyer staff periodically. Can you remember the last time you reminded everyone you work with of their obligation to comply with the ethics rules just as you do? As lawyers, we have a duty to make reasonable efforts to ensure we have in place measures to ensure lawyers and staff we work with know, and are complying with, the rules. (*See* Rules 5.1 and 5.3, MRPC.) If you really have your act together, you may have policies and procedures you can cite to your team about their obligations, but what if you don't actually do it? It is always a good idea to reiterate core precepts: confidentiality, honesty, communication and diligence, recordkeeping, dealing with unrepresented or represented parties, speaking up if you see an issue or make a mistake. Too often we assume that individuals understand the requirements because they work for a lawyer—but unless your team is taught and reminded, how can they really understand and comply with the various ethics rules that govern your practice? Resolve to talk to your team about ethics.

No. 4: Try to prioritize your well-being

This one is perhaps the most challenging. Being a lawyer is stressful. It demands a lot from us, and there is never enough time in the day to get everything done. Adding to the challenge, we also have high expectations for ourselves and others. Conflict is also often present.

I know you know this, but the law is also very enticing. Whether it's a matter of money or influence, the rewards can cause us to deprioritize family and ourselves. I have no magic solutions for this well-known and insidious aspect of our profession, but I do know that you will never regret taking small steps to refocus on yourself and those you love. Just before Christmas, a friend and mentor passed away. He was a talented and successful lawyer, but his superpower was the ability to be present for others, and to take time for family, friends, and activities he enjoyed. He found balance and encouraged others to do the same. Are there small ways that you can work in time for yourself, family, and friends into your day? It may be difficult to find balance, but small steps really do add up. Resolve to try to prioritize your well-being in 2023.

Conclusion

Resolutions may not interest you, but we all set personal and professional goals. My resolution (goal) for 2023 is remembering that small steps forward are the key to lasting change. Perhaps one of the above suggestions will help you take a small step toward including the ethics rules in your practice. And do not forget: We are here to help you answer your ethics questions, at *www.lprb.mncourts.gov* or 651-296-3952. Best wishes for 2023. ▲

PUBLIC DISCIPLINE SUMMARY FOR 2022

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

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

Public discipline is imposed by the Minnesota Supreme Court for a lawyer's serious professional misconduct. It provides notice to the public and legal profession that a lawyer has not discharged their professional duties as the Court expects. In 2022, 36 lawyers were publicly sanctioned, an increase from the 28 lawyers publicly disciplined in 2021.

Discipline in 2022

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 36 attorneys who received discipline in 2022, three additional attorneys were transferred to disability status in lieu of public discipline proceedings.

Five attorneys were disbarred in 2022: Gregory Anderson, Geoffrey Colosi, Peter Lennington, Matthew McCollister, and Jesse Powell. Two of the five lawyers disbarred in 2022 were disbarred based largely upon criminal convictions. Mr. Anderson pleaded guilty to conspiracy to commit bankruptcy fraud by helping a client to hide assets. Mr. Powell pleaded guilty to several felony counts of fourth-degree criminal sexual conduct involving clients. Mr. McCollister pleaded guilty to health care fraud relating to participation in chiropractor "runner" cases, but his disbarment was based upon his misappropriation of client funds. Mr. McCollister very sadly died by suicide just before his sentencing.

Mr. Colosi was disbarred for breaching his fiduciary duties to a vulnerable adult through the draining of her estate to enrich himself. Mr. Colosi's matter was interesting in part because his was an atypical case of disbarment in which the attorney had no prior discipline. Mr. Lennington was disbarred after abandoning his practice and numerous clients, including misappropriation of client funds by taking money, doing no work, and making no refunds.

The intentional misappropriation of client funds remains the most common cause of disbarment, but commission of serious criminal misconduct—particularly when related to the practice of law—also generally warrants disbarment.

Suspensions

Twenty-one lawyers were suspended in 2022, including one stayed suspension. The lawyers who were suspended in 2022 engaged in a wide variety of misconduct. Some involved the commission of felony-level criminal conduct outside of the practice of law (which, unlike crimes related to the practice of law, may lead to a lengthy suspension rather than disbarment). For example, John Huberty was suspended for five years for his conviction for attempted criminal sexual conduct in the third degree, where the victim was 13-15 years old and the actor was greater than 24 months older than the victim. Mr. Huberty's criminal conviction resulted in a stay of imposition and five years of probation. However, his lengthy suspension shows the Court's determination that, no matter how the criminal justice system may choose to handle an underlying crime, felony convictions of lawyers represent serious misconduct warranting serious sanctions.

Other lawyers engaged in dishonest conduct. For example, Lillian Ballard's misconduct involved multiple acts of dishonesty relating to her legal and academic background, including making false statements on a resume, forging a transcript, and making knowingly false statements to human resource personnel and the Director. (At the time the Court's decision was issued, I happened to be working with my high school senior on his resume for college applications, and took the opportunity to reiterate to him the importance of honesty in how one presents oneself to others, whether or not you are a lawyer.)

An example of dishonest conduct that also led to a suspension involved Dennis Smith. Mr. Smith failed to meet his communication and diligence obligations to a client, but also combined this misconduct with making false statements regarding his progress on a matter and communication with the client. While it might be tempting to dissemble when you find yourself behind on a matter, do not do so. Just offer an apology. All too often, we see lawyers elevate the level of discipline by engaging in dishonest conduct in an attempt to cover up lack of diligence or communication.

Sometimes suspensions are warranted due to the variety of rule violations involved and prior discipline of the lawyer. Kevin Duffy is an example. Mr. Duffy generally failed to act with competence and neglected communication in representing a client in a bankruptcy matter, and then engaged in additional misconduct including mishandling client costs and failing to refund unearned costs in a number of matters. Mr. Duffy's prior discipline included five admonitions that had occurred from 1991-2015.

Public reprimands

Ten attorneys received public reprimands in 2022 (four reprimands-only, six 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 misappropriate of client funds. In 2022, however, only one lawyer was publicly disciplined for failing to maintain compliant trust account books and records.

The lawyers who received public reprimands in 2022 engaged in other misconduct. For example, Ronald Bradley failed to act with diligence and competence, allowing a statute of limitations to run on a client's claim. Thomas Harmon engaged in the unauthorized practice of law for 20 months after his provisional authorization to practice in South Dakota expired. Joseph Roach provided incompetent advice, failed to communicate with his client, charged fees not agreed to by his client, and threatened to withhold a client's file until his fees were paid.

Two other cases may be of interest. Albert Usumanu received a public reprimand based on a stipulation with the Director's Office and upon the agreement of a majority of the Court for his misconduct in two immigration matters. However, two members of the Court, Justices Moore and McKeig, dissented, based upon the vulnerable status of Mr. Usumanu's immigration clients and his prior discipline. Justices Moore and McKeig did not believe that a public reprimand, even considering mitigating factors present, adequately addressed the misconduct present. In another matter, the Director dismissed a petition for disciplinary action after failing to convince a referee that an attorney engaged in misconduct by failing to adequately supervise trust account staff in his firm. This is a rare case of misconduct where, even though probable cause was received from a Lawyers Board panel, misconduct was not ultimately proven under the Director's clear-and-convincing burden.

Conclusion

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

2022 public discipline covered a wide variety of misconduct. I hope this review motivates you to be ever vigilant in your practice. While most attorneys do not see themselves as engaging in dishonest or criminal conduct, so many other fact patterns can lead to discipline. Call if you need us—651-296-3952—and remember to take care of yourself. We are in a challenging profession that expects much of us. ▲

PRIVATE DISCIPLINE *in 2022*

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

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

Private discipline is non-public discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are viewed as isolated and nonserious. In 2022, 80 admonitions were issued, one panel admonition was issued (in lieu of charges for public discipline), and six lawyers were placed on private probation. These numbers are generally comparable to the numbers in recent years.

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 (available on our website). It is always true that a significant number of admonitions are due to lack of diligence (Rule 1.3) and lack of communication (Rule 1.4); hence my perennial advice that the best thing you can do to avoid complaints is to work on your files and communicate with your clients. This is of course easier said than done, as we all have those files that are challenging to work on for a variety of reasons, and once time has elapsed it is harder than ever to pick up the file. Just do it, as the saying goes. You will feel better, and you owe it to your client.

Every year a significant number of admonitions are issued for violations of Rule 1.16(d)—relating to ethical withdrawals. Last year was no exception. Fifteen admonitions were issued for failing to take reasonable steps upon withdrawal to protect the client's interest, such as providing notice, surrendering the file, and refunding unearned fees. This is also one of the most frequently asked about areas on our ethics hotline. If you have questions, just ask. I would love to see this number reduced substantially. Although compliance is pretty straightforward, it often comes when there is a breakdown in the relationship. Don't let your annoyance with the client or the souring of the relationship interfere with the discharge of your ethical duties at the time of termination.

Also remember that you have an affirmative ethical duty to refund unearned fees and expenses that have not been incurred. Don't wait for the client to complain or ask for the refund. The rule is mandatory; a lawyer "shall" refund "any advance payment of fees or expenses that has not been earned or incurred." And you must do so "promptly," upon request under Rule 1.15(c)(4). When a representation ends, prioritize settling the account with the client and make sure the client has what they need to avoid rule violations.

Let's look at a few additional rules and situations that tripped up lawyers in 2022.

Contact with a represented party

Every year lawyers are disciplined for contacting represented parties in violation of Rule 4.2, MRPC. Three lawyers were admonished for this violation in 2022; of note, two of the three lawyers admonished for this rule violation had 20-plus years of experience as lawyers and the third had more than a dozen years of experience, so an overall refresher is in order for even seasoned attorneys.

Rule 4.2 is generally referred to as the no-contact rule and states:

> "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."

Sometimes a lawyer inadvertently contacts a represented party directly by serving documents in a case because they failed to note in the lawyer's file management system that the opposing party is represented by counsel. Mistakes happen (I've done this) and such a mistake rarely leads to discipline. In most instances, the opposing counsel calls the mistake to counsel's attention by reiterating the representation, the error is acknowledged, and the parties move forward.

In one case, a lawyer continued to directly contact a represented party by e-serving documents on that party, even though they had specifically been advised previously that the party was still represented. This is a situation that more typically gives rise to a violation; the first contact is not at issue because there was some question as to the lawyer's continuing representation. Or a mistake was made. Here, the lawyer contacted the opposing party directly after being advised of the representation on two additional occasions, because the lawyer was moving for default and wanted to make sure the client was receiving information, having heard little from opposing counsel.

While the intentions were good *(i.e.,* wanting to avoid the opposing party's default), the requirements of the rule are clear. There may be any

number of reasons why an opposing party and their counsel would choose to proceed as they are, and there is no exception to the no-contact rule to make sure that opposing counsel is effectively communicating with the opposing party. It is not our job to make sure someone else is doing their job, but it is our job to comply with the rules. This question arises fairly frequently on the ethics hotline and we advise, as the rule requires, to serve counsel and let the consequences fall where they may.

