LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

January 24, 2025 – 12:30pm (in person and via Zoom) –
Minnesota Judicial Center
Lunch provided for Board members 12:00pm

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1. Approval of minutes of December 13, 2024, meeting (attachment 1).

2. Personnel

    a. Tributes to departing members.
    b. Update on membership as of Feb. 1, 2025.

3. Rules committee report.

    a. Board opinion regarding ABA Opinion 511 on listservs and Minn. R. Prof. Conduct 1.6 (attachment 2).

4. Board/OLPR petition regarding Rules 1.8 and 3.8 (attachment 3).

5. Board letter to Justice Thissen regarding aggravating factors (attachment 4).

6. Late complainant appeals – update on process.

7. Director's report (attachment 5)

8. 2024 statistics (attachment 6).

9. Open discussion.

10. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES
December 13, 2024 12:30 pm (In-person and via Zoom) – Minnesota Judicial Center

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Board member attendance:

- Landon Ascheman
- Katherine Brown Holmen
- Ben Butler, Chair
- Dan Cragg
- Michael Friedman
- Tom Gorowski
- Jordan Hart
- Tommy Krause
- Paul Lehman
- Frank Leo
- Kevin Magnuson
- Melissa Manderschied
- Jill Nitke-Scott
- Kristi Paulson, Vice Chair
- William Pentelovitch
- Jill Prohofsky
- Matthew Ralston
- Wendy Sturm
- Sharon Van Leer
- Carol Washington
- Antoinette Watkins
- Bruce Williams
- John Zwier

Other attendees:

- Minnesota Supreme Court liaison Justice Gordon Moore
- Susan Humiston, Director of the Office of Lawyers Professional Responsibility
- Members of the OLPR staff
- Members of the public

Approval of prior meeting minutes:

The last meeting of 2024 for the LPRB was called into session at 12:33, Chair Ben Butler thanked the board and OLPR for attending and welcomed members of the public and the Supreme Court liaison Justice Gordon Moore. Chair Butler moved to approve the September 13, 2024, meeting minutes, there was brief discussion about the length and clarity of the minutes, but no changes were made and the motion to approve was seconded by Paul Lehman. The motion passed unanimously.

Personnel Updates:

The next meeting in January 2025 will be the last for this term. The board has 5 members with terms expiring who will not be returning.

Dr. Jordan Hart announced that she would be ending her time with the board after her term ends in January. Dr. Hart has served since March of 2022 and her service as a public member could not be appreciated more.

Bruce Williams, whose term will be expiring in February, was also honored because he will have to miss the January 2025 meeting because he will be trying a murder case. Bruce has served the Board since 2017. Bruce's hard work, strong sense of justice and late-night emails to all will be missed.

The Executive Committee will be looking to fill a number of positions, 2 public and 2 attorney members as well as 2 MSBA positions. The MSBA has nominated two people, including Vice Chair Kristi Paulson, for membership.

New members will be appointed February 1st, 2025. There were 24 all very qualified applicants, and it was a hard decision narrowing it down. Interviews are still ongoing, but Chair Butler advised the Board to keep an eye out for appointment orders.

The Board will be losing 3 panel chairs in February, Chair Butler asked that members reach out to him if they are interested in being a panel chair.

Rules and Opinion Committee Update:

a. Board opinion regarding ABA Opinion 511 on Listservs and Rule1.6, Minnesota Rules of Professional Conduct (attachments 2-3).

Rules Committee Chair Dan Cragg spoke about the rules committee's draft opinion on ABA Opinion 511 regarding lawyer communication on listservs. The committee met twice to approve the draft opinion and discuss if there was something broader that could be said

about confidentiality and clients. The committee decided to keep this narrow and to the topical issue; listserv communication involving qualified exceptions to confidentiality, information not privileged, lawyer believes not embarrassing/detrimental, and client hasn't asked for the information to be private. The draft presented was passed by the committee for final consideration by the Board but can be taken back with feedback from today.

William Pentelovitch asked about including social media in the opinion and not just Listserv. The Board thought this would maybe be getting too into the weeds on the everchanging landscape of social media and would bog down the opinion at hand. Landon Ascheman concurred and worried about the number of doors being opened and stated there would need to be some other deeper interpretation as social media improves. Dan Cragg agreed, and opined that Listservs have a different emotional connotation than other social medias. What could be embarrassing on LinkedIn or Facebook is very different than what is potentially embarrassing on Listserv.

Director Humiston offered her comments that she did not oppose the substance of the opinion but did not think the draft was not as helpful as it could be. The Director suggested that what the opinion is trying to comment on is the restriction in Rule of Professional Conduct 1.6(a), instead of the exception in Rule 1.6(b)(2). Director Humiston recommended some reorganizing of the opinion for clarity. She thought that the key was that our rule is different than the ABA Model Rule, and those differences lead to a different result in that area. Carol Washington, who served on the Rules Committee, disagreed stating that not only is the opinion stating that Minnesota's rules are different, but we are happy that they are that we support this looser interpretation of the rule.

Melissa Manderschied asked if was possible to add a potential interpretation of the rule's allowance for communication to comply with all other laws. She thought that by their very function government lawyers' work is public or published to the public, one interpretation of this is that government lawyers would have to do the analysis about embarrassing the clients for virtually everything. Manderschied offered to write up some language for the change.

Members of the rules committee worried about changing the rule on the fly and so it was decided without formal motion that the committee would take up the matter again. The plan was to redraft the opinion with this discussion in mind and have another draft for the January meeting.

b. <u>Response to Justice Paul Thissen's concurrence in In re Udeani (attachment 4) and In re Nelson (attachment 5).</u>

Committee Chair Cragg reported that the Rules Committee was unable to offer much substantive feedback on Justice Thissen's referral regarding aggravating factors, except to say that the way the Director is currently handling the matter seems authorized. Director

Humiston confirmed that OLPR practice is to allege noncooperation during an investigation as a separate violation and to argue that noncooperation after charging is an aggravating factor. The Board agreed that this was permissible and within the Director's discretion. Chair Butler stated he would be writing a letter to Justice Thissen explaining that response to the referral.

Director Humiston asked if the Rules Committee had made any decisions after hearing more about artificial intelligence and the unauthorized practice of law. The rules committee had a presentation given by attorney Damien Reel and the MSBA about AI and unauthorized practice of law, but they did not have a concrete ask of the Board. The committee asked the group to come back when they had some more tangible ideas of how they would like the board to proceed. There was also a MSBA meeting where how to handle AI was discussed. Committee Chair Cragg also asked about Legal Aid and their use of AI to help direct people without the necessary resources.

5. Discussion item: How to handle late complainant appeals.

Chair Butler called for discussion on how the Board should handle late complainant appeals. Currently the Board assigns the late case but gives the power to the assigned Board member on whether the case should be heard despite being late.

> "Rule 8(e) Review by Lawyers Board. If the complainant is not satisfied with the Director's disposition under Rule 8(d)(1), (2) or (3), the complainant may appeal the matter by notifying the Director in writing within fourteen days."

The rules do not specify needing to send the appeal, only needing to notify the Director within 14 days. Members discussed how this time window felt short, particularly when the staff has addressed some issues with mail not finding its own in a timely fashion. The Executive Committee thinks a formal procedure needs to be in place and asked for Board input.

Carol Washington asked where individual members get authority to hear late appeals? She could be helpful if for clarity and efficacy if that question is answered before it comes to Board members. Otherwise, it raises too many issues about fairness based on member attitudes and individual preferences.

Bill Pentelovitch said he had done a few late cases in his years. He considered the merits because this is about people believing they are heard and getting closure.

Michael Friedman agreed with Washington that, for the purpose of consistency, the decision should come from the Executive Committee. Friedman thought 14 days was too short and that a full 30 days could allow for a better, more thorough appeal, with harder

restrictions on what happens to appeals received after those 30 days for the respondent's sense of closure.

Dan Cragg asked whether these deadlines are jurisdictional, as they are in other contexts. In most appellate courts, before an allegedly untimely appeal ever sees a judge it will go through an admin who decides if its timely. He thought something like that should be at play here.

Vice-Chair Kristi Paulson asked about potential for delivery confirmation.

Chair Butler said he did not think the time limits were jurisdictional because the Board is not a court. He also said the time limit in the rule was not going to change. Chair Butler said his sense from this discussion was that the Board preferred to have the Executive Committee make a decision on timeliness before the matter was assigned to a Board member. The Board unanimously agreed to this. Chair Butler said he would have a proposal of sorts for January.

6. Updates on Board projects and participation:

a. Board comment on recommendations of Minnesota Supreme Court Advisory Committee on Rules of Lawyers Professional Responsibility.

The Board has already made our comment on the Advisory Committee's recommendations on how to amend the Minnesota Rules on Lawyers Professional Responsibility. The Minnesota Board of Law Examiners (BLE) and MSBA have also submitted their own brief comments. Justice Gordon Moore stated these are all in front of the Court, and that the Court is working with the commissioner's office on this issue. Justice Moore stated that he anticipated that the Court would schedule a public hearing on the matter.

b. Working group between Lawyers Board, Minnesota District Judges Association, and Board of Judicial Standards considering rules regarding judicial elections.

Frank Leo reported that the working group has not heard anything back from the Board of Judicial Standards or the District Judges Association about this potential project.

7. Director's Report

Director Susan Humiston reported that the number of complaints has exceeded last year's numbers. She noted case-wise December has been a bit lighter and that soon some of oldest and largest files are getting ready to be charged with probable cause.

Director Humiston had previously spoken about the retirement of the OLPR trust account auditor; this has been a struggle as trust account auditing is a huge part of what OLPR does.

The OLPR decided to revert its auditor position to one for a paralegal due to salary constraints. The OLPR will be hiring (potentially) two new paralegals to assist with trust accounts and other issues. Director Humiston mentioned that the current paralegals are feeling overburdened, but they are indispensable and invaluable when it comes to cases and finding probable cause.

Currently the OLPR is working around a lease cancellation on their current downtown office space. Some space has opened up in the Minnesota Judicial Center and it could save on costs to move internally. Currently the building is on a 10-year lease that was signed in January of 2021 There has been some pushback from the State Court administration, but it appears that the move to MJC will be moving forward. This move would also help with safety concerns the OLPR has had and would cut costs on the subsidizing OLPR is currently doing for client security board.