In another case, the lawyer violated Rule 4.2 when he interviewed a 12-year-old witness that he knew had been appointed counsel in a CHIPS proceeding; counsel knew the 12-year-old had counsel because he was present in court when the appointment was confirmed. Often lawyers will claim that the "matter" is not the same, attempting to draw fine distinctions to unilaterally narrow the scope of the opposing counsel's representation, an argument that is usually unpersuasive when the opposing counsel's representation arises from the same operative facts and circumstances such that the questioning infringes on the subject of the opposing counsel's representation. If you know that a party is represented by counsel, your best course of action always is to reach out to opposing counsel to understand the scope of the representation, and to proceed with caution. Opposing counsel and opposing parties take this rule seriously and direct contact often prompts ethics complaints. The Minnesota Supreme Court has a helpful opinion on Rule 4.2 that you may wish to review, *In re Panel No. 41755*, 912 N.W.2d 224 (Minn. 2018).

Business transactions with clients

Four lawyers were privately disciplined for failing to comply with Rule 1.8(a), MRPC, when entering into a business transaction with a client or acquiring an ownership interest adverse to the client. Rule 1.8(a) does not prohibit such arrangements, but rather sets forth specific compliance requirements due to the conflict of interest that the arrangements introduce into the relationship. These violations often arise when lawyers acquire a financial interest in a client's property to secure or satisfy their fee, such as acquiring title to a vehicle or other personal property that later can be sold to satisfy a fee balance. Three such admonitions arose out of criminal cases, and one from a family law case. To ethically enter into such transactions, make sure:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Failure to comply with all requirements will likely lead to discipline given the conjunctive nature of the requirements. Taking a moment to ensure compliance with this very straightforward rule when you enter into a business transaction or acquire a security or ownership interest adverse to your client will pay off in avoiding discipline, as this too is a frequent source of complaints by former clients.

Conclusion

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

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 504 **March 1, 2023**

Choice of Law

When a lawyer practices the law of more than one jurisdiction, choice-of-law questions arise concerning which jurisdiction's ethics rules the lawyer must follow. Model Rule 8.5 provides that when a lawyer's conduct is in connection with a matter pending before a tribunal, the lawyer must comply with the ethics rules of the jurisdiction in which the tribunal sits, unless otherwise provided. For all other conduct, including conduct in anticipation of litigation not yet filed, a lawyer must comply with the ethics rules of the jurisdiction in which the lawyer's conduct occurs. However, if the predominant effect of the lawyer's conduct is in a different jurisdiction, then the lawyer must comply with the ethics rules of that jurisdiction.

Introduction

Lawyers frequently are admitted to practice law or are authorized to practice the law of more than one jurisdiction. When jurisdictions have differing ethical requirements, the lawyer must determine which jurisdiction's ethics rules govern the lawyer's actions in the representation.[1] This Formal Opinion addresses several scenarios applying ABA Model Rule of Professional Conduct 8.5, Disciplinary Authority; Choice of Law, to determine which jurisdiction's rules govern the situation, including: 1) fee agreements; 2) law firm ownership; 3) reporting professional misconduct; 4) confidentiality duties; and 5) screening lawyers who leave one firm to join another (referred to as "lateral" lawyers).

ABA Model Rule of Professional Conduct 8.5, Disciplinary Authority; Choice of Law – An Overview

Pursuant to ABA Model Rule of Professional Conduct 8.5(a), lawyers are subject to the disciplinary authority of the jurisdiction(s) in which they are licensed regardless of where their conduct occurred. Lawyers also are subject to the disciplinary authority of the jurisdiction(s) in which they are offering to provide or are providing legal services regardless of whether they are admitted to practice or licensed by that jurisdiction. For example, lawyers practicing pursuant to a jurisdiction's in-house counsel rule, or pro hac vice rule, or providing legal services temporarily pursuant to Model Rule 5.5, are all subject to the disciplinary authority of the jurisdiction in which they are providing legal services. Finally, a lawyer "may be subject to the disciplinary authority of *both this jurisdiction and another jurisdiction for the same conduct.*"[2]

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2023. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (emphasis added).

ABA Model Rule of Professional Conduct 8.5(b) determines which jurisdiction's ethics rules apply to a lawyer's conduct. In answering the choice of law question, Rule 8.5(b) addresses litigation matters and non-litigation matters differently.

For litigation matters, Rule 8.5(b)(1) provides: "In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise[.]"

For "any other conduct," Rule 8.5(b)(2) explains that the ethics rules of the jurisdiction where the lawyer's conduct occurred will govern unless the "predominant effect" of that conduct is in a different jurisdiction, in which case, the "rules of that jurisdiction shall be applied to the conduct."

For litigation matters, a key question is what does Rule 8.5(b)(1)'s phrase "in connection with a matter pending before a tribunal" mean? Does it apply to the fee agreement entered into before the matter is filed in court or to the ownership structure of a law firm in a different jurisdiction than the tribunal?

Another key question is what does Rule 8.5(b)(2)'s phrase "any other conduct" mean? Does it apply to transactional matters and/or conduct that is *not* involving a tribunal – such as the fee agreement or conduct occurring before a case is filed?

Comment [4] is instructive, explaining that the phrase "any other conduct" includes "all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal."

Rule 8.5(b)(2) provides a safe harbor for a lawyer's "predominant effect" determination: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." This safe harbor from disciplinary action is not without limits. The lawyer's belief about the jurisdiction of the predominant effect of the lawyer's conduct must be a reasonable belief. Reasonable belief is a defined term and "denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."[3]

Although Rule 8.5 does not provide lawyers guidance on what factors the lawyer should consider when determining where the predominant effect of the lawyer's conduct occurs, the Committee believes lawyers should look to the following factors:

- the client's location, residence, and/or principal place of business;
- where the transaction may occur;
- which jurisdiction's substantive law applies to the transaction;
- the location of the lawyer's principal office;
- where the lawyer is admitted;

[3] MODEL RULES OF PROF'L CONDUCT R. 1.0(i).

- the location of the opposing party and other relevant third parties (residence and/or principal place of business);[4] and
- the jurisdiction with the greatest interest in the lawyer's conduct.[5]

When a choice of law question concerning the applicable conflict of interest rules arises and a regulatory authority must determine whether the lawyer's belief—that a specific jurisdiction's rules applied because the predominant effect of that lawyer's conduct occurred in that jurisdiction—was reasonable, then a written agreement between the lawyer and client that explains a particular jurisdiction's conflict of interest rules will apply may be considered, at least if certain requirements are satisfied.

Specifically, the ABA added to the last sentence of Comment [5] to Rule 8.5 in 2013 to address this concept:

> [5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. *With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.* (emphasis added)[6]

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[4] *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1027 (2014) (noting that factors for determining "predominant effect" may include where client resides, where funds will be deposited, where the services will be performed, and where the business will operate).

[5] For example, conduct permitted in one jurisdiction that has little or no relationship to the client and legal matter may be the subject of discipline if the conduct is prohibited in another jurisdiction that has a greater nexus with the matter.

[6] Ethics 20/20 Commission Report and Resolution 107D that recommended adding the last sentence to this Comment explained "[l]awyers and clients can resolve some of the unavoidable uncertainties of Rule 8.5(b)(2) in the same way choice of law issues are resolved in other contexts: through choice of law agreements … They may also be useful to disciplinary authorities who are asked to consider whether a lawyer's determination of the applicable jurisdiction's conflict of interest rule was 'reasonable' … These kinds of agreements are analogous to waivers of future conflicts, which are already authorized in Comment [22] of Rule 1.7, and will have a similar effect.". *See* ETHICS 20/20 COMMISSION REPORT AND RESOLUTION 107D (2013), *available at* 20121112_ethics_20_20_choice_of_rule_resolution_and_report_final.pdf (americanbar.org).
The Ethics 20/20 Commission specifically limited any contractual authorization between lawyers and clients to conflicts of interest considerations. *See* Resolution and Report 107D (2013) at p.3. A lawyer and client cannot contract around Rule 8.5(b)(1)'s choice of law conclusion for conduct "in connection with a matter pending before a tribunal." The report noted that "[d]espite the advantages of these agreements, the Commission concluded that they should be subject to several limitations. First, such agreements should only be used in the context of conflicts of interest; they should not be used to specify the rules of a jurisdiction on other issues, such as the duty of confidentiality. The Commission did not want to authorize parties to contract around rules intended to protect

To offer guidance to lawyers on these important choice-of-law principles, the following scenarios illustrate how Rule 8.5 applies when a lawyer may be subject to more than one jurisdiction's ethics rules.

Scenario 1: Fee Agreements

Lawyer is admitted in State X and enters into a client-lawyer relationship with Client who resides in State X. Lawyer will work from Lawyer's office in State X on Client's matter. Litigation is to be filed in State Y. In drafting the terms of the fee agreement,[7] should Lawyer adhere to the Rules of Professional Conduct of State X or State Y?

As noted above, Rule 8.5(b)(1) will apply the rules of the jurisdiction of the tribunal for conduct "in connection with a matter pending before a tribunal" but Comment [4] to the Rule expressly recognizes:

> [. . .] As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct.[. . .]

Securing a fee agreement is "conduct in anticipation of a proceeding not yet pending before a tribunal" and, therefore, Rule 8.5(b)(2) applies. Applying the factors set forth above to determine the jurisdiction in which the "predominant effect" of the lawyer's conduct occurs, a lawyer admitted in State X, who is hired to represent a resident of State X, may reasonably conclude that State X's rules apply to the terms of the fee agreement both because the Lawyer's conduct, executing the fee agreement and accepting the representation, and the predominant effect of the agreement to represent the Client take place in State X.[8]

The agreement is signed in State X, where Lawyer's office is located, where Lawyer is admitted to practice, where Lawyer will research and prepare for the matter (even if done virtually), and where Client resides. Therefore, State X's version of Rule 1.5 would apply to the fee agreement including whether the fee agreement must be in writing, whether it must be signed by a client if it

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adverse parties or tribunals. To ensure the limited use of the agreements, the proposed Comment language begins with the phrase 'With respect to conflicts of interest…'" This "essentially permits a lawyer and client to enter into a choice-of-law agreement regarding the applicable conflict-of-interest rules, although the agreement is not binding on a court or disciplinary authority." ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 748 (2019).

[7] "Principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." MODEL RULES OF PROFESSIONAL CONDUCT, Scope [17]. Once the client-lawyer relationship is formed, Rule 1.5(b) states that the scope of representation and how fees and costs will be charged "shall be communicated to the client, preferably in writing, [. . .]". Many jurisdictions' versions of Rule 1.5(b) require written fee agreements for all representations. Rule 1.5(c) and (e) require specific written disclosures for contingent fee agreements and situations where lawyers in different firms will be sharing a fee.

[8] This Opinion is limited to analyzing which jurisdiction's rules of professional conduct apply to a fee agreement and does not opine on which state's substantive contract laws would apply.

is a contingent fee agreement, and whether the fee may be divided with lawyers in different firms who assume joint responsibility.

Certainly, from a client protection perspective, the jurisdiction where the lawyer is licensed and/or the jurisdiction where the client resides has a significant interest in requiring certain provisions in the fee agreement, and therefore, application of that jurisdiction's version of Rule 1.5 is most appropriate.[9]

To avoid ambiguity, a lawyer may want to identify in the fee agreement the lawyer's belief as to which jurisdiction's rules of professional conduct will apply to the fee agreement. That fee agreement may list the factors considered by the lawyer in reasonably concluding where the lawyer's conduct will occur and where the predominant effect of the fee agreement will occur.[10]

Of course, there must be some reasonable relationship between the jurisdiction whose rules of professional conduct are selected to govern the fee agreement and where the lawyer is admitted to practice, as well as the other factors listed above.[11] It would not be reasonable for a lawyer to conclude that the applicable ethics rules would be those of a jurisdiction in which the lawyer is not admitted to practice or a jurisdiction for which there is no reasonable basis to find the "predominant effect" of the lawyer's conduct occurred.

The ethics rules that apply to fee agreements between lawyers and clients may include not just Rule 1.5 but also the ethics rules regulating what the lawyer may then do with those fees such as rules governing with whom the lawyer may share or divide a legal fee.[12]

This hypothetical demonstrates the relevance of the final sentence of Model Rule 8.5(b)(2): "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Thus, a lawyer who reasonably believes that the predominant effect of the fee agreement will be in a specific jurisdiction should not be subject to discipline, even if the scope of representation contemplates filing a case for the client in a different jurisdiction.

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[9] The Committee recognizes that Mass. Bar Ass'n Op. 12-02 (2012) comes to a different conclusion as to which state's rules apply in a dispute over a fee agreement. Massachusetts' version of Rule 8.5 is different than the ABA Model Rule and the issue presented involved the reasonableness of the fee charged in litigation, not the formation of the agreement. The Committee's position is consistent with Bernick v. Frost, 510 A.2d 56 (N.J. 1986), construing contract law to find that New Jersey – the state in which the lawyer was licensed, and the client lived – was the appropriate venue for a dispute between a lawyer and client over the engagement agreement for a matter litigated in New York. *But see In re* Schiller, 808 S.E.2d 378 (S.C. 2017) applying rules of professional conduct of North Carolina, the state in which litigation was filed, to South Carolina licensed lawyer fee agreement.

[10] In addition to Rule 1.5 applying to fee agreements, Rules 1.15 and 5.4 also may be relevant.

[11] *See In re* Wyatt, 159 N.H. 285 (2009) (lawyer cannot use another state's rules as defense to disciplinary charges where lawyer was not licensed or admitted pro hac vice).

[12] For instance, a lawyer admitted in jurisdiction X and practicing law in jurisdiction X will have the fee agreement enforced and interpreted by the Rules of Professional Conduct in jurisdiction X, which might, for instance, permit paying referral fees or permit jurisdiction X lawyers to have nonlawyer partners. Compare MODEL RULES OF PROF'L CONDUCT R. 5.4 with Ariz. Rule 1.5 Cmt [9].

Scenario 2: Law Firm Ownership

State A permits Lawyer to have nonlawyer partners in the law firm, while State B follows Model Rule 5.4, which does not permit nonlawyer partners in law firms. Lawyer is admitted to practice law only in State A and has a law firm formed in State A with a nonlawyer partner. Lawyer seeks to appear in a case *pro hac vice* pending before a tribunal in State B. Will State B's Rules of Professional Conduct prohibit Lawyer from sharing the fees earned on the case pending before State A tribunal with Lawyer's nonlawyer partners?[13] Can one jurisdiction in essence reach into a law firm in another jurisdiction and find that jurisdiction's permissible firm structure to be unethical and subject lawyers from another jurisdiction to discipline?

When a lawyer seeks to appear before a tribunal by *pro hac vice* admission the lawyer agrees to be bound by the rules of the tribunal, and Rule 8.5(b)(1) provides that the ethics rules of that tribunal apply to "conduct in connection with a matter pending before a tribunal." Under the ABA Model Rules on Pro Hac Vice Admission, the tribunal has the discretion to admit the out-of-state lawyer and Rule 1.D.3 provides:

> [. . .] An application ordinarily should be granted unless the court or agency finds reason to believe that such admission:
>
> a. may be detrimental to the prompt, fair and efficient administration of justice,
>
> b. may be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent,
>
> c. one or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk, or
>
> d. the applicant has engaged in such frequent appearances as to constitute regular practice in this state.

Thus, the Model Rule on Pro Hac Vice Admission defaults to permitting admission unless there is some fact to suggest the admission would be detrimental to the administration of justice, or competent representation of the client is an issue, or the lawyer is too frequently appearing in the court. There is nothing in the Model Rules on Pro Hac Vice Admission that says the tribunal should inquire into the Lawyer's business model particularly when it is permitted by the Lawyer's home

[13] There is no ethical concern for Lawyer's local counsel who is admitted to practice law only in State B in sharing fees with Lawyer under a co-counsel agreement so long as local counsel is in a separate firm and not part of Lawyer's State A law firm. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 464 (2013); *See also* N.Y. City Bar Formal Op. 2020-1 (2020) (finding that New York lawyer may share fees with Arizona lawyer who has separate firm from New York lawyer and Arizona firm has nonlawyer owners); Fla. Bar Op. 17-1 (2017); Phila. Bar Ass'n Op. 2010-7 (2010).

licensing jurisdiction. Nor is there any indication that the business model permitted in the Lawyer's home jurisdiction would be detrimental to the "prompt, fair and efficient administration of justice."

Even so, a Lawyer admitted pro hac vice agrees to be bound by the ethics rules of the tribunal and Rule 8.5(b)(1) provides that the Rules of Professional Conduct of that tribunal apply to "conduct in connection with a matter pending before a tribunal [. . .]".[14] Certainly, the tribunal's ethics rules with respect to the Lawyer's conduct in representing the client in the proceeding, in dealing with the tribunal, and dealing with the opposing party and counsel will be governed by tribunal's Rules of Professional Conduct. Model Rule 8.5(b) expressly chooses the tribunal's ethics rules regarding the lawyer's "conduct in connection with a matter pending before a tribunal" – suggesting that the tribunal has a relevant interest in assuring the Lawyer's conduct *in that tribunal's matter* complies with the tribunal's Rules.

But does Model Rule 8.5 make the Lawyer who is licensed in State A—which allows nonlawyer partners in firms—subject to discipline for having nonlawyer partners when the Lawyer is admitted pro have vice to represent a client in a matter pending in a tribunal, in State B which does not allow nonlawyer partners?

The Lawyer's law firm is in State A, where the Lawyer is admitted to practice and has an office, and that firm structure is not "conduct in connection with a matter pending before a tribunal." The firm is not located in State B – the partnership conduct is occurring in State A, not State B where the tribunal sits.

Therefore, Rule 8.5(b)(2), not (b)(1), governs which ethics rules regulate the structure of the firm. Lawyer's conduct—establishing a firm structure—and the "predominant effect" of Lawyer's partnership with a nonlawyer is in State A, not State B. Thus, even if the Lawyer is admitted before a tribunal in State B, pro hac vice, Lawyer's law firm ownership in State A is governed by State A's ethics rules and not State B's.

Scenario 3: Reporting Professional Misconduct

Lawyer is admitted to practice law in States A and B, with Lawyer's office located in State B. Client residing in State A hires Lawyer to complete litigation in State A. Prior counsel on this matter forged the Client's signature on a document that was filed with the tribunal, which has prejudiced the rights of Client going forward in this matter.

State A requires Lawyer to report professional misconduct of another lawyer to State A's disciplinary authority even if doing so requires Lawyer to disclose information relating to the representation without the consent of the client. State B follows Model Rule 8.3, which requires Lawyer to report professional misconduct of another lawyer, but if Lawyer would have to reveal information relating to the representation in making such a report, the Lawyer only may report the misconduct if Client provides informed consent to make the disclosure.

[14] As noted above, if the tribunal does not have a rule designating the rules of professional conduct that apply to a lawyer appearing before the tribunal, the applicable rules will be those of the jurisdiction where the tribunal sits.

Which State's version of Rule 8.3 governs Lawyer's reporting obligations? State A or State B?

Because Lawyer is representing a State A client and Lawyer's work for Client is in connection with a matter pending before a State A tribunal, Rule 8.5(b)(1) would require Lawyer to follow the Rules of State A and report prior counsel in accordance with State A's version of Rule 8.3. Even though Lawyer's office is in State B, and even if prior counsel of the Client was admitted only in State B, or even if the *Client* was only a resident of State B, State A's version of Rule 8.3 applies because the matter is pending before the tribunal in State A and Lawyer's conduct—reporting prior counsel—is conduct in connection with a matter pending before a tribunal in State A.

Scenario 4: Confidentiality Duties

Lawyer is licensed in State A and State B, and practices from an office in State A. State A is a Model Rules state and Model Rule 1.6, Confidentiality of Information, permits, but does not require, a lawyer to disclose information relating to the representation to the extent the lawyer reasonably believes necessary "to prevent reasonably certain death or substantial bodily harm."[15] State B's confidentiality rule requires a lawyer to reveal such information, using the term "must reveal," client confidential information to prevent death or substantial bodily harm to another person.

Lawyer is representing a Client/Buyer, who resides in State B, in a transactional matter to purchase residential real estate in State A from Seller in State A. The matter is not before a tribunal. The transaction has become contentious because Buyer and Seller are having a difficult time coming to terms on the agreement. Buyer and Seller have been engaging in negotiations on the transaction at Buyer's place of business in State B. At a recent meeting, Client/Buyer privately made a specific threat to Lawyer to gravely physically harm the Seller at their next meeting if Seller refuses to accept Buyer's terms. Lawyer reasonably believes that the Client will carry out the threat. Is Lawyer required to disclose the threat by Client/Buyer to Seller?

Rule 8.5(b)(2) will determine which jurisdiction's version of Rule 1.6 applies to the situation because the matter is not before a tribunal. Paragraph (b)(2) tells Lawyer to look to the "rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction."

Although the Lawyer's conduct, informing the Seller of the Client/Buyer's threat, could take place from any number of locations, the Committee believes that the predominant effect of Lawyer's conduct is in State B. In assessing where the predominant effect of Lawyer's conduct occurs, a lawyer should consider where the client is located, where the client's actions might occur, which jurisdiction's substantive law would be applied to the client's actions and where the lawyer is admitted. In this scenario both State A and State B are involved because the Client/Buyer is residing in State B, but the Seller and transaction are in State A. However, the threatened harm would most likely occur in State B because Client/Buyer made a specific threat to Lawyer to harm

[15] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1).

the Seller at their next meeting and prior meetings have been held in State B at Client/Buyer's place of business.

The Lawyer may reasonably conclude that the predominant effect for the matter involving the Client's/Buyer's threat is in State B due to the Client's location and the location where the threat is specified to occur. Therefore, State B's version of Rule 1.6 will applicable and Lawyer must disclose the Client's threat.

Scenario 5: Screening for Laterals Lawyers

A law firm with multiple U.S. offices would like to hire a Lawyer A who is currently associated with another firm. Lawyer A is licensed in State A and would practice law from the firm's office in State A. The firm's hiring of Lawyer A would impute a former client conflict of interest to another lawyer at the firm, Lawyer B. Lawyer B is licensed in State B and practices law from the firm's office in State B.

As prescribed in Model Rule 1.10(a)(2), State A allows the law firm to screen Lawyer A without obtaining the consent of the affected clients (Lawyer A's soon-to-be former client and Lawyer B's current client). State B, however, does not follow Model Rule 1.10(a)(2) and would impute Lawyer A's conflict to Lawyer B unless Lawyer A's soon-to-be former client and Lawyer B's current client gives informed consent, confirmed in writing. To prevent imputing Lawyer A's conflict to Lawyer B, may the law firm screen Lawyer A without obtaining the consent of the affected clients?