The Director reported that OLPR received a complaint to the Minnesota Department of Human Rights about an alleged Americans with Disabilities Act accommodation compliance violation. The Director advised members to contact her if someone makes a request to an accommodation regarding an appeal. The Director is the ADA compliance person the Director's opinion on his case and then helping him made his appeal. The Director reported that the Brach's legal counsel was very pleased with how we work with those we do.

Director Humiston discussed the current state of failure to self-report by attorneys who have been charged with a felony. Currently the director said its very happenstance on if the OLPR notices it, court administrators are supposed to be telling the office but haven't been. She may ask the Court to consider requiring attorneys to self-report being charged with a felony.

Justice Gordon Moore reported that the Court had several concerns in mind for which it might seek Board input. These include matters related to reciprocal discipline, fee sharing between attorneys, and other matters. Justice Moore thought a formal referral or referrals could be forthcoming. Chair Butler thanked Justice Moore for his insight, said that the Board appreciates being told what the court is interested in.

8. 2024 statistics – third quarter
The average of days to complete a case is 21.4.

9. Open discussion.
Chair Butler called for open discussion. Nothing was suggested.

10. Adjournment.
Bruce Williams motioned to adjourn, the motion was seconded and approved unanimously.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NUMBER 26

LAWYER CONFIDENTIALITY OBLIGATIONS WHEN COMMUNICATING ON LISTSERVS®

If a lawyer reasonably believes the disclosure of information that is not protected by the attorney client privilege, would not be embarrassing or likely detrimental to the client, and the client has not asked that the information be held inviolate, it is not a breach of the confidentiality obligations provided for in Rule 1.6(a) of the Minnesota Rules of Professional Conduct to disclose such information on a Listserv®. When the disclosed information falls within Rule 1.6(b)(2), MRPC, practitioners do not need to obtain informed consent from their clients to post about that client's matter on a Listserv®. Practitioners should note that Minnesota's exceptions to an attorney's confidentiality obligation differ from the exceptions in Model Rule 1.6.

Comment

The American Bar Association recently opined in Formal Opinion 511R that, under Model Rule 1.6, informed consent of a client is required when posting questions or comments to a Listserv® relating to a representation of the client. The ABA's opinion is quite broad, prohibiting posts "in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved." (ABA Formal Opinion 511R at 1.)

In view of Rule 1.6(b)(2) of the Minnesota Rules of Professional Conduct, the Minnesota Lawyers Professional Responsibility Board opines that American Bar Association Formal Opinion 511R regarding the confidentiality obligations of lawyers posting to a Listserv® is not applicable to the Minnesota Rules of Professional Conduct.

Rule 1.6, MRPC, first establishes a baseline general obligation of confidentiality. Rule 1.6(a), MRPC, states:

> Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

Rule 1.6(b), MRPC, then provides for qualified exceptions to the general confidentiality obligation where a lawyer may reveal information relating to the representation of a client.

Relevant here is the exception at Rule 1.6(b)(2), MRPC, which states:

> (b) A lawyer may reveal information relating to the representation of a client if:
> …

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

Rule 1.6(b)(2), MRPC, as presented above, was adopted by the Minnesota Supreme Court in 2005. This clause was implemented to remove the previous language of "confidence" and "secret" that was used throughout the rule to describe the scope of information protected under Rule 1.6.

Prior to 2005, Rule 1.6(a), MRPC (2004), stated:

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly:
(1) reveal a confidence or secret of a client;
(2) use a confidence or secret of a client to the disadvantage of the client;
(3) use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

Prior to 2005, Rule 1.6(d), MRPC (2004), stated:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Prior to 2005, the comment titled "Authorized Disclosure" to Rule 1.6, MRPC (2004), stated in part:

A lawyer must always be sensitive to the client's rights and wishes and act scrupulously in making decisions which may involve disclosure of information obtained in the professional relationship. Thus, in the absence of the client's consent after consultation, a lawyer should not associate another lawyer in handling a matter; *nor, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the client's identity or confidences or secrets would be revealed to that lawyer.* Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

(emphasis added). Comparing the pre-2005 language the current language of Rule 1.6, MRPC, shows that the "scope of information" protected under this rule was previously provided for in Rule 1.6(d) (2004) as a definition. This limitation on scope was then amended into Rule 1.6(b)(2) as a qualified exception.

Comment [4] to Rule 1.6, MRPC, states:

Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. *A*

> *lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.*

(emphasis added). What the language of Rule 1.6, as amended, demonstrates, is that Minnesota takes a measured, practical approach to client confidentiality as compared to the more restrictive ABA Model Rule.

Rule 1.6, MRPC, allows a lawyer to reveal certain information relating to the representation of a client if it is not privileged, held inviolate, or reasonably believed to be embarrassing or likely detrimental to the client. The ABA does not have an equivalent clause under Rule 1.6 of the Model Rules of Professional Conduct that allows for the disclosure of this type of information. Therefore, the ABA's guidance in Formal Opinion 511R on the confidentiality obligations of lawyers posting to a Listserv® is overly restrictive compared to what is allowed in Minnesota under Rule 1.6(b)(2), MRPC.

We recognize that other jurisdictions have found ethics violations for lawyers who post on Listservs® or other public forums. *See In re Peshek*, M.R. 23794, 09 CH 89 (May 18, 2010); *Office of Lawyer Regulation v. Peshek,* 334 Wis.2d 373, 798 N.W.2d 879 (2011) (lawyer published a public blog containing confidential information about her clients and for failing to inform a court of a client's misstatement of fact); *In Re Quillinan,* 20 DB Rptr. 288 (2006) (lawyer revealing client confidences on a bar Listserv where two aggravators and three mitigators applied); *In re Tsamis*, No. 2013PR00095, Ill. Att'y Registration & Disciplinary Comm'n (Jan. 15, 2014) (lawyer published adversarial response to negative review); *People v. Isaac*, 470 P.3d 837, 839 (Colo. O.P.D.J. 2016) (lawyer responded to negative review and listed specific client information).

However, in each of those instances, the lawyers would also have violated Rule 1.6(b)(2), MRPC, because the information posted was protected by the attorney client privilege, was embarrassing to the client, or breached other confidentiality obligations. As such, we do not find that those precedents weigh on the proper application of Rule 1.6, MRPC to Listservs®.

Adopted:

ADM10-8042

STATE OF MINNESOTA

IN SUPREME COURT

Joint Petition of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for amendments to the Minnesota Rules of Professional Conduct

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The Lawyers Professional Responsibility Board ("the Board") and the Director of the Office of Lawyers Professional Responsibility ("the Director") respectfully petition the Minnesota Supreme Court to amend the Minnesota Rules of Professional Conduct. The Court should amend Rule 1.8 (Addendum A), concerning financial assistance from lawyer to client, and Rule 3.8 (Addendum B), concerning the special responsibilities of a prosecutor. Almost all of these amendments would substantially conform Minnesota's rules to the American Bar Association's Model Rules in these areas.

The Board and the Director make this petition after the Board received requests from lawyers who are familiar with the rules at issue, their application in practice, and the salutary effects of amending them. The Board studied these requests for one year, debated and considered the pros and cons of all options, and solicited and received feedback from other potentially interested groups, including the Director. The Board and the Director make these recommendations because they believe adopting them will make the

practice of law in Minnesota more empathetic, more transparent, and more just.

I. The Court should amend Rule 1.8 to allow lawyers in pro bono and nonprofit organizations to provide modest gifts to clients.

As it currently stands, Rule 1.8 does not allow a lawyer to "provide financial assistance to a client in connecting with pending or contemplated litigation" except under extremely limited circumstances. The ABA Model Rules contain an exception to that rule that Minnesota currently does not have: the Model Rule allows lawyers representing an indigent client *pro bono*, including via a nonprofit legal-service organization or other agency, to provide clients with "modest gifts" for "food, rent, transportation, medicine, and other basic living expenses." "Gifts" authorized under the Model Rule include, for example, bus fare to attend court, child-care costs during attorney-client meetings or court appearances, food and modest living expenses, and other basic necessities of life.

The Board has heard from at least one agency – Hennepin County Adult Representation Services – that the lack of the Model Rule exception in Minnesota's Rule 1.8 have prevented lawyers from helping indigent clients in these basic, humanitarian ways. (Addendum C). This situation, to the Board and the Director, is untenable. Rule 1.8's anti-gifting rule is designed to prevent lawyers from essentially bribing clients in exchange for hiring the

lawyer. It also prevents unscrupulous lawyers from exploiting clients by plying them with gifts, potentially causing the client to hire a lawyer she might not otherwise have hired or taken legal action that might not be in her best interest. The rule also prevents lawyers from having a financial interest in the representation.

None of this applies to lawyers representing indigent clients *pro bono*. There is no financial or other incentive for those lawyers to give clients modest gifts to help those clients meet basic life needs. The Board and the Director do not see any other potential downside to allowing lawyers in situations like this to help their indigent clients via modest gifts.

The ABA Model Rule contains one provision that the Board and the Director do not recommend: the Model Rule provides that a lawyer "may not publicize or advertise a willingness to provide such gifts to prospective clients." The Board and the Director have serious concerns about the First Amendment implications of that kind of restriction on speech. *See generally Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). It could be that courts would consider the Model Rule's restriction to be constitutionally reasonable; it could be that courts would decide the opposite. Litigation over the provision would not be in the public interest. The Board and the Director also believe that the advertising restriction is not necessary to prevent misuse of the rule.

II. The Court should amend Rule 3.8 to clarify prosecutors' ethical obligations regarding exculpatory evidence.

The Great Northern Innocence Project requested that the Board recommend that the Court amend Rule 3.8, concerning the special responsibilities of a prosecutor, to adopt the ABA Model Rules and clarify prosecutors' ethical obligations surrounding disclosure of exculpatory evidence. (Addendum D). The GNIP was specifically concerned with scenarios where there is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense." Under the Model Rule, in such cases the prosecutor must promptly disclose the evidence to the appropriate court. If the conviction was obtained in that prosecutor's jurisdiction, the prosecutor must also disclose the evidence to the defendant unless a court authorizes a delay and must undertake or cause further investigation into the validity of the conviction.