This is a common scenario where the hiring law firm wants to hire a lawyer who is practicing at a different firm, commonly called a "lateral hire," but the lateral is currently working on a client matter adverse to a client of a lawyer at the hiring firm. The hiring firm wants to avoid imputation of the new lawyer's conflicts to the hiring firm. Most states have adopted a screening rule similar to Model Rule 1.10(a)(2), which permits the screening of a lateral irrespective of the lateral's level of involvement with the soon-to-be former client's matter. Some states have adopted rules where the availability of screening depends on the lateral's level of knowledge or participation in the soon-to-be-former client's matter. Other states do not permit screening to avoid the imputed conflict, and therefore require the hiring firm to obtain the informed consent of the affected clients.

The choice of law analysis for screening laterals will initially pivot on whether the imputed conflict of interest affects a pending lawsuit or a transactional matter. If the conflict that would be imputed from Lawyer A to Lawyer B concerns litigation filed in State B, then State B's screening rules would govern unless the tribunal's rules provide otherwise.[16] Similarly, if the imputed conflict arises in a matter that Lawyer B is litigating before a tribunal located in State C, then State C's screening rules would govern unless the tribunal's rules provide otherwise.[17]

The analysis is more complicated if the conflict that would be imputed from Lawyer A to Lawyer B involves a transactional matter. The location of Lawyer B's conduct—handling a potentially conflicted representation from the law firm's office in State B—is but one consideration.

[16] MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1).
[17] *Id.*

Under this non-litigation scenario, Lawyer B's client and the client on the opposite side of the transaction—Lawyer A's soon-to-be former client—will shoulder any harm associated with the imputed conflict. Considering the factors referenced above to assess where the "predominant effect" will be, if the affected parties to the transaction have their principal places of business or reside in State A, then the predominant effect of the imputed conflict will be in State A even though Lawyer B practices from an office in State B.[18] State B's screening rules would apply if both parties to the transaction are in State B.

When the parties to the potentially conflicted transaction are in different states, additional factors such as the location of the subject of the transaction (e.g., the location of real property, business operations, or services to be performed), the substantive law governing the transaction, and the location of deposited funds may point the predominant effect to one state over another. For instance, if Lawyer B's client resides in State B and is purchasing real estate located in State B (which means State B's law would govern the transaction), then the predominant effect of Lawyer B's conduct remains in State B even if the selling client (Lawyer A's soon-to-be former client) is in State A and the selling client will deposit the transaction's funds in a bank account in State A.

In non-litigated matters with significant contacts to more than one state, it may be unclear where the predominant effect of Lawyer's B representation will occur. For those situations, it would be prudent for Lawyer B to follow the more restrictive rule in State B (which is also the location of Lawyer B's conduct and Lawyer B's state of licensure) and obtain the informed consent of each affected client, confirmed in writing. Lawyer B, however, will not be subject to professional discipline for violations of Model Rules 1.9 and 1.10 so long as Lawyer B acts in accordance with the rules of the jurisdiction in which Lawyer B reasonably believes the predominant effect of Lawyer B's representation will occur.[19]

Conclusion

Model Rule 8.5 provides guidance for determining which jurisdiction's rules of professional conduct apply to a lawyer's conduct. When a lawyer's conduct is in connection with a matter pending before a tribunal, the lawyer must comply with the ethics rules of the jurisdiction in which the tribunal sits, unless otherwise provided. For all other conduct, including conduct in anticipation of litigation not yet filed and conduct not involving litigation, a lawyer must comply with the ethics rules of the jurisdiction where the lawyer's conduct occurs or, if different, where the predominant effect of the lawyer's conduct occurs. Factors to assess where that "predominant effect" occurs may include the client's location, where a transaction occurs, which jurisdiction's substantive law applies to the transaction, the location of the lawyer's principal office, where the lawyer is admitted, the location of the opposing party, and the jurisdiction with the greatest interest in the lawyer's conduct. A lawyer will not be subject to discipline if the lawyer's conduct conforms to

[18] MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2).

[19] MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2). Another alternative when the predominant effect is uncertain is for a lawyer and client to agree that the lawyer's representation will be governed by a particular state's conflicts of interest rules. MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. [5]. The specified state must have a reasonable relationship to the client representation.

the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

STATE OF MINNESOTA

BOARD ON JUDICIAL STANDARDS

2022 ANNUAL REPORT

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Hon. Louise Dovre Bjorkman, Chair
Minnesota Court of Appeals
St. Paul, Minnesota

Hon. Charlene Hatcher (Eff. 4/22)
Fourth Judicial District
Minneapolis, Minnesota

Hon. Ellen Maas (Exp. 4/22)
Tenth Judicial District
Stillwater, Minnesota

Hon. Theresa M. Neo
Sixth Judicial District
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*Brief biographies are appended at the end of this report.

FOREWORD FROM THE CHAIR

On behalf of the board members and staff of the Board on Judicial Standards, it is our pleasure to present this 2022 Annual Report of the Board on Judicial Standards to the citizens of Minnesota, Governor, Legislature, and the Minnesota Judiciary.

The board members take great pride in their diligent efforts to provide education, ensure compliance with the Code of Judicial Conduct, review and investigate complaints, and recommend discipline of judges.

The Minnesota Board on Judicial Standards (Board) is charged with enforcing the Minnesota Code of Judicial Conduct and with interpreting the Code for the education of judges and others. The Minnesota Legislature created the Board in 1971 and provides its operational funds. The Governor appoints all Board members, including four judges, four public members, and two lawyers. The public members and the lawyers are subject to Senate confirmation. All board members serve in a volunteer capacity. The Minnesota Supreme Court adopts rules of the Code of Judicial Conduct and adopts rules governing Board procedures.

The Judicial Code establishes a high standard for judicial conduct in the State of Minnesota. The Preamble to the Code states:

> An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.
>
> Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

The members of the Board take these principles to heart in carrying out their duties and make every effort to fulfill the Board's mission.

The Board's primary function is to receive, investigate, and evaluate complaints of judicial misconduct. Complaints that do not allege conduct that violates the Code are dismissed. If the Board finds that a judge has violated the Code, the Board may issue private discipline or a public reprimand. In cases involving more serious misconduct, the Board

may seek public discipline by filing a formal complaint against the judge with the Minnesota Supreme Court. After a public hearing, potential discipline imposed by the Supreme Court may include a reprimand, suspension, or removal from office. In addition to cases involving misconduct, the Board has jurisdiction to consider allegations that a judge has a physical or mental disability.

Education is also an important Board function. The Board and Executive Secretary Sipkins respond to judges' requests for informal advisory opinions. The Board also issues formal opinions on subjects of importance. The Board's website provides a wealth of information, including links to the Code of Judicial Conduct, the Board's procedural rules, Board opinions, public discipline cases, annual reports, and other judicial conduct resources. In addition, the Executive Secretary gives presentations on current ethics topics to newly appointed judges, at meetings of district court judges, and at state-wide judicial seminars. Finally, the Executive Secretary endeavors to maintain open and cordial relationships with the Minnesota Supreme Court, the Court of Appeals, and the Minnesota District Court Judges in an effort to maintain confidence in Board decisions and compliance with the Code.

In 2022, the Board received a total of 760 complaints. This substantially exceeds the number of complaints received in 2021 (237) and 2020 (158). The increase may be explained, in part, by the Board's implementation of an online complaint process, which was intended to increase accessibility. Of the 2022 complaints, the Board summarily dismissed 709 complaints, reviewed 50 complaints at board meetings[*], authorized investigations of 25 complaints, and issued discipline against 4 judges. The Board also issued 3 letters of caution to judges regarding their conduct to point out areas in need of improvement. In addition, the Executive Secretary issued 114 informal advisory opinions to individual judges at their request.

The Board accomplished many important goals in 2022. These include:

- Public Member Dr. Scott A. Fischer, Attorney Member Theresa M. Harris, and Judge Member Charlene Hatcher joined the Board.
- Board staff upgraded the server and implemented SharePoint, making Board materials available to Board members electronically.
- Board staff issued a high number of written informal advisory opinions to judges.
- Board staff implemented an online complaint submission form and online record management.
- Board members provided in-person and virtual guidance and advice to judges experiencing difficulties.
- The Board engaged in outreach and education for judges at bench meetings, seminars, and conferences. The Executive Secretary gave in person and virtual presentations to judges across Minnesota, providing information about the Board and education regarding judicial ethics. The Executive Secretary has made presentations to judges in all of the ten judicial districts.

[*] One complaint opened in 2022 will be reviewed at a 2023 Board meeting.

- The Executive Secretary presented at several judicial branch meetings, including a presentation at the 2022 Annual Conference of Judges.
- The Board updated the "Minnesota Judicial Ethics Outline" on the Board's website. The Outline addresses a wide variety of subjects, including the history of judicial discipline in Minnesota, case law interpreting the Code, and summaries of the Board's ethics opinions. The Board also updated its website with recent news and summaries of its recent disciplinary action.

The Board anticipates the reappointment of Public Member Nhia Vang and Attorney Member Tim O'Brien. It has been a pleasure to work with such dedicated and committed staff and board members to fulfill the Board's important mission.

Hon. Louise Dovre Bjorkman
Chair of the Board on Judicial Standard

INTRODUCTION

A society cannot function without an effective, fair, and impartial procedure to resolve disputes. In Minnesota, the Constitution and laws provide a system designed to fit these essential criteria. The preservation of the rule of law, as well as the continued acceptance of judicial rulings, depends on unshakeable public recognition that the judiciary and the court system are worthy of respect and trust.

Unlike the executive and legislative branches of government, the judiciary "has no influence over either the sword or the purse." The Federalist No. 78, at 465 (Alexander Hamilton). "The legal system depends on public confidence in judges, whose power rests in large measure on the ability to command respect for judicial decisions. Whether or not directly related to judicial duties, misconduct by a judge brings the office into disrepute and thereby prejudices the administration of justice." *In re Miera*, 426 N.W.2d 851, 858 (Minn. 1988).

It is the Board's mission to promote and preserve public confidence in the independence, integrity, and impartiality of our judicial system by enforcing the Judicial Code and by educating judges and others regarding proper judicial conduct.

AUTHORIZATION

The 1971 Legislature approved an amendment to the Minnesota Constitution authorizing the Legislature to "provide for the retirement, removal or other discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice." The 1971 Legislature also created the "Commission" (now "Board") on Judicial Standards and authorized the Supreme Court to make rules to implement the legislation. (Current version at Minn. Stat. §§ 490A.01-.03.) In 1972, Minnesota voters approved the constitutional amendment (Minn. Const. Art. VI, § 9), and the Minnesota Supreme Court adopted the Code.[*]

ORGANIZATION

The Board has ten members: one Court of Appeals judge, three district court judges, two lawyers, and four citizens who are not judges or lawyers. The Board members are

[*] Until 1972, Minnesota appellate and district court judges could be removed or suspended from office for misconduct only by the rarely used impeachment process, which involves impeachment by the Minnesota House of Representatives and conviction by the Minnesota Senate. Since 1996, judges have also been subject to recall by the voters, although this has never happened. Minn. Const. Art. VIII, § 6.

appointed by the Governor and, except for the judges, are subject to confirmation by the Senate. Members' terms are four years and may be extended for an additional four years.

The Board meets approximately eight times annually and more often if necessary. Non-judge members of the Board may claim standard State per diems as well as reimbursement for expenses such as mileage. Judge members are not paid per diems.