The GNIP also thought our rules should address scenarios 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." Under the Model Rule, in such cases the prosecutor must "seek to remedy the conviction." The GNIP noted that 24 states had adopted some form of the former rule while 19 states had adopted some form of the latter rule. Finally, the GNIP advised that, in its experience, "prosecutors in Minnesota

lack clarity concerning their ethical obligations when they become aware of exculpatory evidence concerning a prior conviction."

The Board thought the GNIP's suggestions had merit and set forth to investigate what if any recommendations might be in order. To do this, the Board formed a working group of members with particular interest or experience in these issues. The group included, among others, a criminal defense attorney, a city attorney, non-lawyer public members, and, for the final part of the group's work, an elected county attorney.

The working group solicited feedback on potential amendments from numerous stakeholders, including the Minnesota County Attorney's Association, the State Public Defender, the Office of Lawyers Professional Responsibility, the Minnesota State Bar Association, the GNIP itself, and others. The group heard back from most of these organization and conducted meetings and listening sessions with interested participants.

The group learned that the GNIP's concern about prosecutors' lack of clarity on their ethical obligations concerning exculpatory evidence had merit. The working group reported its understanding that county attorney's offices' practices with regard to such information varied, meaning that criminal defendants in different parts of the state received different information at different times. The working group also reported its belief that the proposed amendments were consistent with prosecutors' roles as ministers of justice

whose duties are to see justice done, not simply convictions entered. Finally, the working group determined that, in part to help standardize prosecutors' views of their day-to-day obligation to disclose evidence, an amendment to a rule not specifically cited by the GNIP – Rule 3.8(d) – was warranted and wise.

The Board discussed and debated the working group's recommendations at two public meetings and heard views on all sides of the issues. Ultimately, the Board agreed to recommend that the Court adopt the ABA Model Rules, with slight modifications, and amend Rule 3.8(d). The Director joins in those recommendations.

The proposed rules 3.8(g) and (h) both relate to prosecutors' obligations upon learning of "new, credible, and material evidence" that a person convicted of a crime did not, in fact, commit that crime. Under proposed Rule 3.8(g), a prosecutor is obligated to disclose that evidence to the defendant and, in some circumstances, must take steps to cause further investigation of the matter. Under proposed Rule 3.8(h), if the prosecutor learns of "clear and convincing"[1] evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of a crime the defendant did not commit, then the prosecutor's obligation is somewhat more specific: the prosecutor must seek to remedy the conviction.

[1] "Clear and convincing" evidence of a fact is evidence that makes the fact "highly probable." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978).

The recommendations differ from the Model Rules in a couple of instances. Model Rule 3.8(g)(2)(ii) requires that, if a prosecutor learns of new, credible, and material evidence of innocence, then "the prosecutor shall…undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit." The Board and the Director think requiring the prosecutor to personally undertake an investigation (which is what the Model Rule could be read to require) was not reflective of the separate roles of the participants in the criminal-court system. Accordingly, the Board and the Director recommend that the rule require the prosecutor to "make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit."

The Board also sought to make more specific the prosecutor's affirmative obligations to cause an investigation of or remedy a potentially wrongful conviction. The Model Rules state that a prosecutor must seek to do these things regarding potentially wrongful convictions "in the prosecutor's jurisdiction." The Board was concerned about the ambiguity of that phrase. Prosecutors, like all lawyers, sometimes change jobs. The Model Rules are unclear as to whether a prosecutor's obligations would apply only to potentially wrongful convictions in the prosecutor's current jurisdiction or also to such convictions in a prosecutor's former jurisdiction.

The Board and the Director determined that a prosecutor's investigation and/or remedy obligations should be limited to knowledge of potentially wrongful convictions "in the prosecutor's current jurisdiction." The Board and the Director do so because a prosecutor's ability to cause an investigation of or to remedy a potentially wrongful conviction entered in a jurisdiction in which the prosecutor does not current work would be so practically difficult as to make it nearly impossible to comply. A prosecutor's disclosure obligations under proposed Rule 3.8(g)(1), however, would apply to new, credible, and material evidence of potentially wrongful convictions in any jurisdiction, because there are minimal if any practical barriers to such disclosure and because the Board and the Director agree with the ABA that prosecutors should have a specific ethical obligation to at least notify potentially wrongfully convicted people of such evidence.

Finally, the Board and the Director recommend that the Court amend Rule 3.8(d) to address prosecutors' day-to-day obligation to disclose to the defense information that the law requires to be disclosed. The current rule requires prosecutors to disclose "evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." The Board and the Director recommend that the Court expand that rule to require disclosure of all evidence or information "the prosecutor is required to disclose under applicable law and procedural rules which, a

prosecutor knows or reasonably should know, tends to negate the guilt of the accused or mitigates the offense." Caselaw already requires prosecutors to disclose to the defense evidence such as that described in the amendment. Making such requirements an express ethical obligation will provide transparency and clarity to members of the bar and the bench as to prosecutors' constitutional obligations in this area.

CONCLUSION

The Board and the Director thank the Minnesota Supreme Court for its attention to these important issues.

Dated: January 22, 2025

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

/s/ *Benjamin J. Butler*

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INDEX TO ADDENDUM

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Hon. Paul C. Thissen
Associate Justice
Minnesota Supreme Court
25 Rev. Dr. Martin Luther King, Jr. Blvd. **BY E-MAIL ONLY**
St. Paul, MN 55455

December 16, 2024

Re: Referral to Lawyers Professional Responsibility Board in *In re Udeani*, A21-0754.

Dear Justice Thissen:

On January 25, 2023, in your concurrence in the above-named case, you suggested that the Lawyers Professional Responsibility Board review whether it is appropriate to use an attorney's noncooperation as an aggravating factor when noncooperation can also be a stand-alone ethical violation. The Board, and in particular its Rules Committee, has studied the issue, discussed it with the Office of Lawyers Professional Responsibility and that office's Director, and reviewed relevant Minnesota Supreme Court caselaw including your concurrences in *Udeani* and *In re Nelson*, A18-1149. This letter serves as the Board's response to your suggestion.

As you have noted, "[a] lawyer's failure to cooperate with an ethics investigation has been considered a professional ethics violation requiring discipline in Minnesota since the 1930s." *Nelson*, at C-2 n.2. That obligation is codified in Rule 25, Rules of Lawyers Prof. Responsibility, and Minn. R. Prof. Conduct 8.1. In addition, the Minnesota Supreme Court has long allowed the act of noncooperation to serve as an "aggravating factor"; that is, a basis to make harsher the disciplinary sanction for an unrelated rules violation. *See Nelson*, at C-3 – C-4 (citing cases).

The Board's understanding is that the Director treats alleged noncooperation with a *pre-charging* investigation as a potential substantive ethical violation under Rule 25, RLPR,

and/or Rule 8.1. The Director treats alleged noncooperation with *post-charging* proceeding as a potential aggravating factor under supreme court caselaw.

The Board cannot express a substantive opinion on this exercise of discretion by the Director. The Director's practice seems authorized by the rules and caselaw and appears to the Board to be made in good-faith. While the procedures in the two scenarios are different, the Board is assured that respondents in both situations are given the notice and opportunity to the heard on the matter that due process demands.

The Board notes that the Director's practice is not codified in the RLPR or the Rules of Professional Conduct. In other words, the rules do not distinguish between pre- and post-charging noncooperation. The Board makes no formal recommendation on the matter, but simply notes the issue.

Thank you for your attention to this matter and to Minnesota's attorney-regulation system. The bar and the people of our state are better for it.

Very truly yours,

/s/ *Benjamin J. Butler*

Benjamin J. Butler
Chair, Lawyers Professional Responsibility Board

BJB:

cc: Hon. Gordon Moore, Associate Justice, LPRB Liaison
Dan Cragg, Chair, LPRB Rules Committee
Susan Humiston, Director, OLPR

January 21, 2025

OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

2024 Year in Review Numbers—Year over (Year)

New Complaints:	1278	(1151)
Closings:	1229	(1068)
Advisory Opinions:	1704	(1792)
Public Discipline:	27	(28)
Disbarred:	5	(3)
Suspended:	14	(24)
Reprimand/Prob:	2	(1)
Reprimand:	6	(0)
Private Discipline (files):	102	(77)
Probation:	7	(6)
Admonitions:	95	(68)
Open Files:	603	(554)
Lawyers:	374	(370)
Year Old:	218	(158)
With Office:	122	(104)
With Others	94	(54)
Lawyers:	125	(103)
Oldest File:	10/2018	

OLPR Dashboard for Court And Chair

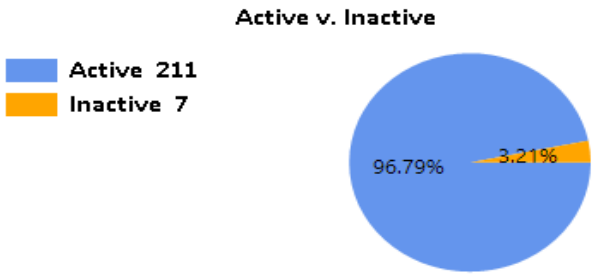
	Month Ending December 2024	Change from Previous Month	Month Ending November 2024	Month Ending December 2023
Open Files	603	5	598	554
Total Number of Lawyers	412	3	409	374
New Files YTD	1278	129	1149	1151
Closed Files YTD	1229	124	1105	1068
Closed CO12s YTD	253	28	225	227
Summary Dismissals YTD	673	83	590	529
Files Opened During December 2024	129	17	112	76
Files Closed During December 2024	124	27	97	109
Public Matters Pending (excluding Resignations)	34	4	30	23
Panel Matters Pending	17	2	15	8
DEC Matters Pending	122	21	101	93
Files on Hold	9	0	9	12
Advisory Opinion Requests YTD	1704	101	1603	1792
CLE Presentations YTD	37	7	30	45
Files Over 1 Year Old	218	-5	223	157
Total Number of Lawyers	125	-3	128	103
Files Pending Over 1 Year Old w/o Charges	124	-40	164	103
Total Number of Lawyers	84	-8	92	77