The Board is supported by a staff consisting of the Executive Secretary, an executive assistant, and a part-time staff attorney. At the direction of the Board, the staff is responsible for reviewing and investigating complaints, providing informal opinions to judges on the application of the Code, maintaining records concerning the operation of the office, preparing the budget, administering the Board funds, and making regular reports to the Board, the Supreme Court, the Legislature, and the public.

CODE OF JUDICIAL CONDUCT

The Minnesota Supreme Court has adopted the Code of Judicial Conduct to govern judicial ethics. Intrinsic to the Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.

The Board considers only complaints involving the professional or personal conduct of judges. The Code is not construed so as to impinge on the essential independence of judges in making judicial decisions. Complaints about the merits of decisions by judges may be considered through the appellate process.

RULES AND PROCEDURES

The Rules of the Board on Judicial Standards are issued by the Minnesota Supreme Court. Under its Rules, the Board has the authority to investigate complaints concerning a judge's conduct or physical or mental condition. If a complaint provides information that furnishes a reasonable basis to believe there might be a disciplinary violation, the Board may direct the Executive Secretary to conduct an investigation.

Under the Rules, the Board may take several types of actions regarding complaints. It may dismiss a complaint if there is not reasonable cause to believe that the Code was violated. A dismissal may be accompanied by a letter of caution to the judge. If the Board finds reasonable cause, it may issue a private admonition, a public reprimand, or a formal complaint. The Board may also defer a disposition or impose conditions on a judge's conduct, such as obtaining professional counseling or treatment.

The Board affords judges a full and fair opportunity to defend against allegations of improper conduct. If the Board issues a formal complaint or a judge appeals a public reprimand, a public hearing will be held. Hearings are conducted by a three-person panel appointed by the Supreme Court. After the hearing, the panel may dismiss the complaint, issue a public reprimand, or recommend that the Supreme Court impose more serious discipline, such as censure, suspension, or removal from office. If the panel recommends that the Court impose discipline or if the judge or the Board appeals the panel's action, the final decision is made by the Court.

If a judge appeals a private admonition, a private hearing will be held. Hearings are conducted by a three-person panel appointed by the Supreme Court. After the hearing, the panel may dismiss the complaint, affirm the admonition, or recommend that the Board issue a public reprimand or a formal complaint. If the judge appeals the panel's affirmance of an admonition, the Court makes the final decision.

All proceedings of the Board are confidential unless a public reprimand is issued, or a formal complaint has been filed with the Supreme Court. The Board notifies complainants of its actions, including dismissals and private dispositions, and provides brief explanations.

An absolute privilege attaches to any information or testimony submitted to the Board, and no civil action against a complainant, witness, or his or her counsel may be based on such information.

AUTHORITY AND JURISDICTION

The Minnesota Board on Judicial Standards has jurisdiction over complaints concerning the following judicial officials:

- State court judges, including judges of the District Courts, Court of Appeals and Supreme Court. There are 296 district court judge positions and 26 appellate judge positions.
- Approximately 110 retired judges in "senior" status, who at times serve as active judges.
- Judicial branch employees who perform judicial functions, including referees, magistrates, and other judicial officers.
- Judges of the Minnesota Tax Court (3) and the Workers' Compensation Court of Appeals (5) and the Chief Judge of the Office of Administrative Hearings (1).[*]

[*] *See* Rule 2, Rules of Board on Judicial Standards; Code of Judicial Conduct, "Application"; Minn. Stat. §§ 14.48, subds. 2 and 3(d), 175A.01, subd. 4, 271.01, subd. 1, 490A.03.

The Board does not have jurisdiction over complaints that concern the following persons:

- Court administrators or personnel, court reporters, law enforcement personnel, and other non-judicial persons.
- Federal judges. Complaints against federal judges may be filed with the Eighth Circuit Court of Appeals.
- Lawyers (except, in some circumstances, those who become judges or who were judges). Complaints against lawyers may be filed with the Office of Lawyers Professional Responsibility.

COMPLAINTS RECEIVED IN 2022

In 2022, the Board received and reviewed 760 complaints. This represents a 221% increase compared to 2021 when the Board received and reviewed 237 complaints. This increase appears to be due to at least two factors.

First, in March 2022 the Board implemented a new online complaint system which facilitates the complaint submission process. Also, in conjunction with the new online complaint system, the Board created a complaint form that can be sent to complainants, and which also facilitates the complaint submission process.

Second, in two different instances, the Board received multiple identical complaints from different people. In one instance, the Board received 152 identical complaints from 152 different people, and in a second instance, the Board received 184 identical complaints, involving four judges, from 46 different people. Each of these complaints were included in the total complaint count.

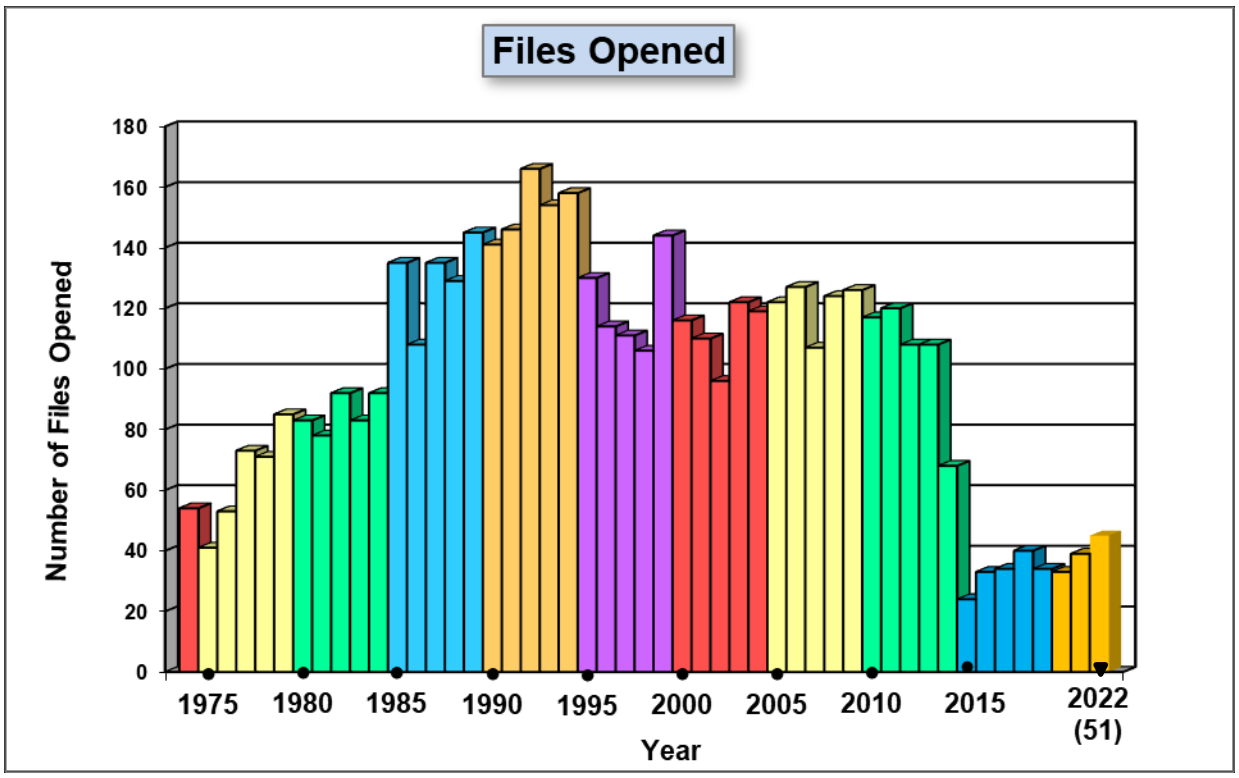
If the multiple identical complaints are subtracted from the total complaint count, the Board received and reviewed 336 complaints in 2022. This represents a 79% increase in complaints received compared to 2021.

Complaints can be submitted online, via email, U.S. mail, fax, or through personal delivery. If the person has a disability that prevents them from submitting a complaint in writing, a complaint can be submitted over the phone. Below is a table which summarizes the method by which complaints were received in 2022.

Method by Which Complaint Was Received	Number Received	% of Total
U.S. Mail	376	50%
Online Complaint System	292	38%
Email	61	8%
Personally Delivered	20	3%
Fax	10	1%
Phone	1	<1%
Total:	760	100%

2022 COMPLAINT STATISTICS

In 2022, the Board opened 51 files based on written complaints alleging matters within the Board's jurisdiction. The number of files opened annually by the Board since 1972 is set forth below:



This chart shows a decline in the number of files opened beginning in 2014. The decline appears to be due to at least two factors.

First, in 2014, the Legislature transferred primary responsibility for enforcing the "90-day rule" from the Board to the chief judges of the judicial districts. The 90-day rule generally requires a judge to rule within 90 days after a case is submitted. Minn. Stat. § 546.27. Judicial Branch case-tracking reports of possible violations are now sent to the chief judges rather than to the Board.

Second, the chart reflects only matters that were reviewed by the full Board and does not reflect complaints that were summarily dismissed. If a complaint does not fall within the Board's jurisdiction, the complaint may be summarily dismissed by the Executive Secretary, subject to the approval of a single Board member. This procedure avoids the inefficiency of requiring the full Board to review complaints that are not within its jurisdiction.

For example, complaints that merely express dissatisfaction with a judge's decision are summarily dismissed under Board Rule 4(c). In recent years, larger numbers of complaints have been summarily dismissed, as shown in the next table:

SUMMARY DISMISSALS
(BY YEAR)

2013	60
2014	99
2015	102
2016	112
2017	117
2018	167
2019	147
2020	125
2021	198
2022	709

As reflected in the following table, most complaints that were reviewed by the Board were filed by litigants:

SOURCES OF COMPLAINTS AND REPORTS – 2022

Litigant	27
Judge	9
Self-Report	6
Attorney	4
Citizen	3
Prosecutor	2
TOTAL	51

The next table outlines the judges who were the subject of complaints in 2022. The majority of the complaints filed and opened in 2022 were against district court judges.

JUDGES SUBJECT TO COMPLAINTS AND REPORTS – 2022

District Court Judges	44
Conciliation Court Judges	4
Tax Court Judges	2
Supreme Court Justices	1
TOTAL	51

The types of allegations are set forth below. The total exceeds 51 because many complaints contained more than one allegation.

ALLEGATIONS REPORTED – 2022

General demeanor and decorum	35
Bias, discrimination, or partiality	28
Failure to follow law or procedure	10
Ex parte communication	8
Failure to perform duties	8
Delay in handling court business	5
Conflict of interest	3
Incompetence as a judge	2
Loss of temper	2
Profanity or offensive language	2
Abuse of authority or prestige	1
Administrative irregularity	1
Financial activities or reporting	1
Health; physical or mental capacity	1
Improper conduct on the bench	1
Other	1

Of the 51 new complaints opened in 2022, 50 of them were considered by the Board in 2022. One complaint file was opened in late 2022 and was considered by the Board at the January 2023 board meeting. Of the 50 new complaints considered in 2022, the Board determined that 25 of the matters warranted formal investigation. A formal investigation includes asking the judge to submit a written response to the Board. In addition, a formal investigation typically includes review of court records and interviews with court participants and may include reviewing audio recordings of the hearings. A judge or the Board may request the judge appear before the Board to discuss the allegations of judicial misconduct.