	2024 YTD	2023 YTD
Lawyers Disbarred	5	3
Lawyers Suspended	14	24
Lawyers Reprimand & Probation	2	1
Lawyers Reprimand	6	0
TOTAL PUBLIC	**27**	**28**
Private Probation Files	7	9
Admonition Files	95	68
TOTAL PRIVATE	**102**	**77**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	SCUA	REIN	TRUS	Total
2018-10		2							**2**
2018-12	1								**1**
2019-04					1				**1**
2019-06						1			**1**
2019-07	1								**1**
2019-08	1								**1**
2020-01	1								**1**
2020-02					1				**1**
2020-09	1								**1**
2021-01	1					1			**2**
2021-03	1			1					**2**
2021-04	1								**1**
2021-05	3								**3**
2021-06	2	1				2			**5**
2021-07	1								**1**
2021-08			2			1			**3**
2021-09	1					2			**3**
2021-10	1								**1**
2021-11	5								**5**
2021-12						1			**1**
2022-01	1								**1**
2022-03	1				1				**2**
2022-04	3				1				**4**
2022-05	2								**2**
2022-07	1								**1**
2022-08	4					3			**7**
2022-09	3					1			**4**
2022-10	1		1	3					**5**
2022-11	3					2			**5**
2022-12	1								**1**
2023-01	4		1		1				**6**
2023-02	2			3	4	1			**10**
2023-03	3		2		1	1			**7**
2023-04	4				2				**6**
2023-05	4		2		1	1			**8**
2023-06	2								**2**
2023-07	9		1		6				**16**
2023-08	12		1		2	1			**16**
2023-09	8		22		1		1		**32**
2023-10	8	1	4			1	1	1	**16**
2023-11	17		1			1			**19**
2023-12	10	1							**11**
Total	**124**	**5**	**37**	**7**	**22**	**20**	**2**	**1**	**218**

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	198	25
Total Cases Under Advisement	20	20
Total Cases Over One Year Old	**218**	**45**



All Pending Files as of Month Ending December 2024

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	SCUA	REIN	RESG	TRUS	**Total**
2018-10					2								**2**
2018-12				1									**1**
2019-04								1					**1**
2019-06									1				**1**
2019-07				1									**1**
2019-08				1									**1**
2020-01				1									**1**
2020-02								1					**1**
2020-09				1									**1**
2021-01				1					1				**2**
2021-03				1			1						**2**
2021-04				1									**1**
2021-05				3									**3**
2021-06				2	1				2				**5**
2021-07				1									**1**
2021-08						2			1				**3**
2021-09				1					2				**3**
2021-10				1									**1**
2021-11				5									**5**
2021-12									1				**1**
2022-01				1									**1**
2022-03				1				1					**2**
2022-04				3				1					**4**
2022-05				2									**2**
2022-07				1									**1**
2022-08				4					3				**7**
2022-09				3					1				**4**
2022-10				1		1	3						**5**
2022-11				3					2				**5**
2022-12				1									**1**
2023-01				4		1		1					**6**
2023-02				2			3	4	1				**10**
2023-03				3		2		1	1				**7**
2023-04				4				2					**6**
2023-05				4		2		1	1				**8**
2023-06				2									**2**
2023-07				9		1		6					**16**
2023-08				12		1		2	1				**16**
2023-09				8		22		1		1			**32**
2023-10				8	1	4			1	1		1	**16**
2023-11				17		1			1				**19**
2023-12				10	1								**11**
2024-01				18				2	1				**21**
2024-02			1	22				1					**24**
2024-03				20					1				**21**
2024-04		1		15						1			**17**
2024-05		2		18		1	1	1	2	1			**26**
2024-06		3	2	23									**28**
2024-07		3	2	23					1	2			**31**
2024-08		15	1	16			1						**33**
2024-09		12		10									**22**
2024-10		29		17									**46**
2024-11		22		14						1			**37**
2024-12	28	35		11							4	1	**79**
Total	**28**	**122**	**6**	**331**	**5**	**38**	**9**	**26**	**25**	**7**	**4**	**2**	**603**

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

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 514 **January 8, 2025**

A Lawyer's Obligations When Advising an Organization About Conduct that May Create Legal Risks for the Organization's Constituents

When advising an organization, lawyers necessarily provide their legal advice through constituents such as employees, officers, or board members. At times, the organization's decisions may have legal implications for its constituents who will be acting on the organization's behalf, including the constituents through whom the lawyer conveys advice. This situation implicates both the lawyer's duties to the organization client and the lawyer's professional obligations in interacting with the nonclient constituents of the organization.

The Model Rules of Professional Conduct set forth a general standard of competent representation under Rule 1.1, necessary communication under Rule 1.4, and candid advice under Rule 2.1. Where a lawyer—in-house or outside counsel—is giving advice to an organization client about future action of the organization, these provisions may require the lawyer to advise the organization when its actions pose a legal risk to the organization's constituents.

When an organization's lawyer provides advice to the organization about proposed conduct that may have legal implications for individual constituents, the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe that they can rely personally on the lawyer's advice. Rules 4.1, 4.3, and 1.13(f) require an organization's lawyer to take reasonable measures to avoid or dispel constituents' misunderstandings about the lawyer's role.

An organization's lawyer may want to instruct or remind an organization's constituents about the lawyer's role early and often during the relationship, not only at times when constituents might rely to their detriment on a misunderstanding of the lawyers' role. Educating an organization's constituents who may receive the lawyer's advice in the future will lay the groundwork for later situations where lawyers may be advising the organization on matters with legal implications for the organization's constituents.

I. Introduction

Lawyers provide legal advice to organization clients[1] on a number of aspects of the organization's operations. For example, both in-house counsel and outside counsel advise

[1] As used in Rule 1.13 and this opinion, an organization is a legal entity that includes but is not limited to corporations, governmental organizations, unincorporated associations (such as limited liability companies), and other types of associations. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. [1] & [9]. Depending on the jurisdiction, it may also include partnerships. *See*, *e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-361, at 1 (1991) ("A partnership is an organization within the meaning of Rule 1.13. Generally, a lawyer who represents a partnership represents the entity rather than the individual partners. Confidential information received by the lawyer while representing the partnership is 'information relating to the representation' of the partnership that

organization clients about contracts and contractual negotiations, regulatory requirements and other legal requirements, litigation and disputes with third parties generally, and a host of other matters. Because organizations act through individual constituents, such as board members, officers, and employees, lawyers give advice to those organizations directly through individuals, including those individuals who are authorized to act on the organization's behalf.

Although an organization's lawyers convey their advice to individuals who are likely to act on the basis of the lawyers' advice, in this scenario, the actual client is the organization itself, not any individual constituent, except when the individual becomes a co-client. Model Rule 1.13(a) explains that the organization is "acting through its duly authorized constituents." Therefore, when the organization's lawyer communicates information and advice to those constituents, it is the organization the lawyer is advising through individuals who are duly authorized to communicate with the lawyer and to act on the organization's behalf. However, as discussed below, individual recipients of the lawyer's advice may not always understand that the advice is intended solely for the organization's benefit and is based solely on consideration of the organization's interests, and that the advice is not intended for the individual constituent's own personal benefit or formulated out of concern for the constituent's personal interests. The individuals' lack of an adequate understanding is particularly significant when lawyers are advising about decisions and actions that have legal implications not only for the organization clients but also for the nonclient individual constituents personally. Although any misunderstanding on the part of the organization's constituents may arise out of the complexity of the situation itself, and not because the lawyer is intentionally misleading, the lawyer may have an obligation under the circumstances to attempt to prevent or rectify the constituents' misunderstanding.

This opinion focuses on situations where (1) a lawyer—in-house or outside counsel—is giving advice to an organization client through a constituent about future action the organization may choose to take; (2) the lawyer knows or reasonably should know that the constituents are likely to have their own legal interests at stake – for example, where the lawyer is advising the organization about possible future conduct for which the constituents may be subject to personal civil or criminal liability; and (3) the lawyer does not intend to create a client-lawyer relationship with the constituent or otherwise to assume fiduciary or contractual duties to the constituent.[2]

The questions in this situation are two-fold. First, whether and when the duty to competently advise the organization under Model Rules 1.1, 1.4, and 2.1 includes a duty to advise the organization about the legal implications of its proposed conduct for its constituents. Second, whether and when the Rules regulating lawyers' dealings with nonclients, specifically Model Rules 4.1, 4.3, and 1.13(f), require an organization's lawyer to take measures designed to avoid or correct

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normally may not be withheld from the individual partners."). This opinion's guidance may also have relevance in some situations to certain government lawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. [9].

[2] This opinion addresses a lawyer's advice to an organization regarding future conduct. It does not address a host of other situations in which counsel for an organization interacts with organization constituents. Among other things, the opinion does not address when a lawyer speaks with an organization constituent in the course of conducting an internal investigation of alleged misconduct on the part of the organization or in the course of other fact gathering. Nor does the opinion address when an organization's counsel attends a deposition of an organization's constituent and counsel represents only the organization or counsel represents the organization and the constituent. Nor does the opinion address the possibility that an organization's lawyer might give a legal opinion to a nonclient constituent of the organization. *See* note 12, *infra*.

the constituent's misunderstanding of the lawyer's role or mistaken belief that the lawyer is protecting the constituent's personal interests.

II. Preliminary observations

The situation addressed in this opinion is unique and challenging. Other than when a lawyer represents an organization client, or otherwise communicates through a client's agent, it is unusual for lawyers to convey or communicate extensive advice to individuals who are not their clients, and even more unusual to convey advice that has legal implications for the nonclients. Prudent lawyers refrain from giving legal advice to nonclients about their conduct,[3] because doing so risks inadvertently creating a client-lawyer relationship. Although the lawyer will be acting with undivided loyalty to the lawyer's intended client, recipients of the lawyer's advice may end up relying on it to their detriment, mistakenly believing that the lawyer is acting in their best interest.

Lawyers who give advice intended for the organization's benefit cannot avoid communicating that advice for the organization client through individuals who are not clients, but who are constituents of the organization. There is no way to advise the organization client other than by conveying that advice through individuals who are constituents or representatives of the organization. At least from these individuals' perspective, this unavoidable situation may create uncertainty as to the lawyer's role and/or about the significance and application of the lawyer's advice.