The majority of complaints and Board-initiated investigations (38) were dismissed in 2022. Many complaints are dismissed because they concern a judge's rulings or other discretionary decisions that are generally outside the Board's purview. The reasons for dismissal are set forth below. The total count of dismissal reasons differs from the number of complaints considered in 2022 because some complaints are dismissed for more than one reason. Also, in 2022, the Board considered four complaints that were opened in 2021, and still under investigation in 2022. And, at the end of 2022, 9 complaints were still under investigation and thus, remained open.

DISMISSAL REASONS – 2022

No misconduct; no violation	29
Unsubstantiated after investigation	11
Frivolous, no grounds	10
Corrective action by judge	4
Within discretion of judge	2
Insufficient evidence	2
No issue left to resolve	2

As shown in the table below, in 2022, four matters resulted in discipline and three matters were resolved with a letter of caution to the judge.

DISPOSITIONS – BY YEAR ISSUED

Year	Letter of Caution	Admonition	Deferred Disposition Agreement	Public Reprimand	Supreme Court Discipline
2013	4	2	0	1	0
2014	2	5	0	2	1
2015	1	2	1	1	1
2016	3	1	3	1	0
2017	5	3	0	0	0
2018	9	4	0	1	0
2019	4	2	1	0	0
2020	7	0	1	1	0
2021	4	4	1	1	0
2022	3	4	0	0	0

CASE DISPOSITIONS

In 2022, the Board issued 4 private admonitions, and three letters of caution. A letter of caution is a non-disciplinary disposition. A sampling of the disciplinary actions and letters of caution are summarized below.

PUBLIC DISPOSITIONS

Public dispositions are posted on the Board's website at http://bjs.state.mn.us/board-and-panel-public-reprimands. There were no public dispositions in 2022.

PRIVATE DISPOSITIONS

Private Admonitions Issued in 2022

Summaries of the private admonitions the Board has issued since 2009 are available on the Board's website at *http://www.bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf*. The purpose of providing summaries of the private dispositions is to educate the public and to help judges avoid improper conduct. The Board issued private admonitions and letters of caution in 2022.

- A conciliation court referee unnecessarily berated an attorney for failing to follow the court rules even though the attorney's error did not have an adverse effect on the administration of justice. The attorney had filed exhibits one day late. The referee admitted to being "really hard" on the attorney, and that the referee had gone overboard. The Board found violations of Rules 1.1 (Compliance with the Law), 1.2 (Promoting Confidence in the Judiciary), 2.2 (Impartiality and Fairness), 2.6(A) (Right to Be Heard), and 2.8(B) (Demeanor).

- A district court judge personally sued two defendants in a conciliation court case. Prior to bringing suit, the district court judge abused the prestige of judicial office by stating in a letter to the defendants: "Being a District Court Judge….myself and presiding over matters similar to this." The reference to the judicial title came immediately after a threat to sue the defendants. The reference was made in a way to show that the judge had special knowledge of the court's procedures and the conciliation court referee's expectations. The defendants perceived the judge's reference as intimidating, and the reference undoubtedly harmed the defendants' confidence in the integrity of the judiciary. The Board found violations of Rules 1.1 (Compliance with the Law), 1.2 (Promoting Confidence in the Judiciary), 1.3 (Abuse of the Prestige of Judicial Office), and 2.8(B) (Decorum and Demeanor).

- In a telephone call with Judge B, Judge A yelled and used profanity directed at Judge B. On another occasion, Judge A yelled at Judge B in a Zoom meeting while judicial staff were present. In addition, in conversations with Judge B, Judge A made disparaging comments about other judges and attorneys, many of which did not serve a legitimate purpose in furtherance of Judge A's judicial duties. The Board found violations of Rules 1.1 (Compliance with the Law), 1.2 (Promoting Confidence in the Judiciary), 2.5(A) (Competence, Diligence, and Cooperation), and 2.8(B) (Demeanor).

- A judge engaged in inappropriate conduct directed toward court administrative staff, other judges, and justice partners, including verbally berating court staff, and yelling at another judge during bench meetings. The Board found violations of Rules 1.1 (Compliance with the Law), 1.2 (Promoting Confidence in the Judiciary), 2.5 (Competence, Diligence, and Cooperation), and 2.8(B) (Demeanor) of the Code

of Judicial Conduct. The judge agreed to complete the following conditions: Meet with the Board's Executive Secretary, meet with a mentor, complete a course on effective communication in the workplace, confer with a therapist to assist in addressing the causes of the misconduct, and mail letters of apology.

Letters of Caution Issued in 2022

- A judge self-reported that the judge independently researched the value of an item in preparation for a restitution hearing, but that the judge did not rely on the research in making a decision. The Board cautioned the judge that independent investigations abuse the adversary process, harm public confidence in the judiciary, create an appearance of partiality, and affect the administration and that such conduct violate Rules 2.9(C) of the Code of Judicial Conduct.

- Off the record, a judge used profanity in a discussion with a prosecutor in a non-joking manner. A litigant overheard the conversation. The Board cautioned the judge that using profanity while performing judicial or administrative duties may harm public confidence in the judiciary, and that such conduct may violate Rules 1.1 (Compliance with the Law), 1.2 (Promoting Confidence in the Judiciary), and 2.8(B) (Demeanor) of the Code of Judicial Conduct.

PUBLIC INQUIRIES

The staff receives frequent inquiries about judges' conduct. The inquiries are often from parties involved in court proceedings. Callers are provided information about the Board and how to file a complaint.

Board staff often receives requests for information, complaints that concern persons over whom the Board has no jurisdiction, and complaints that do not allege judicial misconduct. Callers are given appropriate referrals when other resources are available.

ADVISORY OPINIONS

The Board is authorized to issue advisory opinions on proper judicial conduct with respect to the provisions of the Code. The Board encourages judges who have ethical questions to seek its guidance. The Board provides three types of advisory opinions:

- The Board issues *formal opinions* on issues that frequently arise. These opinions are of general applicability to judges.

- A *Board opinion letter* is given to an individual judge on an issue that requires consideration by the full Board.

- The Board's Executive Secretary issues *informal opinions* to judges as delegated by the Board pursuant to Board Rule 1(e)(11). Judges regularly contact the Executive Secretary for informal opinions on ethics questions. Depending on the nature of the request, the Executive Secretary may consult the Board Chair or another Board member.

The Board began issuing formal opinions in 2013. The Board's current practice is to ask for public comments on its proposed formal opinions before the opinions are made final. Formal opinions are sent to the chief judges of the Minnesota courts and are posted on the Board's website at *http://www.bjs.state.mn.us/formal-opinions*. The Board did not issue a formal opinion in 2022.

The Executive Secretary gave 114 informal advisory opinions to judges in 2022. This continues the trend of a significant increase over prior years, reflecting the increased assistance the Board is providing to judges who are faced with ethics issues. The opinions cover a wide range of subjects, including disqualification standards and permissible extrajudicial activities. In many cases, the judge requests the opinion by telephone and the opinion is given orally. Since 2014, however, opinions are usually confirmed by e-mail and include analysis and citation to legal authority.

BUDGET

The Board's current base budget is $461,000 per year, which is used to pay staff salaries, rent, and other expenses. The staff consists of the Executive Secretary, a three-quarter time staff attorney, and an executive assistant.

In addition, a special account funded at $125,000 per year is potentially available to the Board to pay the expenses of major cases, which often require the Board to retain private counsel, resulting in significant expenditures for attorney fees.

FURTHER INFORMATION

For additional information regarding the Minnesota Board on Judicial Standards, please feel free to contact the Executive Secretary at (651) 296-3999.

Dated: March 10, 2023

Respectfully submitted,

/s/ Louise Dovre Bjorkman
Judge Louise Dovre Bjorkman
Chair, Minnesota Board on Judicial Standards

/s/ Thomas M. Sipkins
Thomas M. Sipkins
Executive Secretary, Minnesota Board on Judicial Standards

BOARD AND STAFF BIOGRAPHIES

Honorable Shereen M. Askalani
Judge of District Court (Fourth District). Appointed to the bench in 2016. Assistant Ramsey County Attorney from 2002 to 2016. Appointed to the Board on Judicial standards in 2020.

Honorable Louise Dovre Bjorkman
Board Chair. Judge of Minnesota Court of Appeals. Appointed to the Court of Appeals in 2008. Judge, Second Judicial District Court, 1998-2005. Private practice of law, 1985-1998 and 2005-2008. Appointed to the Board on Judicial Standards in 2017.

Scott A. Fischer, PhD., LP, ABPP
Public Member. Dr. Fischer is a forensic psychologist in private practice in Saint Paul. He is the former chair of the Minnesota Board of Psychology. Appointed to the Board on Judicial Standards in 2022.

Theresa M. Harris, ESQ.
Attorney Member. In-house counsel at a corporation providing legal advice regarding complex business contracts, product labeling and advertising claims, marketing-related regulations, and legal compliance. Appointed to the Board on Judicial Standards in 2022.

Honorable Charlene W. Hatcher
Judge of District Court (Fourth District). Appointed to the bench in 2016. Past employment includes Chief Civil Deputy Hennepin County Attorney; Managing Attorney, Human Services Division, Hennepin County Attorney's Office; and Special Assistant Attorney General, Office of the Minnesota Attorney General. Appointed to the Board on Judicial Standards in 2022.

Honorable Theresa M. Neo
Judge of District Court (Sixth District). Appointed to the bench in 2014. Assistant Duluth City Attorney 2010-2014. Staff Attorney Indian Legal Assistance Program 2005-2010, Attorney Safe Haven Shelter 2002-2005. Appointed to the Board on Judicial Standards in 2020.

Timothy O'Brien, ESQ.
Board Vice Chair and Attorney Member. Retired partner, Faegre Baker Daniels LLP. Served as a member of the Lawyers Professional Responsibility Board from 1997-2003, as a member of the Minnesota Client Security Board from 2007-2013, and as a member of the Minnesota Commission on Judicial Selection from 2011-2018. Appointed to the Board on Judicial Standards in 2019.

Dr. Scott Sakaguchi
Public Member. Dr. Sakaguchi was trained as a cardiologist and, in 2019, retired from practice as a Professor of Medicine at the University of Minnesota. Appointed to the Board on Judicial Standards in 2021.

Debbie Toberman
Public Member. Claim Supervisor at Minnesota Lawyers Mutual Insurance Company since 2006. Previously, Ms. Toberman was a Claim Representative at Minnesota Lawyers Mutual from 1986 to 2006, and she served as a public member on the Lawyers Professional Responsibility Board from 2005 - 2011 and the Fourth District Ethics Committee from 1997 - 2009. Appointed to the Board on Judicial Standards in 2020.

Nhia Vang
Executive Committee Member and Public Member. Ms. Vang works for the City of Saint Paul and has more than 20 years' experience in public service in the areas of administration, budget, and policy. Appointed to the Board on Judicial Standards in 2019.

Thomas M. Sipkins
Executive Secretary. Mr. Sipkins was a judge of the Hennepin County District Court from 2009 until September 2017. He was previously in the private practice of law at the Maslon, Edelman, Borman, and Brand law firm in Minneapolis, where he headed the firm's Labor and Employment Group and was a member of its Competitive Practices and Litigation groups.

Sara P. Boeshans
Staff Attorney. Admitted to practice in 2007. Ms. Boeshans clerked for Judge Marybeth Dorn, Second Judicial District, after which she was employed in the Minnesota Attorney General's Office.