The same ambiguity about the lawyer's role does not inhere in all interactions between organization lawyers and organization constituents. Lawyers representing organizations who are interacting with the organization's constituents do not always communicate advice to these constituents about their conduct on behalf of the organization. For example, the organization's lawyer does not give legal advice to organization constituents in the situation typified by *Upjohn v United States*,[4] where an organization's lawyer conducts an internal investigation to obtain information needed to advise organization decision makers about how to deal with allegations of entity misconduct. The lawyer's role is not to give advice to the constituent but simply to obtain information from the individual constituent to conduct litigation on behalf of the organization or to enable the lawyer to later convey advice to some other representatives of the organization.[5]

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[3] *See, e.g.*, Ky. Bar Ass'n Formal Ethics Op. KBA E-450 (2020), addressing under Rule 4.3 the difference between providing legal advice to a nonclient as opposed to the permissible truthful explaining to a nonclient the meaning of a document the lawyer has prepared for the lawyer's client. *See also* Tex. Disciplinary Rule of Professional Conduct R. 4.03 cmt. 3 (effective October 1, 2024), a non-conforming addition to the comment to the Texas equivalent of Rule 4.3, stating: "[t]his Rule maintains the traditional distinction between "legal advice" and "legal information" and does not restrict the latter. "Legal information" includes providing information about court rules, court terminology, and court procedure; directing to legal resources, forms, and referrals; offering educational classes and informational materials; recording on forms verbatim; reviewing forms and other documents for completeness and, if incomplete, stating why the form or document is incomplete; and explaining how to navigate a courthouse, including providing information about security requirements and directional information and explaining how to obtain access to a suit file or request an interpreter." This opinion does not attempt to address this distinction.

[4] 449 U.S. 383 (1981).

[5] Even in this different situation, however, there may be ambiguities for lawyers to address. The organization's lawyers interview constituents to gather facts from them, not to advise them. Even so, prudent lawyers are careful at the outset of these interviews to avoid misunderstandings about their role. Courts have recognized the importance of so-called "Upjohn warnings" to avoid inadvertently misleading individuals who are questioned and to avoid

In the context of a formal internal investigation of alleged wrongdoing, the divergence of the organization's interests and those of the individual constituents who are suspected of wrongdoing should ordinarily be clear. However, such divergence of interest in other contexts may often be less clear. The individual constituent's obligation is to act in the best interest of the organization, and the individual solicits or accepts the lawyer's advice with that objective in mind. To the extent that the individual has personal legal interests at stake, they may be largely aligned with those of the organization. For example, a constituent who is making representations on behalf of the organization to the government or to a private party may face civil liability or even criminal liability if the representations are false or misleading, and therefore the individual will have an interest in avoiding such misrepresentations. In most cases, the organization will have similar interests in avoiding civil or criminal liability based on misrepresentations made on its behalf.

However, even if the interests of the organization and the individual are generally aligned, they are not necessarily identical in situations where the individual has legal interests at stake. There is particularly likely to be a divergence of interests in situations where the lawyer's advice on actions the organization could take in the future may expose the individual constituent to legal risk. For example, when a lawyer advises a constituent regarding what representations to make on the organization's behalf in a government filing or in a transactional document, the individual may have an interest in proceeding carefully, because the personal cost of being accused of misconduct will be high. Taking a less cautious or more aggressive approach may be in the interest of the organization but such an interest may not be shared by the individual signing his or her name to the disclosure, because the benefits and risks of an aggressive approach may be different for the individual. The organization's decision makers may sympathize with the individual's interests out of general concern for its constituents' welfare or because protecting the constituents is important to the effective operation of its business or avoiding civil or criminal liability. But the organization's decision makers may also strike a different balance between promoting the organization's interests and protecting its constituents, and this may lead the organization, acting through its decision makers, to tolerate greater risk than the individual constituent.

III. Lawyers' duty to give competent advice to the organization clients about constituents' legal interests

To a large extent, the Rules of Professional Conduct establish duties to clients, not to individuals whom the lawyer does not represent. For example, a lawyer owes a client the duties of competence and confidentiality, and a duty to avoid conflicts of interest, which are codified in the professional conduct rules. *See, e.g.,* Model Rules 1.1, 1.6 & 1.7. But lawyers generally do not owe these duties to nonclients.

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unintentionally establishing a client-lawyer relationship with them. *See, e.g.*, Under Seal v. United States (*In re* Grand Jury Subpoena: Under Seal), 415 F.3d 333, 340 (4th Cir. 2005); *see also* Sehyung Daniel Lee, *The Benefits of a Miranda-Type Approach to Upjohn Warnings*, 13 COMM. & BUS. LIT. 12 ("According to the American Bar Association, it is recommended that counsel give the Upjohn warnings at the outset of the employee interview, with the minimum warnings that (1) counsel is retained by the company, not the employee; (2) the attorney-client privilege is in effect; and (3) the privilege is held by the company, which alone can decide to waive it.") (citing ABA WCCC WORKING GROUP, UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES (July 17, 2009), *available at* https://www.crowell.com/a/web/4TMx7dpADUfammfw6nzEZX/abaupjohntaskforcereport.pdf).

An organization's lawyer does not owe the organization's constituents a duty of competence or other duties established by a client-lawyer relationship unless the lawyer also represents a constituent as a client.[6] The Model Rules emphasize that lawyers representing an organization do not owe the obligations of the client-lawyer relationship to the organization's constituents simply by virtue of the lawyers' interaction with such constituents. As previously noted, Rule 1.13(a) explains that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Although Model Rule 1.13(g) acknowledges that an organization's lawyer is permitted to also represent one of the organization's constituents, subject to the provisions of Model Rule 1.7, the conflict-of-interest rule governing dual representations, the organization's lawyer does not owe duties of loyalty and confidentiality to an individual constituent in the absence of a client-lawyer relationship with that individual. Indeed, Rule 1.13(g) drives home the understanding that, absent steps taken to establish a dual representation of both the organization and one or more of the organization's constituents, the only client is the organization itself.

The question we address here is whether the professional responsibilities of a lawyer representing *the organization* require the lawyer to inform the organization when proposed future conduct may pose legal risk for the organization's constituents. In addition to Model Rule 1.1, which requires a lawyer to "provide competent representation to a client," other provisions specifically address a lawyer's advisory role. First, Model Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Additionally, Model Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Previously issued formal ethics opinions have addressed a lawyer's role as an advisor in various contexts. They have recognized that an essential aspect of a legal advisor's role is to assist clients in conforming to the requirements of civil and criminal law, which in turn entails assisting clients in recognizing and responding to the risk that their conduct may run afoul of the law. ABA Formal Ethics Opinion 491 explained that "[i]n general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance."[7] However, competent lawyers and their clients are not obligated to avoid all legal risk. A lawyer providing competent advice may identify a course of conduct that presents some legal uncertainty and so advise the client so that the client is fully informed, and the

[6] An organization's lawyer may enter into a client-lawyer relationship with an organization constituent inadvertently or by implication, but such a relationship is not established simply by virtue of representing the organization and communicating with the constituent. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f, at 131 ("An implication that such a [personal client-lawyer relationship with a constituent] exists is more likely to be found when the lawyer performs personal legal services for an individual as well or where the organization is small and characterized by extensive common ownership and management. But the lawyer does not enter into a client-lawyer relationship with a person associated with an organization client solely because the person communicates with the lawyer on matters relevant to the organization that are also relevant to the personal situation of the person.").

[7] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 491 (2000) (quoting N.Y. City Bar Ass'n Prof'l Ethics Comm. Formal Op. 2018-4 (2018)).

competently advised client may decide to engage in conduct where the legal implications are unclear.[8] For example, ABA Formal Ethics Opinion 85-352 (1985) noted that "a lawyer, in representing a client in the course of the preparation of the client's tax return, may advise the statement of positions most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law."

When an organization's lawyer advises an organization about whether to engage in future conduct, the lawyer should generally advise the organization about legal considerations that are important to the organization's decision. As we recently noted in ABA Formal Ethics Opinion 512 (2024), "Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include 'the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive.'" Further, "Comment [5] to Rule 1.4 explains, 'the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.'"

When giving advice in areas of legal uncertainty, it may be important for a lawyer to both identify legally relevant considerations and to assist a client in identifying other relevant considerations. *See* Model Rule 2.1. At the same time, the lawyer may not be presented with the entire picture when providing legal advice and, consequently, may not be in a position to provide an exhaustive analysis of all of the possible ramifications of a particular course of action. In the end, similar clients, although equally well-advised, may choose different paths, whether because they have different tolerance for legal risk or because they weigh other relevant considerations differently.

It may be important to an organization client to know not only when potential future conduct creates legal risk to the organization but also when the conduct creates legal risk to the organization's constituents, such as employees, officers, or board members, who will be acting on the organization's behalf. Whether this information or any other information *must* be provided to an organization's decision maker under the Rules will be a fact-based determination. The Rules do not specify in detail what must be disclosed as a matter of competent, necessary, or candid advice; the Rules set forth only a general standard. Whether an organization must be advised of how its proposed conduct will legally affect organization constituents may turn, in part, on the extent and gravity of the legal risk to the constituents. An organization's lawyer may know from past experience whether the organization's decision makers would want or expect to be told when proposed conduct has significant legal implications for the organization's constituents. If the

[8] *See, e.g.*, William H. Horton, *A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for Upjohn*, 61 BUS. L. 95, at 107-108 (2005) ("Given the complexity of the modern regulatory environment, and the fine distinctions upon which the legality of a particular course of conduct may turn, the waters that transactional lawyers help their clients navigate are frequently dark and murky indeed. . . .[For example], when a healthcare client turns to a transactional lawyer for advice about structuring a transaction with a referral source, it is highly unlikely that the lawyer will be able to say, "Yes, what you want to do is absolutely, without question, okay," and not much more likely that the lawyer will be able to say, "No, if you do that you're going to jail." Instead, what the lawyer must do is obtain as much information as possible, evaluate the facts and circumstances, and advise the client as to ways in which a legitimate transaction might be structured to minimize the risk of a violation and as to factors which would be more or less likely to cause the transaction to be perceived as illegitimate.")

lawyer does not definitively know, the lawyer can discuss with the relevant organization decision makers whether the organization would want to know of significant legal risks to its constituents. A lawyer should not assume without any basis that an organization's decision makers are or are not indifferent to legal risks to its constituents. Many organizations' decision makers have an interest in the constituents' welfare and seek to treat the constituents fairly. Many would want to take account of the potential costs and disruption if its constituents encountered legal problems because of their work for the organization.[9] Moreover, particularly if the client is an organization of a sufficiently large size, the organization may have contractual duties of indemnification in place as to the constituents impacted that could both reduce the costs or disruption for those constituents and be directly relevant to the risk to the organization itself.

Wholly apart from whether the lawyer's advice will fall below the standard of minimally competent representation under Rule 1.1, necessary communication under Rule 1.4, or candid advice under Rule 2.1, a lawyer may often include the legal risks to nonclient constituents among the subjects of discussion. In certain circumstances, even if the importance of this information is uncertain, the organization's lawyer may conclude as a matter of professional judgment that the organization is best served by being advised, through its duly authorized decision makers, when a proposed course of conduct poses a significant legal risk to constituents; to make a well-informed decision, the decision makers might want to have the opportunity to consider that they are putting individual constituents at legal risk, and the nature and extent of the risk. In such cases, the decision makers ultimately may or may not take account of the risk to individual constituents in making the decision, but the decision may not be as well-informed if is the decision makers are not at least made aware of the risk.[10] Of course, the duties of the decision makers to determine whether the

[9] Pursuant to Rule 1.2(b), a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Depending on the circumstances, it might be reasonable for the lawyer and the organization to agree that the scope of the representation will not include advising the organization about the potential legal liability of the organization's constituents. For example, a closely held corporation that is evaluating a potential sale of the business might agree that the lawyer representing it in that transaction is not obligated to advise it of potential tax liabilities that could result from the transaction for employees and officers of the corporation who hold stock in the corporation. In some instances, evaluating the potential liability of an organization's constituents could require the lawyer to undertake factual investigation, conduct legal research, or complete other tasks that otherwise would not be required to advise the organization. The organization should not be obligated to incur the legal fees for that work and should have the option to avoid that expense by limiting the scope of the representation. In other instances, the organization constituents who would face potential liability arising from the organization's action might be represented by their own counsel, which may also make it reasonable for the organization to exclude advice about their liability from the scope of the work to be performed by the organization's lawyer. In these and other circumstances, any limitation on the scope of the lawyer's representation must comply with the professional responsibility rules, including Rules 1.1 and 1.2(c), and with other law. To satisfy the requirement of informed consent, the lawyer must explain the material risks of excluding particular advice from the representation and ensure that the organization client consents to limiting the scope of the lawyer's advice with an understanding of those risks. *See* Rule 1.0(d) (defining "informed consent").

[10] An organization's lawyer may not always be presented with all of the material facts for a determination of whether there are or might be personal risks facing a nonclient constituent through whom the lawyer is providing the organization client with legal advice. As explained in paragraph [19] of the Scope section and reiterated in ABA Formal Ethics Opinions, a lawyer's decisions should not be judged in hindsight but rather with information known or readily available at the time and, likewise, a lawyer should not be subject to discipline "because of a course of action, objectively reasonable at the time it was chosen, turned out to be wrong in hindsight." *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 513 (2024) at 8, n. 23, quoting ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 491 (2020), at 9.

organization wishes to engage the lawyer to analyze the legal risk to constituents is governed by organization law rather than the Rules of Professional Conduct.[11]

IV. Lawyers' responsibility to nonclient constituents when giving legal advice to the organization

When a lawyer's advice about an organization's conduct implicates the legal liability of individual constituents, the individuals through whom the lawyer gives advice to the organization will often be the very ones who will be undertaking, directing, or assisting the action in question and who may therefore have personal risk of civil or criminal liability. As discussed, that individual is not a client (unless the lawyer intentionally or inadvertently establishes a client-lawyer relationship), and therefore, the organization's lawyer will not owe that individual the ethical duties that lawyers owe to clients. Nevertheless, lawyers representing organizations may have obligations or restrictions when giving advice to the organizations they represent through nonclient constituents, as lawyers sometimes do in interacting with other nonclients in the course of a representation.

Lawyers are "officer[s] of the legal system," not just "representative[s] of clients." Model Rules, Preamble, para. [8]. Consequently, they are subject to requirements and restrictions when dealing with others on a client's behalf, including, most obviously, a "require[ment] to be truthful." Model Rule 4.1, cmt. [1]. Other Rules require lawyers, in certain situations, to avoid misleading a nonclient or exploiting a nonclient's misunderstanding about the lawyer's role. The most generally relevant of these is Model Rule 4.3, which forbids a lawyer from giving "legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."[12] When the lawyer is representing a client in a matter with an unrepresented person, Comment [1] to Rule 4.3 advises:

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested

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[11] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & cmt. [1] ("[Rule 1.2(a)] confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.").

[12] This opinion addresses circumstances in which the lawyer knows or reasonably should know that the organization's constituent is likely to have legal interests at stake if the individual acts on the lawyer's advice. Although the interests of the organization and its constituent differ in this situation, Rule 1.7, which addresses concurrent conflicts of interest, may nevertheless allow the organization's lawyer to provide personal legal advice to the constituent as the organization's co-client, with the respective clients' informed consent. *See* Rule 1.7(b). If the lawyer does jointly represent both the organization and its constituent, the constituent is entitled to all of the rights of a client under the Rules of Professional Conduct. A lawyer who provides personal legal advice to the organization's constituent, where forbidden by Rule 1.7 or without complying with the rule's requirement of informed consent, may also create a client-lawyer relationship inadvertently. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (discussing client-lawyer relationship formation when the lawyer fails to "manifest lack of consent" to forming the relationship). Additionally, Rule 2.3 permits a lawyer to "provide an evaluation of a matter," *i.e.*, a legal opinion as distinguished from legal advice to "someone other than the client" in certain circumstances. This opinion does not address whether, and, if so, in what circumstances, an organization's lawyer may provide a legal evaluation or opinion to a nonclient constituent of the organization regarding the law relating to that constituent's legal liability.

> authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

Other Model Rules address specific situations where a nonclient may misunderstand the lawyer's role. Model Rule 1.13(f) specifically addresses the lawyer representing an organization in interactions with nonclient constituents, providing: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." The accompanying Comments [10] and [11] explain:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.
>
> Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

The concerns underlying Rules 4.1, 4.3, and 1.13(f) are implicated when a lawyer for an organization conveys legal information to nonclient constituents about proposed conduct by that individual on behalf of the organization and the lawyer knows or reasonably should know that the constituent is likely to have legal interests at stake.[13] The situation may give rise to any number of misunderstandings or erroneous assumptions regarding the lawyer's role.[14]

Individual constituents may or may not be aware that they have their own legal interests at stake. They might erroneously assume that they have no personal legal risks, because they may think that if they did, the lawyer would tell them. Or, if the individuals understand that they have legal risks along with the organization, they might assume that they can rely personally on the

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[13] Both "knows" and "reasonably should know" are defined terms in the ABA Model Rules of Professional Conduct. Knows "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Reasonably should know "denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question." ABA MODEL RULES OF PROF'L CONDUCT R. 1.0(f) & (j). Paragraph [19] of the Scope section of the Model Rules explains, "[t]he Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation."

[14] For a prior writing calling attention to this issue, see Melissa E. Romanovich, Note, *Corporate Law's Forgotten Constituents: Reimagining Corporate Lawyering in Routine Business Contexts*, 90 FORDHAM L. REV. 301 (2021).

lawyer's advice and that they therefore have no need for separate counsel. Although the organization's lawyer may not intend to foster these misunderstandings, such misunderstandings may be difficult to avoid when the lawyer is advising constituents about how they should act on behalf of the organization. Some constituents who are experienced in interacting with the organization's lawyers will instinctively and correctly understand that the organization's lawyer does not represent them personally and recognize the possible need for independent counsel, if they have concerns about their own liability. But others, without being told otherwise, may not understand this without an adequate explanation that their actions on behalf of the organization may have personal consequences, especially if they are not experienced in interacting with the organization's lawyers.[15]

Individual constituents' misunderstandings may be harmful to them because, when the interests of the organization and individual constituents diverge, the constituents cannot rely on the organization's lawyer's advice to protect their interests. For example, it may be reasonable for an organization to engage in conduct that poses legal risks for both the organization and its constituents. In the same situation, however, individuals might act more cautiously in light of the legal and other risks to themselves. One reason is that the organization may have defenses—such as an advice-of-counsel defense—that are unavailable to the unrepresented individual constituent.[16] Another is that the consequences of acting aggressively in the face of risks may be less significant for the organization than for the individual, or that the organization will derive greater benefit from acting aggressively.

In this situation, the Model Rules require an organization's lawyer to take reasonable measures to avoid or dispel constituents' misunderstandings about the lawyers' role.[17] This is not because the organization's lawyer is intentionally misleading the constituents or otherwise acting wrongfully. It is because, for many organization constituents who receive and act on the lawyer's advice to the lawyer's organization client, the situation may be confusing or misleading with regard to the lawyer's role absent reasonable efforts by the lawyer to correct that misunderstanding.[18]

The Model Rules do not provide any particular formula for avoiding or dispelling constituents' possible misunderstandings. Under the circumstances, the lawyer may need to discuss with the nonclient constituent that: the lawyer represents only the organization, and not the constituents; the constituents may have a personal legal risk if the constituents act on behalf of the organization in the matter under discussion; the lawyer is rendering advice to the organization *through* the individual constituents, not to, or for the benefit of, the individual constituents; in

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[15] The latter is more likely to occur in the case of closely held corporations.

[16] *See, e.g.*, United States v. Wells Fargo Bank N.A., 12-CV-7527, 2015 WL 3999074, 2015 U.S. Dist. LEXIS 84602, at *8-9 (S.D.N.Y. 2015) ("Allowing any employee to waive the [corporation's] privilege by asserting an advice-of-counsel defense could also create an incentive for plaintiffs to pursue claims against individual employees in the hopes of forcing a waiver of the corporation's privilege.").