Mary Pat Maher
Ms. Maher served as Executive Director of Project Remand - Ramsey County Pretrial Services for 26 years where she collaborated with her justice partners to improve the pretrial justice system in Ramsey County and statewide.

Professional Perspective

Time to Renew America's Lawyer Discipline System

Lucian T. Pera, Adams and Reese LLP
Mark Armitage, Michigan Attorney Discipline Board
Lydia Lawless, State of Maryland
Ronald Minkoff, Frankfurt Kurnit Klein & Selz
Sari W. Montgomery, Robinson, Stewart, Montgomery & Doppke LLC
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Bloomberg Law

Time to Renew America's Lawyer Discipline System

Editor's Note: The opinions expressed in this article are those of the individual authors and do not necessarily represent the views of the authors' employers or law firms. Some of the authors hold positions in the American Bar Association and other organizations, and the views expressed here do not necessarily represent the views of the ABA or those other organizations.

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It's time for the American Bar Association to launch a fresh, high-level effort to renew the US lawyer discipline system for the 21st century.

There has been a steady drumbeat of discussion recently about US lawyer regulation. Much of the debate has surrounded questions of nonlawyer ownership of law firms, fee-sharing with nonlawyers, and licensing of legal para-professionals. These are important discussions, but that's not what we propose.

Instead, as lawyers who have practiced and worked in the lawyer regulatory system for many years—more than 200 years collectively—we believe it is time for the ABA, the traditional convener and leader on lawyer regulation, to launch a once-in-a-generation review of the mechanics, structure, and reach of lawyer regulation. It's time to revisit the infrastructure of lawyer regulation, rather than the substance of ethics rules.

Some of us hold elected or appointed positions in the ABA. None of us speak in those official positions, for the groups we represent or work with, or for the ABA. We speak only for ourselves in our personal capacities. Still, we believe many in lawyer ethics and regulation share our view.

Like roads and bridges, the rules, procedures, enforcement tools, as well as the jurisdictional boundaries of lawyer regulation, need periodic maintenance. We believe the infrastructure of American lawyer discipline is overdue for an update.

Background: The Clark Committee & McKay Commission

The ABA has used its convening authority more than once for this purpose.

In 1970, the ABA's Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark, which became known as the Clark Committee, spent three years studying lawyer discipline, only to find what it described as "a scandalous situation that require[d] the immediate attention of the profession."

The Committee noted that "the prevailing attitude of lawyers toward disciplinary enforcement range[d] from apathy to outright hostility." Moreover, "public dissatisfaction with the bar and the courts [was] much more intense than [was] generally believed within the profession."

So much so that, "unless public dissatisfaction with existing disciplinary procedures [was] heeded and concrete action [was] taken to remedy the defects, the public soon [would] insist on taking matters into its own hands."

The Clark Committee identified 36 problems in disciplinary enforcement and proposed solutions. The overall thrust was a call for the professionalization of lawyer disciplinary enforcement. The ABA in the ensuing years led jurisdictions in the effort to bring the Committee's vision to reality. Within five years, half the jurisdictions in the US employed professional disciplinary counsel in their discipline systems, replacing the former disciplinary structure that had been composed purely of lawyer volunteers.

Over the two decades following the 1970 Clark Committee report, the ABA framed out the structure it had envisioned. It enacted model procedural guidelines for lawyer discipline that became the ABA Model Rules for Lawyer Disciplinary Enforcement as well as model sanctions standards that became the ABA Standards for Imposing Lawyer Sanctions.

In 1989, the ABA launched its Commission on Evaluation of Disciplinary Enforcement to study current lawyer discipline and examine the implementation of the Clark Committee's recommendations. In honor of its first chair, former NYU School of Law Dean Robert B. McKay, the group became known as the McKay Commission. Its detailed recommendations, adopted by the ABA House of Delegates in 1992, carried forward the vision of the Clark Committee.

The McKay Commission confirmed the ABA's—and the profession's—view that judicial regulation of the profession is a paramount value. They surveyed the country's best practices in its recently professionalized lawyer disciplinary systems. Importantly, they expanded the structure of lawyer discipline to include several additional elements, all well known today, including alternatives to discipline, client protection funds, trust account overdraft notification, random audits of trust accounts, continued study of mandatory malpractice insurance requirements, lawyer assistance, and law practice management assistance.

The McKay Commission's recommendations are still relevant and should be updated and improved upon. The Standing Committee on Public Protection in the Provision of Legal Services (formerly known as the Standing Committee on Client Protection) has worked steadily to advocate for model rules designed to prevent lawyer misconduct and client harm and to compensate legal consumers when necessary. Rules designed to prevent the invasion of trust funds through audits and payee or overdraft notifications are examples of useful prophylactic regulation. Some jurisdictions' requirements of written fee agreements in some instances, and assistance in resolution of client-attorney fee disputes are other examples of the expansion of the lawyer regulatory system beyond a purely prosecutorial model. Many of these changes have served the profession, clients, and the public well.

Trends Requiring Regulation

Thirty years on, it's time to update and improve upon this landmark work, in light of current circumstances and the experience of all our jurisdictions.

But today we face more than the need to update the current lawyer regulation system. The last generation has seen at least two major trends that require fresh attention to the infrastructure of lawyer regulation.

Multi-Jurisdictional Practice

First, lawful, appropriate practice by lawyers across the borders of US jurisdictions has increased dramatically. Over the last several decades, the legal needs of clients—individuals, businesses, and governments—have increasingly become regional, national, and even international. Even the most local clients may have regular international suppliers. Domestic relations matters increasingly involve cross-jurisdictional issues that track clients' moves to follow careers and family.

Because as lawyers we serve clients, lawyers' practices and work are increasingly less limited by the boundaries of their state of licensure. Multi-jurisdictional practice, or "MJP," has been authorized in some form in the overwhelming majority of US jurisdictions under versions of ABA Model Rule of Professional Conduct 5.5. An increasing number of lawyers are also licensed in multiple jurisdictions, and the ABA has just begun a new round of study of potential changes that might better reflect these new realities.

With those changes have come challenges for lawyer discipline in confronting lawyer misconduct involving multiple jurisdictions or lawyers misbehaving away from their home jurisdictions. Which rules apply? Which jurisdiction should initiate an investigation? Can clients and lawyers choose those rules? Which regulatory elements – trust account requirements, client protection funds – apply to lawyers practicing in multiple jurisdictions? And who pays for disciplinary investigation and prosecution of multijurisdictional misconduct when a lawyer may not even be admitted to practice in a jurisdiction investigating misconduct inside that jurisdiction? Disciplinary counsel need new approaches, maybe new procedural help, and possibly new structures to confront multijurisdictional misconduct with effective disciplinary enforcement.

Alternative Legal Service Providers

Second, the boundaries of law practice and the legal services business have blurred and expanded.

Over the last thirty years, a whole new class of non-law firm businesses has been created. Sometimes called "alternative legal service providers," or ALSPs, these businesses sell legal services to clients of law firms and law departments. These

legal services are provided by temporary or contract lawyers, employed by the company (not by any law firm), and supervised by those law firms or law departments.

Some of these staffing companies are multi-national behemoths, rivaling the biggest BigLaw firms. Others provide temporary brief writers to individual lawyers. However they differ, they share one thing: they are not law firms, and they are selling legal services.

For a generation, they have thrived and grown, by and large serving client needs. They are only regulated today through traditional regulation of the lawyers who work for and deal with them. Is that sufficient? Or should lawyer regulation be broadened, as some have suggested, to more consciously regulate them?

Since the dawn of the internet, lawyer marketing has exploded into digital form, from lead generation to lawyer-matching services. Many jurisdictions do nothing at all to separately regulate this activity, relying on the traditional lawyer advertising and solicitation rules. A small, growing number of jurisdictions have each taken their own path to regulate this activity, some requiring registration by these nonlawyer companies, others placing new regulations on lawyers who deal with them, and still others electing to not regulate these services at all. Should lawyer regulation encompass this new terrain more directly?

A few jurisdictions have also authorized other alternative legal service providers such as legal technicians, legal paraprofessionals, social workers, courthouse navigators, and more. Other jurisdictions are considering these options today. No national discussion has yet focused on how the regulation of these authorized providers should relate to the traditional regulation of lawyers.

Those who regulate lawyers and legal services need to survey, consciously, and intentionally, the changing boundaries of regulation. Should it expand? If so, how? Through new types of regulation of lawyers themselves? By bringing others under some form of regulation? If so, should lawyer regulators take on that challenge, or should there be other or new regulators?

Procedural Changes

Both as a part of periodic maintenance of our lawyer regulation infrastructure, and in the wake of the changes in how and where lawyers practice and who delivers legal services, a number of other subjects also need attention by the best minds on lawyer regulation. Those include a number of issues concerning procedure in disciplinary proceedings, including whether blanket confidentiality rules for investigations best serve the public or profession; who should decide contested proceedings; what burden of proof should apply; and what kind of discovery should be permitted.

The ABA Model Rules for Lawyer Disciplinary Enforcement provide jurisdictions a template for investigations and proceedings governing lawyer discipline. These model rules were adopted in 1989, and periodically tweaked, but no thorough review has been attempted in decades. Increasing cross-border practice, remote practice, and technology changes in the last 20 years require a review of these rules to assess if they are still the most effective and realistic approaches to investigating, adjudicating, and sanctioning lawyer misconduct.

Review of Professional Conduct & Sanctions Rules

While the ABA's core guidance on the substantive rules governing lawyer conduct—the ABA Model Rules of Professional Conduct—now serve as the model for ethics rules in every US jurisdiction, the ABA's model disciplinary enforcement rules are out-of-date, and closely adopted by virtually no US jurisdiction. Ethics regulators deserve better, as do the clients, public, and lawyers they serve. On many particular issues, in fact, individual jurisdictions do better on one aspect or another of the rules or regulation. That success needs to be identified and spread to other jurisdictions.

The same is true for the ABA Standards for Imposing Lawyer Sanctions. These are guidelines most jurisdictions use more or less as sentencing guidelines for lawyer disciplinary proceedings. Their goal is greater fairness and consistency. They set baseline sanctions for specific kinds of disciplinary violations. They identify appropriate aggravating and mitigating factors that should or must be considered in imposing sanctions for violations of the disciplinary rules. Some jurisdictions mandate the use of these standards; some simply use them routinely; and some do not use them at all.

The Standards were last amended 30 years ago. They need to be re-evaluated in light of a generation of substantive rule changes, enforcement experience, and case law.

Related ABA models that also need review include the Model Rules for Lawyers' Funds for Client Protection Funds and the Model Rules for Client Trust Account Records. The model client protection rules were last updated in 1989 and today struggle to address such issues as which jurisdiction's client protection fund should apply when a lawyer is admitted in more than one jurisdiction and how should funds work together to assure as much client protection as possible for a multi-state admitted lawyer.

The Model Rules for Client Trust Account Records were last amended in 2010. These trust account record rules similarly provide little guidance to lawyers on which rules should apply when a lawyer represents clients in more than one jurisdiction and the lawyer is admitted in more than one jurisdiction.

Next Steps

We submit that the ABA president should appoint a group of experts from all the relevant constituencies to survey the current landscape and experience of the last few decades. This review should include the more than 50 versions of disciplinary enforcement rules currently operating in US jurisdictions, as well as innovations in regulation US jurisdictions might adopt from other countries.