[17] This is wholly apart from whatever duty the lawyer may owe to the organization client, as a matter of competence, to avoid or rectify this sort of confusion or ambiguity in dealing with constituents of the organization.

[18] In this regard, an organization's lawyer should recognize that the nonclient constituents who may be acting on the lawyer's advice to the organization, potentially to their personal detriment, may not be limited to constituents, such as officers or directors, who may be more familiar with the organization's lawyer's role. To the extent the lawyer is conveying legal advice on behalf of the organization client through those constituents who have fewer interactions with the lawyer, there may be a greater likelihood that such a nonclient constituent may misperceive the organization lawyer's role.

giving advice to the organization, the lawyer is taking account of the interests of the organization, not necessarily those of the individuals; and if individual constituents want legal advice about how a proposed course of conduct will affect their personal legal interests, the constituents must seek that advice from their own counsel, not from the organization's lawyer.[19]

The objective is not to advise constituents about how to act in light of personal legal risks but simply to give them information to prevent them from erroneously relying on misunderstandings of the lawyer's role. Indeed, as Rule 4.3 makes clear, the lawyer shall not provide legal advice to the nonclient other than to advise the nonclient to secure independent counsel. As the comments to Rules 4.3 and 1.13 reflect, an organization's lawyer is not providing legal advice when informing the constituents, in a way adequate for them to understand, that their interests may differ from those of the organization and that "the lawyer represents only the organization, not them." At the same time, these comments do not limit or specify what information may or must be provided in any given situation to avoid or dispel misunderstandings. With this objective in mind and depending on the circumstances, a more in-depth conversation may be necessary to satisfy the lawyer's duty to undertake "reasonable efforts to correct" a constituent's misunderstanding of the lawyer's role as lawyer to the organization.[20]

As discussed above, in providing advice to the organization, the lawyer will sometimes explain that when individual constituents act on behalf of the organization, their acts may have legal implications for them as well as for the organization. When this is so, it is especially important for the lawyer to avoid certain misunderstandings and make reasonable efforts to rectify them. For example, when addressing the legal implications of the organization's acts for its constituents, the lawyer may emphasize that the lawyer is taking into account only the organization's interests; that is, the lawyer is giving advice only with the organization's best interest at heart, and that is true even insofar as the lawyer discusses how the organization's acts might affect its individual constituents' interests. Therefore, if constituents want personal legal advice about how their acts will affect their own legal liability, they should speak with their own lawyer, whom the organization may or may not be willing to compensate. Of course, some constituents will already have a clear understanding of the lawyer's role based on prior experience or may need only a reminder, if that. But that cannot be taken for granted in all situations. It is important for organizations' lawyers to be sensitive to ambiguities in their advice-giving role and to approach each situation, in light of the particular circumstances, in a manner that appropriately avoids any obvious or likely confusion on the part of the constituents who receive the lawyers' advice.

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[19] This opinion does not address whether, when, or how an organization's lawyer should explain either the lawyer's obligations to the organization regarding the duty of confidentiality and the attorney-client privilege, or the constituent's obligation to keep their communications confidential in order to protect the organization's attorney-client privilege.

[20] As we previously recognized in a different context, a lawyer's communications are of little value if the person to whom they are directed does not understand them. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 500 (2021) ("If a lawyer does not communicate with a client in a mutually understood language, it is doubtful that the lawyer is exercising the thoroughness and preparation necessary to provide the client with competent representation."). *See also* MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. [3] (when a lawyer serves as a third-party neutral, in addition to explaining that the lawyer does not represent the parties to the dispute resolution process, the lawyer may be required to provide additional explanation to unrepresented parties who are not frequent users of dispute-resolution processes, and particularly to first-time users).

This is no easy undertaking. Lawyers seek to develop a relationship of trust and confidence with their clients, so that the clients will understand that their lawyers are seeking to act in their clients' best interest and so that clients will have confidence in their lawyers' advice. In the case of organizations' lawyers, they will be seeking to develop the trust of constituents through whom the lawyers advise the organization and who implement the lawyers' advice. But at the same time, it is important for lawyers to avoid nonclient constituents' misunderstandings regarding the lawyers' role, so that constituents do not regard the lawyers as their own personal lawyer. Particularly given this delicate balance, in applying the Model Rules, organizations' lawyers' interactions with organization constituents should be viewed deferentially based on "the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." Model Rules, Scope ¶ [19].

Finally, although the Model Rules do not require it, the lawyer for an organization would be well advised to instruct constituents about the lawyer's role on other occasions when the lawyer interacts with constituents, and not only at times when constituents might rely to their detriment on a misunderstanding of the lawyer's role. Educating the organization's constituents who may receive the lawyer's advice in the future will lay the groundwork for later situations where the lawyer is advising the organization on matters with legal implications for constituents. Among other things, lawyers for the organization should avoid referring to individual constituents as their clients, and these lawyers should correct individual constituents who refer to the organization's lawyers as the constituent's own lawyers. When an organization's lawyers interact with the organization's decision makers in settings in which the lawyers are not conveying advice, the lawyers can nevertheless take the opportunity to clarify their role, such as by explaining that they represent the organization, not the individual constituents, and that the individuals cannot rely on the lawyers to look out for their individual interests, even when those interests may appear to coincide with those of the organization. These sorts of explanations may help the constituents better understand the lawyer's role later, when the lawyer is advising the organization on matters that have personal legal implications for the nonclient constituents of the organization.[21]

V. Conclusion

When lawyers for an organization advise the organization, the organization's lawyers necessarily provide the advice to the organization through constituents such as employees, officers, or board members. At times, the organization's decision about how to act may have legal implications for the organization's constituents who will be acting on the organization's behalf, including the constituents through whom the lawyer is conveying advice. This situation implicates both the lawyer's duties to the organization client and the lawyer's professional obligations in interacting with the nonclient constituents of the organization.

The Model Rules of Professional Conduct set forth a general standard of competent representation under Rule 1.1, necessary communication under Rule 1.4, and candid advice under

[21] *See*, *e.g.*, Sarah H. Duggin, Shannon "A.J." Singleton & James D. Wing, *The "Cooperation Revolution" and the Professional Ethics of Giving Advice on Executive Protection Issues*, 77 BUS. LAW. 1079, 1101-1102 (Fall 2022) (discussing ways in which in-house counsel can navigate the issue of nonclient constituents misunderstanding the organization lawyer's role).

Rule 2.1. Where a lawyer—in-house or outside counsel—is giving advice to an organization client about future action the organization may choose to take, the Rules may require the lawyer to advise the organization about constituents' potential legal risk. This will be a fact-based determination.

When an organization's lawyer provides advice to the organization about proposed conduct that may have legal implications for individual constituents, the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe that they can rely personally on the lawyer's advice. When the lawyer knows or reasonably should know that constituents are likely to have their own legal interests at stake, Rules 4.1, 4.3, and 1.13(f) require an organization's lawyer to take reasonable measures to avoid or dispel constituents' misunderstandings about the lawyer's role.

An organization's lawyer would be well advised to instruct organization constituents about the lawyer's role early and often during the relationship, not only at times when constituents might rely to their detriment on a misunderstanding of the lawyers' role. Educating organization constituents who may receive the lawyer's advice in the future will lay the groundwork for later situations where lawyers may be advising the organization on matters with legal implications for the organization's constituents.

LICENSE STATUS
If you have questions about what you can and cannot do depending on your license status, contact the OLPR at 651-296-3952.

REMAINING ACTIVE

A tutorial on law license statuses

BY SUSAN M. HUMISTON AND EMILY ESCHWEILER ✉ *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.

Did you know there are approximately 30,000 licensed Minnesota attorneys? The number may surprise you. Also surprising: That number has remained relatively static for more than a decade. The Office of Lawyers Professional Responsibility fields questions regularly relating to law licenses, and mostly we explain we are not the office you should be contacting!

The Minnesota Supreme Court has established several entities to assist in regulating the profession, and attorneys often mistake the roles of each. This month's column aims to provide some basic information related to your law license, answering some of the frequently asked questions we receive and offering guidance on where you can go to get additional answers. Joining me in writing this column is Emily Eschweiler, the director of the Board of Law Examiners, Lawyer Registration Office, Board of Continuing Legal Education, and Board of Legal Certification.

> DID YOU KNOW THERE ARE APPROXIMATELY 30,000 LICENSED MINNESOTA ATTORNEYS?

The details

Once a year, licensed Minnesota lawyers receive notice from the Lawyer Registration Office that their registration statements are ready for review. The timing is governed by the first initial of your last name on the date of admission. Most lawyers (93 percent) choose to file online through the Online Attorney and Sponsor Information System (OASIS), and most choose the same fee status as the previous year. The fees collected defray the cost of regulating the profession. (Since we are self-regulated, lawyers, not the Legislature, fund regulation activities.) This fee is separate from any fee you may pay to belong to a bar association, such as the MSBA or one of the affinity bars. The fee is determined by the status elected. But what do the statuses mean? What options do lawyers have if they wish to remain in good standing? And why can't lawyers elect to retire before they are 68?

There are three active fee statuses in Minnesota, based on whether a lawyer has been admitted for more than three years in any jurisdiction and whether a lawyer makes more than $50,000 per year. Lawyers on any active status can engage in the practice of law in Minnesota, can refer to themselves as attorneys, and can hold themselves out as authorized to practice in Minnesota.

Lawyers who are not practicing in Minnesota may choose to elect an inactive status and pay a slightly discounted rate. The most important thing to note here is that lawyers on inactive status may not engage in the practice of law in the state. Lawyers on inactive status should also take care not to hold themselves out by word or deed as suggesting they are licensed to practice law in Minnesota. Lawyers electing inactive status are still required to submit their continuing legal education credits every three years unless they also elect voluntary restricted (VR) CLE status through OASIS.

If lawyers do not complete their registration statement by the filing deadline, a late notice is sent. Lawyers then have 30 days to complete their registration statement. Lawyers who do not complete their registration statement by the first day of the month following their due date become administratively suspended for non-payment. Lawyers who are administratively suspended are not authorized to practice and are not in good standing. Additionally, allowing your license to become administratively suspended can have unanticipated consequences if you plan to be licensed in other jurisdictions. For example, if you are seeking admission to the bar of another state, those jurisdictions will ask if you have ever been administratively suspended. Also, because you are not in good standing while administratively suspended, this can have other implications, such as disrupting *pro hac vice* admissions in other jurisdictions. You cannot obtain a Certificate of Good Standing if you are not in good standing.

Lawyers who plan to no longer practice in Minnesota may elect inactive status, may elect to retire if they meet the qualifications, or may choose to resign their license. Lawyers who are permanently

disabled may also elect disability status. Electing inactive status, disability status (separate from any disability that is impacting a discipline proceeding), or retirement status is handled by the Lawyer Registration Office. Electing to resign is handled by the Office of Lawyers Professional Responsibility, as is disability status when it is being elected in lieu of discipline.

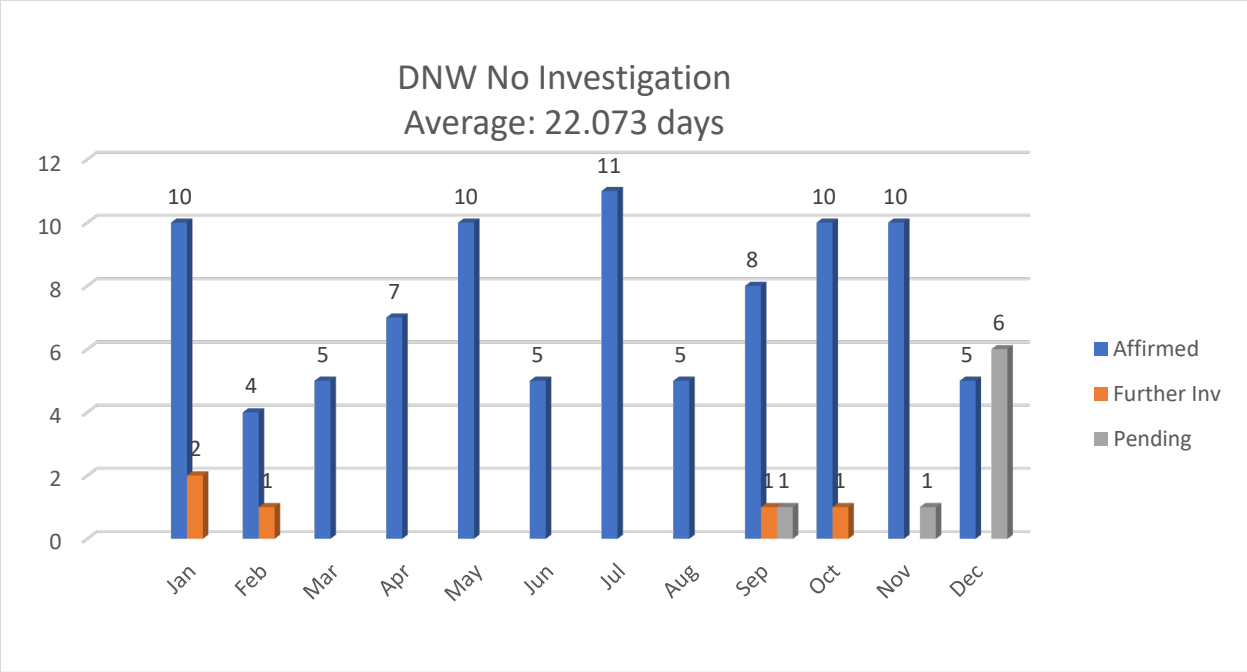
Once a disability affidavit or a retirement affidavit is filed with the Lawyer Registration Office, the lawyer has no further obligation to file their lawyer registration statement. Lawyers electing these statuses are also automatically placed on voluntary restricted status and no longer have an obligation to report CLE credits unless they wish to later return to active status. To elect retirement status, a lawyer must be 68, in good standing, not hold a judicial office or sit by special appointment, and not be engaged in the practice of law in any state, territory, or the District of Columbia. Thus, you might retire from the practice of law before 68 but retirement status is only available according to the licensing rules adopted by the Court at 68.

But there is more! Lawyers on retirement status (who, again, must be 68 by definition) may also elect emeritus status through the Board of Continuing Legal Education. Lawyers on emeritus status may provide "pro bono legal representation to a pro bono client in a matter referred to the lawyer by an approved legal services provider." Emeritus lawyers must file with the CLE Board an affidavit that the lawyer has completed five credit hours in the 90-day period prior to electing emeritus status: three credit hours in the substantive area of law in which the lawyer intends to perform pro bono service, one credit hour in ethics and professional responsibility, and one credit hour in elimination of bias in the legal profession and in the practice of law. If the lawyer will provide pro bono representation in multiple areas, the lawyer must certify that they will seek the training necessary to competently represent clients in those areas. Pro bono legal service providers would love to have you consider emeritus status if you are contemplating retirement and do not wish to keep your license active—but do wish to continue to be of service.

If you no longer see a need for your Minnesota license, you can also resign. Prior to resigning licensure, lawyers should verify that their license is in good standing with the Lawyer Registration Office. Once a lawyer resigns, resolving good standing issues is no longer a possibility and this can be problematic—for instance, in applying for licensure in other jurisdictions. Some jurisdictions require that to be admitted in that jurisdiction, you must be in good standing in every jurisdiction in which you have been licensed or to have been in good standing at the time of resignation. Electing voluntary restricted status and paying outstanding fees can typically resolve standing issues promptly, but if you have resigned your license, that is not possible. The other consideration is that resignation can take time. You must petition the Minnesota Supreme Court, which must approve your resignation. There is no provision in the lawyer registration rules that allows for an extension of time to get this done before your annual registration fees are due. Starting the process at least three months before the registration statement is due can provide the time necessary for the proper paperwork to be filed and for the Court to address your petition. The Office of Lawyers Professional Responsibility has an FAQ on resignation that you might find helpful if you are considering this step. Regaining your Minnesota license after resignation is like applying to the bar in the first instance (though without the bar exam) and not to be taken lightly.

Conclusion

You invested a lot to obtain your law license. There are several license statuses to maximize flexibility over the course of a career. Another tip we can share: Please alert the Lawyer Registration Office if a licensed Minnesota lawyer passes away so that the registration rolls can be updated accordingly. And do not forget to keep the Lawyer Registration Office informed of your current address. If you have questions regarding your license status and these options, you can email lawyer registration at *lawyerregistration@mbcle.state.mn.us.* If you have questions about what you can and cannot do depending on your license status, or wonder if you are accurately representing yourself in accordance with your status, you can contact the OLPR at 651-296-3952 for an advisory opinion or to talk to someone about resignation requirements. ▲

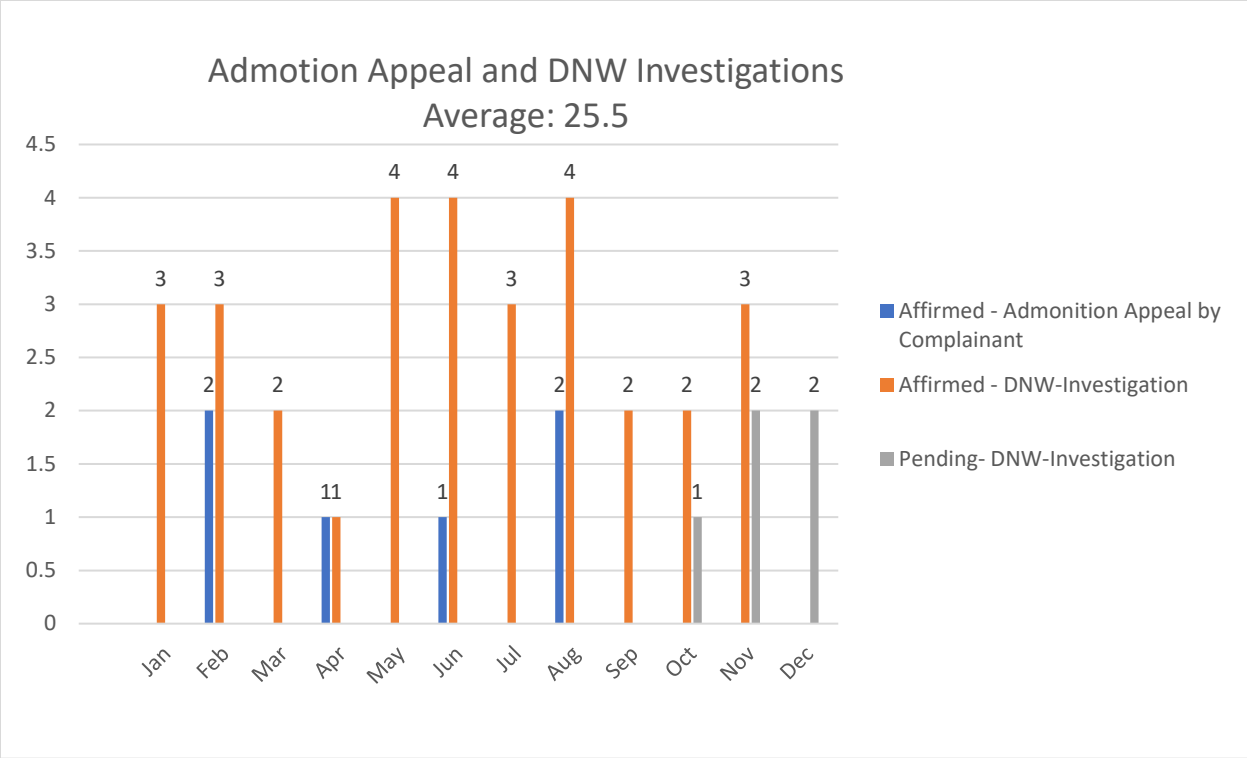


103 DNW No Investigation

90 Affirmed

5 Further Investigations

Avg of 23 days


Admotion Appeal and DNW Investigations
Average: 25.5
4.5
4
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Affirmed - Admonition Appeal by Complainant
Affirmed - DNW-Investigation
Pending- DNW-Investigation