This group should examine carefully the full scope and record of other regulatory approaches and should also reinforce the strengths in our current system. We strongly believe that those strengths, which include individual accountability, client-focused rules, and increasing attention to the prevention and redress of misconduct, must be carefully preserved and strengthened.

Those experts need to include veteran regulatory counsel from jurisdictions big and small, disciplinary defense counsel, academics who study lawyer regulation, client protection fund administrators, IOLTA program representatives, and ultimate regulators such as state supreme court justices. This group should review existing rules and changes in the profession and the legal services market to make recommendations to establish renewed and improved model standards for all jurisdictions. That's how ABA leadership in ethics and lawyer regulation has worked successfully for more than 100 years.

Conclusion

Your authors may each have their own tentative views, and those views are by no means uniform. But we all share the firm conviction that it's time to be conscious and intentional about defining the proper frontiers of legal professional regulation for the 21st Century, as well as about identifying and developing the tools regulators need for the new world.

To be crystal clear, we propose that this effort not consider any changes to the substantive ethics rules involving nonlawyer ownership or fee-sharing with nonlawyers. Those are entirely different debates we do not address here.

In the history of lawyer regulation in this country, no single organization has done remotely as much as the ABA to advance client and public protection and responsible and sensible regulation. In fact, the success of lawyer regulation in the US owes more to the ABA than any other organization.

It's time for the ABA to step up again and renew our lawyer regulatory system to meet the needs of the next generation.

Rule 3.8. Special Responsibilities of a Prosecutor.

Colorado Court Rules
Colorado Rules of Professional Conduct

Advocate

As amended through Rule Change 2022(06), February 24, 2022, effective July 1, 2022

Colo. R. Prof'l. Cond. 3.8

Rule 3.8 - Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
(d) timely disclose to the defense all information known to the prosecutor, regardless of admissibility, that the prosecutor also knows or reasonably should know tends to negate the guilt of the accused or mitigate the offense, or would affect a defendant's decision about whether to accept a plea disposition, except when the prosecutor is relieved of this responsibility by statute, rule, or protective order of the tribunal. This information includes all unprivileged and unprotected mitigation information the prosecutor knows or reasonably should know could affect the sentence. A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused. A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it;
(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of

the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c) or other law, and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutorial authority, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority

(A) disclose the evidence to the defendant, and

(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

RPC 3.8

(f) and comment amended and adopted and (2) deleted, effective February 19, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (g) and (h) added and adopted, comment [1] amended and adopted, and comment [3A], [7], [7A], [8], [8A], [9], and [9A] added and adopted June 17, 2010, effective July 1, 2010; (f) and comment [5] amended and effective February 10, 2011; amended and adopted by the Court, En Banc, 10/14/2021, effective immediately; amended and adopted by the Court, En Banc, February 24, 2022, effective 7/1/2022.

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to address the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented defendants. Paragraph (c) does not apply, however, to a defendant appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The disclosure obligations in paragraph (d) are not limited to information that is material as defined by Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Instead, paragraph (d) imposes a duty on a prosecutor to make a disclosure irrespective of its expected effect on the outcome of the proceedings. A finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case. See Preamble and Scope [20]. Paragraph (d) requires prosecutors to evaluate the timeliness of disclosure at the time they possess the information in light of case-specific factors such as the status of plea negotiations, the imminence of a critical stage in the proceedings, whether the information relates to a prosecution witness who will be called to testify at the next hearing, and whether the

information pertains only to credibility or negates the guilt of the accused. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest and that procedural rules, such as Crim. P. 16, may allow a prosecutor to withhold evidence about informants or other sensitive subjects. The prosecutor's duty to disclose information pursuant to paragraph (d) continues throughout the prosecution of a criminal case and the prosecutor should notify agencies known to be involved in the case of this continuing obligation. The last sentence of paragraph (d) is satisfied by an inquiry limited to information known to the agency as a result of activity in the current case.

[3A] A prosecutor's duties following conviction are set forth in sections (g) and (h) of this rule.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires disclosure to the court or other prosecutorial authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, the prosecutor must take the affirmative step of making a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[7A] What constitutes "within a reasonable time" will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable (see C.R.S. §18-1-601 et seq. and 18 U.S.C. §2), but which those others did not commit, then the prosecutor must take steps in the appropriate court. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8A] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.

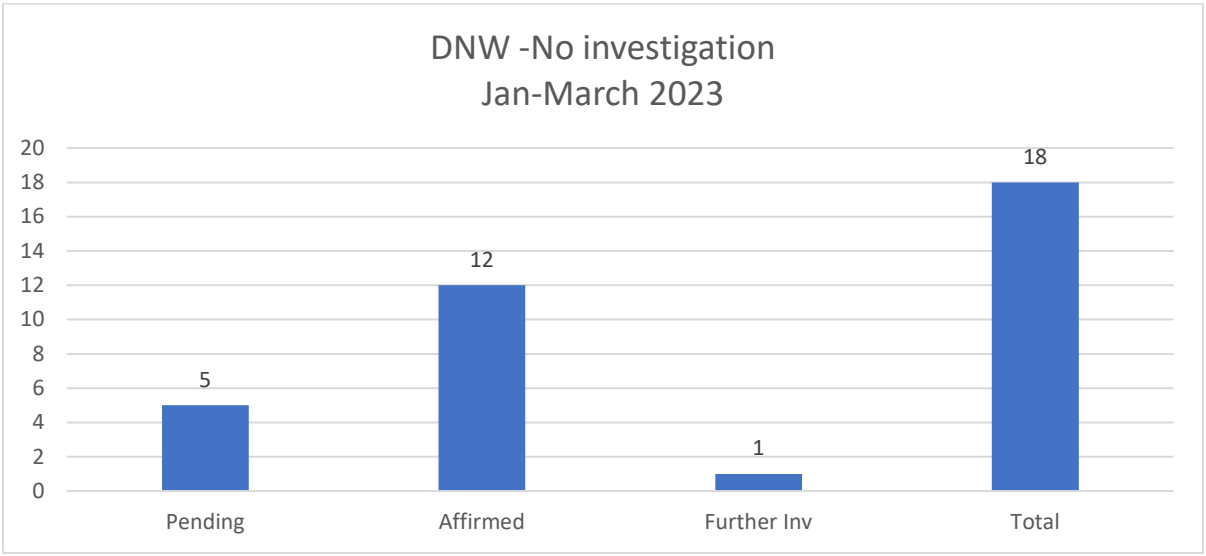
[9] A prosecutor's reasonable judgment made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), although subsequently determined to have been erroneous, does not constitute a violation of this Rule.

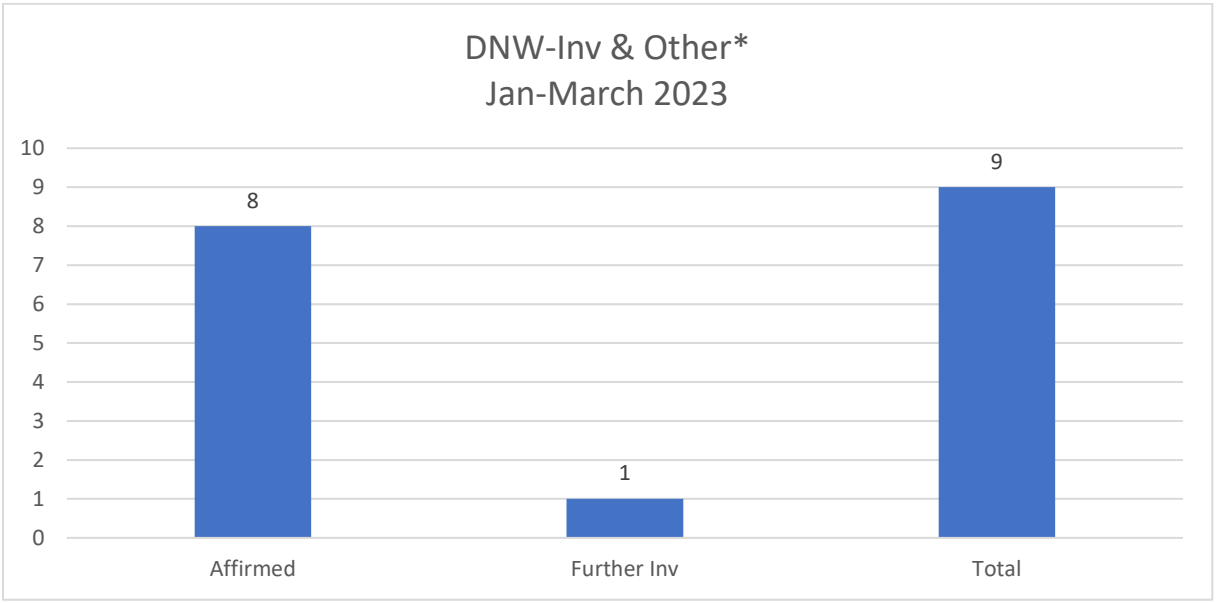
[9A] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

[10] The special responsibilities set forth in Rule 3.8 are in addition to a prosecutor's ethical obligations contained in the other provisions of these Rules of Professional Conduct.

ANNOTATION Annotator's note. Rule 3.8 is similar to Rule 3.8 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule. Paragraph (f)(1) is inconsistent with federal law and thus is invalid as applied to federal prosecutors practicing before the grand jury. As applied to proceedings other than those before the grand jury, paragraph (f)(1) is not inconsistent with federal law and does not violate the supremacy clause. Thus, paragraph (f)(1) is valid and enforceable except as it pertains to federal prosecutors practicing before the grand jury. U.S. v. Colo. Supreme Court, 988 F. Supp. 1368 (D. Colo. 1998), aff'd, 189 F.3d 1281 (10th Cir. 1999). Paragraph (d) should be read as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused in advance of the next critical stage of the proceeding, consistent with the materiality standard adopted with respect to the rules of criminal procedure. In re Attorney C, 47 P.3d 1167 (Colo. 2002). Violation of paragraph (d) requires mens rea of intent. In re Attorney C, 47 P.3d 1167 (Colo. 2002). Cases Decided Under Former DR 7-103. While the prosecutor may strike hard blows, he is not at liberty to strike foul ones, for it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972). Prosecutor's zealous prosecution of a case is not improper. People v. Marin, 686 P.2d 1351 (Colo. App. 1983). A prosecutor's duty is to seek justice, not merely to convict. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972); People v. Drake, 841 P.2d 364 (Colo. App. 1992). If the prosecution witness advises prosecutor that he or she knows or recognizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and

opposing counsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992). There was no prosecutorial misconduct when the district attorney and police had no knowledge of any evidence that would negate the defendant's guilt or reduce his punishment. People v. Wood, 844 P.2d 1299 (Colo. App. 1992). Prosecutor should see that justice is done by seeking the truth. The duty of a prosecutor is not merely to convict, but to see that justice is done by seeking the truth of the matter. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973). No evidence proving defendant's innocence shall be withheld from him. It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972). A prosecutor must be careful in his conduct to ensure that the jury tries a case solely on the basis of the facts presented to it. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973). The district attorney has the duty to prevent conviction on misleading or perjured evidence. The duty of the district attorney extends not only to marshalling and presenting evidence to obtain a conviction, but also to protecting the court and the accused from having a conviction result from misleading evidence or perjured testimony. DeLuzio v. People, 177 Colo. 389, 494 P.2d 589 (1972).





*Other=private probation appeal & admonition appeal by complainant